The green bag

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INDEX TO VOLUME VII.

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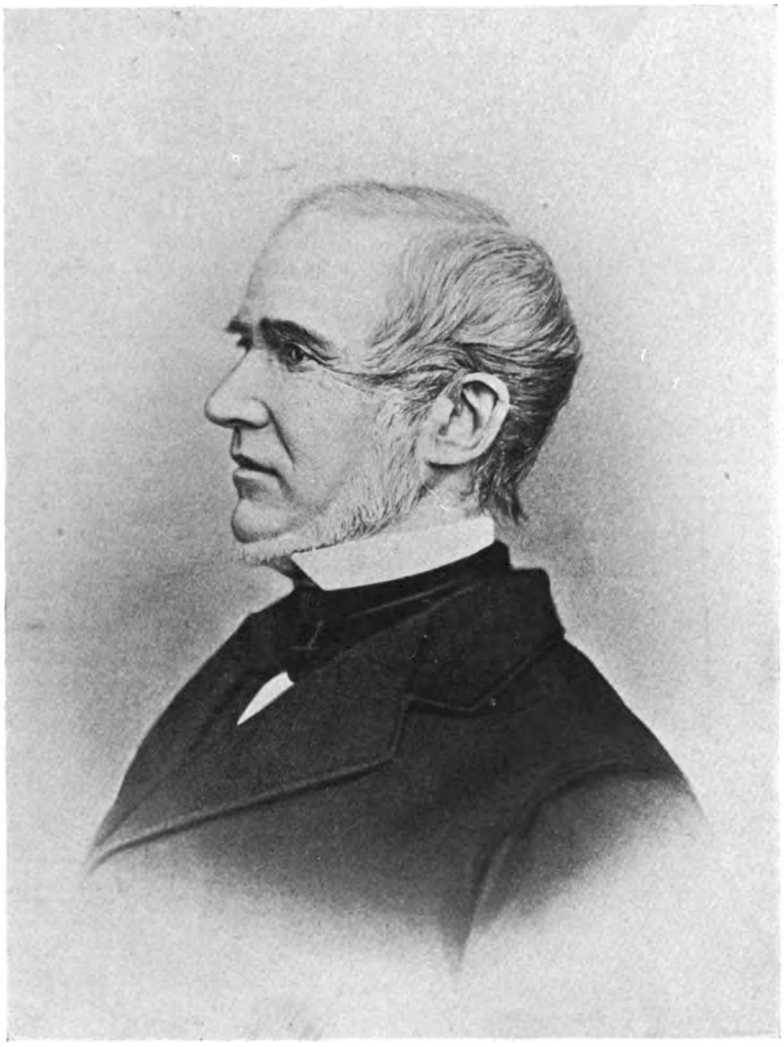

The Green Bag.

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CHARLES O'CONOR.

I.

By IRVING BROWNE.

CHARLES O'CONOR was born in the city of New York, January 22, 1804. The Encyclopædia Britannica and Appleton's Dictionary of Biography state that his father emigrated from Ireland in 1801, but in Mr. Bigelow's interesting sketch in the Century Magazine (1884–1885, p. 725), he records that Mr. O'Conor resented the imputation that he was an Irishman, and told him, as Mr. Bigelow thinks, that his father and his grandfather were born in this country. It would seem that Mr. Bigelow must have misunderstood Mr. O'Conor on this point. Appleton's Dictionary states that Mr. O'Conor's father was born in Dublin, in 1770. To Mr. Coudert he spoke of himself as the son of an Irish exile, as will be seen later. It has always been popularly understood that Mr. O'Conor was proud of his descent from the Irish kings, as nearly all the Irish are. Undoubtedly he did not intend to deny that he was of Irish descent. It is recorded that he changed the spelling of his name by dropping an *n*, to conform it to the ancient style.

His father's later years were passed in literary and editorial work. Among other things he wrote a work entitled "The Inquisition examined by an Impartial Observer," of the character of which I have no knowledge, but in which, if one may infer anything from his celebrated son's peculiar characteristics, one may reasonably suppose that he whitewashed that somewhat obnoxious institution.

The dates and events of his life are few. He was admitted to the Bar in 1824; in 1855 he was appointed district attorney for New York; he once was a candidate for the office of lieutenant-governor of New York, and, although defeated, ran several thousands ahead of his ticket; in 1846 he was a member of the State Constitutional Convention, but he was not a member of the Convention of 1867–68, as is erroneously stated in the "Britannica." He practiced law in the city of New York until 1881, when he removed to Nantucket, where he died in 1884. He was married in 1854, but had no children.

It is evident from this bare record that we have to consider the career of a mere lawyer, and not that of a statesman or a jurist; but it will be disclosed that we have to deal with an intellect of the first order, and an indomitable, combative, and imperious nature. He was one of the most remarkable of self-made men. He owed everything to himself. He told Mr. Bigelow that "he hardly had any education." All that he got he wrested from Fortune by the strong hand and the tireless brain. He came up to the very front of the legal profession in this country from obscurity and through poverty and dreadful discouragements. His tale of his early life to Mr. Bigelow is extremely touching. To Mr. Bigelow he denied that he thought he possessed any peculiar aptitude for the law, but had no doubt that he would have met the same measure of success in any walk — as blacksmith, physician, or in any other calling. He attributed all to industry. This alone shows that Mr. O'Conor, although a proud, opinionated and imperious man, was not unduly vain. He would not

add, but others will, that his industry was effectively aided by a rugged honesty and the keenest sense of gratitude for early benefactions which came to him by reason of his apparent trustworthiness. From his obscure and struggling youth to his rich and honored old age, among all the harsh traits of his character, and the unpleasant incidents of his career which it is the duty of an impartial biographer to chronicle, let it be recorded to his credit, that he never forgot a friend nor a favor, never turned a deaf ear to the appeal of distress or struggling merit, never used his tremendous powers against any but the powerful, and never blazoned forth his own good deeds. His somewhat rugged, austere and reserved character was adorned by an unswerving fidelity and an open-handed generosity to the struggling and unfortunate.

There probably never went into a court room, in this country or any other, a better "all-round lawyer" than Charles O'Conor. In the preparation and management of a case, in the examination of witnesses, in tact, in fertility of resources, in courage, in composure, and in the conduct of the appeals, he could not be surpassed. In the highest attributes of eloquence he was lacking, although his style was elegant, his elocution was animated and graceful, and his arguments were manly and cogent. He superintended the smallest details and foresaw the most remote possibilities, but he lacked just the one spark that inflames the hearts of hearers. As Napoleon, on setting out for Moscow, beforehand looked after every harness-buckle and wagon load of provender, as well as appointed every halting and meeting place of his half million men, so that everything should proceed with the precision of the heavenly bodies, yet failed for once because he did not sufficiently take into account the cold, so Mr. O'Conor, with a mental grasp of small things and large very unusual and almost unparalleled, found the only obstacle to the successes which genius alone achieves in the coldness of his nature. He was truly a learned lawyer — a learned lawyer in the proper sense of the term, so that in Mr. Carter's words, "He could have stepped into Westminster Hall and argued a special demurrer with success against Sergeant Williams." So Mr. Evarts generously said, he "was in my judgment and to my perception, the most accomplished lawyer in the learning of the profession, of our Bar. Indeed I cannot be mistaken in saying that he was entitled to pre-eminence in this province of learning among his contemporaries in this country, and among the most learned of the lawyers of any country, under our system of jurisprudence." And so John K. Porter ranked him with Alexander Hamilton and Nicholas Hill, calling them the three greatest lawyers this country has produced. He was not distinguished as a constitutional lawyer, because he argued comparatively few constitutional questions; but with all his powers it may be doubted whether he could have held his own against Webster or Evarts in their magnificent exhibitions, any more than he could have maintained himself against Choate's inspired and humane eloquence in the Dalton divorce case. He possessed the largest measure of talents, but stopped just short of the divine endowment of genius. He ranks with Scarlett and Benjamin, not with Erskine, Webster and Choate. It may be doubted whether his judgment was equal to his other endowments. He sometimes made and persisted in serious blunders, which a man of less strength would have avoided or abandoned, thinking to carry his point by the force of his intellect and his reputation. But comparisons are deceptive and odious. He was unique in his sphere — "teres et rotundus."

It would be a tedious task to enumerate celebrated or important cases in which Mr. O'Conor was engaged. It may be said, without exaggeration, that he was in every one of the most important cases in the New York courts of the period of thirty years ago. He was the leading counsel in the Parrish,

Lispenard, and Jumel will cases, and associated in the Mason will case. He was one of the principal counsel in the North American Trust and Banking cases, which present themselves in many phases in the New York reports. He was counsel for Mr. Tilden before the Electoral Commission. In the famous Almaden mine case, in the United States Supreme Court, he charged his largest fee, $50,000. This was when gold was at a premium of 250, and his clients sent him a check payable in gold for his bill, as they well might, for the pecuniary interests involved were enormous. Mr. James C. Carter, once his partner, informs me: "A case which I think he wanted very much to try and argue, but which never came on for trial, as you know, was the case of the indictment of Jefferson Davis for treason. The Mason will case was another of the great will cases occurring thirty years ago, which I well remember, and I have a strong impression that he was engaged in that case. In the cases arising out of the Schuyler frauds — the fraudulent issue of stock of the N.Y. and New Haven Railroad, he was also engaged, at least, in the last of them, in which he induced the Court of Appeals to somewhat withdraw from their prior decisions, and hold that a bona-fide holder of over-issued stock had a claim." Mr. O'Conor left by will to the New York Law Institute two silver vases hereinafter more particularly mentioned, the sum of $20,000, and a scarcely less valuable gift, eighty bound volumes of his cases and arguments, which are preserved in the library of the Institute. A reference to these will convince any one that considering the number, variety, and importance of his causes and the success which he attained, his career is unparalleled in American advocacy.

A good example of Mr. O'Conor's learning, mental force and literary style is his argument before the Court of Claims, at Washington, in the case of the Brig-of-war General Armstrong, involving a grave question of international law and the right of the citizen to redress against his own government. This is to be found, very intelligently reported, in Mr. Wm. L. Snyder's excellent compilation, "Great Speeches of Great Lawyers."

THE FORREST CASE.

The cause in which Mr. O'Conor acquired most of his contemporary popular fame was the celebrated action of Mrs. Forrest against her husband, Edwin Forrest, the actor, for absolute divorce. This cause lasted a great many years, and in various phases went repeatedly through all the courts. It was defended with great persistence and skill by James T. Brady, a foeman in every way capable of testing Mr. O'Conor's mettle. For once at least the latter met his match, not only in the lawyer, but in the party, for Forrest himself was as resolute and pugnacious as the great lawyer himself, and fought the battle to the last ditch with an animosity and recklessness of expense unparalleled at that time in the history of our courts. After Mrs. Forrest obtained her decree, years were spent in contesting the question of alimony, and Forrest, like his favorite dramatic hero, did not yield until every horse in the stables had been killed under him, and he brandished his arms after they had been deprived of his sword.

In this case Mr. O'Conor evinced the finest qualities of the advocate and of advocacy. He had however the popular side from the start, for he championed a wronged woman, and the defendant was a very unpleasant and unloved character. Out of this case eventually sprang a very exciting scandal touching Mr. O'Conor's conduct. The impression early went abroad, somehow, that he was to serve Mrs. Forrest gratuitously, and hence he was lauded and worshipped by all the women in the States, and by all the ministers of the gospel, and by many of the men, for his "disinterestedness." There never was any foundation

whatever for the impression, and it does not appear at the last that even his client so understood it. But it seems that "she was disappointed in the amount of his bill." Every lawyer knows that this is the invariable feeling of the woman-client in any case. Women regard it as unmanly to compel them to yield their lawyer much if anything, even if it is got out of their husbands. Mr. O'Conor had waged a long and costly fight and had scored a great success. He obtained a very large allowance of alimony for Mrs. Forrest, — some $64,000. He charged her, as I have always understood, some $40,000, which, however, included a considerable outlay for the unavoidable expenses, and a large amount of loans to his client. No lawyer will say that this was excessive, even if it included no loans, especially as every cent of it was wrung from Forrest; but on the other hand no lawyer will pretend that his conduct was "disinterested." He was not "disinterested." He was serving for pay, and he was no more "disinterested" than Brady on the other side. Nor will any lawyer nowadays pretend that he deserves any special credit for those efforts. He simply did his duty like an intrepid, conscientious and skillful advocate; he amply deserved compensation, — and he got it. But that was not the way his worshippers felt about it at the time. Thirty ladies voted him one silver vase, and sixty lawyers another, for his "disinterested" service, in 1852, and Mr. O'Conor accepted them; at a later day, in 1876, this foolish piece of emotion rebounded against Mr. O'Conor. He had been severely criticised in the newspapers for having taken pay when it was "understood" that he was not to have any. This accusation led him at the time to demand an investigation of his conduct, by the New York City Bar Association, in compliance with which a committee was appointed to hear and determine, but inasmuch as nobody appeared to make any charges, the determination could only result in his complete and undoubtedly deserved exculpation. The entire matter was purely one of business. Mr. O'Conor charged his client interest on his advances and outlay, as he should have done. Perhaps, in 1852, he could not gracefully refuse the vase, but he did not deserve it and should have given no assent, even by silence, to the idea of "disinterestedness." If he deserved a testimonial, Brady deserved one still more, for he advocated the unpopular side, and fought a losing battle from the outset. As to Mrs. Forrest, her notion seemed to be that having accepted the vase for being "disinterested," Mr. O'Conor ought not to have asked any, or at all events so much compensation for being interested. In this view the vase would have been indeed an empty honor. Probably in accepting the honor Mr. O'Conor did not for a moment dream that its donors or anybody supposed that he did not intend to be fairly paid for his services, and if he had so supposed he would have refused, but his language was a little unguarded and ambiguous.

In the following paragraphs are given some contemporary details of this curious affair, embodied in articles in the "Albany Law Journal," some of which were evidently written by myself. I have not changed my mind about the merits of the matter, although if it were to be written now I might express myself with a smaller degree of vehemence and satire:—

"The article which recently appeared in the New York *Times*, relating to Charles O'Conor's connection with the well-known Forrest divorce case, has called forth an elaborate defense on the part of Mr. O'Conor, and a demand by him for an investigation of his conduct by the New York Bar Association. The article in question stated, on the apparent authority of Mrs. Forrest, that it was understood when the divorce suit was begun that nothing should be charged for counsel fees; but that of the final judgment of $64,000 in the case, for arrears of alimony, Mr. O'Conor

took $40,000, and the Attorney, Mr. Chase, $19,000, thus leaving her but $5,000. Mrs. Forrest states that in Mr. O'Conor's bill there were some charges for loans made to her; and while expressing her gratitude for his services, she says that she was entirely surprised at the course which he took in making his charges for professional services. In this connection the article in the 'Times' states that it was understood by the public during the pendency of the Forrest case that Mr. O'Conor's services were gratuitous; and that for this act he received great credit and honor. Some of the most estimable ladies of New York, and many members of the Bar, expressed their admiration for his unselfish course by presenting him with testimonials.

"Mr. O'Conor's reply to the article relating to his connection with the Forrest case is marked with the usual forcible and dramatic style of its author. So far as we have examined his defense, he denies that he agreed to serve in the Forrest case gratuitously, or that he supposed the public or Mrs. Forrest thought he was so doing. He admits the bill of nearly $40,000, but states that the greater part was for sums loaned Mrs. Forrest when she was in need, and for expenses incurred for her. He claims that he was exceedingly generous to her, and to her friends. Much of Mr. O'Conor's defense is taken up with matters of very remote relevancy to the real issue. A committee of investigation was appointed by the Bar Association, consisting of Judge Bosworth, Judge Mitchell, John E. Parsons, Joseph H. Choate, Benjamin D. Silliman, and William M. Evarts. This committee will undoubtedly do ample justice to Mr. O'Conor's case. If the charges are substantiated, Mr. O'Conor has already indicated what the penalty should be. He says: 'If I am guilty of what is charged . . . I ought to be expelled from membership in your Association, and from the Bar itself, as a disgrace to both.'" — *Vol. 13, p. 259.*

"The Committee of the Bar Association appointed to investigate the charges against Charles O'Conor, reported on Tuesday evening, that there were no matters before them to consider except what Mr. O'Conor himself had presented, and no accusers, and they did not advise the constitution of any tribunal for the purposes of investigation. The report of this committee was objected to quite vehemently by Mr. O'Conor. He demanded the fullest investigation, and said that he thought it was for the interest of the profession that the matter should be thoroughly looked into. The report of the committee recommended that Mrs. Forrest be invited to make a communication on the subject to the Bar Association. Mr. O'Conor objected to having the Association call upon Mrs. Forrest to bring charges against him. He said that his controversy was with the newspapers which had printed the charges. After much discussion which, as far as we can learn, was largely confined to Mr. O'Conor himself, a resolution was passed by the Bar Association whereby a new Committee was appointed to 'investigate the charges referred to in Mr. O'Conor's statement, and to invite the accusers before them.'

"Lawyers are notoriously inexact and careless in keeping their own accounts. Mr. O'Conor seems to be an exception, or possibly he has had the assistance of an extremely mathematical managing clerk. We find in his account against Mrs. Forrest that he charges the lady with $2.86 for several years' interest on $7 paid for a copy of an opinion; and with $1.02 interest on $4.41 for "cash, postages, etc."; and with $1.45 interest for one month on $250 paid for counsel; and with twenty cents interest on $7.50 paid for printing points! After this exhibition of thrift and exactness, how can Mr. O'Conor claim to have been '*disinterested*' in his conduct of Mrs. Forrest's case? But who would have suspected such shop-keeping care in the descendant of the Irish Kings?

"No one denies Mr. O'Conor's right to demand pay in the Forrest case. The question is, did he sanction the belief, which undoubtedly obtained, that he was working gratuitously? Mr. O'Conor claimed at the time to have been acting 'disinterestedly,' and on account of this 'disinterestedness' allowed himself to be presented with a silver vase from thirty ladies of New York, and with a silver pitcher from his professional brethren. The thirty ladies in the presentation letter spoke of his 'noble conduct,' his 'generous espousal' of his client's cause, and his 'chivalrous defense' of the weak. It is apparent that the writers supposed that Mr. O'Conor had been working gratuitously. This

was in 1852. What said Mr. O'Conor in reply? Did he undeceive the thirty confiding ladies? Oh, no. He took the vase, and wrote a letter. In the letter he modestly insisted that any of his 'peers at the Bar would have assumed the office and deemed it, as I did, *a boon rather than a burthen.*' Of the result he says, it '*was ample reward for whatever of labor devolved upon me,* yet I most gratefully accept the unhoped for addition now so delicately tendered.' In the presentation address accompanying the silver pitcher, Mr. Lord said Mr. O'Conor had 'fulfilled with success that office of the profession *which allies it to chivalry,*' and alluded to his 'disinterestedness.' What did Mr. O'Conor say to this? Did this Bayard confess that he was a mere mercenary, and protest that he expected to be paid for tilting his chivalric lance at the vociferous Mr. Forrest? Oh, no. He took the pitcher, also, bearing the arms of his royal Irish ancestors, and inscribed with their motto, 'From God cometh the succoring champion,' and bearing a further inscription attesting his 'zeal, *disinterestedness,* etc.' And then he beautifully observed: 'The Bar has ever devoted itself with *courage and disinterestedness to the defense of the feeble and oppressed.* It was my good fortune to be selected on an exciting occasion *to exemplify the fact,* and my whole merit consists in this: *that I did not fail in a duty which the first rule of our profession rigidly exacts from all its members.*' Will this exact, severe, and rigid gentleman, this royal Milesian Cato, who has arraigned the Court of Appeals of this State for corruption, now proffer some parol evidence in explanation of these writings? We would suggest a letter to Judge Davis, or an extra edition of 'Harper's Weekly' prepared by Mr. Albert G. Browne, Jr. We await the explanation in breathless suspense." — *Vol.* 13, 279.

"The Committee appointed by the New York Bar Association to arrange a tribunal to hear and determine the charges against Charles O'Conor have succeeded in getting a number of excellent men to serve upon the tribunal. The tribunal will consist of John A. Dix, Wilson G. Hunt, William Adams, D.D., Howard Potter, and John K. Porter. There is an admirable combination of characteristics in this tribunal. The committee of selection say that they have been solicitous 'to provide a court, whose intelligence and impartiality shall be above suspicion, and whose judgment, whatever it may be, can be accepted as final.' The members of the tribunal have accepted the duties imposed upon them, and a preliminary meeting has been held." — *Vol.* 13, *p.* 299.

"The tribunal appointed to consider the charges against Charles O'Conor's professional conduct while acting as counsel for Mrs. Forrest, had a hearing of the case on Saturday last, and no one appeared to substantiate the charges against Mr. O'Conor. Mr. Sedley, the near relative of Mrs. Forrest, said he would not present his version of the affair to a tribunal chosen entirely by Mr. O'Conor's friends. Mrs. Forrest had written a letter to Mr. O'Conor, which was read. This letter expressed regrets that her statements had been printed in the newspapers, and reiterated the fact that she was grateful to Mr. O'Conor, although she was disappointed at the size of his bill. Chief Justice Daly, who made the presentation of the silver vase in behalf of the ladies, testified that during the whole trial he had the impression that Mr. O'Conor was to receive a fee. This is the main point in the case, and if it is established that no deception was practiced upon the public by Mr. O'Conor, then he will, of course, be honorably acquitted." — *Vol.* 13, *p.* 319.

"The exoneration of Charles O'Conor by the tribunal appointed to consider the charges against him in the Forrest divorce case was foreshadowed by the reports which reached us last week. On Wednesday evening the Bar Association of New York city accepted the report of the special committee in the O'Conor case, and of the tribunal. The tribunal finds: 1. That there is no evidence that Mr. O'Conor became counsel of Mrs. Forrest with an understanding that his services were to be gratuitous. 2. That the testimony of Judge Charles P. Daly, who presented the silver vase for the ladies, shows that the presentation was not made with the impression that Mr. O'Conor's services were gratuitous. 3. That Mr. O'Conor did not make exorbitant charges for his services. The committee who arranged the tribunal of investigation close their report with the following eulogium: 'Through many years the name of Charles O'Conor has been known to our com-

munity, and the whole country as synonymous with eminent ability and spotless purity. Such a reputation could not be marred without injury to the profession he so long adorned and pain to his countrymen. But conscious of his integrity and sensitive to the slightest imputation upon it, he persevered, even against the judgment of wise professional brethren who loved and honored him, in demanding investigation of the charges referred to. And now five of our fellow-citizens, eminent for wisdom and goodness, have fully heard the evidence, and have unanimously pronounced the charges without foundation.'" — *Vol. 13, p.* 392.

THE TWEED CASES.

So much for the disagreeable contact into which Mr. O'Conor came with his former worshipers among the laity. Now let us speak of a matter in which he came into equally unpleasant relations with the courts and many of the Bar. This was in the prosecutions growing out of the celebrated Tweed scandals in the city of New York. It is unnecessary to tell any middle-aged lawyer who Tweed was, but it may be well to explain to the legal youth of this day that he was a person who, under the peculiar possibilities of this favored land, arose from the degree of stone-mason to be the "boss" of the city and State of New York, and who plundered the city of untold millions for the benefit of himself and his creatures, but who, after some years of abject fear and helplessness on the part of the public, was prosecuted, convicted, sentenced to prison for a long term, escaped by connivance, fled the country, was brought back, and died pending a new trial. Mr. O'Conor, being at the head of the bureau of municipal correction, charged with the prosecution at law of the so-called Ring-thieves in the city of New York, was directed to prosecute Tweed for a great number of misdemeanors of which he had been guilty in his bandit career. They were all joined in one indictment in 226 counts, and there was a verdict of guilty on 204. Thereupon Judge Noah Davis, who presided at the trial, sentenced him to imprisonment for twelve years for twelve offenses, and to a fine of $250 in each; and on the other counts to fines aggregating $12,500. The maximum allowed for one offense was one year's imprisonment and a fine of $250. Appeal was taken to the Court of Appeals, and in the famous case of People *ex. rel.* Tweed *v.* Liscomb, 60 N.Y. 559; s. c. 19 Am. Rep. 211, the court unanimously laid down the doctrine, that in such a case sentence may not pass for a longer term than the maximum prescribed for a single offense. The opinions were written by Judges Allen and Rapallo, both Democrats, and were concurred in by the five other judges, of whom two were Republicans. Hereupon arose a terrific clamor of the populace and the newspapers. The decision was stigmatized as a stretch of political mercy towards an offender of the Democratic school. In the course of his opinion, Judge Allen rather mischievously cited as authority against the doctrine of cumulative sentences, some expressions of Mr. O'Conor himself, in his brief in a former case in that court, a civil action against a railroad company to recover 526 penalties for as many different offenses in taking excessive fare. Mr. O'Conor there argued, as counsel for the defendant, that only one penalty was recoverable, and cited the law applicable to indictments as analogous. He said: "And accordingly, except under some statute, expressly authorizing such a course, it has not been the practice to allow the two distinct offenses to be tried at the same time either by indictment or penal action." Judge Allen quoted this, with other and even stronger language of the "eminent jurist" with approval, and observed, "his arguments appear to me unanswerable." This commending of the chalice to his own lips, or hoisting the engineer with his own petard, did not tend to soothe Mr. O'Conor's spirit, perturbed by the signal defeat; and so, when Judge

Davis, also smarting, wrote him a letter drawing him out, he suffered himself to be drawn out to the length of two columns and a half in the "New York Tribune," in a letter roundly abusing the court and imputing improper motives to them, which I characterized at the time as "vindictive and indecent allusions"[1] (12 Albany Law Journal, 53). This started the ball, and then ensued a most ferocious and disgraceful attack on the court by disgruntled Judge Davis and others, embracing some newspapers which ought to have known better, including "Harper's Weekly," which hired (I assume he did not do it gratuitously) Albert G. Browne, once reporter of the Massachusetts Supreme Court, to vilify the court in that otherwise respectable journal, to the extent of six and a half pages! (See "Mr. Browne wipes out the Court of Appeals," 12 Albany Law Journal, 308.)

After all these years, I see no reason to modify what was written at the time: "Mr. O'Conor was wrong in this" — namely, his assertion that under the decision of the Court of Appeals, Judge Davis was liable to an action by Tweed for false imprisonment — "just as he has been in everything else connected with the case, except his original declaration in the Fisher case, that cumulative sentences are illegal." (12 Albany Law Journal, p. 81). "After all, this crusade of Mr. O'Conor is a very ridiculous display. If any other lawyer in the state had been guilty of it, he would have been treated with no consideration whatever. Judge Davis would have committed him. But Mr. O'Conor has a high and commanding position at the Bar, and so believes himself infallible."

"The palpable object of the letters has, and we confess to our surprise, most signally failed. The newspapers have, with scarcely an exception, denounced both their motive and spirit, and have censured Mr. O'Conor and Judge Davis in unstinted terms. But the fact has been very generally recognized that the latter deserved the greater condemnation, not only because of his position, but because it was so apparent that he was the instigator of the whole affair" (12 Albany Law Journal, p. 49).

In the course of the same litigations, Mr. O'Conor again disapproved of the Court of Appeals. This was in what is known as the "six-million-dollars suit," brought under a statute specially enacted in 1875, to enable the city and county to recover the spoils from the receivers. Fearing that, if prosecuted in the name of the city and county, the action would not be effectively pressed, Mr. O'Conor caused it to be brought in the name of the people of the State. Mr. George Ticknor Curtis at the time having pointed out that this was erroneous, Mr. O'Conor replied in a letter, in terms "more pointed than polite," maintaining the regularity of his course. The Court of Appeals, however, in People *v.* Ingersoll, 58 N.Y. 1; S.C. 17 Am. Rep. 198, disagreed with him,

[1] These are quoted in the following, from 12 Albany Law Journal, 57: —

"Mr. O'Conor writes, that '*when dealing with peculators*, the Court of Appeals have been '*admirably astute*' *in the same uniform direction of impunity*'; and that Mr. Tweed, 'by using the courage of a Rinaldo, has, either in his own person or through a representative, *thrice bearded public justice in that high tribunal and has, on each occasion, received its award that as against him or his the weapons devised by the people's advocates were vain and hurtless.*'

"As a remedy in the future for this state of affairs, Mr. O'Conor does not advise more care in the preparation of their cases by the '*thick-witted advocates for the people*'; but animated with the spirit of a crusader, he invokes 'from the suffering class *a determined resistance to the power by which they are enthralled, and an inflexible resolve to reform existing abuses.*'

"Mr. O'Conor then proceeds to account for this fearful state of affairs. He writes: 'Because the local judges had, in most instances, received their offices through Tweed and his associates, the lawyers, who were charged with the duty of prosecuting for the public, anticipated difficulty in the earlier stages of the suits; but they had no suspicion that *like agencies had influenced the construction of the highest court.* They felt assured that in all cases against the robbers, whatever might happen elsewhere, the judgment of that tribunal *would not merely be in accordance with law, but that in pronouncing it the judges would be animated by an earnest love of justice and an active zeal for its advancement.*' He regrets that his assurances in this regard have not been realized."

holding (Chief Judge Church and Rapallo, J., dissenting), that the State could not maintain the action because it had no title to the moneys. For this Mr. O'Conor allowed himself severely to reprimand the Court in an interview with a "Herald" reporter. On this occasion the "Albany Law Journal" observed: "We fear that ripe age and distinguished ability have not improved Mr. O'Conor's discretion." (That was not written by the present writer.)

Mr. O'Conor, in 1875, published the various arguments and opinions in the "six-millions suits" in a volume entitled "Peculation Triumphant, being the record of a four years' campaign against official malversation in the city of New York, A.D. 1871 to 1875," with a "Memorandum" containing no offensive comments, but thus patting on the back the dissenting judges: "Our ancestral jurisprudencies denied to us by a lean majority of one, over-ruling Church, our universally reverenced Chief Judge, Rapallo, the chosen representative of our great metropolis, and Miller, the most recent recipient of our people's favor." The Chief and Judge Rapallo seem to have risen in his favor since the "cumulative sentences" decision! In 1875, an act was passed, giving to the people of the State instead of the city the right to sue, and a recovery was finally had, under the leadership of Mr. Wheeler H. Peckham. But owing to the delay caused by Mr. O'Conor's blunder, the ill-gotten wealth of the defendants had been dissipated by the time a recovery was had, and the city realized nothing, as I am informed.

It is probable that there was not at the time and has never since been any considerable difference of opinion among the lawyers and judges of this State as to the soundness of the doctrine declared by the Court, in either case, nor as to the grave impropriety of Mr. O'Conor's conduct in the matter. He subsequently, in a Christian spirit, forgave the Court for his abuse of them, and invited them to dinner in New York. The Chief Judge, I believe, accepted, but some of them would not go.

It is a mark of Mr. O'Conor's sense of justice — although not a broad sense — that he attributed all the merit of the dethronement of Tweed to Samuel J. Tilden, as we learn from Mr. Bigelow's sketch.

MR. O'CONOR'S WILL.

It is really fortunate that Mr. O'Conor was not in a position to comment on the audacity of the courts in even entertaining an argument against the validity of his will! His old enemy, the Court of Appeals, — although but two of the judges whom he had censured and impugned were left in it, in Sloan *v.* Stevens, 107 N.Y. 122, were called on to construe a codicil to his will. The official syllabus is as follows: —

"The will of O'C. contained various devises and bequests to different parties, and also this clause: 'I hereby release all claims or demands which I may have at my death against any person or persons named in this will.' At the time of the execution of the will, the testator was conducting, as counsel, a litigation for defendant; the latter was not named in the will. At the close of the will, the testator revoked all former 'wills and codicils.' By a codicil, subsequently executed, which the testator described therein as the 'first codicil to his last will," he released three persons named from all claims against them. Two of these were named in the will; one was not. Immediately following this was a provision giving to defendant, whom he described as his 'faithful and honorable friend,' all books, papers, etc., relating to the claim in litigation. In an action to recover for legal services rendered by the testator in said litigation *held*, that defendant was not released from liability by the said provision of the will."

Judge Finch, in the opinion, concedes the general rule that the will includes the codicil, the two constitute one act, and the execution of the codicil is a republication of the will as of that date, "and the two instruments are to be read together as if their provisions had all been embodied in

one, then for the first time executed," and conceded "that the testator thoroughly knew the rule and appreciated its force," citing Van Cortlandt *v.* Kip, 1 Hill, 590, in which, it seems (although the Court did not allude to it), Mr. O'Conor himself had contended for that doctrine! But the great lawyer did not suffer from the citation of his own contention as in the Tweed case, for the court steered him out of the difficulty by applying the rule that the testator's clear intention to the contrary of the usual inference must prevail. In effect they held that in the light of the circumstances it would be absurd to suppose that Mr. O'Conor meant what he had said! It is noteworthy that Judge Rapallo, who wrote a concurring opinion in the Tweed case, did not vote in this case.

CODIFICATION.

It is amusing to read the following in Mr. Bigelow's paper: "He said that as far as he knew, he as much as any one was entitled to the credit of originating the reform of our system of procedure in 1847–8, the abolition of forms of action, and the abolition of the Court of Chancery. He said he made the plea for those reforms in the Constitutional Convention of 1846. *He would on no account, he said, claim for himself, or have anyone claim for him the credit of these, but he was quite willing to be instrumental in defeating the pretentions of any other person to their authorship.* The line of remark had been suggested by the news then just received that Governor Cornell had vetoed the Field-Throop Civil Code[1] — an act on the governor's part with which he repeatedly expressed the greatest satisfaction. Recurring to this subject of codification later, he said he doubted whether our civil law could be codified successfully; he inclined to think it could not,[1] and proceeded to place his doubts upon grounds substantially the same as those which have been more recently set forth in Mr. James C. Carter's exhaustive and masterly discussion of that subject."[2] To set up Mr. O'Conor, or for him to set himself up as the originator, or even as a champion of our practice codification, is ridiculous. Old lawyers will not have forgotten his celebrated letter on code pleading, and his avowal of his utter inability to "state the facts" in any case, and his fling at "the pleadings which come from the office of the chief codifier himself." But even according to Mr. O'Conor, as stated in Mr. Bigelow's paper, the old system of pleading was at least as bad as the new, for he said "he never knew a case in which the parties had been pleading for an issue a year that he could not find a defect of sufficient gravity to set their proceedings aside." In that letter Mr. O'Conor bewailed the new system because "a demurrer to any pleading under the Code is a very dangerous step," and "there are no precedents which would be of use to one beginning to draw pleadings under the Code." It is difficult to imagine the state of mind of a lawyer who approved a system of pleading in which it was not "dangerous to demur." But Mr. O'Conor prided himself on his skill in pleading. Mr. Carter assures us: "His pleadings were beautiful examples of art, and in his

[1] There is an inaccuracy here: there never was any such thing as "the Field-Throop Code." The implication that Mr. Field ever collaborated with Mr. Throop would plant a thorn in Mr. Field's pillow and cause the ample ghost of Mr. Throop to wander at night, like Hamlet's, in search of an avenger. What Governor Robinson vetoed, was Mr. Throop's code of civil procedure (with which Mr. Field had nothing to do), and Mr. Field's three codes — the penal code, the code of criminal procedure, and the civil (general) code. It was this fell swoop that caused such "satisfaction" to that ardent "reformer," Mr. O'Conor!

[1] Mr. Bigelow informs us that John C. Spencer once proposed to him that he join him and Benjamin F. Butler in preparing a code of the common law, but facing the probability that "they would conclude that the fruits of their labor would not be worth reporting to the Legislature," they abandoned the idea. They were too modest.

[2] Whether to indicate his approval or his disapproval of the old system, or his opinion of his own skill, does not clearly appear, but he told Mr. Bigelow that "he never knew a case in which the parties had been pleading for an issue a year, that he could not find a defect of sufficient gravity to set the proceedings aside."

later years, *when he had more leisure*, to draw a bill in equity or an answer was a genuine delight to him." (The italics are mine.) What a pity to have all this spoiled by the compulsion to "state the facts"!

It is true that Mr. O'Conor, in the Constitutional Convention of 1846, favored the blending of law and equity in one form of procedure, but this was the only point on which he was in harmony with the reformers, and this was not original with him. (See the letter of Hon. David Dudley Field, in the foot note.[1])

[1] "Two great measures of legal reform have been undertaken in New York, one the reform of procedure, the other the codification of the Common Law. In respect of the latter, I have never heard that Mr. O'Conor advocated or approved such a codification.

"In respect of the former, all that he ever did, so far as I know, was to advocate, together with several other members, on two occasions, the blending of law and equity in one form of procedure. The only proposition he made was to offer the following as one of the judiciary sections: 'A code of procedure in civil suits shall be established within two years, subject to alteration by law. The Supreme Court, subject to control by law, shall establish uniform rules of practice for all civil courts in this State, except the Court of Appeals.' His speech on that occasion contained among other things the following, which may be taken as his most pointed utterance on the subject: —

"'. . . . 'The Convention had been informed by the chairman that the committee had determined by a considerable majority to bring together the administration of what was called law and equity and to direct justice in these two forms to be administered in the same courts, acting, as the chairman informs us, in some measure under the idea that at some period these two forms or methods of administering civil justice might be perfectly blended, so that there should no longer be recognized or known such a distinction as law and equity — a distinction which it must be admitted it would be highly desirable to abolish. He deemed it an evil that we should have recognized in the constitution by an express provision the truth of that saying which the unlearned in the metaphysics of law or legal practice are apt to indulge in when they find fault with a legal decision — to wit, that law is one thing and equity or good conscience is another. He thought there was no ground for the distinction, and that civil justice in all its forms and phases might be and ought to be administered in the same tribunals and in one uniform mode of procedure.' — *Argus Report, p.* 378.

"It thus appears, that these views had already been discussed in the Convention and so stated by Mr. Ruggles, chairman of the committee on the judiciary. Once afterwards, on the 10th of August (p. 440), the question came up again, and Mr. O'Conor repeated the same views, and at the same meeting Mr. Stetson offered the following, page 444: —

"'And to the end that ultimately the jurisdiction of law and equity may not be separately administered, and that the two may be blended into one harmonious system, the legislature shall provide by law, as far as may be, a common form of procedure for remedies arising under both jurisdictions.'

"See also pages 486 and 560 of the Argus Report of the Convention. In both instances his motion was defeated, and I do not find that he returned to the subject. Finally he voted against the Constitution altogether (page 838). He seems to have given law reform the go-by ever afterwards. If he once lifted a finger to help it, the movement is unknown to me. The real authors of the two law-reforming provisions in the State constitution were Mr. Campbell P. White, a New York merchant (see pages 77, 82, 460, 642), and Mr. Levi S. Chatfield, a lawyer from Otsego, afterwards Attorney General (see page 643). Other members of the Convention held and advocated similar views, such men as Mr. Hoffman, Mr. Taggart, Mr. Nicole, Mr. Harris, Mr. Kirkland.

"So much for the Convention of 1846, and Mr. O'Conor's action therein. My part in law reform is partly explained in my article, published in the 'American Law Review' for August, 1891, and afterwards separately published. But even this does not tell the whole story. From the time that I came to New York as a law student I have had hold of the subject, more or less. The idea of a code is older than Justinian. It is the taking it up and carrying it to a successful accomplishment that is the real task. 'Hic labor, hoc opus est.' Long before the Convention of 1846, that is in 1842, I submitted a reforming scheme to the Legislature, which was the forerunner, if not the cause, of the movement in the Convention.

"I went to O'Conor to get him to sign the memorial to the Legislature which begot the first code of civil procedure, after I had obtained the signature of Vice-Chancellor M'Coun, and Mr. O'Conor said coldly, 'I suppose I must sign this.' That I suspect was his last and only act in support of law-reform. This memorial was as follows: —

"'*To the Senate and Assembly of the State of New York:*

"'The memorial of the undersigned, members of the Bar in the city of New York, respectfully represents that they look with great solicitude for the action of your honorable bodies in respect to the revision, reform, simplification and abridgment of the rules and practice, pleadings, forms, and proceedings of the courts of record. They are persuaded that a radical reform of legal procedure in all its departments is demanded by the interests of justice and by the voice of the people; that a uniform course of proceeding in all cases legal and equitable is entirely practicable, and no less expedient; and that a radical reform should aim at such uniformity, and at the abolition of all useless forms and proceedings.

"'Your memorialists therefore pray your honorable bodies to declare, by the act appointing Commissioners, that it shall be their duty to provide for the abolition of the present forms of action and pleadings in cases at common law, for a uniform course of proceeding in all cases, whether of legal or equitable cognizance, and for the abandonment of every form or proceeding not necessary to ascertain or preserve the rights of the parties.'"

Mr. Field also wrote, in a letter to the New York "Evening Post," in January, 1846, five months before the convening of the Convention, as follows: —

"I have said little about the court of Chancery, not from insensibility to the magnitude of its abuses, but because a radical reform must first be made in the practice of the other courts. Until that happens, the court of chancery, bad as it is, is a necessary evil — its interposition is indispensable so long as the narrow and technical forms of the common law are suffered to continue. But when these forms are opened so as to admit of remedies as extensive as injuries, then the court of chancery will become unnecessary. Till that this arrives, and *I hope the first legislature under the new constitution will bring it*, my plan allows the continued separation of legal and equitable remedies, to be administered either by the same or by different judges."

NOTABLE AND CURIOUS CASES IN THE COURT OF CLAIMS.

VOLUMES could be written about the claims against the Government, which have been brought before the Court of Claims, the Court of Private Land Claims, or before Congress itself. Some of the petitions are evidently the work of cranks, others of ingenious rascals, while yet others are legitimate. It sometimes seems as if the last class were the least likely to gain satisfaction.

Some of the just claims, I am pleased to say, belong to estates where heirs have not spent all their strength and substance in the prosecution, but who have been able to earn a competence for themselves. An instance of this is the somewhat peculiar claim of the Childs family in Philadelphia.

It was in 1777 that the Continental Congress sent two spies to Montreal to report upon the preparations then being made by the British Government to subjugate her rebellious colonies. The men were appointed by General Washington, and a Mr. George W. Childs was one of them. The men did their work to the satisfaction of the General, who gave them certificates to the effect that their wages were well earned. Whether his comrade fared better I do not know, but the compensation promised Mr. Childs was not paid by the Continental Congress, and his heirs petitioned the Fifty-second Congress for two million dollars, which they affirm to be the principal and interest due them.

Another interesting claim is that of Richard W. Meade, father of the hero of Gettysburg. It seems that at the time when the United States purchased Florida, she agreed to assume all the claims which American citizens had against Spain. Among these claims was one for $373,879 which had been allowed by Spain to Mr. Meade, and which under the terms of the treaty should have been promptly settled. Mr. Meade, it seems, was unable to obtain from the Spanish Government the proofs upon which his accounts had been settled with Spain, and without these the United States courts refused to act. The case has been before Congress nearly a score of times, and has been reported favorably nearly every time, but it was never acted upon by both Houses of the same Congress. The original claimant died years ago, and if ever the heirs are able to get their claim through, they will be the richer by several millions of dollars.

One of the most curious claims ever put into a Congressional bill was originally presented by Mr. Weaver, who is now better known as a recent Presidential candidate on the people's party ticket. It was afterward reintroduced by Mr. Smith of Illinois. The bill proposed to pay to Federal soldiers the difference in value between the gold dollar and the depreciated currency in which they were paid during the war. This depreciation ranged from twenty-five to two and a half cents on a dollar, and it was estimated that it would take about $500,000,000 to satisfy the terms of the bill.

At present there is no limit to the number of times a claim may be presented to Congress. Every political change of administration is sure to bring back thousands of

applicants whose petitions have been rejected by the outgoing power.

I have said that some of these claimants are cranks. A citizen of the middle West has spent at least three times as much money in postage as he claims the Government owes him, in writing letters to the Treasury, to United States officials, and even to the Chinese and Korean legations. Nearly two million claims have been filed in the Treasury Department alone, and the way in which many of them are addressed is odd enough. It must have taken the "blind reader" of the post-office department to make "second auditor" out of "second oratorio," or out of "sekun oder of the Tresur."

Saddest of all are the just claims which will probably never be satisfied, and whose inheritors have died in poverty.

Major Joseph Wheaton is recorded as a gallant soldier in the Revolution who served throughout the war. During 1780–1783 Congress passed an act guaranteeing half pay for life to every officer who stayed in the service to the end of the fight for liberty. Major Wheaton never received a dollar of the money promised. Moreover, during the war of 1812, this gallant officer used thirty thousand dollars of his own money with which to purchase army supplies, at a time when the army must have perished without this aid. He was then acting as assistant quartermaster-general. This money, likewise, was never refunded to him, although Congress doubtless intended that it should be. Some time after the major's death a bill for the relief of his daughter finally succeeded in passing both Houses during the same session, but by a fatal error reference was made, not to the Treasury, but to the Interior Department, for payment, and I believe the daughter died in poverty, although the undoubted heir to plenty.

There are said to be more than fifteen thousand claims, acknowledged to be perfectly just, dating from revolutionary times to the last war, which cannot get a satisfactory settlement from Congress.

One of the oldest is that of James Bell, a Canadian, who spent a fortune in building and fitting out three vessels for the Yankees during the Revolution. He was afterward arrested for treason, his unspent property confiscated, and his life spared only through the clemency of the English king, who, it is said, was the man's cousin. Bell was released on parole, and at the close of the war returned to this country. Pointing to Washington's proclamation, that whoever assisted us in our struggle for freedom should be rewarded if we were successful, he asked for aid. He died without it and very poor. A very small portion of the claim has been paid to some of his descendants, but the bulk of it is still an acknowledged debt.

Over in Georgetown there lives, or did a year or two ago, an old lady whose husband was a soldier in the Northern army. During the war the Federal troops used her farm as a camping-ground, and her live stock and other movable property as their own. The damage is put at $20,000, and the justness of her claim is undisputed, but she will probably never get her money.

Now and again there comes a claim which the government has tried to satisfy, but which the claimant persists in prosecuting to the last cent. One of these, apparently, is the famous Reid claim, which is said to have furnished the plot for Mr. Crane's play, "The Senator."

In September, 1814, British buccaneers destroyed the brig "General Armstrong" in the neutral port of Fayal. The owners tried to recover damages, but their efforts had been fruitless up to 1835, when they all engaged Samuel C. Reid of New York to prosecute their claims. The agreement, signed by the fifteen owners, consigned to Reid their rights in the claim, with the agreement that he was to bear all the expenses of the prosecution and retain half of the money he might recover. It was not

until 1857 that England and the United States submitted the loss of this vessel to the arbitration of Louis Napoleon, and it was not until 1882 that Congress directed the Secretary of State to adjust the claims of the captain, owners, officers, and crew of the brig. Long before this, Mr. Reid had assigned his claim to his son, Samuel C. Reid, Jr. The Court of Claims fixed the value of the vessel at $70,739, and put the owners' share at $43,000. For want of evidence to adjudicate the relative interests of the heirs of the fifteen owners, Secretary Frelinghuysen decided that their estates should share alike. Mr. Reid got his half of the whole at once,—$21,500. He also got something for his services from the share of the officers and crew, so that one would think he might have been satisfied. The owners' shares were not all paid out, however, as some of them had died without heirs. This part of the award, of course, reverted to the United States; and it is for all, or at least the major part, of this that Mr. Reid continues his suit.

The McGarrahan claim is another interesting case, but one which is so perennially before the public that it seems useless to give more than a brief outline of what the claimant really wants. His claim is for title to land for which nobody disputes, I believe, that he has paid good money. At the time of the purchase, however, the title was not good. Since then it has become vested in the United States, and the present question is, Shall the man who actually bought and paid for the property in good faith receive the final title, or shall it go to a mining company who are simply squatters?

To show how investigators may be taken in, I will give a brief *résumé* of the Weil and La Abra bills, as they are called. The history of these cases runs back to 1868, when by a treaty with Mexico the United States secured something like four million dollars' worth of awards. The La Abra Silver-Mining Company was awarded $683,041 for alleged damages arising from the closing of a silver mine. In the Weil case the award amounted to $487,819, and was for cotton and mules said to have been seized by Mexican troops. When the United States had paid to each claimant about one-third of his award, suspicions of fraud were aroused, and further payment was suspended. This was in 1877. After a long fight in Congress, early in 1892, the matter was finally referred to the Court of Claims. If the Court finds that the awards were procured by fraud and perjury, the unpaid balance will be returned to Mexico; otherwise, payment on the claims will be resumed. The suspicions are founded in the mine case on what seems to be conclusive evidence, that it had never been seized at all, but had been voluntarily abandoned as valueless, and that the claim had been a fabrication of the former superintendent of the mine, inspired by the appointment of the commission to consider claims arising out of the Mexican war. The ex-superintendent, I believe, died before any payment had been made on the award.

In the La Abra case, then, there had once been a mine, though a valueless one. The Weil claim, however, had even less foundation in fact, if the latest evidence proves to be correct. The claim was based on the allegation that Weil lived in New Orleans, was engaged in running cotton through Mexico during the war, and had lost a heavy mule train and seven hundred bales of cotton through seizure by the Mexicans. Cotton was then worth fifty cents a pound. The proofs at the time seemed so complete that the award was promptly made, and question would probably never have been raised, had it not been for the mixed conditions of Weil's business affairs, which caused a quarrel over the disposition of the proceeds. It now looks as if Weil had never owned a mule or a pound of cotton in his life.

The Court of Private Land Claims was

organized, I believe, in 1891, for the purpose of adjudicating claims to private ownership in land before it was ceded to the United States. There have been filed in this court upward of forty cases, over thirty of which are located in New Mexico, the total area claimed amounting to nearly two and a half million acres. These, of course, are grants alleged to have been made to private parties before New Mexico became the property of the United States, and the only way of proving the truth or falsity of the claims is to patiently and carefully overhaul old Spanish records and archives, much worn and very badly arranged. In this way not only the fact of the grants but also their proper boundaries and areas have to be established.

— *Kate Field's Washington.*

OLD WORLD TRIALS.

VIII.

THE CASE OF FREDERICK AND MARIA MANNING.

ON 25th October, 1849, Frederick Manning and his wife Maria were tried before Chief Baron Pollock, Mr. Justice Maule, and Mr. Justice Cresswell, and a jury of the City of London, at the Old Bailey, now the Central Criminal Court, for the murder of a person named Patrick O'Connor under the following circumstances:

Frederick Manning had at one time been a guard in the service of the Great Western Railway Company, but had been discharged on suspicion of having been concerned in a series of robberies committed on that line. Maria Manning was a Swiss by birth, and her maiden name was De Roux. After Frederick Manning's dismissal from the post of railway guard, this worthy couple had opened an inn at Taunton, whence they had removed, at the time when the present story opens, to No. 3 Miniver Place, Bermondsey, near London. Patrick O'Connor, with whose murder the Mannings were charged, was an officer in the Customs. He lodged not far from Miniver Place, and carried on an adulterous intercourse with Mrs. Manning, whose conduct seems to have been regarded by her husband with perfect equanimity. He was a man possessed of considerable property, a fact well known to Maria Manning, who by his express permission had a right of entry to his room at any moment, whether he was at home at the time or not.

On 9th August, 1849, O'Connor left his lodgings about five o'clock with the avowed intention of going to "dine with Maria." He had received a letter of invitation from her in the morning. This letter he had shown to a companion, to whom he announced that he meant to accept the invitation which it contained. He was seen to walk in the direction of Miniver Place. But he never returned to his lodgings. After a few days his mysterious disappearance began to attract public attention, and hand-bills were printed and circulated offering a reward for his discovery. An ugly rumor got abroad that Maria Manning had visited O'Connor's rooms on the evening of his disappearance; the rooms were searched and it was found that his drawers and boxes had been broken into and their contents rifled; of course the police at once repaired to 3 Miniver Place to arrest the Mannings. The birds had flown, and flown in different directions. It was thought advisable however to search the nest. A certain dampness in the cement between the flagstones on the kitchen floor arrested the attention of a police officer: the flagstones were torn up, and the dead body of O'Connor was found underneath. He had evidently been

shot through the temple, and no less than eighteen severe wounds had been inflicted on his head. It only remained to track the criminals. Mrs. Manning was the first to be arrested. A few days after the murder, a lady who gave the name of Smith called on a stock-broker in Edinburgh and asked him to sell for her some shares in the Amiens and Boulogne Railway — of course she left her address. Shortly after her visit, this gentleman received a printed circular cautioning stock-brokers against dealing in certain foreign railway shares, alleged to have been stolen in London. The numbers of the missing shares corresponded with those that "Mrs. Smith" had left behind her. The stock-broker gave her address to the police, she was promptly arrested, tacitly admitted that she was Maria Manning and accounted for her presence in Edinburgh by saying that she had fled from the brutality of her husband. Frederick Manning was at length tracked to Jersey. He had taken refuge in the house of an old peasant at Beaumont, in the parish of St. Peter's, in that island, and had ordered large supplies of brandy from a neighboring public house with a view to create and maintain a fictitious courage. The publican however, unaccustomed to such large orders, and attracted by the news that the Bermondsey murderer was lurking in the island, betrayed his patron to the police, and Manning was duly arrested. He at once confessed the crime, which he said that he had committed at the instigation of his wife.

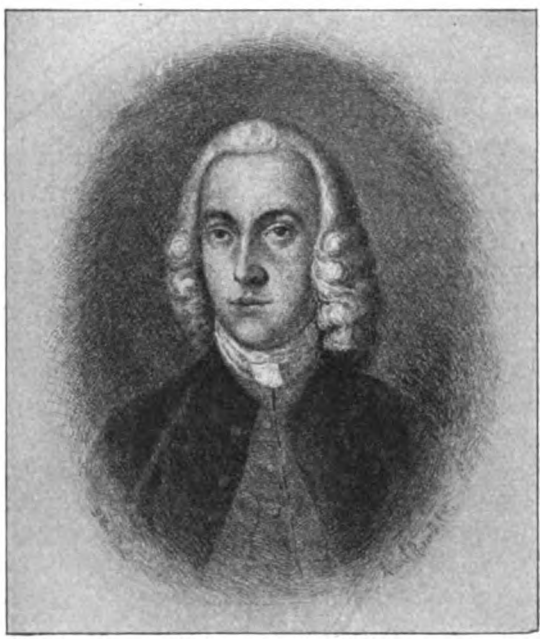
The prosecution of the Mannings was conducted by Sir John Jervis, the Attorney-General of the day. Serjeant Wilkins defended Frederick Manning, and Serjeant Ballantine, author of the famous "Experiences," appeared for Maria. In a manner befitting the descendants of Adam and Eve, the guilty pair endeavored to shift the responsibility for the outrage on to each other's shoulders; and a vigorous attempt to save the life of Maria Manning on the ground that, being an alien, she was entitled to trial *de medietate linguae*, i.e. by a jury half composed of aliens. But it was all in vain, and the Mannings were sentenced to die. Mrs. Manning spent the last days of her wasted life in alternations of despair, denunciations of "base, base England," and scrupulous attention to her toilet. The convicts made several "statements" before their execution, but the only reliable facts to be deduced from them were that O'Connor's grave had been dug some days before the murder, that the wretched man had walked over it and into it, and had asked why the flagstones had been taken up and that Mrs. Manning had told him the drains were under repairs!

LEX.

THE CASE OF THE SLOOP "ACTIVE."

BY HAMPTON L. CARSON.

IN the office of the clerk of the Supreme Court of the United States, among a mass of interesting but unpublished matter relating to the naval history of the American Revolution, can be found the original documents in a celebrated admiralty cause entitled "The Case of the Sloop 'Active.'" Although historians and lawyers are more or less familiar with the main incidents of the narrative, yet many well-informed students of history are ignorant of its details. It is the purpose of this paper to present in a concise form the substantial features of the controversy.



GEORGE ROSS.

The case presents a most notable collision between the United States and the State of Pennsylvania. Indeed, it may be said to constitute the only instance of armed resistance on the part of Pennsylvania to Federal authority; for though the Whiskey Insurrection, which convulsed the administration of Washington, took place on Pennsylvania soil, yet it was but the tumult of an unorganized mob, and did not represent a rebellion on the part of the State.

The case presents also an admirable illustration of the evolution of national authority. It lasted more than thirty years, beginning in 1778 and terminating in 1809. It originated in a controversy as to a prize, in the midst of the American Revolution. It outlived the old Court of Appeals in Cases of Capture, the establishment of which it did much to hasten; it survived the collapse of the Confederation, and was brought twenty years later before the Supreme Court of the United States for final determination.

It exhibits at the outset the political impotence of the Continental Congress uttering a feeble protest against State power while fully conscious of its own rights, and cowering beneath the prospect of a clash of authority. It displays, a few years later, the increasing strength and courage of the infant nation, — the gristle hardening into bone, — and it terminates, after a series of sharp conflicts between State and Federal officers, in the absolute triumph of the national power. It displays all the inherent qualities of a romance, and its scenes are crowded with the most distinguished personages, who are arrayed against each other in situations which are highly dramatic. It opens with a tale of heroism cheated of its reward by jealousy and chicane, contending with indomitable perseverance against great odds, until at the end of a struggle of thirty years the hero of the drama receives the fruits of his valor, and justice prevails over

the plots which had been devised to entrap her.

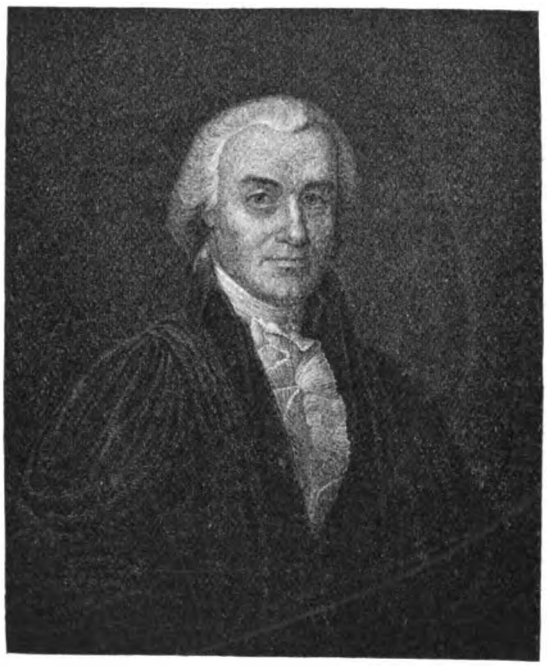
In the early part of September, 1778, Gideon Olmsted, a sturdy Connecticut fisherman, and three associates were captured by the British upon the open sea, in the neighborhood of Cape Charles, and were carried to Jamaica. They were put on board the sloop "Active" and forced, much against their will, to assist in the navigation of the vessel to New York with a cargo of arms and supplies for the British Army, then occupying that city. One night Olmsted boldly resolved to seize the vessel, and unfolding his plan to his friends, they rose upon the master and crew, more than thrice their number, confined them to the cabin below the hatches, took possession of the sloop, and steered for Little Egg Harbor in New Jersey.

WILLIAM HENRY DRAYTON.

A two days' struggle ensued in which shots were exchanged, and desperate efforts were made by the men below to recapture the vessel. The British melted pewter spoons into bullets, forced up the hatches, and swept the deck with their fire. Olmsted was severely wounded, but succeeded in turning a swivel gun heavily loaded down the companionway, and thus secured control. The British captain then cut a hole through the stern and wedged the rudder so as to prevent Olmsted from steering, releasing it only when the pangs of hunger and thirst compelled submission. Having completed his capture, and being in full sight of land, Olmsted was pursued and forcibly taken, against his indignant protest, by an armed brig named the "Convention," fitted out by the State of Pennsylvania, and commanded by Captain Thomas Houston, who insisted upon carrying the "Active" into Philadelphia, where he claimed her as his prize. A claim was also made by the captain of an American privateer, "Le Gerard," cruising by agreement in concert with the "Convention" and in sight at the time of the alleged capture. It was argued that Olmsted's victory had not been complete, and that it was absurd to suppose that four men could have subdued fourteen. To this it was replied that the facts were as stated, and that the British captain had surrendered. The depositions of the witnesses, now on file at Washington, certainly sustain this assertion.

The case was tried before Judge George Ross and a jury, under the terms of an Act of Assembly, which had been passed but nine days before the trial, by which it was provided that while an appeal upon questions of law could be carried to Congress, yet, the "finding of the facts by the jury shall be without re-examination or appeal." The jury found (most unwarrantably, it seems to us) that the Connecticut captors were entitled to but one-fourth of the prize,

and they divided the residue between the State of Pennsylvania, the owners of the privateer, and the officers and crews of the "Convention" and "Le Gerard." The Judge, who was one of the signers of the Declaration of Independence, did not conceal his sympathy with the heroic conduct of Olmsted, but found himself unable to overcome the local prejudices of the jury in favor of the mariners of their own State, and, moreover, felt himself coerced by the express language of the law into a confirmation of the verdict. Olmsted and his associates were too spirited to submit, and promptly appealed to Congress. Security was required, and in his plight the unknown and friendless Olmsted applied to Benedict Arnold, himself a native of Connecticut, then military commander of Philadelphia, who had recently embarked upon a course of speculative enterprises, induced in a large measure by the life of extravagance and display which he led after his marriage to Peggy Shippen, the acknowledged belle of Philadelphia. Arnold, with a keen scent for gain and certain of success, purchased in common with Stephen Collins, a merchant, a share in the controversy for a low and inadequate price.[1]



OLIVER ELLSWORTH.

The matter was duly referred by Congress, then sitting in the State House, to the standing Committee on Appeals, styling themselves "The Court of Commissioners of Appeals for the United States of America," consisting of William Henry Drayton, of South Carolina, but lately the Chief Justice of his State; John Henry, Jr., of Maryland; William Ellery, of Rhode Island, one of the signers of the Declaration of Independence; and Oliver Ellsworth, of Connecticut, afterwards Chief Justice of the United States.[1]

After full argument and due consideration, on the 15th of September, 1778, they solemnly reversed the judgment of Judge Ross, and directed the marshal of the State Court to sell the sloop and cargo, and after deducting the costs to pay over the entire fund to Olmsted and his friends.

Unhappily the matter did not end here. Prior to this time judgments of reversal in admiralty matters had been cheerfully submitted to by the State Courts, but now a serious collision occurred.

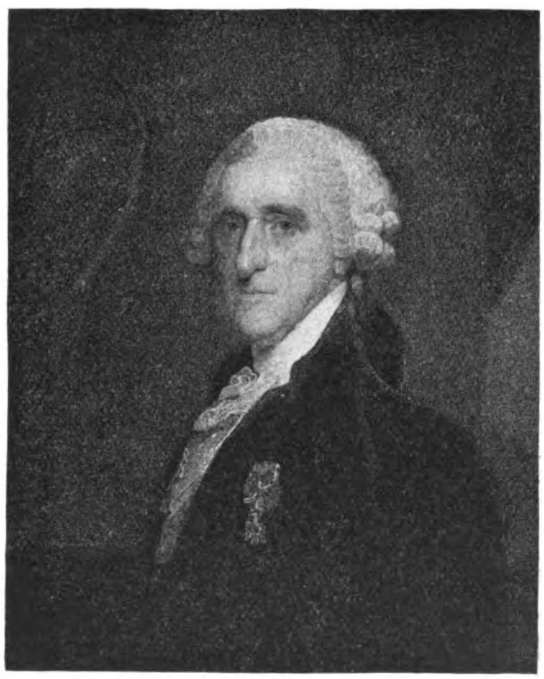
The first intimation of the coming storm was given by General Arnold,[2] who warned

[1] Arnold's conduct in this transaction was made the basis of one of the charges preferred against him by the Supreme Executive Council of Pennsylvania, but it was dismissed by the court-martial for want of jurisdiction. He was then indicted for the crime of maintenance, but the bill was ignored by the Grand Jury, by direction of Chief-Justice McKean. — Arnold's Trial, p. 118, privately printed, New York, 1865.

[1] Journals of Congress, Vol. IV., p. 445.

[2] His letter is dated the 3d of January, 1779. The original is on file at Washington, D.C., among the MSS. in the office of the clerk of the Supreme Court of the United States, and is printed in full by Hon. J. C. Bancroft Davis, in a pamphlet privately printed by him, entitled "The Committees of the Continental Congress chosen to hear and determine Appeals from Courts of Admiralty and the Court of Appeals in Cases of Capture, established by that Body." See also Appendix to 131 United States Reports.

the commissioners in writing that Judge Ross was about to defy them by getting possession of the money, with the avowed purpose of standing out obstinately against any orders that might be given; that he had openly directed the marshal to deliver the money to him at nine o'clock on the following morning, and had boasted that no order of the Congressional committee should take the case out of his hands. He begged them to meet that evening and adopt preventive measures, and added that he had been informed upon good authority that a member of the Pennsylvania Assembly had applied to the judge to get the money paid into his hands, and, if he should succeed, it would probably reach the Treasury, and then the claimants would have the whole State of Pennsylvania to contend with. His anxiety was not without cause, but the commissioners acted with deliberation. The next morning they sent for Andrew Robeson, registrar of the State Court of Admiralty, who informed them under oath that he had witnessed, but an hour before, the payment by the marshal to Judge Ross of the sum of forty-seven thousand nine hundred and eighty-one pounds, two shillings, and five pence, Pennsylvania currency, arising from the sale of the cargo. As the sloop had not been sold, the commissioners drew up an order, in the nature of an injunction, commanding the marshal, at his peril, to maintain his custody of the whole of the moneys arising from the sale of the sloop and cargo, until their further order.[1] In reply, he audaciously sent them a copy of the written receipt of the judge.[2]



THOMAS MCKEAN.

The commissioners then solemnly declared that they were unwilling to resort to any summary proceedings, lest consequences might ensue dangerous to the public peace of the United States, and positively declined to hear any other appeal until their authority as a court should be so settled as to give full efficacy to their decrees. Thus did they veil their consciousness of their own judicial feebleness behind patriotic fears of provoking a contest between State and Congressional authority. The fact stands out in bold relief, that a Pennsylvania judge had successfully defied the Continental Congress.

A statement of the proceedings in the entire case was prepared and made the subject of a communication to Congress, who referred it to a special committee, consisting of Mr. Burke, Mr. Paca, Mr. Dyer,

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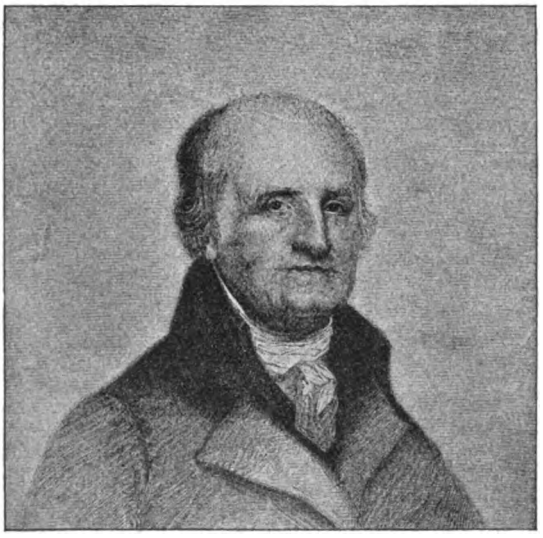

RICHARD PETERS

On the 6th of March, 1779, Congress took steps to assert its final authority, and after a spirited review of the facts, declared that it necessarily had the power to examine as well into verdicts on facts as decisions on law, and to decree finally thereon, and that no finding of a jury in any Court of Admiralty, or court for determining the legality of captures on the high seas, can or ought to destroy the right of appeal and the re-examination of the facts expressly reserved to Congress. That no act of any one State can or ought to destroy the right of appeal to Congress, which was invested by these United States with the supreme sovereign power of war and peace. That the power of executing the law of nations was essential to the sovereign supreme power of war and peace; that the legality of all captures on the high seas must be determined by the law of nations, and that the authority to ultimately and finally decide on all matters and questions touching the law of nations rested in and was vested in the sovereign supreme power of war and peace. That a control by appeal was necessary, in order to compel a just and uniform execution of the law of nations; that this control must extend as well over the decisions of juries as judges, otherwise juries would be possessed of the ultimate power of executing the law of nations in all cases of capture, and might at any time exercise the same in such manner as to prevent a possibility of being controlled, a construction which involved so many inconveniences and absurdities as to destroy an essential part of the power of war and peace entrusted to Congress, and would disable Congress from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties, or other branches of the law of nations, and would enable a jury in any one State to involve the United States in hostilities; a construction which for these and many other reasons was inadmissible. It was also asserted that Congress had hitherto always exercised the power of controlling, by a committee of its own members through appeals, the several admiralty jurisdictions of the States. It was therefore resolved that the committee before whom had been determined the appeal from the Admiralty Court of Pennsylvania, in the case of the sloop "Active," was duly constituted and authorized to determine the same. Upon this resolution the vote stood twenty-one yeas to six nays, all of the Pennsylvania members, and Mr. Witherspoon, of New Jersey,

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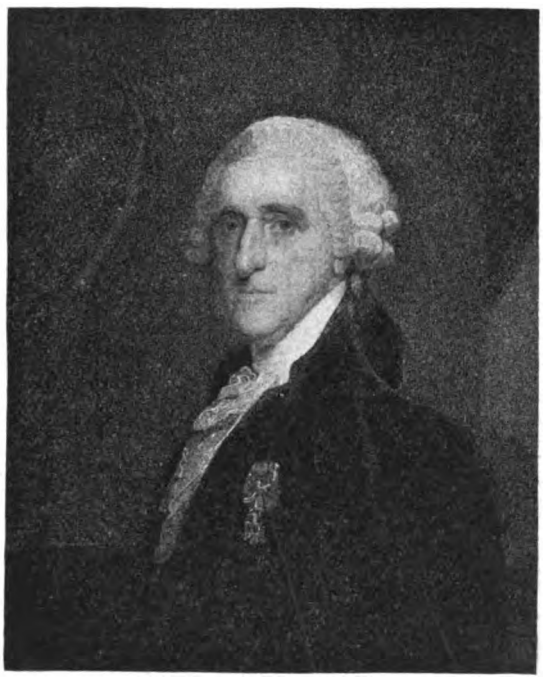

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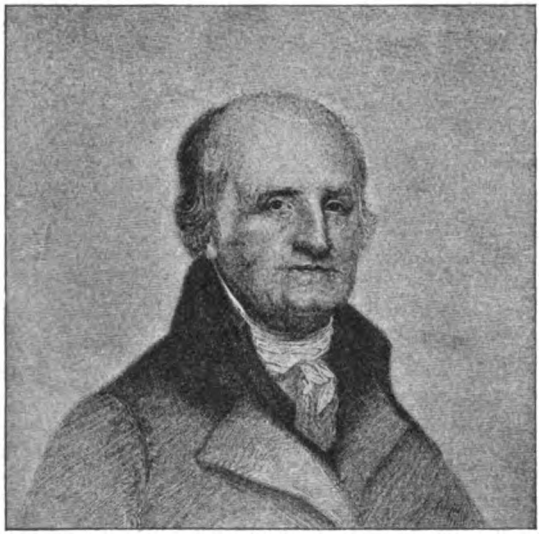

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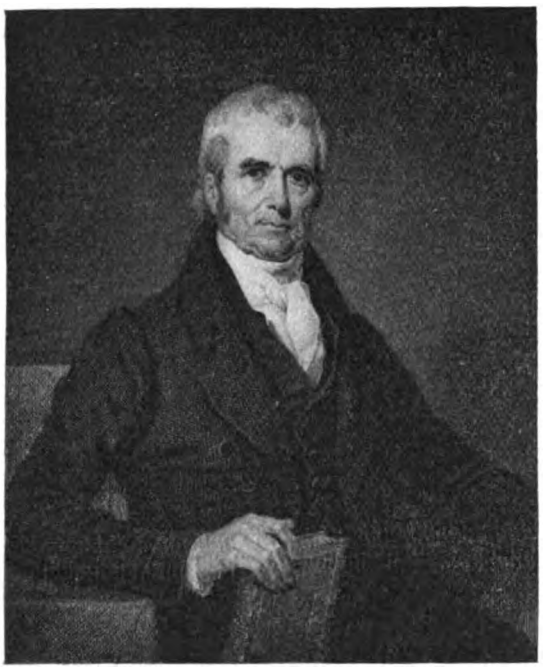
voting in the negative, while the power of Congress was sustained by such men as Samuel Adams, John Jay, Richard Henry Lee, Thomas Burke, Henry Laurens, and William Henry Drayton.[1] The reasoning of Congress, while readily commanding assent in our day, proved but a paper victory.

On the memorial of Olmsted, who bitterly complained that the decree of the appellate body had not been complied with, committees were twice appointed by Congress to confer with a committee of the Pennsylvania Legislature. Resolutions, asserting the absolute power of control of Congress by appeal in the last resort "over all jurisdictions for deciding the legality of captures on the high seas," were transmitted to all the States, with the request that they take effectual measures for conforming thereto.[2] An active correspondence was entered into between Joseph Reed, president of the Supreme Executive Council of Pennsylvania, and Thomas Burke, Esq., in behalf of the Congress, in which, while each was tender in his treatment of the question involving the harmony of the Union, both were firm and outspoken in the maintenance of what they believed to be the respective rights of the parties to the controversy.[1]



JOHN MARSHALL.

On the 8th of March, 1780, Pennsylvania passed a new act, abolishing trial by jury in admiralty causes and restoring the practice of the civil law, and a similar act was passed by South Carolina on February 26, 1782. The remaining States declined to act.

Nothing, however, of a conciliatory nature was done by Pennsylvania in Olmsted's behalf; on the contrary, her Assembly by resolution authorized Judge Ross to pay over the money realized from the sale of the cargo and the sloop, which had been disposed of during the discussion in Congress, to David Rittenhouse, the celebrated astronomer, who, though studying the stars by night, was willing to act as State treasurer by day. Payment was made, and a bond of indemnity given to the Judge as to that portion of the fund which had been awarded to claimants other than the State.

In the meantime the Constitution of the United States had been adopted, and by the terms of the second section of the Third Article, the judicial power of the United States was expressly extended to all cases of admiralty and maritime jurisdiction. The power of the newly-created nation stood behind this constitutional provision, and it remains to be seen what change was wrought

[1] Journals of Congress, Vol. V., p. 64, et seq. Many years afterwards the reasoning of Congress was expressly adopted and sustained by the Supreme Court of the United States in determining a somewhat similar case. See opinion of Paterson, J., in Penhallow *v.* Doane, 3 Dallas, 54.

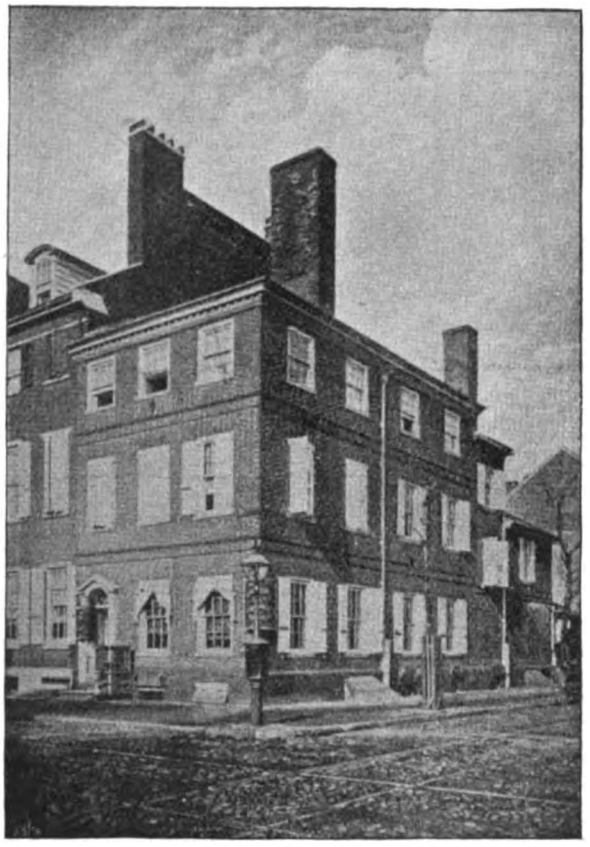
[2] Journals, Vol. V., 165.

[1] Letters of January 28, 1779; January 29, June 5, 1779; Pennsylvania Archives, 1778, 1779, pp. 170, 171, 172, 468.

in Olmsted's fortunes by this positive declaration in the fundamental law.

In 1790 Judge Ross died, and suit was brought against his executors in the Court of Common Pleas of Lancaster County, Pennsylvania, by Olmsted, who still toiled wearily in search of justice.

A judgment was recovered by default. Thereupon Ross's executors sued Rittenhouse to the use of Olmsted upon the bond of indemnity. This aspect of the controversy came before the Supreme Court of Pennsylvania in 1792, and Chief-Justice Thomas McKean, whose name with that of Ross is attached to the Declaration of Independence, declined to sustain the suit, on the ground of the lack of jurisdiction of the Common Pleas over an admiralty matter. He held that this objection ran equally against the validity of the judgment against the executors of Ross, and at the same time expressed in an extra-judicial fashion a decided opinion against the powers of Congress. In the conclusion Associate Justices Shippen and Yeates concurred, although dissenting from his reasons.[1]



FORT RITTENHOUSE.

Baffled but undismayed, Olmsted quietly awaited the course of events. Three years later, in the case of Penhallow *v.* Doane, the Supreme Court of the United States held that the District Courts of the United States had power and authority to carry into execution the decrees of the defunct Court of Appeals in cases of capture.[1] The heart of the doughty old mariner was warmed by fresh hopes. Presenting himself before Judge Richard Peters, the United States District Judge for Pennsylvania, in 1803, he obtained a decree against Mrs. Sergeant and Mrs. Waters, the daughters and executrices of David Rittenhouse, by which they were directed to hand over the certificates of Federal debt in which their father had invested the money received by him as treasurer of the State. To meet this decree, the Legislature of Pennsylvania, at the instigation of Thomas McKean, the Governor, smarting under the inattention paid to his decision as Chief Justice of the State Supreme Court, passed an act requiring the ladies to pay over the funds in dispute to the State Treasury, and directed the Governor to protect their persons and property against any process issuing out of any Federal Court.[2] Here was a gage of battle flung down by the State, accompanied by a note of defiance. The nominal parties to

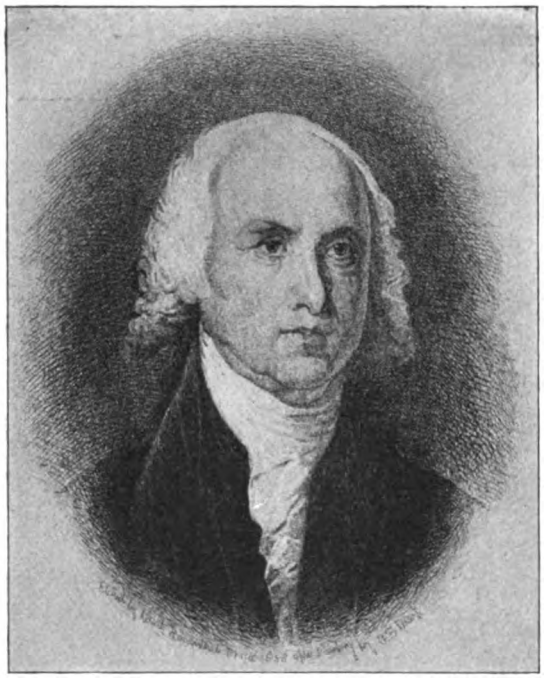
[1] Russell *et al.*, Exrs. *v.* Rittenhouse, 2 Dallas, 160.

[1] 3 Dallas, 54.

[2] Act 2d of April, 1803.

the controversy were a man of '76, and two women who had inherited the lawsuit, but the real contestants were the State of Pennsylvania and the United States.

For five years no process was issued upon the decree entered by Judge Peters, because, as he himself stated, for prudential reasons he deemed it best to withhold it, so as to avoid embroiling the government of the United States and that of Pennsylvania. Rallying his energies for a supreme and final effort, Olmsted applied, in 1808, to the Supreme Court of the United States for a mandamus, which was awarded by Chief Justice Marshall, in one of his characteristic judgments. "With great attention and serious concern" he examined the question of jurisdiction, and after a calm but convincing course of reasoning in support of Federal power, he solemnly declared, "If the Legislatures of the several States may at will annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves. . . ." "The State of Pennsylvania can possess no Constitutional right to resist the legal process which may be directed in this case. It will be readily conceived that the order which this Court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory mandamus must be awarded."[1]



JAMES MADISON.

There could be but little doubt as to the result, when John Marshall sounded such a note, but the State still maintained an attitude of defiance. Judge Peters issued his writ, but when service of the attachment was attempted, the marshal found the house of Mrs. Sergeant and Mrs. Waters, at the corner of Seventh and Arch Streets, long known as "Fort Rittenhouse," surrounded by the State militia under the command of General Bright, who had been called out by Governor Snyder with the sanction of the Legislature, in fulfilment of their pledge of protection. In vain did the marshal read his commission and his warrant, and add a speech on the duty of obedience; every effort to enter the house was resisted by pointed bayonets.

He withdrew for a time, but fixed that day three weeks for the service of the warrant, and summoned a *posse-comitatus* of two thousand men. Bloodshed was imminent, and the City of Philadelphia was torn by the

[1] United States *v.* Peters, 5 Cranch, 115.

apprehension of civil war. The Governor appealed to President Madison and begged him to discriminate between opposition to the laws and Constitution of the United States and resistance to the decree of a judge founded on a usurpation of power, but Madison replied that the Executive of the Union was not authorized to prevent the execution of a decree of the Supreme Court, but was specially enjoined by statute, wherever any such decree was resisted, to aid in its enforcement. The Legislature then prudently opened a door for retreat. In a new act, they still insisted on the right of the State; but "as sundry unforeseen difficulties" might arise in the way of enforcing it, and as the State was bound to protect at all events the persons and property of the executrices of Rittenhouse, they appropriated a large sum to meet contingent expenses, and otherwise to be used "as to the Governor might appear advisable and proper." The marshal, cleverly resorting to stratagem as a means of escaping a bloody collision in the streets, secured access to the rear of the house of the ladies, a day or two before the time appointed for the array of his posse, and having taken them into custody, held them as prisoners. A writ of habeas corpus was then sued out before Chief-Justice Tilghman, of the State Supreme Court. The case was argued with great warmth by Walter Franklin, the Attorney-General of Pennsylvania, and Jared Ingersoll on the one side, and on the other by Alexander J. Dallas, the United States District Attorney, and William Lewis, who had represented Olmsted for thirty years, and to whose stubborn qualities as a legal pugilist the final result was largely due. The Chief-Justice, in a sensible and well-reasoned opinion, made it plain that the Federal Courts were successors to the Continental admiralty jurisdiction, and therefore the validity of the decree of the Continental Court of Appeals was a question exclusively for them, with which he had no right to meddle. He therefore remanded the prisoners to the custody of the marshal.[1] The Governor then paid over the money in dispute to the marshal, out of the legislative appropriation, and thus saved the ladies from imprisonment.

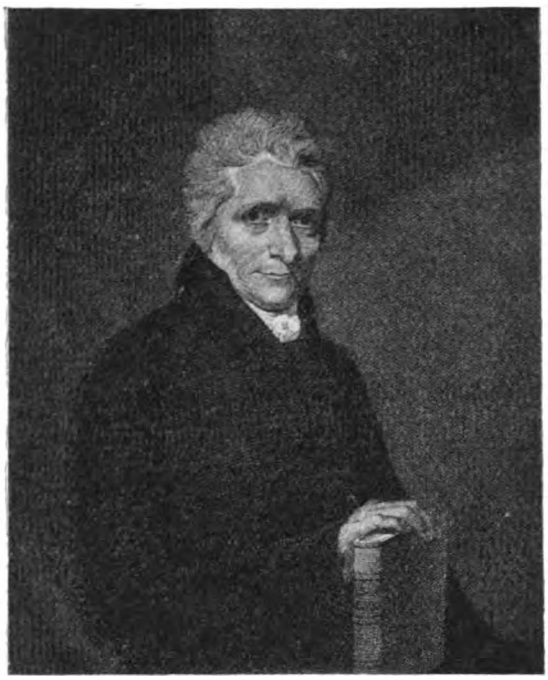
WILLIAM LEWIS.

But the drama had not yet closed. Another act remained. The litigation had ended with the triumph of the nominal plaintiff, but it remained for the United States to vindicate their authority. Warrants were issued against General Bright and his men for forcibly obstructing Federal process. The trials came on before Mr. Justice Washington, who was on all points opposed in opinion to the prisoners, and strenuous in his efforts to uphold the supremacy of Federal law. The jury, however, held out for three days and nights, refusing to convict. The Judge refused to discharge them. When two of them fell

[1] Olmsted's Case, Brightly's Reports (Pa.), I.

sick he sent a doctor to them, but declared that they should never separate until they had agreed. Finally they brought in a special verdict, that the defendants had resisted the marshal, knowingly and wilfully, but that they did it under the authority of the State of Pennsylvania. On these facts they left it to the Court to direct the form of the verdict according to his view of the law. Thereupon he directed a verdict of guilty,

The fisherman had triumphed. His pertinacity in maintaining his legal rights had equaled his persistent valor, when gashed and bleeding upon the sea, in securing his prize against superior numbers. Born in 1748, and dying at the age of ninety-eight, in 1846, at East Hartford, Conn., he lived for many years after his legal victory to enjoy his reward. But better and more lasting than the fruits of heroism was the



BUSHROD WASHINGTON.

which was entered, and after a suitable admonition General Bright was sentenced to three months' imprisonment and a fine of two hundred dollars, and the men to one month's imprisonment and a fine of fifty dollars each; but these were immediately remitted by the President, on the ground that the defendants had acted under a mistaken sense of duty.[1]

vindication of national power. The priceless principle had been established that the Constitution and laws of the United States shall be recognized as the supreme law of the land, "and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

[1] The sources of the foregoing account are the original papers in the case of the Active in the Clerk's Office of the Supreme Court of the United States: Journals of Congress, Vol. V.; Ross *et al.* Exrs. *v.* Rittenhouse, 2 Dallas, 165; United States *v.* Peters, 5 Cranch, 115; The Whole Proceedings in the Case of Olmsted *v.* Rittenhouse, by Richard Peters, Jr., published at Philadelphia in 1809; Trial of General Bright in the Circuit Court of the United States for the District of Pennsylvania, printed at Philadelphia in 1809, two scarce pamphlets in the library of the Philadelphia Library Company.

THE THIRTEEN MAXIMS OF EQUITY.[1]

By Robertson Palmer, of the Chicago Bar.

EQUITY follows the law, regards what should be done.
To reach the substance every form looks through,
On strictly equal plane puts every one;
Who seeks her aid, himself must justice do.

With hands unstained her suitors all must be;
With equal right the first in time prevails;
With equal right the law controls decree;
The wakeful, not the sleeping turns her scales.

To each she will impute a purpose fair,
Each legal right her ample power protects.
She acts alone on persons everywhere,
The very thing that should be, she directs.

[1] The maxims of equity as indexed by the American and English Encyclopedia of Law are as follows: —

1. Equity follows the law.
2. Equity regards that as done which ought to have been done.
3. Equity looks to the intent rather than to the form.
4. Equality is equity.
5. He who seeks equity must do equity.
6. He who comes into equity must come with clean hands.
7. Between equal equities the first in time shall prevail.
8. Between equal equities the law must prevail.
9. Equity aids the vigilant, not the sleeping.
10. Equity imputes an intention to fulfil an obligation.
11. Equity will not suffer a right to be without a remedy.
12. Equity acts in personam.
13. Equity acts specifically.

THE COURT OF STAR CHAMBER.

XI.

By John D. Lindsay.

THE cases which have been cited are but a very few instances of the oppression of the Star Chamber during Charles I.'s reign. Macaulay says: —

"The tribunals afforded no protection to the subject against the civil and ecclesiastical tyranny of that period. The judges of the common law, holding their situations during the pleasure of the king, were scandalously obsequious. Yet, obsequious as they were, they were less ready and less efficient instruments of arbitrary power than a class of courts, the memory of which is still, after the lapse of more than two centuries, held in deep abhorrence by the nation. Foremost among these courts in power and in infamy were the Star Chamber and the High Commission, the former a political, the latter a religious inquisition. Neither was a part of the old Constitution of England. The Star Chamber had been remodeled, and the High Commission created, by the Tudors. The power which these boards had possessed before the accession of Charles had been extensive and formidable, but had been small indeed when compared with that which they now usurped. Guided chiefly by the violent spirit of the primate, and freed from the control of Parliament, they displayed a rapacity, a violence, a malignant energy, which had been unknown to any former age. The government was able through their instrumentality to fine, imprison, pillory, and mutilate without restraint. A separate council which sat at York, under the presidency of Wentworth, was armed, in defiance of law, by a pure act of prerogative, with almost boundless power over the northern counties. All these tribunals insulted and defied the authority of Westminster Hall, and daily committed excesses which the most distinguished Royalists have warmly condemned. We are informed by Clarendon that there was hardly a man of note in the realm who had not personal experience of the harshness and greediness of the Star Chamber, that the High Commission had so conducted itself that it had scarce a friend left in the kingdom, and that the tyranny of the Council of York had made the great charter a dead letter on the north of the Trent."

Between the dissolution of the short-lived assembly convoked by Charles in the spring of 1640, and the meeting of that ever-memorable body known as the Long Parliament in November of the same year, "which," says Macaulay, "in spite of many errors and disasters is justly entitled to the reverence and gratitude of all who, in any part of the world, enjoy the blessings of constitutional Government," the oppression of the Star Chamber was exercised at its greatest height. Members of the House of Commons were called before it and questioned concerning their parliamentary conduct, and thrown into prison for refusing to reply. The Lord Mayor and Sheriff of London were threatened with imprisonment for remissness in collecting the payment of ship money, which was levied with increased rigor. Wentworth, it is said, observed with characteristic insolence and cruelty that things would never go right till the aldermen were hanged.

The Star Chamber was finally abolished by one of the first statutes passed by the Long Parliament, — "that great Parliament destined to every extreme of fortune, to empire and to servitude, to glory and to contempt; at one time the sovereign of its sovereign, at another time the servant of its servants."[1]

This statute was the 16 Charles I. ch. 10. It recited the different statutes bearing on the subject, declared that the proceedings, censures, and "decrees of the court have by experience been found to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and govern-

[1] Macaulay.

ment," and enacted that the Court of Star Chamber, and all similar courts, and particularly the Courts of the Council of the Marches of Wales, the President and Council of the North, the Duchy of Lancaster, and the Court of Exchequer of the County Palatine of Chester be abolished, and that no similar court be established for the future. The words of the act are, "The like jurisdiction now used and exercised" in the courts named "shall be also repealed and absolutely revoked and made void."[1]

Those unfortunate victims who, after undergoing ignominious punishment and cruel mutilations, had been sent to languish in distant prisons, were set at liberty and conducted through the streets of London in triumphant procession.

Says Macaulay: "The abolition of those three hateful courts, the Northern Council, the Star Chamber, and the High Commission, would alone entitle the Long Parliament to the lasting gratitude of Englishmen."

But while we can but with justice look back to the Court of Star Chamber with a feeling of loathing for its tyranny and oppressions, we must not forget the great services which it rendered for many generations, and the lasting benefits it contributed to our system of law. Stephen says: —

"The common law was in all ways a most defective system. It was incomplete. Its punishments were capricious and cruel. Its most characteristic institution, trial by jury, was open to abuse in every case in which persons of local influence were interested. Juries themselves were often corrupt, and the process of attaint, the only one by which at common law a false verdict could be impeached or a corrupt juryman be punished, was as uncertain and as open to corrupt influences as other forms of trial by jury."

"When a corrupt jury," says Hudson,[2] "had given an injurious verdict, if there had been no remedy but to attaint them by another jury, the wronged party would have had but small remedy, as is manifested by common experience, no jury having for many years attainted a former. As also at this day in the principality of Wales, if a man of good alliance have a cause to be tried, though many sharp laws have been made for favorable panels, yet it is impossible to have a jury which will find against him, be the cause never so plain; or if arraigned for murder he shall hardly be convicted, although the fear of punishment of this court carries some awful respect over them."

"According to our modern views, the proper cure for such defects would be intelligent and comprehensive legislation as to both crimes and criminal procedure, but for many reasons such an undertaking as a criminal code would have been practically impossible in the Tudor period. In these circumstances the Star Chamber not merely exercised a control over influential noblemen and gentlemen which put a stop to much oppression and corrupt interference with the course of justice, but supplied some of the defects of a system which practically left unpunished forgery, perjury, attempts and conspiracies to commit crimes, and many forms of fraud and force.

"In the latter stages of its history, no doubt the Court of Star Chamber became a partisan court, and punished with cruel severity men who offended the king or his ministers. Nothing can be said in excuse of such proceedings as those against Prynne or Lilburne; but it is just to observe that the real objection made was to the punishment of the acts themselves, rather than to the cruelty of branding or whipping. The punishments inflicted by the common law were in many cases more cruel than those of the Star Chamber, yet they seem to have elicited no indignation. There is also some reason to believe that the cruel punishments inflicted under Charles I. were at least to some extent an innovation on the earlier practice of the court."[1]

[1] The Court of Star Chamber was dissolved, but the other courts were not dissolved in terms. The "Court holden before the President and Council of the Marches of Wales" seems to have survived for forty-eight years, as it was abolished in 1688 by 1 Wm. & M. ch. 27.

[2] P. 14.

[1] Hudson is quite enthusiastic. He says: "Since the great Roman senate, so famous to all ages and nations, as that they might be called *jure mirum orbis*, there hath no court come so near them in state honour and judicature as this; the judges of this court being surely in honour, state and majesty, learning, understanding, justice, piety and mercy, equal and in many exceeding the Roman senate by such much, by how much Christian knowledge exceedeth

Bacon describes the Star Chamber as "one of the sagest and noblest institutions of this kingdom."

Coke says: "It is the most honorable court (our Parliament excepted) that is in the Christian world, both in respect of the judges of the court, and of their honorable proceeding according to their just jurisdiction, and the ancient and just orders of the court. . . This court, the right institutions and ancient orders thereof being observed, doth keep all England in quiet."

The principal share in the earlier stages of the enlargement of the doctrine of criminal conspiracy must be ascribed to the Star Chamber.

The modern law of conspiracy has grown out of the application to cases of conspiracy, properly so called, and as defined by the 33 Edw. I., of the early doctrine that since the gist of crime was in the intent, a criminal intent manifested by any act done in furtherance of it might be punishable, although the act did not amount in law to an actual attempt.

In accordance with this view the Star Chamber on the authority of Anon. 27, ass. p. 138, b. vl. 44 (1354) finally settled in the Poulterer's case, 9 Rep. 55, Moore, 814, that although the crime of conspiracy, properly so called, was not complete unless in a case of conspiracy for maintenance some suit had been actually maintained, or in a case of conspiracy for false and malicious indictment the party against whom the conspiracy was directed had been actually indicted and acquitted, yet the agreement for such a conspiracy was indictable as a substantive offense, since there was a criminal intent manifested by an act done in furtherance of it, viz., by the agreement: and from this time by an easy transition the agreement or confederacy itself for the commission of what had been previously called in law conspiracy, came to be regarded as a complete act of conspiracy, although traces of the original distinction between a completed conspiracy, and a mere agreement or confederacy to commit it, long continue to be found.

Not only the Poulterers' case, which is the source of all the modern law of conspiracy, but all the other reported cases of conspiracy decided before the abolition of the Star Chamber were in that court.

Undoubtedly the decisions of the Star Chamber were often influenced by considerations that have no place in a judicial tribunal, and its sentences, especially during the reigns of James I. and Charles I., were cruelly harsh and unjustifiable. But there is one consideration that must not be overlooked, one that unhappily cannot be applied to many if any of our modern tribunals, — and I doubt if the pages of history furnish a parallel, — namely, that throughout its existence, so far as the records show, its determination upon questions of law were, without a single exception, founded upon sound reason and the principles of absolute justice, and were legally unassailable.

human learning." After giving an account of the chancellor as Chief-Judge of the court he says: "As concerning the great and eminent officers of the kingdom, the Lord Treasurer, Privy Seal, and President of the Council, their places or voices in this court when the superior sitteth are of no more weight than any other of the table; so that the displeasure of a great officer cannot much amaze any suitor, knowing it is but one opinion, and the court is not alone replenished with nobles, dukes, marquises, earls and barons, which hereby ought to be frequented with great presence of them, but also with reverend and bishops and prelates, grave counsellors of state, just and learned judges, with a composition for justice, mercy, religion, policy and government, that it may be well and truly said that Mercy and Truth are met together, Righteousness and Peace have kissed each other."

AN EARLY CASE OF TRESPASS IN MAINE.

By Geo. J. Varney.

THE number of distinct governments more or less inimical to each other that have been endured by the southwestern section of Maine is uncountable, — less from the number (nearly a dozen) than from their often coincidence, resulting in confusion of authority and jurisdiction.

There had been governments by local association from the first settlement of a group of families; but in 1636, Sir Ferdinando Gorges, having had his grant of the province of Maine confirmed, with rights of government, sent over a governor and established the first court in Maine, — the province being, under this organization, New Somersetshire. This territory extended from the Piscataqua River to that of the New Plymouth colony on the Kennebec.

His governor stayed only until the next year; but it was not until 1640 that the lord-proprietor sent another to represent him, — this time his "trusty and well-beloved cousin, Thomas Gorges, Esq.," — who, like himself, was of the established church.

At a session of court held in September of that year there were tried an action for drunkenness, another for the sale of the liquor that was its cause, one for debt, one for slander, two for swearing oaths, two for profanation of the Sabbath, and the one we are to consider, — the case of Richard Tucker, proprietor of the Presumpscot lands, against Thomas Purchas, proprietor of the broad peninsula of Pejepscot, occupying the area between the Androscoggin River and the sea, from the lower falls to the mouth of the river.

The court record runs thus: —

"Richard Tucker cometh into this court and declareth that nine years since, or thereabouts, there came one Sir Christopher Gardiner to plaintiff in the name of the defendant, Thomas Purchas, and borrowed of him a warming-pan, which cost here in this country 12s. 6d., which the defendant hath all this time and still doth wrongfully detain from the plaintiff. And also the said Sir Christopher did six months after or thereabouts, buy of the plaintiff a new fowling-piece for 40s. which he promised to pay within a month after, which money, both for the warming-pan and the piece, the plaintiff hath oftentimes demanded of the defendant, who doth still refuse to pay the same, to the damage of the plaintiff at least 5£ sterling, for which the plaintiff commenceth his action of trespass on the case against the defendant in this court, and humbly desireth a legal hearing according to law."

The Sir Christopher Gardiner here referred to is that picturesque personage who arrived at Boston in 1630, — whose dudish debut and indecorous doings in the Puritan precincts are described and narrated in Longfellow's "Rhyme of Sir Christopher," the landlord's contribution to the Tales of the Wayside Inn. As there delineated, —

> "His rapier dangling at his feet,
> Doublet and hose and boots complete,
> Prince Rupert hat with ostrich plume,
> Gloves that exhale a faint perfume,
> And superior manners now obsolete, —"

he is a strikingly attractive figure, and must have caused a sensation among the Puritan maidens, — until certain other things were learned that properly rendered him obnoxious to all good citizens.

Sir Christopher was a traveled man, having penetrated the Orient as far as Jerusalem, — where he was made a knight of the Holy Sepulchre. Moreover he was of the family of the persecuting bishop, Stephen Gardiner, in the reign of the bloody Mary. These things gave him a decided Roman Catholic flavor to the taste of the Bay people; besides which, letters surreptitiously opened by the authorities on the way to

him showed that his visit was at least partly in the interest of Sir Ferdinando Gorges, who had a claim on the Bay colony's lands; and the strange knight was suspected to be in a scheme to divert this property from its possessor.

The Puritan stomach was nauseated; and the authorities were soon furnished with cause for action by letters to Governor Winthrop from two women in England, each claiming to be his wife. One besought the governor to send her recreant husband back to her, while the other requested that he be put to death off-hand.

The knight is represented as having brought quite a retinue with him, and appears to have had a town house, though his country seat figures chiefly in Longfellow's rhyme, — which says: —

> "His dwelling was just beyond the town,
> At what he called his country seat, —"

though this was found by the officers who came in search of him to be "little more than a cabin of logs," with

> "A modest flower bed in front of the door."

The knight was accompanied in his mission by a lady whom he represented as his cousin, but whom the suspicious Bostonians believed to sustain a more intimate relation.

Observing the approaching officers, the gay Sir Christopher took a precipitate departure from the rear of his house; and, unable to find the person for whom they had been sent, they seized, instead,

> "A little lady with golden hair,"

and brought the "weeping damsel" before the governor. The poem goes on to say that the latter "read her a little homily

> "On the folly and wickedness of the lives
> Of women half cousin and half wives;
> And seeing that naught his word availed,
> He sent her away in a ship that sailed
> For merry England over the sea."

Meanwhile

> "Sir Christopher wandered away
> Through pathless woods for a month and a day,"

but was finally captured, — it is said, by means of Indians with whom he had found refuge, under the temptation of the reward offered by the Bay people. The accepted authority says that he was sent back to meet alike his pining spouse and the revengeful one, in a ship which sailed from Salem.

Here comes in — beside the outrage on the rights of a well-born Englishman — a conflict of testimony in the matter of dates of sailing and the fates of the unwilling sailors; for in Tucker's action he declares that Sir Christopher obtained the articles from him about "nine years ago," — which shows the knight to have been otherwheres than in England; while his "lady cousin" had previously been married to Thomas Purchas in Boston — in 1631, — according to other trustworthy chroniclers, and as appears to be proved by the York County records; which also show that she bore her lord three children.

It was for the comfort of this lady that the warming-pan was borrowed; to whom, in the year just indicated, Sir Christopher made a visit at her legal residence in the mansion of her husband in what is now the good old college town of Brunswick, Maine. The fowling-piece, it is stated, was bought six months later.

Tucker was raising grain extensively on his land along Back Cove, opposite the present city of Portland; while Purchas carried on an extensive salmon fishery in its season, and a profitable trade with the Indians at all times. He had been one of the commissioners-assistant of the governor whom proprietor Gorges sent over in 1636; but on the departure of this governor the government lapsed; therefore Purchas turned to Massachusetts, and, in 1639, became an adherent of that government, for his own protection against the intrusion of fishing vessels, the encroachments of neighboring proprietors, and the ever dangerous Indians.

So in this court Tucker had a fair field, and Purchas no favor.

"T. Purchas denies ever authorizing Sir C. Gardiner to buy any warming-pan or fowling-piece for him, etc.," is the court record of the defense.

The charges are somewhat mixed in their nature, and the verdict of the six judges, "councillors" or "assistants," is therefore lumped. It runs: "Verdict for the plaintiff, 2*£*. 12*s*. 6*d*. for the two articles, 12*s*. 6*d*., costs of court."

The designation of the offense by the plaintiff, and the judgment of the court, are subjects for the scrutiny of the more technical intellects of the legal profession of to-day — who will doubtless take into view, also, the kind of "goods" that Sir Christopher palmed off upon the rural fisherman, and the rights of the innocent holder.

LEGAL ANTHROPOMETRY.

MR. Edmund R. Spearman contributes to the "London Law Journal," the following interesting paper, which will be read with interest by the legal profession in America.

"It is now just five years since my translation of M. Alphonse Bertillon's description of his system of legal or police anthropometry was published in your columns. That description was originally compiled in the form of an address for the meeting of the International Penitentiary Congress at Rome in 1885, and my translation was prepared at the request of the French Government, which had, and has, the greatest interest in calling the attention of other governments to the Bertillon system, and to endeavor to obtain its adoption by its neighbors. Unfortunately the original impression of my translation, printed for private administrative use by the French Government, was issued without any revision on my part, and, although of course handsome in appearance, had such errors of typography as to prejudice, at first sight, the English official world; alas, only too ready for an excuse for delay or do nothingness in this as in other matters. To somewhat repair this initial disaster in a crusade which I had taken in heart, I had recourse to the hospitality of your columns, and afterwards I issued the translation in pamphlet form, but not in such attractive shape as might have been the French pamphlet, if properly supervised. However, the publication in the "Law Journal" of August 31, September 7, and September 14, 1889, was a landmark in the history of a great reform in criminal procedure. Previously the only attention paid in England to M. Bertillon's wonderful innovation were various communications of my own to the press and some questions in Parliament by friends of mine, rising at my special request. I fear these earlier attempts were little appreciated either by the general public or even by the class more specially interested in the administration of the law. My appeals to the Home Office and to Scotland Yard met with careless incredulity and indifference. With the publication of M. Bertillon's own succinct description all intelligent and reasonable persons at once awakened to the importance of the anthropometric idea. The question was widely debated, and my subsequent contributions to the periodical literature met with a general chorus of sympathy. When, in the early years of the French Anthropometric Bureau, I became acquainted with M. Bertillon and his system, and, with my long experience of the terrible defects of our English administration in this matter of criminal identification, I resolved on devoting my energies to having anthropometry introduced into England, not the

least annoying of the official objections I encountered was the assertion that it would be illegal in England to take the Bertillon anthropometric measurements. Without setting myself up as a legal authority, I still contend that it is contrary to common sense to consider it any more illegal to take the width of a prisoner's head than (as is always the practice) to take his stature. To clear the ground of this frivolous objection, and to finally clinch the matter, by persistently knocking at the door of St. Stephen's my efforts secured the distinct enunciation in section 8 of 54 and 55 Vict. c. 69, that the taking of anthropometric measurements should be henceforth sanctioned. The great reform itself, however, still waits. This matter should especially interest the legal fraternity, as serious defects in the administration of the criminal law come nearest home to the general public, bringing the law itself into disrepute, and entailing odium on the whole legal world, even that portion most remote from the routine of the criminal law, the public not making nice discriminations in this regard any more than did the Merry Monarch when he proposed to remedy the public ills by hanging a few lawyers. It must be understood that the great success of the Bertillon system in France entails an ever-increasing danger to England so long as our machinery remains in arrear. The most dangerous of all criminals are international ones, birds of passage who can ply their vocation in more than one land. If these malefactors discover matters too hot for them in one state, they will surely fly to another if the second affords a safe refuge. This process is going on at this moment so far as France and England are concerned. M. Bertillon's system has now eleven years of service, and half a million of measurements are already docketed in the Paris Prefecture of Police. Such a thing as concealment of identity by any person who has been in the clutches of the law in France since anthropometry was introduced is now practically impossible. So immense is the importance of the service rendered to France by M. Bertillon that one of the chief reforms introduced in the perfecture by the new prefect, M. Lupine, was to place M. Bertillon in charge of the whole service of identity, including those terrible masses of *sommiers judiciaires* (now over eight millions in number) which have been steadily accumulating, since inaugurated by Fouché in 1805, the individual biographies of every French criminal of the nineteenth century, and which were carefully restored from the duplicate records after the Commune catastrophe. Although the *sommiers judiciaires* are the subject of such admiring use by the sensational novelist and dramatist, they were bidding fair, without M. Bertillon's rehabilitation, to become the sport of many of the criminals themselves. Thus the French counterpart of our John Smith, Jean Baptiste Lefevre, counts no less than two thousand representatives among the *sommiers*. It is M. Bertillon's triumph that neither two thousand Jean Lefevres nor any other mass of humanity confuses his scientific discrimination. By means of his accurate and unchanging bone measurements, and, above all, by his elaborate yet simple system of classification, he picks out in a few minutes any previous record of each new person brought to his notice. Out of all the half-million and upwards, he *has never mistaken one single prisoner for another*. What a crying shame for the London administration at this late day to have such a flagrant instance as that of the poor man Blake this past summer at the Central Criminal Court, and at the very moment when my elaborate statement of the working and results of the Bertillon system appeared in the "New Review"! No wonder Blake's solicitor wrote to the press so indignantly about the high-handed methods of our policemen and prison

wardens in swearing so confidently to identity of prisoners, even after intervals of years. The legal fraternity should insist that this crude, barbarous method of identification should be swept away without further delay. I cannot repeat here details of the Bertillon system as already given in your columns and elsewhere. Suffice it to recall that M. Bertillon's method is *scientific* and absolutely *infallible*. He records for each arrested person certain bone measurements, so selected as to serve readily for sorting into minute categories. By the laws of arithmetical progression, M. Bertillon enables us so to classify even millions of measurements into groups so uniform and so small as to enable anyone after search of a few minutes to turn out any particular record when the same subject again appears. Moreover, M. Bertillon's records of personal appearance are so accurate and minute in character that even the most incredulous can have no doubt of the truth; when bodily peculiarities are recorded to the tune of millimètres, the game of concealment is up, and error is out of the question. The legal fraternity cannot fail to be interested in the visit of Sir Charles Russell and Sir Richard Webster to the Paris Anthropometric Bureau during the session of the Bering Arbitration Tribunal. Our illustrious legists were unstinted in their approval of anthropometry. In fact, no lawyer could fail to see both the importance and perfection of M. Bertillon's system at a glance. It only needs the mere comparison of the automatic anthropometry to the English reliance on loose memory of an ignorant warden to have the latter laughed out of court. The recent discussions of criminal anthropometry in the scientific centres, especially the interest by that enthusiastic anthropologist Mr. Francis Galton, is welcomed as indicating the growth of public opinion in this matter, but it is incumbent on the legal fraternity to take heed that the scientists only contribute essentials and not embarrassing superfluities. It must be the Bertillon system pure and simple, or the benefit of international uniformity will be lost."

LONDON LEGAL LETTER.

London, Dec. 1, 1894.

LORD HERSCHELL'S latest additions to the ranks of Queen's Counsel have evoked a good deal of criticism. It has always been said that Lord Herschell was wont to complain of the indiscriminate manner in which his predecessor, Lord Halsbury, distributed the dignity of "silk," but it is difficult to detect any difference between the policy of the two Lords Chancellor. It has almost come to this, that any barrister of ten years' standing who has any professional or political position at all can have a silk gown for the asking: as Mr. Crump complains in the "Law Times," they are becoming cheap commodities; "they are given to retire upon, to decorate professors, to ornament an inferior judge, to grace officials," and the natural consequence of this enlargement of the ranks of Queen's Counsel has followed: a great number of them have nothing to do; they cut themselves adrift from the more laborious functions of junior practice, and discover when it is too late that they have exchanged a competence for titled indigence.

We have a great and substantial grievance to complain of at present. Since the Inns of Court a year or two ago facilitated the passage of solicitors from the lower branch of the profession to the higher, there has been a constantly increasing stream of ambitious solicitors invading our ranks and rendering the competition for work much more intense. Men who come to the bar in this way have generally at their command many ramifications of interest and influence, so that it looks as if in the future anyone desirous

of becoming a successful barrister would require to undergo a period of probation in the lower branch of the profession.

Although a member of another Inn, I had an opportunity the other evening of viewing the Middle Temple Hall lighted as it now is by electricity; the installation has proved an immense success, contrary to very general expectation, for it was feared that the cold rays of the modern illuminant would strike unsympathetically against the dark oak carvings and massive woodwork of the time of Queen Elizabeth.

Some criticism has been excited by the selection of Lord Cross to succeed Mr. Cohen, Q. C., as Treasurer of the Inner Temple for 1895. Lord Cross is a barrister, but he never became a Queen's Counsel. As a junior he got into politics and there made his mark as the possessor of the useful and practical talents, for brilliant he never was, but he attracted Lord Beaconsfield's attention when that eminent statesman was Mr. Disraeli, and was made quite unexpectedly Home Secretary. The duties of that responsible office he discharged with infinite credit, and made an impression so favorable at court that for a number of years he has had the honor of arranging the Queen's private investments. His business capacities are exceptional, and to this he chiefly owes his success. He is a man somewhat of the stamp of the late leader of the House of Commons, the Hon. William Henry Smith, another of Mr. Disraeli's sagacious selections for Cabinet office, and that polished cynic has been credited with the sarcastic observation that he could never remember which was Mr. Smith and which Mr. Cross. Lord Cross is one of the most regular attendants at the Sunday morning service in the Temple Church, where, in his seat close by the pulpit, his well known figure is a characteristic feature of the legal congregation.

London has been thrown into a turmoil for weeks over the triennial School Board election, which has just taken place and relieved us from the continuance of a very tiresome controversy. When I say that the question of religious instruction was seized upon as the occasion of a trial of strength between the two political parties, for notwithstanding a considerable confusion of ordinary political classifications this was substantially the situation, you can imagine how embittered every one has been. We lawyers were hoping that the personalities of the contest would produce a plentiful harvest of libel and slander actions, but I hear that most of the wordy quarrels have been more or less amicably adjusted.

If it were not for divorce cases, which seem to multiply, and defamation actions, there would scarcely be any work for barristers to do. There is beyond dispute a painful stagnation in litigating activity. Lawyers would seem to have killed their goose, for people nowadays much prefer to suffer wrongs patiently than allow the profession to unloose their purse strings. I am told that there was great rejoicing at Lincoln's Inn on grand night last term, when the equity pundits discovered that the meager dainties of the table-d'hôte, introduced as an experiment, had been displaced by the old-fashioned banquet in all its barbaric sumptuousness; if there was an absence of variety there was plenty, and, after all, severe intellectual labor no less than manual toil breeds appetite.

This is a very short letter, but, could you believe it, there is but very little of interest taking place. I cannot trespass on political grounds, and your readers would resent dry points of law.

* * *

The Lawyer's Easy Chair.

. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

ELECTION OF JUDGES.— The result of the late judicial elections in the State of New York has been to confirm the *Easy Chair* in its old opinion, that direct election by the people is the best way to choose judges. We know it seems to be deemed of late rather the elegant thing to denounce this method, even in the States where it prevails, and to point to England, the Federal Supreme Court, and Massachusetts as a demonstration of the better policy of appointment. But when we compare the quality of the appointing power in those instances with that of the partisan and wild-cat governors of many States, the argument loses its apparent force. After all, experience is the best test, and in New York, considering the great number and the good quality of the judges since 1846, it is evident that the governors would not have chosen so well. In the last two years that State supplied an excellent object-lesson on the subject, with a result in favor of the people. In the election just passed both parties nominated worthy candidates. In several instances the nominee of one party was adopted by the other party. In the case of the Court of Appeals, the Democratic party made two perfectly unexceptionable nominations, the first nominee declining to run. The Republicans named and elected a gentleman of the highest character and abilities, who has been on the bench twenty-two years. He and his antagonist had sat in the Court of Appeals at the same time. There really was little room for choice between them personally. Another result of the election is to demonstrate that the people in such matters are not apt to be unduly influenced by newspaper and platform abuse of candidates. There never was a judicial candidate more grossly and persistently libelled than Judge Haight by the New York "World." He was accused of corruption and dishonesty, and of being a "corporation judge"; charges utterly absurd in the estimation of all his townsfolk and of every man who knows him. By them, without respect to party, he is deemed a man of the purest integrity, the keenest sense of justice, the most moderate judgment, the coldest impartiality, and the most conscientious determination to do right. We have reason to believe that his excellent antagonist, Judge Brown, has despised and denounced those base attacks. No one even deemed it worth while to reply to them. The result was that they did not harm Judge Haight; he was elected by a plurality a thousand larger than that of Lieutenant-Governor Saxton. Sometimes "a lie well stuck to" is *not* so "good as the truth."

"BORN FREE AND EQUAL."— A writer in Mr. Astor's "Pall Mall Magazine" sneers at the assertion in the Declaration of Independence of the American Colonies, that "all men are born free and equal." Probably the English snob, or the American truckler, who wrote the article would have sneered just the same if he had quoted the passage correctly. The Declaration does not assert anything of the kind. It is speaking of the natural, not of the social, condition of mankind. It says that "all men are *created* free and equal," and so they are, and as the Declaration continuing says, "endowed by Nature with certain inalienable privileges, among which are life, liberty, and the pursuit of happiness." (We quote from memory.) When Mr. Astor desires to play the lick-spittle to the English, he should be careful not to misrepresent matters. Now let him set his writer to commenting on the English poet's declaration that "Britons never can be slaves."

"JUDICIAL IRRITABILITY." — Several law journals have recently been speaking upon this subject, inspired by some remarks in the "Sun" newspaper upon a judge who increased the punishment of a convict because of contempt of court, in that he laughed at the sentence. The judge was unwise. Indeed it is difficult to see how contempt of court can be predicated of such conduct. It may well be that the prisoner laughed purely out of light-heartedness because he got off so easily. Or it may have been hysterical. like laughter so common at funerals. Such severity of judges toward helpless criminals deserves censure. But great allowance should be made for judicial

irritability toward counsel both in criminal and civil cases. It must be very exasperating to an experienced judge to be forced to sit and appear patient while listening to an exposition of the most elementary principles, and to the "damnable iteration" of matters which would be sufficiently impressed by one telling. We once heard a lawyer explain to the New York Court of Appeals, for half an hour, the inferiority of negative to positive evidence. If we were a judge of that court, and any lawyer should so much as open his lips to say that the testimony of the witnesses who did not hear the engine bell ring or the whistle sound, was weaker than the testimony of those who did hear it, we should find it very difficult to restrain ourselves from throwing an inkstand at his head, although it may be conceded that it would be more dignified to fold our gown about us and stalk off the bench. Then again, it must be extremely irritating to be compelled to listen to genuine wit on the part of advocates and appear stupid and as if we did not understand it. It is one of the unwritten laws of the bench that counsel ought not thus to try the court All jokes should be submitted in the printed brief alone, and there counsel may dare to be as funny as they can. (Holmes — for fear Mr. Dana may take us up.) This is really a very foolish regulation. Law is certainly no more serious than religion, and when the clergyman says a good thing in his sermon, it is permitted, indeed he expects, that the hearers will rustle in the pews and smile. He usually pauses at this point, mops his marble brow, and takes a ladylike sip of water. But judging is certainly a very irritating business. It must irritate a judge terribly to see that counsel take it for granted that he does not know anything, and still more to be obliged to confess to himself that the inference is only too well founded. It must irritate a judge to hear counsel pretending to quarrel, knowing that it is merely Pickwickian, and that they will drink together most amicably at recess. It must irritate a judge to hear counsel floundering awkwardly in some matter with which he happens to have been perfectly familiar before said counsel was born. It must irritate a judge to hear counsel cite such-and-such a case as the "leading case," when he knows that it is founded on a case of his own twenty years earlier It must irritate a judge to be cautioned how he decides this case — that the eyes of the community, and particularly of the counsel are upon him. It must irritate a judge to have to listen hour after hour, and day after day, and year after year to interminable beatings of the same old straw. And so on *ad infinitum*. But the Bench has certain opportunities for vengeance. Thus Mr. O'Conor, who was too apt to lecture the court, and caution them about the awful consequences of deciding against his view of the law — which, of course, in the nature of things must always have been the right view — irritated the Court of Appeals (or at least Judge Allen) in the famous Tweed case about cumulative sentences, and Judge Allen irritated that great lawyer a great deal more by quoting from a former argument of his in another case to the direct contrary, and adopting that as the infallible rule of law. Mr. O'Conor would not speak to the court as they passed by, for a long, long time. We must not be too hard upon our judges. They are not angels, not even Jobs. Frequently when they appear impatient, and are really irritated, it is because of a manifest waste of public time by unwise counsel. It may be that in the multitude of counsel there is safety; there certainly is tediousness. As we generally kick our judges up to the bench in order to get rid of their rivalry at the bar, and divide their business, we should be very long-suffering with them. If poets and judges are an *irritabile genus*, we must put up with them patiently.

"CONVINCED AGAINST HIS WILL." — The interesting editorial writer of the New York "Law Journal" quotes: —

> "A man convinced against his will
> Is of the same opinion still."

Now a man cannot be "convinced against his will," and if he could be, he would not be "of the same opinion." What the poet said was: —

> "He that complies against his will
> Is of his own opinion still."

NOTES OF CASES.

NOVEL CLAIMS OF LIBEL. — There have been two recent singular complaints of libel in the English courts. One was by a Mr. Monson, who complained that his figure was represented in a waxwork show. Of this the "London Law Journal" says: —

"Though members of the Royal Family, His Holiness the Pope, and His Eminence Cardinal Vaughan stand, by their counterfeit presentments, in the same place, and, as we learn on the same authority, submit without complaint to thus furnish instruction to the public and profit to the proprietor, Mr. Monson's wrath is not assuaged by the precedent, or soothed by the company which it secures him. He breathes of wax and threatens litigation; but will the law avail for his redress? To make the image of a man in wax is, beyond doubt, a cause of action if the melting the wax before a fire, or sticking pins into its substance, should cause the man himself to fade away or suffer wounds; but this species of damage has now for some centuries past been classed as too remote. It is plain libel, too, to pic-

ture anyone, whether by a drawing or a statue, in such a way as to hold him up to hatred, contempt, or ridicule, as Mr. Lindley Sambourne found not long ago when he drew a member of Parliament in a fashion which would have blasted the fairest reputation of a portrait painter. Burning a man in effigy, says a great authority, may be a libel; and if burning, why not pillorying? Were the showman to put his effigy in the Chamber of Horrors it might furnish a ground for claiming damages. But, in fact, the image is to be put in the most public part of the exhibition, where the timorous can see it without alarm, and the thrifty may examine it without expense. Placed in the midst of the royal and saintly company to which we have referred, if he be graced with Hyperion's curls, the front of Jove himself, the eye of Mars, or merely presented as he is, or as near thereto as the moulder can conveniently approach, of what can this objector complain? He loathes the celebrity which makes his features valuable property, and would probably shrink away from public notice for a time. But the law takes no account of a man's modesty. Until quite recently it placed no price upon a woman's."

All this comment is very sound, but we do not learn how the case came out. The other action was against the authorities of the British Museum for a libel contained in a book on its shelves. There was a recovery, the jury finding that the authorities had been negligent. Is it possible that they must read every book through, before they safely take it in? This would seem a somewhat onerous requirement. The plaintiff in this case was an American woman, formerly known as Mrs. Victoria Woodhull.

MERCANTILE AGENCIES — LIABILITY TO SUBSCRIBER. — In City Nat. Bank *v.* Dun, U.S. Circuit Court of Appeals, second district, the defendants, who conducted a mercantile agency, agreed at the request of the plaintiff, in order to aid it in determining the propriety of giving credit, to communicate to the plaintiff such information as they might possess concerning the mercantile credit of merchants, etc.; that such information should be obtained and communicated by subagents appointed in behalf of the plaintiff by the defendants; and stipulated the defendants should not be responsible for any loss caused by the neglect of any such subagent, and that the defendants should in no manner guarantee the actual verity or correctness of any such information. In consequence of a request for such information concerning Kitts of Oswego, a report concerning him was made up by Burchard, the defendants' agent at that place, and was by him sent to the defendants, and by them to the plaintiff. Burchard and Kitts were connected in business, and for the purpose of promoting his own interests, Burchard made false statements in that report. The plaintiff, relying on the report, discounted the acceptances of Kitts, which were valueless. It was held that the defendants were not liable for the loss; that in transmitting the information which they had obtained they completely fulfilled the terms of their contract with the plaintiff; that the accuracy of the information so obtained was at the risk of the plaintiff; that in making the report, Burchard was not acting within the scope of his authority as agent of the defendant; that he was not employed as the agent of either party in reference to the discounts which he caused to be effected; that he was merely an agent under the agreement of subscription to furnish information; that the defendants were agents of the plaintiff, and as it appeared from the agreement that the service required could not be rendered by the agent, but must mainly be rendered by subagents, the defendants were not liable for the errors or misconduct of the subagent, if they had used due care in his selection.

CRIMINAL LIABILITY OF DRINKER. — In State *v.* Cullins (Kans.), 24 L. R. A. 212, it was held that the purchaser of intoxicating liquor, sold illegally, is not a participant with the seller, and not punishable as an offender. The court distinguish between *mala prohibita* and *mala in se*, and cite State *v.* Rand, 51 N. H. 361; 12 Am. Rep. 127; Com. *v.* Willard, 22 Pick. 476; Wakeman *v.* Chambers, 69 Iowa, 169; 58 Am. Rep. 218; Harney *v.* State, 8 Lea, 113. The principle is like that which screens the woman in cases of abortion. Verily the law is tender toward the drunkard in criminal jurisprudence.

RES GESTAE. — It seems that the tendency of the courts is toward leniency in the admission of proof of facts and circumstances in criminal cases, savoring of a self-serving nature and so far separated from the main transaction in time as not to be strictly of the nature of *res gestæ*. In Jones *v.* State (Alabama), 15 S. W. Rep. 891, on a trial for murder by shooting, it was held error to exclude the declaration by the defendant before the shooting that the gun was not loaded. The declaration was made on a railroad train on the way to the scene of the shooting, and the occasion of it was the gun's falling down in the car and a caution to the defendant about the danger of its being thus fired, to which he replied that it was not loaded. The exact time elapsing between the time of this declaration and the time of the shooting does not appear, except that it was "a few hours," but it appears that the gun was not charged in that interval. The Court very properly said: —

"The degree of the guilt of the prisoner depended on the inquiry whether, at the time of the homicide, he believed the gun was unloaded, and the reasonableness of the belief. The declaration was uttered a few hours before the

homicide, on the train on which the prisoner was an employee, in the course of continuous travel to the station at which the homicide occurred. It was a natural, instinctive response to the direction of his attention by the witness to the falling of the gun, intended to allay the apprehension of danger he reasonably supposed had been excited in the mind of the witness. The declaration may not, strictly speaking, form part of the *res gestæ*; but it is connected with, and cannot be disconnected from, the inquiry, what was the state of the prisoner's mind at the time of the homicide — did he then believe the gun was unloaded? The evidence, without conflict, shows that he saw the gun unloaded on the night before, and did not know, and had no opportunity of knowing, that it was subsequently reloaded, when the declaration was uttered. The truth and spontaneity of the declaration are apparent, and it is corroboratory of the evidence of the prisoner that at the time of the homicide he did not believe the gun was loaded. We have no purpose to relax the general rule that declarations made by defendant in his own favor, not forming part of the *res gestæ* — self-serving declarations, as they are termed — are inadmissible as evidence for him. But when, as in the present case, the inquiry is as to the state or condition of the mind of the defendant, his declarations uttered instinctively, with no purpose of producing a particular effect in the future, and which have a tendency to elucidate or illustrate his mental condition, are admissible."

NUISANCE. — OFFENSIVE TRADE. — In Rowland *v.* Miller, 139 New York, 93; 22 L. R. A. 182, it was held that an undertaking establishment in which human dead bodies are prepared for burial or other sepulture, and sometimes subjected to embalming and post-mortem examination, is a business "injurious or offensive to the neighboring inhabitants," within the terms of a restrictive agreement, although it may not constitute a legal nuisance. The Court observed: —

"The business carried on by the Taylor Company is not among those kinds particularly specified in the agreement. But the claim of the plaintiff is that it is prohibited by the general clause in the agreement, as 'injurious or offensive to the neighboring inhabitants.' This clause enlarges the scope of the agreement. It is a too narrow construction to hold that it prohibits only trades or kinds of business which are nuisances *per se* for reasons already given, and for the further reasons that nearly, if not quite, all the trades and business specially named are not such nuisances. Any kind of business may become a nuisance by the manner in which it is carried on, from its location, and a business may be offensive to neighboring inhabitants, and yet fall far short of being a legal nuisance, which a court of equity will abate as such. This clause in the agreement must have a reasonable construction. We cannot suppose that the parties had in mind any business which might be offensive to a person of a supersensitive organization, or to one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood to such people undesirable as a place of residence. It cannot be doubted that the business of the Taylor Company was, within this definition, offensive to the neighboring residents. People of ordinary sensibilities would not willingly live next to a lot upon which such a business is carried on. An ordinary person, desiring to rent such a house as plaintiff's, would not take her house, if he could get one just like it, at the same rent, at some other suitable and convenient place. Indeed her house would be shunned by people generally who could afford to live in such an expensive house. The courts can take judicial notice of the offensive character of such a business. Judges must be supposed to be acquainted with the ordinary sentiments, feelings, and sensibilities of the people among whom they live: and hence, in this case, the learned judge, after the character of the business carried on by the Taylor Company had been proved, could have found, as matter of law, that it was in violation of the restriction agreement, without any further proof."

VOX ET PRÆTEREA NIHIL. — In Murphy *v.* Jack, New York Court of Appeals, April, 1894, it was held that an attachment may not issue on an affidavit made by the attorney, upon information and belief, and based solely upon a communication made to him by the plaintiff by telephone, without proof of the identity of the plaintiff, as by recognition of his voice. The Court said: —

"There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff, and recognized his voice, or if it had appeared in some satisfactory way that he knew it was the plaintiff who was speaking with him. None of these facts however were averred. There was absolutely nothing upon which the judge could pass to show that it was the plaintiff who was speaking, and not some undisclosed person who, in the plaintiff's name, furnished to the attorney the information made use of. The perfection to which the invention of the telephone has been brought has immensely facilitated the inter-communication of individuals at distant points, and inasmuch as the voice of the speaker is heard, in most if not in all cases, the identification of the speaker should be possible. The very facility of communication and of identification permits, and therefore imposes a duty upon the party who invokes judicial action upon the strength of information so received, to state his knowledge or his grounds for believing that it actually came from the party required to furnish it. To authorize an attachment to issue upon the affidavit furnished here was in disregard of the rule which requires that the source of information shall be disclosed in such a way as to enable the court to decide upon the probable truth of the statements, and the authenticity of the jurisdictional facts. Judicial action upon such a source of information as was here disclosed was justified below by analogy with telegraphic communication. The analogy is incomplete. If the information comes through the telephone it is quite possible to identify the speaker. Then, too, there is not in the case of a telephonic communication any record, like the message which, in the case of the use of the telegraph, remains for reference and verification."

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LEGAL ANTIQUITIES.

THE following description of a court scene in 1761 (given by the first President Adams), on the occasion of the application for "Writs of Assistance," presents a vivid picture of the Court and Bar of that day: "In this chamber near the fire were seated the five judges, with Lieutenant Governor Hutchinson at their head, as Chief Justice, all in their new, fresh robes of scarlet English cloth, in their broad bands and immense judicial wigs. In this chamber were seated at a long table all the barristers of Boston and its neighboring County of Middlesex, in their gowns, bands, and tie-wigs. They were not seated on ivory chairs, but their dress was more solemn and more pompous than that of the Roman senate, when the Gauls broke in upon them."

FACETIÆ.

JUDGE Underwood of Georgia, like other judges, sometimes gave charges to juries which were not the product of reflection. On one occasion he was presiding at Calhoun, in the Cherokee circuit, for a brother judge, his own circuit being the Rome circuit. A case of some little consequence was being tried before him, Col. E. J. Kiker representing the plaintiff. The Judge adopted fully Col. Kiker's view of the case, and so charged the jury. The jury, however, took a different view and returned a verdict squarely in the teeth of the charge. Brother Kiker immediately moved for a new trial, of course having the greatest confidence that it would be granted. Several days thereafter, the motion having been perfected, it was assigned for argument, and Brother Kiker arose and read his motion for new trial, basing it entirely upon the fact that the jury had found contrary to the Judge's charge. Said Judge Underwood after the charge was read, "Brother Kiker, did I charge that?" "Yes sir, you did, and you have so certified, and the jury found for the defendant," said Col. Kiker gleefully and triumphantly, thinking there was nothing to do but take an order setting aside the verdict. "Well then, Brother Kiker," said the Judge, "if I charged that in this case, and the jury found against it, all I have got to say is, that that jury had more sense that I did, and I congratulate them that their good sense went to such an extent as to prevent them being mislead by the Court into a wrong verdict. I don't care to hear from the other side, I over-rule the motion for new trial."

A NEW YORK man pleaded in his petition for divorce that "the defendant would not sew on this plaintiff's buttons, neither would she allow him to go to fires at night." The court decided that the plaintiff was entitled to a decree on the ground that his oppression was cruel and inhuman. — *Ex.*

LORD COLERIDGE was at Mount Vernon with Mr. Evarts, and talking about Washington, said: "I have heard that he was a very strong man physically, and that, standing on the lawn here, he could throw a dollar right across the river to the other bank."

Mr. Evarts paused a moment, to measure the breadth of the river with his eye. It seemed rather a "tall" story, but it was not for him to belittle the Father of his Country in the eyes of a foreigner.

"Don't you believe it?" asked Lord Coleridge. "Yes," Mr. Evarts replied, "I think it's very likely to be true. You know a dollar would go farther in those days than it does now."

In a Western Court a negro was convicted of stealing a mule. Before the sentence was pronounced the judge gave him an opportunity to speak for himself, and he said: "I wouldn't er tuck de mule nohow ef I hadn't er red in de Testermint whar Jesus tuck a mule." The judge remarked: "Yes, but he didn't ride him to Kinston and try to sell him;" and thereupon he gave the negro three years in the penitentiary.

A Warrington justice once reproved a would-be-suicide thus: "Young man, you have been found guilty of attempting to drown yourself in the river. Only consider what your feelings would have been had you succeeded."

Not very long ago, troubles in a well-known Washington family were the cause of divorce proceedings. The wife got a judgment, though the husband had filed a strong cross bill. In a few months the ex-wife was again married, this time also to a Washington man. One evening, recently, at a large reception the two met unexpectedly, and an acquaintance, not well up in the family history, was proceeding to introduce them. "Oh, we've met before," said the last husband, "we're husbands-in-law."

Chancellor Henry Bathurst was held in low esteem by the Bar on account of his ignorance. At the close of the trial of the Duchess of Kingston for bigamy, he gravely addressed her grace in the following terms: "Madam, the lords have considered the charge and evidence brought against, and have likewise considered of everything which you have alleged in your defense; and upon the whole matter their lordships have found you not guilty of the felony wherewith you stand charged; but, on dismissing you, their lordships earnestly exhort you not to commit the same crime a second time."

A good story is told of an English lawyer, who, having succeeded in making a litigant of every farmer in his county, having grown rich at their expense, and thus established a valid claim to their consideration, consented to sit for his portrait, which was to adorn the court-room of the county town. The picture was duly painted by a London artist, and previously to being hung was submitted to a private view. "Most uncommon like, to be sure," was the general verdict. But one old chap, regarding the canvas critically, dissented from the prevailing opinion, as follows: "That be somewhat like his face, but it aint the man, — this man has got his hand in his own pocket, you see; now, I have knowed him for five and thirty years, and all that time he's had his hand in somebody else's pocket. This chap aint him."

Curran's ruling passion was his joke, and it was strong, if not in death, at least in his last illness. One morning his physician observed that he seemed to "cough with more difficulty."

"That is rather surprising," answered Curran, "for I have been practising all night."

While thus lying ill, Curran was visited by a friend, Father O'Leary, who also loved his joke.

"I wish, O'Leary," said Curran to him abruptly, "that you had the keys of heaven."

"Why, Curran?"

"Because you could let me in," said the facetious counsellor.

"It would be much better for you, Curran," said the good-humored priest, "that I had the keys of the other place, because I could then let you out."

NOTES.

A correspondent, writing from New Zealand, says the police in that colony have the power, if they think a man is injuring his own health or neglecting his family as the result of habitual drinking, to take him before a magistrate and get his drink stopped for twelve months within a radius of twenty miles. After that, any hotel-keeper supplying such a man with drink, and any person privately giving him drink, is liable to a fine; and if a prohibited man is found the worse for drink, he is to be arrested at once, and sent to gaol for three months' hard labor.

— *Tit Bits.*

In Waldeck, a little German principality, a decree has been proclaimed that a license to marry will not be granted to any individual who has the habit of getting drunk; and if one who

has been a drunkard applies for such license, he must produce sufficient proof of reformation to warrant his receiving it.

DR. FRANKLIN thought that judges ought to be appointed by lawyers, for, added the shrewd man, in Scotland, where this practice prevails, they always select the ablest member of the profession, in order to get rid of him and share his practice among themselves.

LORD ERSKINE'S humanity toward animals is perpetuated in his bill "For the prevention of cruelty to animals," in one of his speeches upon which measure he passionately observed: "As to the tendency of barbarous sports, of any description whatsoever, to nourish the natural characteristic of manliness and courage — the only argument I ever heard on such occasions — all I can say is this, that from the mercenary battles of the lowest of beasts — human boxers — up to those of the highest and noblest that are tormented by man for his degrading pastime, I enter this public protest against such reasoning. I never knew a man remarkable for heroic bearing whose very aspect was not lighted up by gentleness and humanity; nor a *kill-and-eat-him* countenance that did not cover the heart of a bully or poltroon."

LITERARY NOTES.

ONE of the most readable of our legal exchanges is THE BRIEF, a new English law journal. Like THE GREEN BAG, it devotes itself to the bright and "entertaining" phases of the law, its contents being made up of legal gossip, anecdotes, legal miscellany etc. We wish our trans-Atlantic contemporary the greatest possible success. If it keeps on as it has begun it will certainly achieve it.

THE POPULAR SCIENCE MONTHLY for December contains a valuable and interesting paper on "Responsibility in Crime from the Medical Standpoint," by Dr. Sanger Brown. He takes the ground that it is the physician's province to determine the part played by bodily defect or disease in the commission of crime, and that then society in general must, with this information, determine the degree of responsibility and decide upon the punishment. The other contents of this number cover a wide and varied field, and are of unusual interest.

"MENTAL Training: A Remedy for Education" is the title of a radical paper by William George Jordan in the current NEW SCIENCE REVIEW. Mr. Jordan makes a strong plea for a mental training that will exercise all of man's faculties and quicken his mind so that it will be ready on the instant. The method proposed is a system based on analysis, law and analogy, three cardinal points of the process. It is clearly outlined and illustrated in a very practical way and contains many original ideas and suggestions. It is based on the truest psychology and is thoroughly natural and simple in its working. The system covers constant exercises in training the senses, in observation: the use of words, illustration, description, quickness in expression, etc., all following a prescribed order. In its completeness it is a fortified attack on the weaknesses of our educational system that deserves and will probably receive careful criticism.

THE December number of the NORTH AMERICAN REVIEW is noteworthy for a number of important and very valuable articles. Hon. Wade Hampton contributes a timely paper on "Brigandage on our Railroads"; and the Comptroller of the Currency, Mr. James H. Eckels, discusses "Our Experiments in Financial Legislation." "Consular Reform," by Henry White, is a strong plea for reform in our Consular service. Henry Cabot Lodge pays a fitting tribute to Dr. Oliver Wendell Holmes, and Prof. Goldwin Smith has a delightful paper on James Anthony Froude. The other contents of this number are unusually readable and interesting.

THE Christmas number of HARPER'S MAGAZINE comes in a cover printed in colors from a special design, and is unusually strong in artistic features. More than one hundred pictures, signed by well-known names, illustrate its stories, poems, and general articles. The special features of the number are "The Simpletons," by Thomas Hardy; "An Arabian Day and Night" (illustrated), by Poultney Bigelow; "Evolution of the Country Club (with eight full-page illustrations), by Caspar W. Whitney; "The Time of the Lotus" (illustrated), by Alfred Parsons; "Taming of the Shrew" (with nine illustrations by Edwin A. Abbey), by Andrew Lang; "Show Places of Paris by Night" (illustrated by C. D. Gibson), by Richard Harding Davis; and short stories by Robert Grant, Gertrude Hall, L. B. Miller, Julian Ralph, Harriet Prescott Spofford, and Ruth McEnery Stuart.

IN MCCLURE'S MAGAZINE for December, Miss Tarbell's second paper on Napoleon treats of Napo-

leon's passionate love for Josephine in the early period of their relations, and of Napoleon's swift rise to fame and supreme power through his brilliant achievements in the Italian and Egyptian campaigns. There are fourteen more portraits of Napoleon, showing him at different times in this most interesting part of his career, and six other portraits, including one of Josephine, most of these pictures being after portraits from life by the great painters of the time, including David, Gros, Appiani, Laurent, and others. Then there is an excellent Christmas story, and a story which, while not a Christmas story in point of time, is pre-eminently one in spirit and conclusion; and, finally, a dramatic story of the Napoleonic era by Conan Doyle. More dramatic, though, than any story, is Cleveland Moffett's history, drawn directly from the archives of the Pinkerton Detective Bureau, of "The Overthrow of the Molly Maguires."

THE complete novel for the December issue of LIPPINCOTT'S is "Mrs. Hallam's Companion," by the well-known writer, Mrs. Mary J. Holmes. A short story by the author of "Dodo" will attract general attention. In this case expectations will not be disappointed, for Mr. E. F. Benson has written nothing better than "A Creed of Manners." To what heights gentlemanhood can rise is the burden of this beautiful and touching little sketch.

THE Christmas number of SCRIBNER'S MAGAZINE presents a remarkable list of popular writers, including Rudyard Kipling, Robert Grant, H. C. Bunner, Brander Matthews and George W. Cable. In illustrations it shows a number of novel features. Oliver Herford produces a series of fantastic drawings which are curiously interwoven with the text of Brander Matthews' story in a manner new to magazine illustration. One of the richest illustrated articles ever published in an American magazine is the account of the great English painter, George Frederick Watts, R. A., by the eminent art critic, Cosmo Monkhouse, who writes from the fullest knowledge, and with the approval of the artist. There are twenty pictures representing the most characteristic phases of Watt's art, both the wood engravings and the process plates showing a delicacy that is seldom seen.

THE "Progress of the World," the editorial department of the REVIEW OF REVIEWS for December, sums up the significant results of the November elections, discusses the probable action of Congress on the "Baltimore plan" of bank-note issues, comments on the progress of the civil service reform movement, and again emphasizes the extent of England's encroachments in Venezuela; the department also chronicles important movements in European politics, and the history of the war in China is brought down to date. "Industrial Agreements and Conciliation" is the title of an interesting article by the Hon. C. C. Kingston, Premier of South Australia; this magazine is publishing a series of articles by leading Australian statesmen on questions of immediate interest to American readers.

LITTELL'S LIVING AGE for 1895. For over half a century THE LIVING AGE has held a place in the front rank of American periodicals — coming week by week freighted with the most valuable literary products of foreign lands. It selects with rare judgment and discrimination the most masterly productions, scientific, biographical, historical, political; the best essays, reviews, criticisms, tales, poetry, in fact everything the intelligent reader most desires to obtain. To the busy man of affairs, and to the mistress of the family with time as fully occupied with domestic cares an social duties, such a magazine is invaluable and to all classes of intelligent readers it proves a welcome visitor. An unparalleled offer is made to new subscribers whereby they may obtain the weekly issues of this sterling periodical from the beginning of the current series, 1st of January, 1894, to the end of the year 1895, postpaid, for only $10.00.

THE ARENA with its big Christmas number of over 200 pages opens the eleventh volume, and its increasing bulk as well as the repute of its contributors, and the standard and character of its literature, indicate its extending influence and prosperity. In the December issue there are contributions from some of the greatest writers of our day, and some of the most delightful and entertaining of the younger American essayists and fictionists. In the former class are Professor Max Müller, the great Oriental scholar and authority on language and comparative religion, of Oxford University, and Count Leo Tolstoi, the famous Russian novelist and social reformer. In the latter are Hamlin Garland, the author of "Main Travelled Roads"; Will Allen Dromgoole, the Southern story writer; Rev. Minot J. Savage, the famous Boston preacher, and B. O. Flower, the editor of the Review.

THE CENTURY for December is a Christmas number and attracts attention by a special cover in a novel and artistic design, and by the richness of its numerous and beautifully printed illustrations, of which twenty-five are of page size. Among the

topics treated are the life of Napoleon Bonaparte, old Maryland homes and ways, the Italian Premier Crispi, science and religion, the labor question (in Kipling's story); the painter Van Dyck, with three beautiful examples of his work engraved by Cole; Christmas poems by George Parsons Lathrop and Julia Schayer; Christmas stories, by Ruth McEnery Stuart, Sarah Orne Jewett, and Grace Wilbur Conant; Christmas pictures by Dagnan-Bouveret, Scheurenberg, Von Uhde, Wenzell, and F. S. Church; and other stories by Nannie A. Cox, Lucy S. Furman, Kate Chopin, and George A. Hibbard, besides serials by Marion Crawford and Mrs. Burton Harrison, in all ten pieces of fiction.

BOOK NOTICES.

Law.

AMERICAN CASES ON CONTRACT. Arranged in accordance with the analysis of Anson on Contract. Edited by ERNEST W. HUFFCUT of the Cornell University School of Law, and EDWIN H. WOODRUFF of the Leland Stanford Junior University. Banks & Brothers, New York and Albany, 1894. Law sheep. $6.00 *net.*

The students in our law schools are receiving special attention at the hands of our law writers, and every subject comes in for its share of illustration in the way of "Selected Cases."

This volume of Cases on Contract is intended to accompany Anson on Contract, Lawson on Contract, or other elementary works, or to be used in connection with lecture courses, or without either text or lectures, as the teacher or student may desire. The cases have been selected with special reference to the needs of law students, and are intended to illustrate the essential principles of the law of contract. Where these principles are well established the editors seek by the cases to present the principles in concrete form, illustrating and applying them. Where the principle is in dispute or doubt cases are given illustrating and discussing the question as viewed by different jurisdictions, and notes are appended directing attention to other and complete authorities.

American cases have been printed to the exclusion of English cases, because it is believed that our own Federal and State Courts have examined and decided with equal ability, and for us higher authority, most of the principles applicable to the law of contract; and also because there are already enough available collections of English cases. The aim of this compilation is to present a collection of American cases fully illustrating the subject of contract.

THE STUDY OF CASES. A course of instruction in reading and stating reported cases, composing head-notes and briefs, criticising and comparing authorities, and compiling digests. By EUGENE WAMBAUGH, LL.D., Professor of Law in Harvard University. Second edition. Little, Brown & Co., Boston, 1894. Cloth. $2.50 *net.* Sheep. $3.00 *net.*

The purpose of this volume is an admirable one, the author's endeavor being to instruct law students, by practice, rather than by precept, how reported cases should be read, digested, criticised and compared. Too little attention has heretofore been paid by our law teachers to this important subject, and as a consequence young lawyers have entered upon the practice of their profession laboring under a great disadvantage when it came to the analyzing and comparison of cases.

Mr. Wambaugh's volume is divided into two books. Book I. is devoted to a general consideration of the study of cases, and Book II. to cases for study. The student is urged, after a careful reading of the first chapter, to plunge at once into the cases printed in the second book, for by actually studying cases, and not by reading about the proper way of studying them, one best learns how they ought to be treated. Mr. Wambaugh has done his work thoroughly, and yet by his clear and concise statements has kept his matter within reasonable limits. We know of no book which will give the student more valuable aid in his preparation for practice, and even veteran practitioners will find much in its pages well worthy their attention.

COURTS AND THEIR JURISDICTION. A treatise on the jurisdiction of the courts of the present day, how such jurisdiction is conferred, and the means of acquiring and losing it. By JOHN D. WORKS. Robert Clarke & Co., Cincinnati, 1894. Law sheep. $6.00.

Judge Works gives us in this volume a very clear and concise treatise upon the subject of jurisdiction, one which we are confident will prove to be exceedingly useful to every practising lawyer. The author is not a superficial writer, but he goes to the very root of the matter in hand, and finds a reason for every why and wherefore, if there is one to be found. The arrangement of subjects is excellent. The treatise first discusses the general principles affecting jurisdiction in all classes of cases, then follows an inquiry into the means of acquiring and losing jurisdiction, including the issuance and service of process: next, the different classes of cases, writs, and proceedings, involving questions peculiar to themselves, are taken up separately and considered in a careful and thorough

manner. Ample and well selected authorities are cited in support of the propositions advanced. The work should find immediate favor with the profession.

THE AMERICAN STATE REPORTS. Containing the cases of general value and authority decided in the courts of last resort of the several States. Selected, reported and annotated by A. C. FREEMAN. Vol. XXXIX. Bancroft, Whitney Co., San Francisco, 1894. Law sheep. $4.00.

The excellence of this series of reports is fully maintained in the present volume. Mr. Freeman's work is always well done, but his annotations to the present selection of cases are even more exhaustive than usual. We have said many a good word for these reports, and they are certainly deserving of high praise.

MEDICAL JURISPRUDENCE, FORENSIC MEDICINE AND TOXICOLOGY, Vol. II. By R. A. WITTHAUS, A.M., M.D., and TRACY C. BECKER, A.B., LL.B. William Wood & Co., New York, 1894. Law sheep. $6.00.

In our April number (1894) we noticed the first volume of this important treatise, and the second volume fully bears out the commendation we then accorded the work. In it the subject of Forensic Medicine is further treated. Dr. Edward S. Wood contributes very interesting chapters on "Examination of Blood and Other Stains," and "Examination of Hair." Dr. W. Thornton Parker has a valuable paper on "Simulated Diseases," and Dr. W. B. Outten one on "Railway Injuries." The other contents cover many important lego-medical questions. As we have heretofore said (April, '94) the work is one of sterling merit, the greatest care and research having evidently been bestowed upon its preparation. To criminal lawyers it will be invaluable, while the general practitioner will find it of the greatest assistance. We recommend a careful examination of the work by the profession.

AMERICAN RAILROAD AND CORPORATION REPORTS. Being a collection of the current decisions of the courts of last resort in the United States pertaining to the law of railroads, private and municipal corporations, including the law of insurance, banking, carriers, telegraph and telephone companies, building and loan associations, etc., etc. Edited and annotated by JOHN LEWIS. Volume IX. E. B. Myers & Co., Chicago, 1894. Law sheep. $5.00 *net.*

All corporation lawyers will find these reports of much value and assistance. The selection of cases is evidently carefully made, and the annotations are full and well prepared. The cases reported cover almost every conceivable point likely to arise in Corporation and Railroad Law.

CASES ON CONSTITUTIONAL LAW, with notes. Part Three. By JAMES BRADLEY THAYER, LL.D. Chas. W. Sever, Cambridge, Mass. $2.50.

Prof. Thayer certainly deserves the thanks of the profession for this admirable selection of cases and for the exceedingly valuable notes which accompany them. One part more (to be issued about February 1, 1895) will complete the work. In its finished form it will be a most valuable addition to our legal literature, and both student and practitioner will be quick to appreciate its merits.

MISCELLANEOUS.

PHILIP AND HIS WIFE. By MARGARET DELAND. Houghton, Mifflin, & Co., Boston and New York, 1894. Cloth. $1.25.

In this, her latest work, Mrs. Deland struggles with a great social problem, and fails to reach anything like a satisfactory solution.

She takes as the motto for her book, "Marriage is not a result, but a process," and as may be inferred the story raises the oft-repeated question, "Is marriage a failure?" When two individuals of such opposite natures as Philip Shore and Cecilia Drayton unite in marriage, the result cannot be expected to be very satisfactory, and in their case things come to the worst possible pass. Neither of them enlists the reader's sympathy; in fact, we have no patience with either of them. Philip is a prig, and by many will be considered even worse than that, while Cecilia is almost equally unattractive. The other actors in this little drama are much more natural and pleasing, and possess more real interest for the general reader.

The book is one of undoubted power, and Mrs. Deland as usual is deeply in earnest in her work, but she has chosen a disagreeable subject, one which we fail to see any good in publicly discussing. We like her better in "Sidney" or "John Ward, Preacher."

THE FRENCH REVOLUTION Tested by Mirabeau's Career. By H. VON HOLST. Callaghan & Co., Chicago, 1894. Two volumes. Cloth.

These volumes contain twelve lectures delivered by Mr. Von Holst at the Lowell Institute, Boston, Mass., upon the history of the French Revolution. The main features of that stupendous uprising are illustrated by the opinions of Mirabeau, the foremost political genius of its first age. Owing to the limited time allowed for each lecture the author was of course obliged to greatly condense his material, but he has,

nevertheless, given us a remarkably clear and interesting account of the causes which led to this fearful upheaval, and carries us with unflagging interest through the exciting scenes which followed. The book is a most valuable contribution to historical literature, and gives, perhaps, a better insight into French character and methods of that time than any work heretofore published. Unlike most histories, it has a charm of style and diction which renders it almost as fascinating reading as a good novel.

CATHERINE DE MEDICI. By HONORÉ DE BALZAC. Translated by KATHERINE PRESCOTT WORMELEY. Roberts Brothers, Boston, 1894. Cloth. $1.50.

In this work Balzac gives us some novel ideas of the character of Catherine de Medici, who, he asserts, has suffered more from popular error than any other woman in French history. The novel is a powerful one, intensely dramatic and of absorbing interest, displaying Balzac's wonderful mastery of every subject upon which he writes. Miss Wormeley's translation is in every way admirable, and the reading public are deeply indebted to her for so ably interpreting the works of this great writer.

GEORGE WILLIAM CURTIS. By EDWARD CARY. Houghton, Mifflin & Co., Boston and New York, 1894. Cloth. $1.25.

This is the latest contribution to the "American Men of Letters" series, and Mr. Cary pays a most fitting tribute to one of the noblest men not only in the world of letters but in public life. Mr. Curtis's life was a remarkable one, and should be closely studied by young men as a shining example worthy of imitation. Mr. Cary writes of him *con amore*, and has gathered together a great deal of very interesting material in regard to his literary and political, as well as his home life. The book is an inspiration, and will give its readers a clear insight into a truly beautiful character.

THE LITERARY SHOP, and other tales. By JAMES L. FORD. Geo. H. Richmond & Co., New York, 1894.

In this volume Mr. Ford gives a delightful insight into the foibles of magazine editors and their contributors. Many interesting reminiscences of well known writers are given, and the author is in many instances frankly outspoken in his opinions. Some of his statements his readers will feel disposed to take issue with. An assertion that in the last half-dozen years we have but precisely one writer to show the finest American literary endeavor, and that writer a woman, will probably call forth a decided protest. The book, however, is so charmingly written, and so full of pure, unadulterated humor, that one has but little inclination to quarrel with Mr. Ford.

THE STORY OF LAWRENCE GARTHE. By ELLEN OLNEY KIRK. Houghton Mifflin & Co., Boston and New York, 1894. Cloth. $1.25.

This is a realistic story of New York life, powerfully written and of great interest. The author's former works have given her an enviable place among our novelists, and the story of Lawrence Garthe is fully equal to anything we have had from her pen. It deserves a high rank among the novels of to-day.

A CHILD OF THE AGE. By FRANCIS ADAMS. Roberts Brothers, Boston, 1894. Cloth. $1.00.

It is difficult to believe that this book is the work of a mere youth, but Mr. Adams had not, we believe, attained his eighteenth year when it was written. Remarkable power is displayed by the author who, had he lived, would undoubtedly have attained a high position in the world of letters. The story is morbid and has but little plot, but there is a certain fascination about it which thoroughly enchains the reader's attention.

THE WORLD BEAUTIFUL. By LILIAN WHITING. Roberts Brothers, Boston, 1894. Cloth. $1.00.

The papers which make up the contents of this attractive volume have for their keynote the truism, that, after all, it rests with ourselves as to whether we shall live in a World Beautiful. They are pleasantly written, and one cannot but receive encouragement and inspiration from them.

THE POWER OF THE WILL, OR SUCCESS. By H. RISBOROUGH SHARMAN. Roberts Brothers, Boston, 1894. Cloth. 50 cents.

Mr. Sharman maintains that the secret of all true and permanent success is the cultivation of the "will," and that what is commonly called "luck" generally shows a marked preference for those who have duly cultured and restrained their mental and moral faculties. The book is an interesting and a helpful one, inculcating lessons which will benefit its readers.

THE GREAT REFUSAL, being letters of a dreamer in Gotham. Edited by PAUL ELMER MORE. Houghton, Mifflin & Co., Boston and New York, 1894. Cloth. $1.00.

These letters, so Mr. More says, were written by a New York gentleman, of rare culture and prodig-

ious learning, who died while comparatively young. They betray throughout the nervous, sensitive, dreamy temperament of the author. Numerous poems are scattered through the work, some of them evincing abilities of high order. The letters, addressed to a lady-love, are exceedingly well written, and are well worth the reading.

VOYAGE OF THE LIBERDADE. By Captain JOSHUA SLOCUM. Roberts Brothers, Boston, 1894. Cloth. $1.00.

Captain Slocum's narrative of his adventures in the little craft built by himself, and measuring only thirty-five feet in length, has all the charm of romance, and yet is literally true. The life of the seafaring man is graphically depicted, and the story abounds in terrible experiences and hair-breadth escapes. It will be read with interest by old and young alike.

A CENTURY OF CHARADES. By WILLIAM BELLAMY. Houghton, Mifflin & Co. Boston and New York, 1895. Cloth. $1.00.

In this little volume Mr. Bellamy has provided entertainment for many a long winter's night. One hundred original charades, which will tax the readers' wit and ingenuity to their utmost, are furnished by the author, and many of them evidence not only the composer's skill, but also his decided propensity for punning. The book is a delightful one for the family circle, where it will furnish much pleasure and amusement.

FATHER GANDER'S MELODIES, for Mother Goose's Grandchildren. By ADELAIDE F. SAMUELS. Illustrated by LILLIAN TRASK HARLOW. Roberts Brothers, Boston, 1894. Cloth. $1.25.

While by no means equal to the world renowned productions of the original "Mother Goose," this little collection of nonsense jingles will delight its youthful readers. The illustrations are capital, and the book very attractive in every way.

THE MINOR TACTICS OF CHESS. A treatise on the deployment of the pieces in obedience to strategic principle. By FRANKLIN K. YOUNG and EDWIN C. HOWELL. Roberts Brothers, Boston, 1894. Cloth. $1.00.

This little volume is a veritable *multum in parvo* on the subject of chess. Small enough to be carried easily in one's pocket, it contains more real information and sheds a clearer light upon the scientific principles of the game than any work we have ever read. Any lover of chess, playing over the games herein given and carefully following the analyses of the several moves will learn more in an hour than from days' perusal of the larger and more pretentious treatises. "The Art of War," declared Napoleon, "can be comprehended only by the exhaustive study and comparison of the campaigns of the great captains." In the same way, by the study and comparison of the recorded games of men who have risen to eminence as chess players, it is possible to discern a similarity in the methods of calculation and procedure, which, if properly comprehended and reduced to a system, must become available as the basis, not only of a theory, but of the true theory of chess play, and to deduce from this system certain principles whose truth and applicability must be universally obvious at all times and in all circumstances of practice. This is what the authors of this volume have tried to do, and we think the verdict will be that they have been eminently successful. We commend the book to all lovers of the noblest of all games.

WHEN MOLLY WAS SIX. By ELIZA ORNE WHITE. Houghton, Mifflin & Co., Boston and New York, 1894. $1.00.

Miss White is thoroughly in her element when she writes of children for children, and the little ones will be delighted with this story of Molly's red-letter days, one in each month of the year. There is "A birthday," in January, "A valentine" in February, an "Afternoon tea" in March, and so on. The charm of the book is its naturalness and simplicity. Molly and her playmates are *real* little girls, and not the insipid, colorless creatures so often introduced into juvenile literature.

BOOKS RECEIVED.

JEWETT'S MANUAL FOR ELECTION OF OFFICERS AND VOTERS OF THE STATE OF NEW YORK. Matthew Bender, Albany, N.Y. Paper. 75 cts.

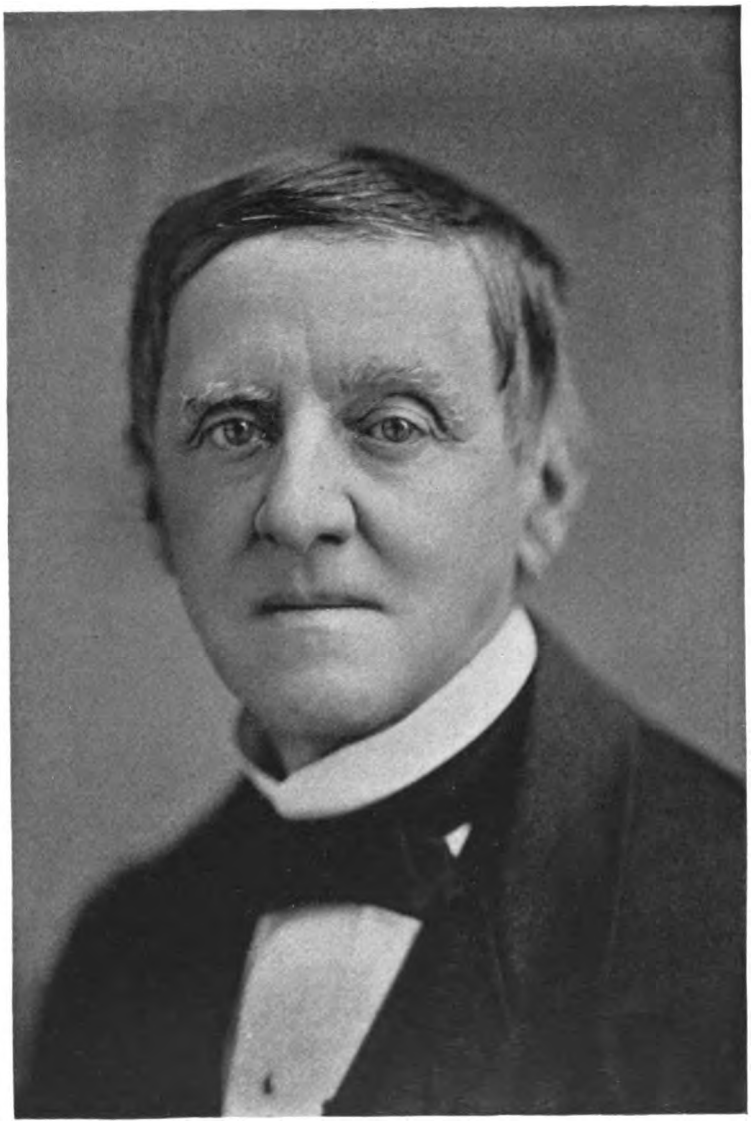
A REVIEW IN LAW AND EQUITY FOR LAW STUDENTS. By GEO. E. GARDNER. Baker, Voorhis & Co., New York. $2.75.

THE FEDERAL INCOME TAX EXPLAINED. By JOHN M. GOULD and GEORGE F. TUCKER. Little, Brown & Co., Boston. Cloth. $1.00.

AMERICAN PROBATE LAW AND PRACTICE. By FRANK S. RICE. Matthew Bender, Albany, N.Y. Law sheep. $6.50.

HANDBOOK OF THE LAW OF CONTRACTS. By WILLIAM L. CLARK, JR. West Publishing Co., St. Paul. Law sheep. $3.75.

PRACTICE IN ATTACHMENT OF PROPERTY FOR THE STATE OF NEW YORK. By GEORGE W. BRADNER. Matthew Bender, Albany, N.Y. Law sheep. $3.50.



Samuel J. Tilden

The Green Bag.

VOL. VII. NO. 2. BOSTON. FEBRUARY, 1895.

SAMUEL J. TILDEN AS A LAWYER.

BY A. OAKEY HALL.

"Who to party gave up what was meant for mankind." — GOLDSMITH'S *Retaliation*.

THE name and fame of Samuel Jones Tilden have entered biography and history mainly as of the politician and statesman. Even many lawyers of the older generation scarcely think of him as having once been a very distinguished member of the New York Bar. This presents an opposite view to that presented by the career of Henry Erskine, who is best remembered as a King's Counsel and Lord Chancellor, but hardly ever referred to as once an M. P., and a vigorous party man in days when partisan asperities and conflicts were notable. Mr. John Bigelow, in his volumes presenting the literary and political career of Mr. Tilden, whose life-friend and executor he was, presents in his preface this apology: "It is with extreme regret that I find myself constrained to put these volumes to press without including in them a memorial of Mr. Tilden's strictly professional career." Those paragraphs serve to show that in the opinion of the editor he regarded his friend and testator as the American people came to regard him, more in his aspect as statesman than as lawyer. Be it the province of the GREEN BAG, then, to commemorate Mr. Tilden in the latter capacity.

He was of English and Puritan ancestry. His great-great grandfather emigrated to Massachusetts only three years later than the famous debarkation at Plymouth Rock. On his mother's side his great grandfather was William Jones — a Welshman — who served as lieutenant-governor of the colony of New Haven. The second generation of Tildens removed from Scituate, Mass., to Lebanon, Conn., and its descendants became revolutionary patriots. Mr. Tilden's grandfather finally became a farmer across the boundary line separating Connecticut and New York, in a new settlement that he named, in memory of the old homestead, New Lebanon. There Samuel Jones was born in the closing year of our naval war with Great Britain; and there he spent sixteen years of boyhood. Among his playmates was Prince John Van Buren, his elder by a few years, the Tilden and Van Buren family being neighbors. Like the last named he attended the Kinderhook Academy, and matriculated later at Yale College; but not to become its alumnus in company with such classmates as Messrs. Evarts and Edwards Pierpont, each becoming federal attorney-generals, and the after Chief-Justice Waite. Young Tilden transferred his collegiate allegiance to the New York City University, and attended law lectures therein. From law school he passed into the law office of John W. Edmonds, his father's friend, who during subsequent years was a Supreme Court judge and reporter of cases. That preceptor always bore testimony to his pupil's deep draughts at the legal Pierian springs. The year 1841 dated Mr. Tilden's admission to the bar, and he opened an office in Pine Street, and also politically allied himself with Tammany Hall, in which he made campaign speeches, and ob-

tained acquaintanceships that led to clientage. He was soon accepted as a specialist in municipal law; and city contractors gave him lucrative business. Like many another young lawyer, in the fourth year of his novitiate at the bar, he entered the lower house of the Legislature, in which body his legal attainments secured him an appointment upon the Judiciary Committee, and many of its reports still on file in the State library vindicate this. While an Assemblyman he was recalled to New York to fulfil a retainer he had received from the then corporation counsel to defend the city in an action brought by a contractor to recover a claim for constructing a sewer, — a claim regarded as fraudulent. Having already won suits for contractors, he was regarded as acquainted with their ways and perhaps subterfuges. It had been an academic tradition that Mr. Tilden exhibited remarkable qualities as a mathematician. He had already proved these in suits wherein calculations about excavations, work per measure and supplies by superficies, had become necessary. His power of such calculation and his patience of investigation — that became throughout life his marked characteristic and so invaluable to the lawyer — served to expose the fraudulent claims of the contractor, and he won his defense for the city by occasioning a large reduction of the bills. Returning to the Assembly, he engaged in marshalling a bill for a Constitutional Convention, whereof in the following year he became a delegate, and once more demonstrated legal ability, especially as a draughtsman of amendments. Conveyancing, as is well known, is regarded at the English bar as a necessary adjunct to professional success; and in that branch of jurisprudence Mr. Tilden became proficient and noted for great accuracy. His professional fame had so increased throughout the State by 1855 that a section of the Democratic party nominated him for attorney-general. He shared the defeat of all other like candidates by the new Know-Nothing or Native American party. He was never fortunate in professional candidature; for a few years later, when nominated for counsel to the corporation of the City of New York, he was again unsuccessful. Each choice, however, distinctly showed high popular estimation of his legal ability.

This in growth he first displayed to wide public notice by his efforts in a famous *quo warranto* procedure in 1856, in which Mr. Tilden's remarkable mathematical training again showed to advantage, and brought success. He had now formed a partnership with a shrewd young lawyer named Andrew H. Green, who had already made intellectual mark in the educational government of the city. The firm were retained by Azariah C. Flagg, who claimed to have been elected city comptroller. So did his competitor, named Giles. The former had been State comptroller, and was a Reform candidate in the municipal canvass. He was declared elected by a majority less than two hundred, and by a final return of only one election district. The Giles supporters brought *quo warranto*, and apparently had sworn evidence that votes credited to Mr. Flagg belonged to Giles. Mr. Tilden could only oppose perjury and forgery, as he claimed the Giles case to be, by bringing mathematical demonstration into play. Oddly enough all Mr. Tilden's great professional victories were obtained through that forte. The election tallies of his client had been purloined. He devoted with Mr. Green, who possessed a like mathematical knack that later in life proved of great use to himself and the public, two entire nights towards analyzing the Giles figures, and finally hit upon a process of reconstructing the missing tallies. His governing mathematical principle in the case was, inasmuch as twelve names appeared upon the one regular party ballot, that wherever any one candidate upon it had a vote, eleven others should have the same vote. Seizing that idea, he went through all the combina-

tions, eighty-four in number, so as to completely reproduce the purloined tallies. In summing up to the jury, he claimed to have given a mathematical demonstration that the relator's case was constructed upon forgery. The jury within a quarter-hour of retiring gave verdict for Mr. Flagg. Popular sympathy and the press were on his side, and Mr. Tilden's professional victory remained for a long time a ruling topic. Clients renewedly besieged his office.

Two years later he was retained in an administration probate case by the heirs of a Dr. Burdell, who had been murdered, as was afterwards clearly demonstrated, by a physician employed for that purpose by Dr. Burdell's landlady, a Mrs. Cunningham, on a promise to divide the slain doctor's estate with the principal felon. She, as accessory to the crime, confessed, as a fact for the first time known, while a coroner' inquest proceeded, that she was the widow of Burdell through a secret marriage, and was then *enceinte* by him. She was tried and acquitted mainly upon the testimony of the physician who did the deed; for at that time the latter was unsuspected. As claimant widow she endeavored to administrate upon the estate of Dr. Burdell. Affirmative testimony of the officiating minister, the marriage certificate, and evidence of Mrs. Cunningham's daughter — of light character by the way — and the clergyman's servants, seemed at first invincible. Mr. Tilden's idea was, "Yes, there was a ceremony, but Dr. Burdell was personated, the clergyman and he being strangers, and the latter had not even seen the former in his coffin; nor was a photograph of the alleged bridegroom in existence to exhibit for identification to the clergyman. Mr. Tilden, in contesting the claims of the alleged widow, made what can be best described as a concordance of every fact which her counsel brought forward; he relied upon the affinity of what seemed truth, and traced other lines of testimony back into the complicated and perplexed phases of fabrication, fairly ravelling the threads of falsehood and pretences. With great patience he traced the alleged bridegroom into a town two hundred miles from New York (the place of alleged marriage), on the day before the ceremony, and showed him in still another place at the very time it was being performed. Mr. Tilden won decision for his clients from the probate judge, whose findings, with a full detail of all the romantic facts, can be found by the curious in the third volume of Bradford's Surrogate reports — that of themselves abound throughout in legal romance. The result was intensified in public interest when in the following year Mrs. Cunningham-Burdell went through the farce of childbirth with a two-day-old baby borrowed from a maternity hospital. The trick of thus producing an heir was however exposed by the treachery of her accomplice doctor, who discovered that his share of estate had gone through her probate failure. He subsequently committed suicide after flight to South America. The attorney-general who had beaten Mr. Tilden at the polls shamefully mismanaged the case of murder against the woman who instigated the crime. Had Mr. Tilden been elected, he would have prosecuted instead, and doubtless by his legal acumen have procured conviction.

Mr. Tilden's legal fame brought to him as clientage large corporate interests, and especially those connected with railway enterprises. He had in the opinion of Wall Street clients shown skill as a financier. Corporations detected his capacity for concentrated labor, and his faith in the mathematical consistency of truths; and this detection made him sought after as standing counsel to these. From 1858 to 1875, at least half of the great railway corporations operating north of the Ohio and between the Hudson and Missouri Rivers at some time employed his professional acumen and activity. He mastered all questions which could arise in the organization, administra-

tion, and financial management of railways; and he came to thoroughly comprehend their history and requirements. He knew how to avoid a wasteful litigation whenever railroads came within purview of an examination of their chartered rights or liabilities. His professional fame reached even to London, where European creditors and debenture holders of the Erie Railroad once invited him to act legally in their behalf. By reason of complications in other clientary directions he was obliged to decline the enormous fee that they proffered.

Another great law case in which he successfully brought to bear for clients his mathematical precision and algebraic facility in reaching unknown quantities amid confusing complications wherein supposition only could lead towards developments of facts, was the suit in the Supreme Court of New York in 1858, brought by the Delaware and Hudson Canal Company against the Pennsylvania Coal Company, the defendant retaining Mr. Tilden. The claim was for extra tolls consequent upon an enlargement of plaintiff's canal, and thereby claimed to benefit the contract for tolls, that was entered into before the improvement. Nearly a million dollars were at stake. Mr. Tilden tabulated all the trips on plaintiff's canal during ten years of contract, and contrasted the percentage of time consumed in transportation over the old or the new canal, and demonstrated that by the enlargement in question his client's disbursements for transportation were enhanced, and therefore they had suffered loss. "Those tables shall be answered," cried his opponents. To which Mr. Tilden, who possessed a slyness of humor for which he never received due credit, replied with an anecdote to this effect: the famous John Randolph of Roanoke having made a speech in Congress, was complimented for it by a constituent who remarked, "Your argument has never been answered." "Answered, sir," the eccentric piped in his shrill voice, "it was not made to be answered." So with these tables, added Mr. Tilden, "I did not construct them to be answered. They cannot be confuted, for they are made according to the best process of scientific analysis, and step by step are proved from the records of the plaintiff, and have been introduced in strict conformity to the rules of evidence." Mr. Tilden's mathematics again won a victory for his clients, whose books show a payment to him of a fee of fifty thousand dollars.

At one time his capacity to deal with corporate clients, — whose fees accumulated the large fortune he left after excellent investments, — was only limited by his physical ability.

At another period he was called upon to argue a case involving the whole doctrine of trusts, either comprised under English chancery law or under the modifications thereof in the peculiar New York Revised Statutes. His brief is indeed a treatise on the subject, which increased the surprise of his fellow-members of the Bar, when the trusts of his will establishing a great library for the City of New York were, on a contest, declared invalid, some years after his decease, by a majority in the Court of Appeals. Some of his political enemies said — and not very amiably — "He could not have been a great lawyer, for his will was broken on purely legal grounds." So was the will of Lord Chancellor Westbury, and not even Lord Campbell, had he been alive to add another biography to his marvelous "Lives of the Chancellors," would have been bold enough to allege that Lord Westbury was not an eminent jurist.

Mr. Tilden, before writing an opinion for clients or previous to preparing for a trial or an argument, invariably first mentally tried the opinion or case against himself, examining how his views could be combated. An excellent method and worthy of adoption by all lawyers. As Abraham Lincoln once said, "How can an engineer testify to the safety of a bridge unless, before it is

used, he shall attempt to prove its unsoundness?"

Of Mr. Tilden could be quoted the line: "I am no orator as Brutus is"; but certainly a succeeding line, "I only speak right on," can be appropriately quoted for application. He was an impressive speaker, because earnest and imbued with convictions; but he did not possess graces of oratory. He was deficient in fancy and imagination, and in what dramatic critics of actors style color. He therefore was not so successful with juries as with judges. In the use of rhetoric he hammered on anvils, rather than employing the paraphernalia of gold-beaters. He was ever a stickler for the ethics of his profession, and such was his passion for the supremacy of legal principles that he would often, to promote justice, serve without fee or hope of reward, and accepted employment only when he was persuaded of the justice and morality of the side for which he was engaged. Upon this topic it will be appropriate to quote a communication by Judge Sinnott of New York: —

"I entered Governor Tilden's office in 1857, and continued there until he retired from practice. I was admitted to the bar in 1859, and from that time forward, and even from before that time, had a very intimate knowledge of all his business, both professional and private. I do not believe there is any lawyer of prominence in this country who has given more professional services gratuitously than he did. He was a man careless of charging for any short service or advice, and I have known clients for years to come in almost daily and take up perhaps an hour at a time on matters where his advice saved them large sums of money, without his making any charge whatever. In no case, occurring in Governor Tilden's office, from 1857 to 1872, did he ever make a charge where he had not rendered a substantial, continued, and important service, and in no case did he make a charge where the benefit accruing to his clients would not have justified a higher charge according to the accepted scale of prices in this city for similar services. I have never known, in all that time, a single instance in which a client paid his bill unwillingly, or was otherwise than entirely satisfied, and even thankful. And no such case could have occurred without my knowledge. He never took a case on speculation nor for a contingent fee, and never until it had been first examined with a view to discover whether the person applying to him had not only the merits in law, but the equity on his side. He always manifested extreme conscientiousness and sensitiveness in regard to accepting any professional employment where his political position or influence could possibly affect the course of justice. I have never known him to appear before a public officer or a legislative or municipal body to advance any private interest, or to assert any private claim. Not only that, but I have never known him to advise in such a case, no matter how privately or indirectly. He could have made a fortune from that class of business alone if he had been willing to enter into it. Finally, I say, as one knowing what he says, that Governor Tilden has never, since I have known him, been interested, directly or indirectly, nearly or remotely, professionally in any job."

When the Civil War seemed imminent, Mr. Tilden, giving an opinion to some banking clients, wrote strongly as a lawyer, as a politician, that nullification and secession found no color of claim in the constitution; and that coercion to preserve the Union was entirely justified by due construction of that instrument. And in his opinion he believed that any war struggle would be a prolonged one. About the same time he publicly disagreed with the early moderate call for Northern troops, and believed President Lincoln should have summoned half a million volunteers. During the war he as a lawyer joined in legal opinion with Messrs. Vallandigham, David Dudley Field and Garfield (who successfully argued the famous Milligan Indiana case before the Federal Supreme Court), that the maxim *inter arma silent leges* did not apply in peaceful territory outside of martial territory, and that the trial of civilians by courts martial in Northern states was unconstitutional. He

was often summoned to Washington for consultation with Secretary Stanton, who held a high opinion of Mr. Tilden's legal attainments, as can be testified to by that veteran of still youthful feeling, Charles A. Dana, long an assistant secretary of war, and to whose cool, conservative judgment the impetuous Stanton, his chief, owed much: as some day, a historian of the period, conning documents on file at the National Capital, must strongly testify. Mr. Tilden is on record as early advising, as an *amicus curiae* as it were, the return to freedom of Messrs. Slidell and Mason, because illegally captured and restrained. He also joined Charles O'Conor and George Shea (counsel for captured Jefferson Davis) in opinion that only the civil arm (as in the case of Aaron Burr), and not the military arm, could legally deal a blow for his treason, if such a blow were deemed politic under all circumstances.

When Horatio Seymour became governor of New York during the war, he frequently consulted with Mr. Tilden on legal matters, and particularly so during the draft riots of 1863. For the half-dozen years that followed the closing of the civil contest, Mr. Tilden closely pursued his professional avocations, in which he then simply refused more retainers than he accepted. When taxed for his income, although believing that it was an unconstitutional measure both in plan and details, he made a return purely out of patriotic motives. The fiscal authorities contravening his return, saw fit to initiate legal procedures, and then he declared his intention of now raising the constitutional objection. Upon this becoming known to the Washington Treasury, it did not from politic motives press the suit, because it was not deemed advisable to court his legal skill and assiduity in raising and considering the question of constitutionality that the Administration had always avoided discussing. It is known that he prepared an elaborate brief against the constitutionality of any direct income tax, which doubtless may again be used by counsel who are preparing to raise the same question regarding the pending income tax.

Between the years 1871 and 1874 Mr. Tilden's time was mainly occupied by legal efforts in connection with Charles O'Conor and Wheeler H. Peckham, — who recently failed of confirmation after enjoying the legal honor of selection by the President as successor to Justice Blatchford on the Supreme Court Bench, — against persons charged by the municipal government of New York City with peculations from, and frauds upon, the local treasury. His mathematical ability again came successfully in play; and having been afforded access to certain bank accounts of those who were implicated, he was able to trace home to them by ingenious manipulation of figures obtained from deposit tickets and cheques, large sums of money. There were many civil suits for the repossession of the misgotten sums, upon one of which he made an appellate argument that bristled with apt citations which exhibited his habitual patience of research and his aptness of illustrating the old saying about a cited case: "It stands on all fours." His legal exertions in this behalf were given without fees and purely from regard to public benefit. But his reward came in an election to the office of governor, in which post again from time to time his legal abilities came into play towards exposing abuses of government and defining legal action. His knowledge of jurisprudence permeated all of his executive documents, showing conclusively, as in the instances of Wirt, Webster, Sumner, and Conkling, that statesmanship need not dim the light of legal science.

With Mr. Tilden's race for the Presidency contemporaneous history has made every one more or less familiar; and this article aims to deal only with the legal incidents of that event. The first of these occurred when the strife between him and his antagonist reposed in a balance that required the weight of only that one vote which had

once elected Marcus Morton governor of the Bay State.

Mr. Tilden, when the proposition was mooted — upon violent protestations of electoral frauds in three states preferred by his political supporters — that the famous electoral commission be appointed to declare result, prepared an opinion that, as to its conclusions, however critics may agree or disagree, they will admit the learning and logical force with which that opinion presented premises and illustrations. He combated strongly the constitutionality of Congress abdicating its powers of counting electoral votes and awarding them to an impromptu body born of occasion. He accompanied it with a remarkable table and notes as to the course pursued on each previous occasion in choice of President — a table that remains of great historic value. His political opponents retorted that he combated the commission because he wished to throw the election into the House of Representatives, in which his party held a majority by vote of states; yet whatever was the motive for the Tilden brief, its legal aptness destroyed the time-honored, but often inaccurate, saying, "A lawyer in his own case has a fool for client." During the discussion before the electoral commission Mr. Tilden filed an elaborate brief, afterwards published, regarding the Florida election, and discussing the oft-mooted legal question of the right to go behind certificates of election, and consult naked returns. All of Mr. Tilden's notable briefs are installed on the shelves of the New York Law Institute; and each one indicates the extent and grasp of his legal attainments and adds to his enduring fame as lawyer.

LEGAL REMINISCENCES.

IX.

THE COMMON LAW AND THE CIVIL LAW: ENGLISH AND FRENCH SYSTEMS OF JURISPRUDENCE.

By Hon. L. E. Chittenden.

I ONCE had an opportunity of contrasting the English common law with the civil law as it was then administered in France, which was both entertaining and instructive. The experience gave me a clear impression of the impartiality and solidity of the common law, as interpreted by English judges, and it also gave me my first knowledge of some of the usages of the French courts of justice, which at the time appeared extraordinary.

My client was a corporation, the owner of a patent upon a machine, which, after many years of trial, had gone into an extensive public use. The machine had been patented in the United States, Great Britain, and France, and was manufactured and sold in all those countries. When the patent was about to expire in the United States, an application had been made for its extension for a further period of seven years. Although the extension had been opposed, I was able to prove so strong a case of merit, that by having the machine operated in the presence of the commissioner of patents, we obtained a decision in our favor, and the patent here was duly extended.

An application was then made for a prolongation of the British patent. This application was not advised by our experienced patent attorney in London, whose opinion was, that the utility of the invention would be affirmed, but that the English judges would decide that the inventor had been liberally rewarded by his profits during the original term for which the patent was granted.

However, the value of the patent for the prolonged term of seven years was so great, that the corporation decided to make the application, though without much hope of success. I was so familiar with the history of the invention, that I was requested to visit London, and give to the attorney and counsel there such assistance as I could in the presentation of our application.

The case was thoroughly prepared. The value of the invention to the people of Great Britain was conclusively proved. The point of difficulty was the profits already made. Former decisions of the tribunal indicated that if we did not present a plain and full statement of the profits which could not be justly criticised, the Judicial Committee of the Privy Council, before whom the application was pending, would reject it. We, therefore, under the direction of an expert accountant, prepared such a statement.

Our junior counsel was the now celebrated Mr. Webster, then just coming into public notice as a painstaking advocate, much esteemed by the judges. He had mastered every detail of our case. Our leader was then probably the most powerful advocate at the English bar. He was a man of profound scientific research and thought, the author of one of the great intellectual successes of the century — his treatise on "The Correlation of the Physical Forces," or the convertibility of heat, light, and force into each other. He was at that time (1868) the head of the patent-law bar, and within a few days after our trial was elevated to the bench, where he still lives to administer justice with honor to Great Britain and the name of Sir William Grove.

Our patent was upon a revolving hook, scarcely larger than a dime, which was so

constructed that it performed a most efficient service, and involved extraordinary mechanical functions. Under the advice of Mr. Grove we had employed as a mechanical expert, a gentleman who was afterwards knighted and raised to higher honors in the scientific world by his inventions, and his influence in the use of life-saving appliances and the prevention of accidents in railway travel. I refer to the late Sir Frederick Bramwell. In our consultations, I was impressed with the clearness of his views and the simple and clear terms with which he expressed them to others, and I told him that, in my opinion, we had been most fortunate in securing his services. He replied that it was not yet certain that we had secured them, for if his brother, Baron Bramwell, sat in the Privy Council, when our case was heard, he would not appear as a witness, as he never did so in a case to be decided in whole or in part by his brother!

His brother did not sit, and Sir Frederick was called by our counsel. The respect shown to his opinion by all the judges was an instructive illustration of the value of the evidence of an expert who was loyal to principles rather than parties. Sir Frederick appeared to have the confidence of all the judges, and his opinion on mechanical questions was decisive. The following was an episode in his examination: —

In illustrating the functions of the hook, Sir Frederick said that it was fixed to the end of the shaft, that the point of the hook entered a loop, and travelled forward as the hook revolved until the stitch was made.

"You state an impossibility!" exclaimed Lord Justice James, who seized his umbrella, the handle of which was a hook, and formed a loop with his handkerchief, into which he thrust it. "Now," he continued, "do you not see that if this loop kept travelling forward, it would wind the thread upon the shaft, and it could never get out of the loop?"

"And still, I insist that this hook does get out of the loop, and form, not only one stitch, but two or three thousand stitches in a minute without failure," said Sir Frederick, "and I will make your lordship see and admit it."

"Then you will make me admit a mechanical impossibility," said the judge. "Proceed; you act as if you believed what you assert."

"I think your lordship was born in a country of windmills," said Sir Frederick. "You know they are constructed with a revolving top, through one side of which there is an opening for a door. Suppose that door opens to the north. You are travelling directly south. You enter the door. While you are crossing the structure, the top makes a half revolution; the door now opens to the south. You have not halted, you have walked in a straight line, and now you walk out and continue your journey. This hook performs a corresponding function, and in this consists its ingenious novelty."

We made excellent progress, and had everything our own way until we came to the showing of profits. Lord Justice James looked at the footing which showed a balance of some thirty thousand pounds.

"Thirty thousand pounds!" he exclaimed, "That is large pay for so small a hook." I saw that our case was gone. Mr. Grove made a powerful argument in which he showed that the simplicity of our machine made it the greatest boon ever conferred upon the poor sempstress; but his words fell upon unwilling ears. Mr. Webster added a few observations, and the curtain fell, which separated the bench from the audience.

And the same curtain fell upon our case. When it was raised a few minutes later, Lord Justice James observed "that their lordships did not care to trouble the counsel for the opponents to make any reply. The originality and value of the invention were clearly proved, and the petitioners deserved the commendation of the court for the full and

fair presentation of the accounts. But it was not the practise of Her Majesty to grant any prolongation where the inventor had been adequately rewarded during the life of the patent. Their lordships were of opinion that in this case the inventor had been adequately and generously rewarded. Their lordships would therefore humbly advise Her Majesty to dismiss the petition with costs, which their lordships fixed at five hundred pounds."

This defeat was a disappointment to the petitioners, but I could not say that it was undeserved. The whole course of the trial impressed me as a fine exhibition of judicial dignity and impartiality, and in subsequent interviews with our counsel, I learned that they concurred with me in the opinion that the judgment was a just and proper one.

My client was the owner of a trade-mark. It had created the trade-mark and the manufactured article to which it was affixed. Upon principles of law professed to be recognized among all commercial nations, this trade-mark was *property*. It had been pirated in France in the most outrageous manner for no other purpose than to enable the pirates to impose upon the public a worthless imitation as a genuine article of great utility, exclusively manufactured by its owners.

It was not at that time known to me as it is now that in France no action upon a patent or to protect a trade-mark was ever decided in favor of a foreigner against a Frenchman. My client consulted an English solicitor who resided in Paris, who prepared his case with great labor and corresponding expense. He showed by the records that our client's right to the exclusive use of the trade-mark had been established by judicial decisions in the United States, in England, and in Scotland, — that its ownership was acquiesced in everywhere save in France, where it was pirated for the sole purpose of imposing an inferior article on the public as genuine. Counsel of celebrity at the Paris bar were then consulted whose opinion was clear that such a transaction was prohibited by the code, and could be restrained by legal proceedings. These had been begun; the trial of the case was approaching; I went to Paris to render such assistance as I could in its preparation.

A consultation with the *avocat* was necessary. In this country, if a suitor wants a consultation with his lawyer, he goes to his office and has it. Not so in Paris. It is a difficult thing to get, and is to be had only in one and the time-honored way.

There was then, and I suppose still is, in France, a fifth wheel to the carriage of civil justice, called an *avoué*. What he is used for I never could clearly ascertain. I did learn that he was expensive and indispensable. As well as I could make it out, the attorneys and the *avocats* are not permitted to communicate with the judges except in court. There is no knowing what would happen if they should. If either wants any one of the many things always wanted in the progress of the cause, instead of going to the judge and asking for it, he must do as the party did in the poem, who "went and told the sexton, and the sexton tolled the bell." The attorney must go and tell the *avocat*, who will go and tell the *avoué*, who will go and tell the judge! And there is only one way for the client to get speech of his *avocat*. He must make his request to the attorney, who carries it to the *avoué*, and the *avoué* to the *avocat*, who appoints the consultation.

After several days' delay, it was finally determined that there should be a consultation at which I should be present. It took place at the chambers of the *avocat*. At the appointed hour I was driven to a house on one of the quais. I climbed the single stairway in a large apartment building to the *cinquième étage*, in company with butchers' meat and all manner of market supplies, meeting on their way down buckets of coal cinders, baskets of empty bottles,

and a miscellaneous assortment of bad odors and broken food on their way to the street. On the fifth floor there was the name of the *avocat* and a bell. As I touched the latter the door opened and disclosed a person of gigantic dimensions. He was fearfully and wonderfully adorned and ornamented. He evidently expected me, for he ushered me into an inner room, and made heroic efforts to announce my name. He failed.

The attorney now came forward and presented me to the *avocat*, who in turn presented me to the president of the College of *Avoués*, a dignified gentleman, employed in our suit. The *avocat* set the example, and we were quickly in consultation. My French halted fearfully, but I managed to make myself understood. The *avocat* had discovered a serious difficulty. How it was to be obviated he did not see, but there must be some way, and if necessary he would take the opinion of one of his eminent brethren, who made a specialty of trade-mark cases. I begged him to inform me of the nature of the difficulty. He said there was a special provision of the French code which limited the protection in France of the trade-marks of foreigners to citizens of countries in which the trade-marks of Frenchmen were reciprocally protected, and in our case there was no proof that the trade-marks of Frenchmen were protected in the United States. I replied that such an obstacle ought not to prove fatal, as the highest judicial tribunal of the United States had decided that a trade-mark was recognized as property upon the principles of commercial law, and that the trade-marks of aliens would be protected in the United States in all cases, whether other countries protected them or not; and I assured them that the proof would be furnished by a volume of the reports of that court in which the decision was officially reported. The volume, I said, must be in their libraries, to which they assented, and this difficulty seemed to be obviated.

We then discussed the case. I was so familiar with it that in spite of my unaccustomed French, I made my views clear. The *avocat* was delighted. "There was only one thing to be done," he said; "an early interview must be arranged *with the judge*, who would hear the case, and *I must state my views to him* in the same manner that I had in the consultation."

I thought I must have mistaken his meaning, but the *avoué* assented and said that he had no doubt that he could procure an invitation for me to breakfast with the judge. I am not easily shocked, but when I really appreciated all that was implied in their proposal, it was some time before I recovered my equilibrium. At length I spoke. "Are you gentlemen seriously proposing that I should meet the judge who is to decide this case and discuss it with him in the absence of the adverse party and his counsel?" I asked.

"Certainly, and why not?" replied the *avoué*. "It is probable that our adversaries have had more than one interview with him. It is not only proper, but the interests of our client will be promoted by the discussion."

"You will have to excuse me," I said. "If a lawyer should attempt such an interview in the United States, he would be expelled from the Bar, and would deserve the expulsion."

They did not seem to comprehend, nor pay much attention to my objection, but continued to converse on the subject. Soon after I took my leave, supposing that this matter was ended; but it was not — far from it. For, not many days afterwards, I received, through the secretary of our legation in Paris, a polite invitation to breakfast at the private apartment of one of the judges, on the following Saturday, with the usual request for a reply. As the proceeding was novel to me, I consulted Mr. Washburn, our minister, who advised me to accept the invitation, and be circumspect in my inter-

course, as the best way out of the difficulty. I did so, and kept the appointment.

We had an excellent breakfast and much general conversation. As I did not refer to the suit, the judge himself introduced the subject. He had examined the papers, understood the questions which the case presented, and took the position of an adversary, prepared to controvert our right to maintain the action. I declined the discussion, explained how I was drawn into the situation, and my strong sense of its impropriety. He rather ridiculed my views, and explained why such discussions were not regarded as improper. It was "the theory of the civil law," he said, "that the judge should be able to decide an action in conformity with right and justice after hearing all that the parties wished to say about it, and that there was no possibility that a judge should be improperly influenced, and that there was sometimes an advantage in having a party state his own case." I still persisted that I should leave the argument of our case to the *avocat*, the conversation turned to other topics, and we had a pleasant interview.

The observations of the judge explained why the judges received hearsay, everything which the parties offered as evidence, without objection. It was the theory of the civil law that the judges would be able to separate the wheat from the chaff, and that irrelevant testimony could do no harm, as they would consider nothing which had not a legitimate bearing upon the issues.

This theory was well enough, but the final decision in our case did not support it. The trial came on; our property in the trade-mark was substantially admitted — the inferiority of the French counterfeit to the American machine was clearly proved. Our case seemed to be clear, but the judgment of the court was against the foreigner and in favor of the French pirate, or as the judges called him, the French *ouvrier*.

There was a French patent upon one part of the machine protected by the trade-mark. The law of France for the protection of the French workmen required that patented machines must be manufactured in France. Our client had established a factory in Paris, in which many thousands of these machines had been made. The hook referred to was of an irregular and peculiar shape, which could not be well shown in a drawing. Under the advice of counsel, that it involved no violation of the French law, our client had imported one of these hooks through the Custom-House to serve as a pattern. As soon as another hook could be made, and within forty-eight hours, the imported hook was exported and sent to the United States. There was no doubt about its identity, or the fact of its exportation, but the French court decided that the bringing of this hook into France, and its use as a pattern, was such a violation of the law of France as forfeited not only the right to the trade-mark, but also all rights secured by the letters-patent; and that the French pirates could use the trade-mark, and impose a worthless manufacture as the genuine upon the French public with impunity. Our action was therefore dismissed with costs.

With this experience in French justice my client was satisfied; it never went after any more, and I have never since advised an American to attempt to enforce his patent or trade-mark in France. This same experience brought to my mind an incident in Charles Reade's novel "Hard Cash":

Captain Fullalove, the former master of a merchant ship, had undertaken to educate and develop the intellect of a colored brother named Vespasian. As they were passing Westminster Hall, the captain pointed to the venerable pile, and observed to his pupil, "There's where you can buy British justice. It comes high, but it's prime!"

While I agree with Captain Fullalove, I might make a similar observation about the Palais de Justice, with an amendment: "There's where you get French justice. It comes high, and it *is not* prime!"

DETECTING HUMAN BLOOD.[1]

ANOTHER safeguard has been thrown out against murder. Daniel Webster's saying that "murder will out" gathers more and more truth as time progresses. When he first made it, it was epigrammatic and effective, but it was inaccurate. It has been since time began less true that murder will out than it has been that burglary, or chicken stealing, or forgery will out. The murderer knows that the penalty of his crime is death. No man likes to pay that penalty. Every man will go to the most extravagant extreme to avoid paying it. When a man's life instead of merely his liberty depends on carefully planning a crime beforehand and carefully hiding it afterward, he will make greater efforts toward both these ends than he would in any other circumstances. It is true that about as large a proportion of murder mysteries as of burglar mysteries are solved, but the proportion is not quite as large, and it should be remembered that the forces of law and order exert twenty times as much energy toward tracing a murderer as they do toward tracing a burglar. Justice often miscarries for lack of proper scientific aid.

In one case in a great American city the whole thing went wrong, and the accused man — of whose guilt scarcely any one had doubt — was not even indicted, because science had no means of differentiating between the blood of human beings and the blood of animals. It was clear that the man had had every opportunity for committing the crime, and indirect evidence of a motive for it existed, but when the matter was placed before the grand jury the only direct evidence that he had been concerned in it was his possession of a knife stained with blood. He acknowledged that the knife was his and that it was he who had stained it with blood, but that it was the blood of a pet dog, upon whose broken leg he proved that he had performed a rude operation, and although all the scientific knowledge in the city was brought to bear upon the subject, not one learned man was found who was certain enough of his learning to swear the life of the accused away by testifying positively that the blood was human and not animal. In fact, this point has been one which has baffled scientific criminology ever since criminology became scientific. The minds of the greatest scientists in the world have been devoted to this problem, but have always failed to find a solution for it. Records exist of cases in which this very point puzzled prosecutions as long as a century ago. It remained, in fact, for a New York scientist to make this discovery less than three weeks ago, and in this article is given positively the first hint of it which has been heard by the public.

The scientist is Dr. Cyrus Edson. He is already famous as a sanitationist, and through this expert knowledge has risen to the high position of president of the New York State Board of Health and commissioner of health in New York City. He is an investigating scientist. His wide reputation and his prominent public position have caused him to be frequently called as an expert in murder cases. Often the value of his testimony has hung upon the differentiation between the blood of animals and the blood of man. Notwithstanding that he had made a deep study of the subject, and knew that a well-defined and important difference existed, his means of defining that difference in his own mind and before the eyes of a jury was so delicate and so likely to be affected even unto inaccuracy by outside and slight conditions, that he never felt justified in giving positive testimony on this point. He was in the same position as that in which other scientists have found themselves. He

[1] Edward Marshall, in the Galveston News.

was morally certain that his ideas were correct, and knew that he could scientifically prove it, but still the basis of his reckoning was so narrow that he was unwilling to stand upon it when human life and liberty were at stake.

In explaining Dr. Edson's discovery, two things should be noted. First, the fact that it is as simple as the alphabet (at least one-third of the important discoveries have been), and, second, the formation and character of the blood must be fully understood. Blood is composed of watery elements and corpuscles. A blood corpuscle is a bi-concave disk. Viewed from the side it seems a perfect circle. Viewed on end it looks like a dumb-bell. The only difference in the blood of different creatures is in the size and shape of the corpuscles. The blood corpuscles of a fish are large and flat, and in their centre is a small spot or nucleus. The blood of all birds and fowls is similar, but the corpuscles are smaller. The blood of all animals, aside from birds, fishes, and reptiles, has smaller corpuscles without the nucleus. The presence of this nucleus has for many years made it possible to throw out the blood of fishes and birds in murder cases. Not long ago a case attracting much attention was tried in England. The issue hung on the statement of the defense that the blood on a knife found in the possession of the prisoner was that of a turkey. This was abundantly disproven, because of the absence of the central nucleus in the corpuscles. Microscopic examination showed this plainly to the jury, and, as no claim had been made that the blood was that of any other animal, the argument was thrown out, and the man convicted and hanged. But no point exists by which it is equally possible to show the difference between the blood of a human being and the blood of a four-footed beast. It has been proven that a difference exists in the size of the blood corpuscles of all animals, including man. The corpuscles have been accurately measured by microscopic examination, and no doubt whatever exists as to the truth of these measurements. It has long been quite possible for a scientist to take the blood found on a prisoner's person, and measure its corpuscles so exactly that the scientist would have no moral doubt in pronouncing them human or otherwise. But, as the figures following will show, the difference in measurements is so slight — a particle of dust, an unexpected refraction of light, the most minute optical illusion, might throw his calculations all awry — that no scientist has been willing to swear to the accuracy of his deductions on this basis. Here are his measurements: A blood corpuscle of a man has a diameter of 1-3200 of an inch, the diameter of a dog's blood is 1-3570 of an inch, that of a mouse 1-3840 of an inch, that of an ox 1-4580 of an inch, that of a sheep 1-5000, that of a goat 1-5200 of an inch.

A microscope will measure with fair accuracy to within 1-200000 of an inch, but as has been said, these measurements are so very delicate that a shade or the most minute difference in focus would derange and destroy their accuracy. For this reason they have not been useful in murder cases. Dr. Edson, in reflecting upon this subject not long ago, thought fantastically of the advantage that would accrue to justice if one could only enlarge these corpuscles so that a minute error in measurement would be less important. Suddenly, it occurred to him that by the very simplest method they might readily be enlarged, and it is because he thought of this simple method, and not because of any extraordinary learning involved in carrying it out, that he has made an important discovery.

For many years it has been customary in cases of forgery to throw the suspected signature in enlarged form upon a screen with a magic-lantern. He saw at once that this might as readily be done with blood corpuscles as with a forged signature. So he did it. First, he set about to measure 3,000

corpuscles of each kind of blood which seemed most likely to be brought into question in murder cases. He found the diameters to be as quoted above. Then by means of the camera lucida, an attachment to his microscope, he cast the image of an average corpuscle of each variety onto a sheet of white paper, from which, with infinite care, he cut a disk exactly corresponding to it in size, but enlarged by means of compasses. He saw to it that his focus was absolutely the same while he carried on this work, and he knew when he had finished that he had six disks of paper which bore exactly the same relation to each other in point of size that the blood corpuscles did to each other. He then took these disks of paper, pasted them on glass, and used them as a lantern-slide. This enabled him to throw them on a screen magnified as many times as he chose. It would have been simple for him, had he so desired, to arrange an apparatus by which he could have made the smallest of them as large as the side of his study. He was contented, however, with magnifying them until the largest one measured about two feet across. It was then possible for him to take a foot-rule and measure the black spots on his screen with a certainty that the differences in size could not be affected by any small, extraneous influence. This method of cutting paper disks he selected as the most desirable, although at first it seemed that photography afforded the best means of accomplishing his ends. The adjustment of the photographic focus, however, is so delicate a matter, that he soon realized that this would add to the possibilities of inaccuracy, and therefore abandoned it. When Superintendent Byrnes was told of Dr. Edson's new method, he greeted the news with pleasure. Said he: "Dr. Edson's discovery is most important. Few people will realize how important it is until they know that within a year, at least fifteen murder cases have occurred in or near New York in which the identification of blood played a very important part."

THE INTRUDING HERMIT.

A Man shall have a Quare Impedit *of an Hermitage, and a writ to put him into Corporal Possession.* — F. N. B., 34 E.

I.

WHEN holy hermit feels inclined
To solitude and prayer,
Still let him ever keep in mind
Of trespass to beware.
While he devoutly seeks to dwell
From earth's contagion free,
He may not with another's cell
Take wanton liberty.

II.

If far from vanity and strife
He find a lonely spot,
Which promises a tranquil life
In wood or field or grot,
Where well he deems that he may make
Retreat in peaceful age,
Yet let him not too rashly take
That for an hermitage.

III.

For should another holy saint
Allege a prior claim,
And make unto the court complaint,
And duly prove the same,
The wrongful tenant surely shall
By writ evicted be
Out of possession corporal
With all indignity.

THE ENGLISH LAW COURTS.

I.—THE PRIVY COUNCIL.

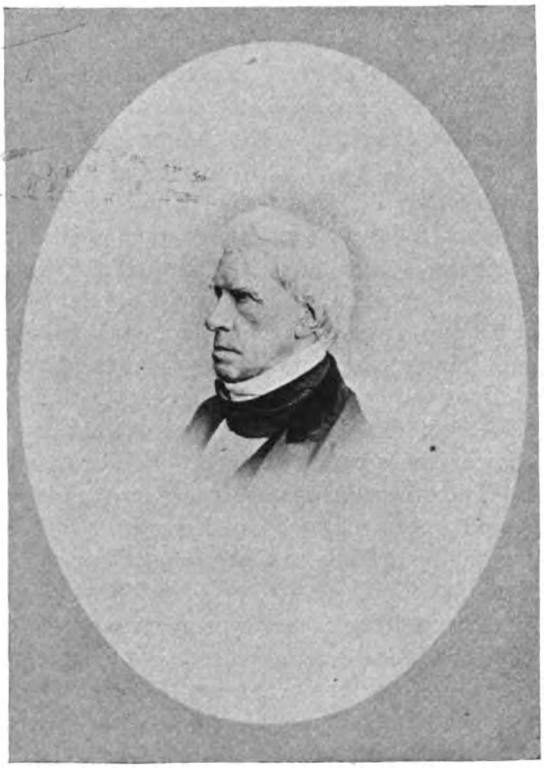
A SERIES of sketches of the English Law Courts cannot make a better commencement than with the Privy Council, which is inferior to few of our legal tribunals in antiquity, coequal with the House of Lords in point of dignity, and superior to every court in the land in the range and the variety of its jurisdictions. The *origin* of the jurisdictions of the Privy Council has somewhat acutely divided historical opinion. The earliest theory on the subject is that of Pownall (*Administration of the Colonies*, 1774). In substance it is as follows: At the time when the first colonial settlements were effected, the distinction between administrative and judicial functions was very imperfectly apprehended. In settlements regulated by royal instructions the governor acted also as judge in chancery. In settlements constituted by charter there was no court of chancery at all. The governor was not necessarily a lawyer, and only a careful legal training would have qualified him for deciding as judge questions on which he had already formed and might even have pronounced an opinion in his administrative capacity. An appeal from the decisions of the colonial governor was therefore clearly essential. Now the one precedent of a judicature within the realm possessing foreign jurisdiction which presented itself to the English sovereign and his advisers was that of the Privy Council over the Channel Islands. Jersey,[1] known to the Romans as Cæsarea, of which the modern name is probably a corruption, had definitely passed with her sister islands under the yoke of the Norman in the beginning of the tenth century (912 A. D.). When his other continental possessions had fallen from him, the Channel Islands still adhered, or were forcibly linked to the fortunes of King John. In 1204 the royal conqueror honored Jersey with his presence, granted her a charter, recognized her laws, established a royal court, and directed that the appeals which were formerly brought before him as Duke of Normandy should now be heard before himself and his Council in England. Now the English sovereign claimed — a claim that the colonists acquiesced in,[1] and which the House of Commons itself (Pownall, 49; Burge, Colonial Law I., Prelim. Treat.; Journal Ho. of Com., April 25, 1621; April 29, 1624) had tacitly admitted—that his colonial settlements and possessions were the demesnes of the Crown, lying quite beyond the jurisdiction or cognizance of the state. The historical relation between the feudal duchies of King John and the plantations and possessions of King Charles I. being so intimate, no great effort of administrative imagination was necessary to make the analogy complete. Thus it came to pass that appeals from the courts, constituted in the various colonies after the old Norman model, were taken not to the House of Lords, not to the Courts of Law and Equity, but to the sovereign himself and the *concilium privatum assiduum ordinarium*, which plays so important and intricate a part in the legal history of England.

Pownall's theory, although characterized

[1] Falle's account of Jersey (Durell's Edition, 1837). Guide to Jersey, 1855. Le Cras, The Laws, etc., and their administration in Jersey, 1839. Report to the Privy Council on the Laws of Guernsey, 1819.

[1] Pownall says (p. 50), "The plantations were settled on (the king's) lands by the king's license and grant; the constitutions and powers of government were framed by the king's charters and commissions; and the colonists, understanding themselves as removed out of the realm, considered themselves in their executive and legislative capacity of government in immediate connection and subordination to the king, their only sovereign lord."

by a superficial ingenuity which is singularly attractive, and has enlisted the sympathy of more than one able writer on colonial law (e. g. Burge and Clark), has been partially rejected by Macqueen (Appellate Jurisdiction of the House of Lords), whose criticisms may thus be summarized: (*a*) It is incorrect to say that at the time when appeals from the colonies to the Privy Council were settled, there was no other precedent than in the Royal Court of Jersey for an appeal to a judicature within the realm possessing foreign jurisdiction. (*b*) There is no proof that Jersey and Guernsey were at that time remnants of the duchy of Normandy. (*c*) It is incorrect to say that appeals from Jersey and Guernsey were brought before the king in council.[1] In support of this proposition Macqueen cites from the Rolls of Parliament, vol. 1, 416, the case of a petition from the Channel Islands against Sir Otho de Grandison for procuring the delay and denial of justice, which was presented to the king and his council (*in Parl.* 18 Ed. 2, 1324, 5), and ordered to be brought before Parliament by a writ of error from the chancery. After so much destructive criticism it was necessary that Macqueen should evolve a theory of his own. In substance it is as follows: The kings of England had three councils, (1) the *commune concilium*, consisting of the sovereign and both Houses of Parliament, (2) the *magnum concilium*, the House of Lords or Court of Parliament, and (3) the *concilium privatum assiduum ordinarium*, which was the permanent Privy Council of the Crown. There is clear evidence that the last named were the constant assessors of the House of Lords, investigated and even determined writs of error in Parliament under the authority of a reference by the peers, and, at all events since 33 Edw. I., acted as the triers of domestic and foreign petitions.



LORD BROUGHAM.

The authority of the Privy Council in these matters was at first derivative only, and no inherent civil jurisdiction was claimed or exercised. But the intervals gradually becoming longer between the sessions of Parliament, rendered the mode of redress unsatisfactory, and by a change almost contemporaneous[1] with the establishment of the Court of Exchequer Chamber to adjudicate on writs of error from the Queen's Bench (27 Eliz. c. 8), the Privy Council came to discharge in their own right those functions which would have devolved upon them as triers had Parliament been summoned. The trial of foreign petitions by parliamentary commissioners was abandoned, and the separate and independent jurisdiction of the Privy Council was ex-

[1] Appeals from the Channel Islands to the Privy Council are said to have been granted in the time of Henry VIII., but the earliest instance in the Privy Council Records is in 1572.

tended first to the colonial and then to the East Indian possessions of the Crown. As if the variance between Pownall and Macqueen did not render the difficulty sufficiently acute, the statute 25 Hen. VIII. c. 9 appears to suggest another explanation of the origin of the appellate jurisdiction of the Privy Council. Under that act a subject aggrieved by the decision of any court in any part of the King's dominions might appeal to the King in Chancery. Every such appeal was referred by a commission under the Great Seal to the Court of Delegates, ordinarily consisting of three puisne judges, one from each of the common term courts, and three or more civilians, usually members of the bar; and the decisions of the Court of Delegates were, in spite of a distinct prohibition in a statute of Elizabeth, reviewed upon petition by the Privy Council. We have, therefore, three distinct theories with regard to the phenomenon in question. Are they so hopelessly irreconcilable as to make it impossible to indicate the general course of development which the appellate jurisdiction of the Privy Council has pursued? We think not. 1. The right of the sovereign to entertain an appeal from any colonial court is undisputed, and indeed (*Chalmers's Opinions of Eminent Lawyers*) indisputable. 2. The conflicting theories relate to different points of time. Macqueen speaks of the fourteenth century; Pownall of the seventeenth; while the Court of Delegates lasted till the beginning of the reign of William IV. It is certain that in less than a century the body to which the Crown entrusted the *administration* of colonial affairs was repeatedly reconstituted. Why may not the judicature for colonial affairs have undergone similar changes in the course of three centuries? The modern history, at least, of the Privy Council as a court of law is so well known as to need only a brief recapitulation. 2 and 3 Will. IV. c. 92 transferred to the King in Council the jurisdiction of the Court of Delegates. C. 67, 3, and 4 Will. IV. c. 41, created the Judicial Committee of the Privy Council, in which is now vested all the former judicial authority of the Privy Council, the Commissioners of Appeals in prize causes, and the Court of Delegates. The Judicial Committee comprises the Lord President of the Council, the Lord Chancellor, the Lords Justices, and such other members of the Privy Council as shall hold or shall have held certain judicial or other offices enumerated in the acts. The fourth section of this statute is declaratory of the sovereign's right to refer to the Judicial Committee "any other matters whatever." We shall return to this provision later on. Under 6 and 7 Vict. c. 38 an appeal may, by order

LORD COLERIDGE.

in Council, or by special direction of Her Majesty under her sign manual, be heard by not less than three members of the Judicial Committee. 14 and 15 Victoria provides that no appeal shall be heard unless three members of the Judicial Committee, exclusive of the Lord President of the Council, are present: Under 7 and 8 Vict. c. 69 Her Majesty may, by general order in Council published in the "London Gazette," within one calendar month from the making of it, or by special order in Council, provide for the admission of an appeal, although there is no court of error or appeal in the colony from which it is brought. By 34 and 35 Vict. c. 91 Her Majesty was empowered to appoint within twelve months after the passing of the act, by warrant under her sign manual, four additional judges, each being or having been a judge of one of the superior courts at Westminster, or a chief justice of Bengal, Madras, or Bombay, to act as members of the Judicial Committee. Finally, under the appellate jurisdiction acts, 1876 and 1887, provision was made for the ultimate substitution of two additional lords ordinary of appeal for the four paid judges appointed under the Judicial Committee Act, 1871 (34 and 35 Vict. c. 91), and thus for the ultimate fusion of the Judicial Committee and the House of Lords.

Having thus sketched the history of the Privy Council as a court of law, and the statutory development of the Judicial Committee, we are now in a position to consider its jurisdiction more minutely. The cases which the Privy Council decides are practically divisible into four classes: I. Petitions for the prolongation of letters patent for inventions; II. Appeals from the ecclesiastical courts; III. Colonial and Indian appeals; and IV. *References* by the Crown on the advice of a responsible minister. We may deal shortly with these in turn: —

I. Prior to 1835 the term of letters patent (fourteen years) could not be extended except by special act of Parliament. The frequency, however, with which application was made to the Legislature for statutory assistance, suggested the propriety of framing some general measure providing for the extension of letters patent; and accordingly Lord Brougham's act (5 and 6 Will. IV., c. 83, s. 3) enabled the Judicial Committee, after due inquiry, to report to Her Majesty in favor of a prolongation not exceeding seven years. A later statute (6 and 7 Vict., c. 69, s. 2), empowered the Judicial Committee to advise an extension for a period not exceeding fourteen years, where it was shown that the patentee had been unable to obtain a due remuneration for the expense and labor in perfecting his invention during the original term, and that a grant of seven years would not suffice for his reimbursement.

II. The Privy Council is the ultimate Court of Appeal from the ecclesiastical courts, such as the Archdeacon's Court and the Court of Arches. As we shall describe the ecclesiastical courts in a separate paper, any further notice of them may be waived for the present.

III. By far the most important of the functions of the Privy Council is its jurisdiction in colonial and Indian appeals. This jurisdiction is practically of a twofold character. The letters patent, royal instructions, local or imperial acts, and orders in Council, under which courts of law are established in the British possessions and dependencies abroad, frequently grant to litigants *a right* of appeal to the Privy Council in certain cases and under certain specified conditions. Thus it is sometimes provided that an appeal may be taken from any judgment affecting a sum in excess of a claim to property or civil right amounting to £500 in value, if leave to appeal is asked within fourteen days from the date of the judgment appealed against, and security, fixed by the court below, is found within three months of the petition for leave to appeal. Apart altogether, however, from any en-

abling charter or statutory rights, the Queen in Council — i.e., for this purpose the Privy Council — may give *special leave to appeal* (a) in civil cases of substantial, general, or constitutional importance, and (b) in criminal cases where it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice, substantial and grave injustice has been done to the appellant. Such leave may be granted even although the constitution of the possession or dependency where the case is tried contains no provision whatever for any appeal being brought. A few instances of this special leave jurisdiction may be of interest. The High Court of Judicature for the Northwest Provinces of India ordered an infant to be taken from the custody of her mother, a Mohammedan, on the grounds that the minor's deceased father had been a professed Christian, and that the mother, who (as the Court held) was living in adultery, was inducing her daughter to adopt the Mohammedan faith and habits (*re* Skinner, 1870 L. R. 3 P. C. 451). Again, in The Speaker of the Legislative Assembly of Victoria *v.* Glass, (1871 L. R. 3, P. C. 561), a question was raised involving the right of the Legislature of Victoria to commit for contempt and breach of the privilege of that assembly under *the general warrant* of the speaker. Lastly, in Neo *v.* Neo (1873 L. R. 5 P. C. 89), the Supreme Court of the Straits Settlements refused leave to appeal to the Queen in Council, on the ground that it did not possess the power to grant it. In each of these cases special leave was given. On the other hand, such leave was refused in Prince *v.* Gagnon (1883, L. R. 8 App. Cas. 102), in which only a sum of about £1000 was involved, and no grave point of law or of public interest carrying with it any after consequences depended on the decision, and in *ex parte* Kensington (8 Jurisp. N. S. 1111), where a claim was resisted, not on its merits, but on the ground of a mere formal defect of procedure on the part of claimant. These were all civil cases. Criminal cases stand on a somewhat different footing. It was at one time (Reg. *v.* Eduljee Byramjee, 276) said that "no appeal lies in cases of felony to the Queen in Council from any of the dominions of the Crown of Great Britain which are governed by the law of England." This doctrine may now be considered as overruled. But the Privy Council is by no means ready to give special leave in criminal cases lightly. The circumstances under which it will entertain criminal appeals are well stated by Sir J. T. Coleridge in The Attorney-General for New South Wales *v.* Bertrand (1867 L. R. 1 P. C. at p. 530): "Any application to be allowed to appeal in a criminal case

SIR GEORGE JESSEL.

comes to this Committee laboring under a great preliminary difficulty — a difficulty not always overcome by the mere suggestion of hardship in the circumstances of the case. When the suggestions, if true, raise questions of great and general importance and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted and diverted into a new course which might create a precedent for the future, and also where there is no other means of preventing these consequences, then it will be proper for this Committee to entertain an appeal if referred to it for its decision." Now let us illustrate the application of this principle on both sides. A solicitor of the Supreme Court of British Honduras was convicted of perjury upon a most improper and unfair charge by the Chief-Justice of the colony, and was sentenced to six months' imprisonment, which he underwent.[1]

He was thereafter struck off the rolls of the Court in respect of the said conviction. The solicitor obtained special leave to appeal to the extent of showing that the conviction was so improperly obtained that it ought not to be conclusive for the purpose of striking his name off the rolls (*re* A. M. Dillet, 1887, 12 App. Cas. 459). Again, in the Falkland Islands Co. *v.* Reg. the decision of the colonial court — a summary conviction for penalties for killing animals *feræ naturæ* — involved the right of the Falkland Islands Co. to hunt and take wild cattle upon grazing stations and the land attached thereto. The ordinance under which the conviction was made granted no appeal. The Judicial Committee advised Her Majesty to grant an appeal in analogy to proceedings by *certiorari* in England, on the understanding that the question of title and right would appear on the face of the record which was ordered to be brought up. On the other hand, in the following cases the Privy Council refused to entertain, or dismissed, an appeal. In Levien *v.* Reg. (1867 L. R. 1 P. C. 536) special leave to appeal from a conviction for libel by a colonial court having been given, the prisoner subsequently obtained a free pardon. The Judicial Committee thereupon declined to enter upon the merits of the case, or to pronounce an opinion upon the legal objections to the conviction, the prisoner having already obtained all the substantial, if not the technical, benefit which could be conferred by a successful appeal. Riel's case (1885 L. R. 10 App. Cas. 675) is also in point. Louis Riel was tried before a Canadian magistrate and a jury of six for high treason, and sentenced to death. The sentence was confirmed by the Court of Queen's Bench in Manitoba. The prisoner then applied for special leave to appeal to the Privy Council, on the grounds that the stipendiary magistrate had no jurisdiction, and that even if he had there were irregularities in the proceedings which vitiated the trial; e.g. no previous inquest, no indictment preferred by a grand jury, and that no notes of the evidence had been taken as required by the statute. These points had been fully considered by the Court of Queen's Bench, and a defense of insanity set up for the prisoner at the trial had been rejected by the jury. The petition was dismissed.

Deeming's case (App. Cas. 1892, p. 422) is the last one that we will refer to in this connection. Deeming was convicted and sentenced to death at Melbourne on May 2, 1892, for the murder of Emily Mather at Windsor. An application was made on his

[1] The Judicial Committee have no jurisdiction to entertain an appeal from orders by a court of record in the colonies inflicting fines for contempt (Rainy *v.* The Justices of Sierra Leone, 8 Mod. P. C. 4), if it appears, upon the face of the order, that the party has committed a contempt, that he has been duly summoned, and that the punishment awarded was of an appropriate kind. The law bearing upon this point is rather obscure, but this note appears accurately to express the *ratio decidendi* of the following cases: Smith *v.* Justices of Sierra Leone, 3 Mod. P. C. 361; *re* Stewart, L. R. 2 P. C. 88; *re* Wallace, L. R. 1 P. C. 283; *re* Macdermott ib. 260; *re* Pollard L. R. 2 P. C. 106, and see Australian case, Reg. *v.* Morrison, 3 V. R. L. 3.

behalf to the Judicial Committee for special leave to appeal against the conviction. In substance it was of a two-fold character. First, it was alleged that certain affidavits were on their way from this country to Australia, which might convince the colonial authorities that Deeming was insane, and so induce them to advise Her Majesty to exercise her prerogative of mercy. Then it was, rather by implication than otherwise, suggested that on the evidence before the colonial court Deeming was improperly convicted. The application was refused. In giving the decision of the Judicial Committee, Lord Halsbury, then Lord Chancellor, pointed out that the first ground on which the application was based was not one with which the Privy Council could have any concern (but was matter for the consideration of the executive); while, in regard to the second, the Privy Council were merely being invited to review the verdict of the jury on question of fact. Deeming was therefore executed with the approval of the whole civilized world.

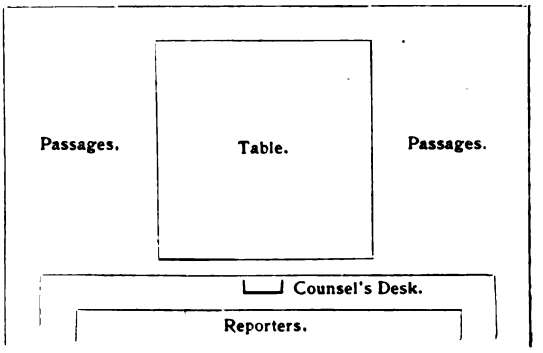
LORD BRAMWELL.

IV. In addition to these jurisdictions, the Privy Council has authority, as we have seen, to consider *any other matters* referred to it by the Crown. The most recent instance of the exercise of this power is the case of Mr. Yelverton, the ex-chief-justice of the Bahamas. Mr. Roger Dawson Yelverton, barrister at law, was appointed chief-justice of the Bahama Islands during the lifetime of the late Conservative government. He sailed for the "Land of the Pink Pearl," and entered upon his judicial duties. On one occasion a colonist who had been a litigant in the Supreme Court sent him a present of pineapples. The chief-justice returned the gift, and made some observations on the subject from the bench, in the course of which he said that he had "to sustain the rectitude" of the resident magistrates. Mr. Moseley, the editor of a local paper, "The Nassau Guardian," published in his columns a letter from a correspondent, in which Mr. Yelverton's conduct was ironically compared with that of Chief-Justice Gascoigne, who taught Prince Hal, in the reign of Henry IV., that the law was above the Crown, and sarcastic comments were made upon the pineapple incident and on Mr. Yelverton's fitness for his post. Mr. Yelverton summoned Mr. Moseley to his chambers, and demanded the name of the writer and the delivering-up of the offending manuscript. Mr. Moseley refused compliance with the demand. Thereupon he received notice to appear before the chief-justice, and was promptly committed for contempt. The Governor, Sir Ambrose Shea, released him; and the legal question raised by this unfortunate conflict, viz., whether the contempt of court alleged to have been com-

mitted was a crime which the Governor had power to pardon, was referred to the Judicial Committee by Her Majesty on the advice of the Colonial Secretary, and answered in the affirmative. A second reference (on the question whether Mr. Yelverton ought to be removed from his office) arose from the Bahamas case, and was heard late in 1893 before Lords Herschell, Watson, Bowen, Hobhouse, Shand, Coleridge, Morris, Sir Richard Couch, and the Earl of Jersey, who, although a layman, had been a colonial governor, and was therefore added to the Committee. But any formal decision was avoided by Mr. Yelverton's resignation. Another case (a similar kind) came before the Privy Council in 1891. Mr. Henry Frederick Gibbons, barrister at law, had been appointed judge of the Eastern District Court of Jamaica in November, 1881. He was transferred to the Northern District in January, 1882, and to the Southern District in November, 1883. On 20th of September, 1884, Mr. Gibbons had an altercation and fracas in the precincts of the court-house at Mandeville with a solicitor named Daly Lewis. The governor, Sir Henry Norman, called upon him for an explanation, and ultimately suspended him from office on the advice of the Privy Council of Jamaica. Thereupon Mr. Gibbons returned to England, and demanded an investigation into his conduct. Lord Derby, then Secretary of State for the Colonies, directed Sir Henry Norman to appoint a committee to inquire and report; and Sir Henry Norman appointed the chief-justice (Sir Adam Gib Ellis), Mr. Justice Curran, and another gentleman to act as commissioners. Mr. Gibbons was present during the inquiry. In due time the report of the commissioners was made and sent to England, and on 20th April, 1885, the Colonial Secretary required Mr. Gibbons to resign as an alternative to being dismissed. Mr. Gibbons resigned and returned to England. Shortly afterwards he raised an action against Sir Henry Norman, which was referred by consent to the arbitrament of Lord Herschell. After a careful inquiry Lord Herschell decided in favor of the Governor, on the ground that his act had been ratified by the Secretary of State. His lordship, however, also found that Mr. Daly Lewis, and not Mr. Gibbons, was to blame for the fracas; and an effort was, therefore, subsequently made to induce the Privy Council to reopen the whole question of the circumstances under which Mr. Gibbons was dismissed. This their lordships refused to do, (1) because the dismissal was an administrative act which could not be reviewed in any court of law, and (2) because his letter of resignation put Mr. Gibbons out of court. Lord Watson, however, observed that the matter could have been dealt with, if it had been referred to the Privy Council by the Crown.

The Privy Council sits, as often as is necessary to overtake its list of causes, every legal term. Its sittings are held in the council room at the Privy Council office in Downing Street. The councillors present do not wear wigs or robes, but sit on either side of an oblong table, separated from the rest of the room by a wooden barrier, in the middle of which is placed a desk (like that from which an Episcopal clergyman reads "the lessons"), and from behind this counsel address the court. The subjoined diagram may bring out the different points more clearly.

PRIVY COUNCIL ROOM.



At the conclusion of the argument of an appeal, counsel are directed to withdraw, a practice doubtless due to the fact that the Judicial Committee is a board, and a pretty numerous one, whose deliberations can best be carried on in private, and the committee either make up their minds on the spot or decide to postpone judgment. The decision of the Judicial Committee is delivered by one of their number only, so that no divergencies of opinion are disclosed. The origin of this rule probably is that in strict theory the Judicial Committee *advise* her Majesty as to the course which should be taken, and do not give a formal judgment like other courts of law. But, as Mr. Westlake has well pointed out, this mode of procedure detracts from the authority of Privy Council decisions without adding anything to the dignity of the body giving them. In one of Mr. Gladstone's Home Rule bills a position was assigned to the Privy Council not unlike that now occupied by the Supreme Court of the United States. But as neither of these measures has any immediate (some would add, or remote) prospect of passing into law, we need not further consider them here.

LORD ESHER.

The history of the English Common Law and Equity Courts stretches so far back into the past that it would be difficult, if not impossible, to give any adequate account of their judges and barristers. But the comparatively modern origin of the Judicial Committee to a large extent obviates this difficulty. Amongst the leading members of the Judicial Committee a foremost place must be assigned to Henry Lord Brougham. Born in Edinburgh on 19th September, 1778, and educated at the High School, Brougham joined the Scotch bar in 1800. Except in criminal cases, however, he did not acquire a large practice north of the Tweed, his reputation for eccentricity having apparently repelled the cautious Scots from entrusting him with their civil suits. But he was one of the brilliant band of literary lawyers (Jeffrey and Harry Cockburn were amongst the others) who raised the "Edinburgh Review" to the highest pitch of journalistic fame. In 1807 he was admitted to the English bar, and soon became the leading advocate for the defence in the far too numerous libel prosecutions then instituted by the Crown. He also attained the distinction of being the adviser of Caroline of Brunswick, then Princess of Wales, and when she became Queen, defended her in conjunction with Denman during those famous trials which made them both the most popular lawyers of the age. It was as counsel for the Queen that Brougham uttered the memorable passage which has bulked so largely in the subsequent history of forensic casuistry: "An advocate, by the

sacred duty which he owes his client, knows in the discharge of that office but one person in the world — that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties, and he must not regard the alarm, the suffering, the torment, the destruction he may bring on any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences if his fate it should unhappily be to involve his country in confusion for his client's protection." Lord Brougham subsequently attempted to explain this wholly indefensible language. "The real truth is," he said, "that the statement was anything rather than a deliberate and well-considered opinion. It *was* a menace, and it was addressed chiefly to George IV., but also to wiser men such as Castlereagh and Wellington. I was prepared, *in case of necessity*, that is, in case the bill (for the Queen's divorce) passed the Lords, to do two things: first to resist it in the Commons with the country at my back, but next, if need be, to dispute the King's title, to show he had forfeited the crown by marrying a Catholic, in the words of the succession act, *as if he were naturally dead*." One might be disposed to regard Brougham's language as simply an instance of the unbridled license which led him to denounce Peel — whose shoe's latchet he was unworthy to unloose — as "the mean, base, fawning parasite" of Wellington. But he afterwards expounded the advocate's duty, as he conceived it, in not wholly dissimilar terms; and — to the credit of the English bar be it said — the exposition was promptly condemned by Chief-Justice Cockburn, who declared that a barrister must exercise his art with the weapons of a soldier and not with the poisoned dagger of an assassin. Brougham became Lord Chancellor in 1830, and played an important part in the judicial work of the Privy Council, and in the judicial and legislative work of the House of Lords, till 1860. He died on 7th May, 1868. During his chancellorship his utmost energies were applied to securing the enactment of the Reform Bill, and to the support of other ministerial measures, and to the reform of the Court of Chancery, from which he swept away a great number of sinecure places entailing enormous expense on suitors. He took an active part in the creation of the Judicial Committee, and was the author of the Act of 1835, by which the prolongation of letters-patent was brought within its jurisdiction. Perhaps the judgment of Lord Brougham's that has excited most discussion was that in Waring *v.* Waring, where he held that even the least degree of mental disease would destroy testamentary capacity. This doctrine was, however, overthrown by the decision of Chief-Justice Cockburn in Banks *v.* Goodfellow. Lord Brougham was not a great lawyer or judge in the sense in which we apply the term to Cairns or Jessel. But he had one of the keenest and brightest intellects and one of the best stored minds ever possessed by man.

Another judge who has taken a prominent part in Privy Council appeals is Lord Penzance (Sir J. P. Wilde). Born in 1816, and educated at Winchester School and Trinity College, Cambridge, Wilde was called to the bar of Lincoln's Inn in 1839, and joined the Northern Circuit. In 1840 he was appointed junior counsel to the excise and customs, and soon acquired a large mercantile and admiralty practice. He took "silk" in 1855, was appointed Baron of the Exchequer in 1860, succeeded Sir Cresswell Cresswell in the Court of Probate and Admiralty in 1863, and was raised to the House of Lords with the title of Lord Penzance in 1869. We shall have to refer to some of his judgments in dealing with the ecclesiastical courts, and the Probate and

Admiralty Courts. In the meantime it may suffice to say that, like his brother, Lord Chancellor Truro, he has been both a careful administrator and an able expounder of legal principles. At the present day, perhaps the most striking figure in the Privy Council (or in the House of Lords) is Lord Watson. For many years at the Scotch bar, to which he belongs, for his connection with the English bar is titular, Mr. Watson, as he then was, proved a somewhat indifferent success. As Lord Advocate under the Conservative government he prosecuted the poisoner Chantrelle, and also the City of Glasgow Bank directors, with ability. On the death of Lord Gordon, he was promoted in 1878 to the House of Lords as a lord of appeal in ordinary, and since that date he has acquired an almost unique position both in that tribunal and in the Judicial Committee, in whose deliberations he usually takes part. Not only in Scotch, but in English and Irish appeals to the House of Lords, and in Indian and colonial appeals and patent petitions to the Privy Council, Lord Watson has displayed a versatility of intellect and a power of mastering and expounding the principles and the practice of legal systems, in which by the very necessity of the thing he was absolutely unlearned at the date of his promotion to the bench of the supreme tribunal. To say that he is the first Scotch or Irish law lord who has been a notable figure in the House of Lords or Privy Council is the truth, but far from the whole truth. Lord Watson has been for some years, and is still the dominant spirit in both tribunals, and he is certainly the judge with whom counsel fear most to grapple. A position so commanding has not, of course, been left unassailed by hostile critics; and Scottish legal fledglings, peeping down over the rim

DOWNING STREET, LONDON (IN WHICH THE PRIVY COUNCIL IS SITUATED).

of their little nests at the larger world beneath, are wont to chirrup surprise at the respect paid to their countryman in England in spite of his original unfamiliarity with English practice and his Doric accent. But Lord Watson's record is in the Law Reports; English lawyers know its volume and its worth, and he can afford to disregard the carpings of critics whose brains he could "grind to powder with a lady's fan."

LEX.

THE LAW OF THE LAND.

IX.

THE SCIENTER.

BY WM. ARCH. McCLEAN.

WE dare to believe we know somewhat of the nature and character of the scienter. Our presumption owes its existence to a memory. The Professor was lecturing on that portion of Chitty's Pleading in which the scienter is explained. It had been gone over carefully, yet a certain student — do not ask us who, for we will absolutely refuse to be more personal — had not heard, by reason of some inattention, and was surprised with a request to tell his conception of the scienter. Desiring to be obliging, he volunteered that "it was a knowing." This was met by the Professor with: "A knowing — quite likely — very good — but of what?" "Why, it was just a knowing," and the class audibly smiled at the knowledge. Then and there the scienter was clearly and forcibly explained in a way that the certain student was not likely to forget. The owners of domestic animals, such as dogs, horses, and oxen are not liable for injuries committed by them unless it can be shown that they had notice — the scienter — of the animals' mischievous propensity to do injury.

The scienter is a question for the jury. The scienter does not merely consist in the fact that an injury has been done by a domestic animal, but that the owner *knew* of a mischievous propensity of the animal to do injury, and knowing this, kept the animal at his risk, to be responsible for injuries committed by it. The law gives the animal a fair chance to behave. The animal may have a pedigree it is proud of, may have the blue blood of an illustrious ancestry, may have always conducted itself in a dignified and peaceful way, may have never met an occasion to have aroused the mischievous propensity. At last, like mankind, the temptation presents itself, and the animal breaks over the traces. It is not the first fall that causes the trouble, but the subsequent steps downward with the owner's knowledge.

A certain respectable dog entered the lot of an old lady, probably an Irish descendant of Mother Goose, for her name was Mulherrin, and killed her goose. It could not have been the goose that laid the golden eggs, for the judgment given the old lady for her goose was four dollars. There was no evidence in the case against the dog, his respectability was not attacked, no proof submitted of his mischievous propensity to do harm, nor that the owner had any notice thereof; hence the judgment was reversed, and the old lady had no damages to console her for the loss of her goose.

Of all domestic animals the dog seems to

have had the greatest trouble to establish his magna charta of rights. Blackstone says that dogs, being of no intrinsic value, but being kept only through the whim or caprice of their owners, cannot be the subject of larceny. Under George III. the dog's legal status was advanced, and to steal a dog was made subject to penal punishment by fine or imprisonment, and for the second offense, in addition the dog-stealer was to be whipped. Yet it has been held that dogs were entitled to less legal regard and protection than more harmless and useful domestic animals.

Continuing to grow in favor in the eyes of the law, courts have held that the same liberty did not appertain to the horse as to the dog, for dogs are a domestic animal, which everybody in every place owns, and keeps, and suffers to go at large. The custom is almost as old as time, for Tobit had his dog. The universality of this custom has made the practice lawful, unless where it is interdicted by statute.

Legislatures have at times required a uniform good moral character of dogs. A local statute of Pennsylvania at one time directed that dogs should be chained or housed at night. Where dogs killed sheep, it was held that under this statute it was unnecessary to prove that the dogs were addicted to killing sheep and that their owners had knowledge of this viciousness. The law dispensed with the scienter. The fact that the dogs were abroad at night, not chained or housed, was sufficient to make their owners liable for the damages done.

Generally it is now held that dogs belong to the class of domestic animals which are not ordinarily dangerous, but when they become mischievous, and knowledge of this is brought home to the owner, he is liable in damages for the misdemeanors of his dog. It has been declared that the scienter is not the negligent keeping of the dog, but the keeping of him with knowledge of his vicious disposition. The circumstances may be such that the scienter virtually proves itself. If the dog has been muzzled and is then let loose without a muzzle, or if a dog is chained in the daytime and let loose at night, these facts of themselves can establish the scienter.

There have been circumstances in which it has been held not only that no scienter need be proven, but that the public is entitled to notice from the owner of a domestic animal likely to be vicious. In an English case it was said: "In case of a dangerous animal likely to do mischief to another in a private close, it should seem that public notice ought to be given, although no one has a right to enter. If there be a foot-path in a close and a dangerous animal is put in there, the owner must give notice or he will be liable to an action for any injury committed." It was decided that a bull that broke into a neighboring field and gored a horse till he died, created a liability to pay for the horse by the owner of the bull, without regard to his being aware of any vicious propensity in the bull or otherwise; the ground of the decision being that the animal was naturally inclined to roam, and often guilty of mischief when going off on one of his larks, therefore it was the duty of the owner to keep him on his own land. The foregoing forces the conclusion that when you see a sign in a field, "Beware of the Bull," and you enter, that it will make no difference whose ox is gored, there will be no damages.

A plaintiff suffered his horse to go at large in the streets of a city, and was compelled to pay damages for injury done by the horse kicking a child, without it being proved or averred that the owner knew the horse was vicious and had a habit of kicking. The horse might have been of good repute, but there was danger to let him run loose in the streets, from the nature and disposition of the horse to gambol, plunge, and kick up his heels.

It is not necessary that the injury results from a *mischievous* or *vicious* disposition of

which the owner has knowledge. The propensity from which the injury comes need not be the result of a wicked or perverted character, a ferocious nature. It is only necessary to show that the propensity brings to pass an injury, and that such a disposition to do that which proved to be harm is known to the owner. A court aptly illustrates this point by saying that one might have a domesticated bear that manifested its affection by hugging until ribs be broken. The owner might be able to prove that the habit of embracing persons did not proceed from the savage nature of the bear, but under the influence of civilization from a cultivated affection. But this proof would not avail the owner in a suit by a party embraced. Such a propensity would be held to be mischievous, because hurtful to those who were the object of the bear's affection.

Likewise it will not avail to say that your dog bites people only in fun, that his snapping and missing your leg by a hair's breadth is only out of the exuberance of his affection for you, to be playful and good natured. This was tried in a case. The defendant contended that although several persons had been bitten by the dog, of which he had information, yet it appeared in every instance the biting occurred while the dog was in a playful mood, and consequently that damages could not be recovered where it was shown that the dog had a propensity to bite only in play. To recover it must appear that the dog was in the habit of biting mankind while in an angry mood, actuated by a ferocious spirit. The court refused to affirm such a position to be the law, remarking, an action can be maintained against the owner by a party injured upon evidence that the dog, with the knowledge of the owner, had a mischievous propensity to bite mankind, whether in anger or not. In either case the persons bitten would suffer injury, a mischievous propensity being a propensity from which injury is the natural result. In this case the plaintiff was bitten in the hand, the hand broke out, the man became nervous, lost sleep, suffered pain, employed a physician, paid for medicines, lost two or three weeks' wages, and was out of pocket in money, about twenty-five dollars. The verdict of the jury was for three hundred dollars, the court directing that the damages could not be measured by mere expenditure of money to cure from effect of the bite. Compensation should be made for the pain and the anxiety of mind which must necessarily follow the bite of a dog. In a case where a small girl was badly bitten, a verdict of $1,450 damages was sustained. The amount of the damages vary greatly in the many cases of injury from bite of dog, from several times the expenses of a trip to Paris, to the Pasteur Hospital, down to passage one way and steerage back.

There is a case on record of a good bull — a probable freak of nature. He was gentle and quiet, a very respectable bull. However, he lost all sense of propriety and decorum at the sight of anything red, of which failing his owner admitted he was aware. The plaintiff came walking along the street, wearing a red handkerchief. He had a right to be walking in the street and to wear all the red handkerchiefs in Christendom in defiance of all the bulls, if he so desired. The gentle, quiet bull, that had never been known to gore any person, could not submit to such assertion of a citizen's right, and he attacked and gored the plaintiff. The defense was that the red handkerchief caused the trouble. The plaintiff recovered, for while the bull had no hostile feeling against the man he injured and no disposition to gore mankind, yet, because of his mischievous propensity to rush at a red object, of which the owner knew, it was held that when he caused injury to the plaintiff through that propensity his owner should pay the damages.

In a Vermont case it appeared that Mrs. Oakes was driving cows home from pasture

when the ram of Spaulding attacked and injured her. It was shown that the ram had a ram-like propensity to butt mankind, and that the defendant knew it; but it did not appear whether the previous buttings of the ram proceeded from an ugly disposition or out of the abundance of playful spirit. Yet it was held that the defendant was liable. It would not cure the hurt nor assuage the pain of the woman to be told that the ram, when he butted her, was only in one of his accustomed sportive moods. It might have been fun for the ram, but it was hurtful to Mrs. Oakes. It was a mischievous propensity, whether proceeding from ugliness of temper or good nature, which, if known to the owner of the ram, made him liable for damages resulting from such propensity.

The report of the last case throws no light on the nature of the injuries sustained. The damages recovered amounted to $1,500. The question that presented itself after reading it was how were the damages measured? It would certainly make a considerable difference as to the direction toward which the ram projected itself — front, side, or rear. A forward somersault should be less expensive than one backwards, and a double one should bring just twice the price of a single one. The angle of curvatures of the horns of that particular ram might have had much to do with the measure of damages. The character of the butting would be an important element. A hop, skip and jump, throwing one across a quarter-acre lot, ought to have brought more money than a steady pushing across a field. An unexpected delivery ought to have brought a better sum than taking one on the fly. The numerical quantity of the buttings might have come at so much a hit. An itemized statement of the $1,500 damages would certainly have been interesting.

SOME PECULIARITIES OF FRENCH LEGAL PROCEDURE.

THE trial of the assassin of President Carnot has been made by cable despatches as widely known to the American public as that of Guiteau was to Europeans; and in each case the differing and somewhat antagonistic modes of procedure produced surprise and comment. The first striking peculiarity of a French prosecution to an American is its procedure upon the initial ideas that an accused must prove his innocence, and is compelled to become a witness in his own case against himself. At the time of Guiteau's trial Parisian journalists expressed surprise at the impartial spirit of the Federal prosecution of a dastard who had assassinated the head of a nation. They also could not understand why, as in France, prosecutions were not directly impressed throughout by the power and majesty of the Government. For in France actions, whether civil or criminal, must have in attendance besides judges and procureurs or private advocates some official who represents directly the Minister of Justice and has certain defined responsibilities of interference with the trials. The *Dictionnaire d'Administration*, article *Ministère public*, thus recites: "The French Government maintains a constant and regular supervision over the administration of justice by means of the *Ministère public* — a state department, members of which sit in every Court throughout France to represent there the cause of public order and the interests of society in general." As regards criminal prosecutions these representative members differ little

from our own district-attorneys. And there is a faint resemblance between the Ministère Public of France and the Solicitor to the Treasury in England. But that those members of the state department have relation to private civil suits is little understood in either England or this country. Yet in French civil cases they side with plaintiff or defendant as they see fit; being in such relation called *partie principale*. If they make general comment merely on matters before the court, they are called *partie jointe*. The Minister of Justice may direct these members and is entitled to give them instructions on every point connected with their duties. And not alone in civil suits affecting Governmental interests, as may the Federal Attorney-General, but in points of private differences between citizen plaintiff and citizen defendant. These members hold office at the will of the President on advice of the Minister of Justice. There is thus allowed a direct pressure of Government in all legal differences between private parties or corporate bodies — pressure, too, in addition to what judges may bring to bear.

Civil and criminal courts are various in France as in the United States; with particular names, not necessary to mention; but in matters of *nisi prius* jurisdiction (or as the French statutes say, "courts of first instance"), as well as of appeal, those courts assimilate in jurisdiction, pleas and procedures much in the main as do English or American courts. There is a marked, interesting, and doubtless salutary peculiarity of the court of the *juge de paix* (our justice of the peace) who has exclusive jurisdiction of hundred-franc suits, and of double that sum with concurrent right of appeal in cases involving that amount. But he is practically an arbitrator between these minor suitors in that he is bound by law to try and effect in a friendly way — and gratis — a reconciliation between parties wishing "to go to law." And indeed every French plaintiff, upon bringing suit, must set forth "failure of reconciliation." The most recent statistics show that in one year these *juges de paix* (and there are 30,000 of them over the Republic) arbitrated two and a quarter million civil cases, out of which one-third were reconciliations.

These justices are removable at will, but all other judges in France can only be removed for misconduct. The justices in the provinces have annual salaries ranging — calculated in our currency — from $350 to $1000. In Paris they draw $1500. But then all judicial salaries in France are very low. The highest known is $5000; but $2000 is an average. The president of the Court of Cassation, the head of the judiciary — the only court having sovereign authority over the whole of France — enjoys the largest sum of salary.

Law is more of a luxury however in that republic than in any other country — not excepting Turkey, "the land of blood-money." Inasmuch as public fees, are vexatiously high, and the charges of advocates enormous, because the "Order of Advocates," that regulates costs and fees is a wonderful monopoly, and the pecuniary interests of the French Bar are sedulously looked after by a Sub-Committee of Discipline. A witty Maitre (or Q. C as one would say in London) once said to a suitor: "Monsieur, there are three essentials to our success in your case, time, resignation and money." He might have added. Time is the lever, resignation the fulcrum, and money the lifting power. But all this would not show any especial peculiarity of French systems over others elsewhere. However, the various states of the Union do not extort governmental fees or revenue from suitors as are extorted in Paris or London; while at the same time their statutes duly regard also expenditure of "time and resignation." Hence it is no marvel that when Hamlet is performed at the French capital, that part of the Dane's soliloquy which refers to "the law's delay" is always especially applauded by the parquette.

If the first view of an English barrister begets in the American spectator a thought of a perruquier, the first sight of a French advocate brings to his mind a suggestion of a baker or a male cook; for instead of a horsehair wig, that advocate wears a cap in shape much like the one worn by the priest at mass. The advocate has the English barristerial gown, but he wears it with much more grace than his British brother. For there never yet was a Q. C. who did not, while excited by oratory, look like anything else to an unprejudiced spectator but a guy.

The president of the Court of Assize, which takes jurisdiction of indictments (and a Grand Jury system is put aside by usurpation of the official pleader of the original charge), generally acts in a threefold capacity: he draws the jury instead of a clerk from the box, he swears the jury, and he substantially leads the prosecution by examining accused and witnesses — for the procureur or the advocate defending may be both said to practically cross-examine on matters that the president judge has first brought out. He draws the names of 36 jurymen; each side may peremptorily challenge twelve, and an accused has to take the chances of uninvestigated bias among the twelve who get finally selected. And this is the odd and rather prolix oath each juror takes as the president recites it: "You swear before God and man to examine with the most scrupulous attention into the charges that will be brought against—" (giving full name of the prisoner, who is seated between two gendarmes capped and in uniform in the dock, and not barbarized as in England by having to stand); "not to betray the interests of the prisoner, nor those of society which accuses him; not to communicate with him until after your verdict; to listen neither to hatred or malice, fear nor affection" (N.B. the American formula of "hope of reward" is not used), "and to make your decision after duly weighing the charges and the defense according to your conscience and inmost conviction with the impartiality and firmness becoming to an honest man of independent mind." This oath-taking will have been preceded by placing on the records the name, age, and occupation of the accused.

After the jury take seats, the president, who is generally a champion mental analyst, calls up the prisoner, and proceeds not to directly examine, but to cross-examine him — and interjecting copiously hearsay testimony and suggestion — with the intention of making him either admit his guilt or so contradict himself as to imply it. Of course a wordy duel results between judge and accused, with sometimes shrewdness, cunning and clever perjury combatting experienced skill in questioning and in laying rhetorical traps or puzzles, the whole procedure being a dilution of the rack or wheel of the middle ages. There can be no objections or exceptions, but there are often courteous interruptive suggestions from counsel. The judge is paramount; responsible only to the Court of Criminal Appeal, to which is sent in writing all that the trial has evolved, and before which there can be practically a retrial, with the prisoner again re-examined by the appeal judges, guided by the written evidence before them, and counsel *pro or con* may again be heard. The appeal procedure is upon what common law knows as "case", and not under any "bill of exceptions," the Government and not the counsel for accused always making up this appeal case; and it is invariably made up to advantage the Government.

After the prisoner has undergone his torture — the rack being verbal and not mechanically framed with wood and iron; and the cutting weapons being of irony, sarcasm and inuendoes — the trial proceeds pretty much as with English or American courts by examinations of witnesses, with little attention shown to the distinction between original or secondary evidence.

More importance is given in the French

criminal procedure to speeches of advocates; but since 1880 the judge has been precluded from summing up, as is the English phrase, or "charging," as is the American phrase. Prior to 1880 the judge, after preliminarily torturing the prisoner, possessed the opportunity to become tortuous toward any side that he chose for emphasis and animadversion, but usually aiding the procureur. Upon the wall of the court-room are to be read usually these lines:

> Hic pœnæ scelerum ultrices posuere tribunal,
> Sortibus unde tremor, civitas unde salus;

but the eye of the judge would be perhaps fixed upon the three last words as his excuse for his partisanship. The safety of the state before the justice to an accused being their full, free meaning.

Human nature is the same in a French jury room as in a Saxon one, but its members may legally strain their quality of justice and usurp that of mercy by finding "extenuating circumstances" along with a verdict of guilty, which finding takes the place of the merely emotional American suffix to such a verdict of "recommendation to mercy" — the phrase whereby many a Thomas Didymus of a juror compromises with his conscience.

If the American spectator of the average French trial of a criminal looks for any gleam of pity in the eyes of the prosecuting judge, he may possibly recall the sarcastic lines of the poet Nathaniel Parker Willis: —

> "She hooked me kindly, as the fisher hooks the worm,
> Pitying him all the while."

If the conviction be of a capital crime, the cruelty to the accused is maintained by omission to fix the date of execution. This is left to the discretionary fiat of the *Ministre de Justice*. The awful hour may arrive within a few days — as in the case of Cesario the Lyons assassin — or it may not come within weeks. The condemned in his cell is suffering the mental tortures of a Damoclean hanging sword. Each night as he lies on his pallet he whispers to himself, "Will the guillotine cast its shadow on the dawn?" This mental torture is regarded as an excellent part of expiatory punishment. But at last some morning the culprit is awakened suddenly to see beside him priest and prison attendant, and then he becomes alive indeed to the sudden shock. "*Quelle matière, quel dommage!*" once exclaimed a Monsieur de Paris, of the guillotine, to a reporter of the New York "Herald" who by questions seemed to remonstrate against the cruelty of suspense — "is not all this an incident in every life? Was not Monsieur born with a sentence of death upon his head? Monsieur may live to be a centenarian or he may enter Père la Chaise as an infant. Does he know the hour of his death until it dawns?" Even the "extenuating circumstances" carry with them the torture of the galleys. In comparing the (perhaps too lenient in some cases) procedures of American or English criminal jurisprudence with these French procedures, it may be that the French "quality of mercy is strained," while the American quality of mercy "droppeth" too much "like the gentle dew" on the head of a malefactor.

CHARLES O'CONOR.

II.

By Irving Browne.

MR. O'CONOR was a member of the committee appointed to frame the judiciary article in the convention of 1846. I have carefully looked over all that he is reported to have said and done in the convention on this subject,[1] and there is nothing to substantiate the claim which Mr. Bigelow reports that he made to him, but a great deal to the contrary; so much, in fact, that I am inclined to think Mr. Bigelow must have misunderstood him. Mr. O'Conor did not assent to the article which was adopted. On the contrary, he presented a minority report on behalf of himself alone. This, it is true, proposed to vest judicial power in the Supreme Court and certain inferior courts, and to form a court of appeals, but it is evident that he regretted the imminent changes which he found himself unable to withstand. In the course of his remarks he observed: —

"But conceiving, as he did, that this report destroys nearly all the good features in our existing and past judicial systems, and furnished nothing that can be deemed an equivalent," he deemed it his duty to state his objections. "He thought it would be impossible to do the business of the state under such a system, and that what was done would be badly done." He spoke of the proposed Court of Appeals as "a kind of mongrel court between the two we have had, without the merits of either." "The courts we had prior to 1821 were perfectly unexceptionable." He spoke of the old Court of Errors as "admirably framed," "emphatically the court of the people," "the best court in the state," "hourly infusing new blood into the law." He said "the sad mistake was in abolishing" "that court, the Supreme Court and the Chancellor's Court, and in substituting for the three this single eight-judge court." He strongly insisted on a single supreme court for the whole state. He said that "in the Constitution of 1821, and its predecessor, was embodied the best model for a judicial system." "The Court of Chancery, or a separate tribunal, had been unceremoniously brushed away, and apparently with much personal satisfaction to members here," and he paid a glowing tribute to the chancellor. He favored an ultimate court of more than eight judges,[1] and contended that some of them ought to be laymen. "*He was one of the enemies of this new judicial system*, because he did not believe in its capacity." He uniformly voted in the convention against the codifiers. He voted against the judiciary article, and finally he declared that "he thought the convention had altogether failed to present to the people a Constitution which would meet the exigencies of the times, or in any degree remedy the difficulties in this respect, which led to the calling of this convention — that it did not in any moderate degree meet his approval, and was a most signal failure. It would therefore be his duty to vote against the Constitution, and to induce his fellow-citizens to take the same course when they came to vote on it."

To be perfectly fair to Mr. O'Conor in this matter, I subjoin the continuation of his remarks referred to in Mr. Field's letter, which will show the extent of his efforts at law reform, and also serve as an example of his forcible and excellent style: —

"Although it had been his fortune to practice for a good many years in the rigid and techni-

[1] Constitutional Debates, Atlas ed., Albany, 1846.

[1] He desired sixteen judges, elected by senatorial districts, for four years. Argus Report, p. 541. Among his vagaries he wished to give that court power on motion to determine the venue of suits in the Supreme Court! (Argus Report, p. 641).

cal forms of the common law, and though he did not hesitate to say even here, that he was as capable of fencing with them as his neighbors, and of taking care that his clients should not suffer from their misapplication, yet he had long thought that there was no propriety in the existing distinctions, in the forms of practice and pleading between these two tribunals — that of law and that of equity — and therefore, *with the same view as the committee, that of ultimately blending them together, and forming one consistent, uniform and harmonious method of practice in the administration of justice, he had brought forward, as well as the committee, a system tending to that end.* His method of effecting the result differed from that of the committee in this one important respect — in no part of the article which he had presented had he introduced the phrases courts of law, and courts of equity, jurisdiction in law, or jurisdiction in equity.

"By denying to the distinction a constitutional recognition it was left fully and unquestionably within the power of the Legislature, *should they in their wisdom, on a full examination of the subject, find it proper to blend the system, to do so.* It left the law-making and law-reforming power unembarrassed by any language in the Constitution which might be a barrier to such blending. It also left to them the power of retracing their steps, if, after making the experiment, *it should be found that the project of blending the two systems was impracticable* — was, as some supposed, a dream of visionary enthusiasts in law reform. If, enlightened by the developments of experience, they should find the distinction salutary, they would be free to erect anew this barrier between law and conscience, which nothing but the iron test of mischiefs actually experienced from its abolition could convince him was necessary. It was, in a principal measure, with the view of avoiding the permanent establishment in the Constitution, beyond the reach of legislative power, of these two modes of proceeding, that he had felt himself constrained to write out anew the whole article; otherwise he would probably have confined himself to his right to propose, in committee of the whole, amendments of the article reported by the chairman. In other respects he mainly concurred with the committee. Whilst he concurred most fully in the remarks of the honorable chairman as to the expediency of assimilating the modes of taking testimony in those different classes of cases called cases at law and cases in equity, and especially that the trial by jury should be extended as far as possible, still he had omitted that provision from his system, because he conceived that these minute details belonged to the field of ordinary legislation, or to that of court rules, and not to the Constitution." (Argus Report, p. 375.)

These remarks were made a month and a half after the introduction of the resolution by Mr. White which gave rise to them. It is evident that Mr. O'Conor was a follower and not a leader in these reforms, a modifier, an adapter and a keen critic rather than an originator.

The foregoing will certainly serve to disabuse any New York lawyer of the impression that Mr. O'Conor could ever seriously have claimed for himself the credit of the "authorship" of the great legal reforms of 1846 and 1848. So much for his course in the constitutional convention as to the judiciary article. As to the code of civil procedure adopted in 1848, his spirit is sufficiently indicated by Mr. Field's letter and in his animadversions upon the new system of pleading which it introduced. It is sufficient to add that Mr. David Dudley Field assures me that "Mr. O'Conor did not invent the code reforms, but opposed them with might and main from beginning to end." Of course Mr. Field refers to the code system independent of the judiciary article, in respect to which he has explained Mr. Conor's position in his foregoing letter. The code enacted the substance of the judiciary article as well as the minutiæ of practice. The Hon. Martin I. Townsend, who was a member of the convention of 1867-8, also writes me that "D. D. Field, Michael Hoffman and Arphaxed Loomis reformed our law practice." The venerable Benjamin D. Silliman, at a dinner given him by the Bar of New York and Brooklyn, in 1889, spoke of Mr. Field as "the chief author" of "the change created by the code

of procedure of 1848." This, undoubtedly, is the universal belief in New York, and the unquestionable fact.

This search into ancient history has served to inform me of Mr. O'Conor's views upon another great legal reform of our state, namely, that in respect to the property rights of married women. He opposed it. He made a long and earnest speech about it, very beautiful in point of style. He admired the law as it then was, and declared that "He was no true American who desired to see it changed." He repeated in substance the stock argument that it would be cruel to wives to give them the right to their own property, because it would make their husbands so angry, and thus "tend to impair domestic harmony." "The hammer fell" in the midst of this touching harangue, but by unanimous consent he proceeded, and closed with the following dismal prediction: "From amid the less pure and incorrupt habits and manners as then existing around him, he would look back to the present day with emotions akin to those which affect our minds when contemplating the first family in happy Eden before the tempter came." Up to that time the distinguished speaker had not indulged himself in any practical attempt to realize Eden with a common-law wife; but the reality introduced by the incendiary change must have proved less objectionable than his anticipations indicated, for in 1854 he took unto himself a wife who possessed all the disadvantages brought in by the reformed law. Mr. O'Conor however was with the majority in his views, for the proposition, afterwards effected by legislation, was rejected by the convention by nine majority. One Mr. Simmons, a bachelor lawyer, pronounced it "a strumpet provision." But in small matters Mr. O'Conor was apparently very gallant to women. Thus he was among sixty-one members who voted against forty-seven, in favor of giving the "ladies" a gallery in which they could listen to the debates, under the protection of a doorkeeper. (Atlas Report, p. 67.) It must have been improving to the inmates of that gallery to listen to Mr. O'Conor and Mr. Simmons on their "rights."[1]

It is interesting also to note that Mr. O'Conor advocated giving the defendant's counsel in criminal trials the closing address to the jury. (Atlas Report, p. 1051.)

SLAVERY — THE JACK AND LEMMON CASES.

In his Memorial of Mr. O'Conor, prepared by Mr. Frederick R. Coudert for the Bar Association of the City of New York, he tells how Mr. O'Conor was moved to tears while reciting some fragments of William Sampson's article, "The Irish Emigrant." "He had now lost control of himself," and "tears stood in his eyes," as he recited: "He was born in a land which no longer was his; in the midst of plenty his children ate the bread of poverty; he toiled for a landlord whose face he never saw; he heard there was a great country beyond the sea where" . . . and Mr. O'Conor exclaimed: "Are we not both sons of the Irish Emigrant?" One would suppose that a person of such tender sensibilities, who was "always overcome by pathos," would have had some sympathy with the four millions of black slaves in this country at that time. On the contrary, he always admired, and defended the system of human slavery, and thought its subjects very reprehensible for trying to run away from it. This in an Irishman and a lawyer seems anomalous. It was, however, fortunate for one suitor that there lived one lawyer at the North who entertained such sentiments; otherwise Mrs. Lemmon could not easily have found an advocate to urge the rendi-

[1] Mr. O'Conor's inconsistency was shared by Mr. Russell, who in the amusing debate on a doorkeeper for the ladies' gallery, observed: "In this country, where the sex have higher privileges than in any other upon the face of the earth, and where they are held in higher estimation by men (a feeling which should be universal)," etc.; and then the faithless flatterer voted against giving them their rights in the Constitution!

tion of her slaves, whom she had brought to New York, with such zest and conscientious conviction that those colored persons were standing in their own light when they declined to be remanded to the delights and advantages of the state in which they had been.

Mr. O'Conor first appeared as a champion of slavery in 1835, when he was only thirty-one years old, in the case of the slave Jack (12 Wend. 311; 14 id. 507). It was there held, by the Supreme Court, that where a slave *escapes* from one state into another, and is pursued by his owner, and brought before a magistrate, who, in pursuance of the act of Congress, examines into the matter, and certifies that the slave owes service or labor to the owner, and grants permission to carry him back, the claimant may not be prevented from removing him by a writ *de homine replegiando* sued out under authority of a state law. The Court of Errors unanimously affirmed this, solely on the ground that the plaintiff, having by his pleas admitted his slavery and escape, the defendant was entitled to judgment, declining to pass on the constitutionality of the act of Congress or the State statute. The case is worthy of study as an example of the intricacy and the foolishness of special pleading in the old times, when a question of pleading seemed more important to the courts than the question of a human being's right to his own freedom.

Senator Bishop remarked that if "all the States in the Union are to be permitted to legislate upon this subject," "it will in the end lead indirectly to the abolition of slavery, and that the most fearful consequences in regard to the permanency of our institutions will ensue. I regard this as but the entering wedge to other doctrines which are designed to extirpate slavery; and we may find, when it is too late, that the patience of the South, however well founded upon principle, from repeated aggression will become exhausted." He cited a decision from Pickering to sustain his argument. But he also said: "Slavery is abhorred in all nations where the light of civilization and refinement has penetrated, as repugnant to every principle of justice and humanity, and deserving the condemnation of God and man." He based his opinion solely on the ground of the constitutional compact.

I am informed by a gentleman, who was at the time a partner of Mr. Sedgwick, who sued out the writ, that Mr. Sedgwick "thought O'Conor very bitter in his pursuit of the slave."

But we get Mr. O'Conor's mature and personal opinions of slavery more clearly in the Lemmon case. He entered into and argued this celebrated cause *con amore*. The case was argued in the Court of Appeals in 1860, and is reported in 20 New York, 562.[1] The facts were these: The plaintiff's wife, a citizen of Virginia, intending to go to the State of Texas, came to New York to embark, and brought with her eight negro slaves, her property. She intended to remain there only long enough to find a proper ship, and intended to take the slaves with her. One "Louis Napoleon," a "marksman," sued out *habeas corpus* to release them from the detention of their mistress. This was based directly on the New York statutes of 1817, 1830, and 1841, to the effect that any slave "imported, introduced, or *brought into*" this state, shall immediately become free. The contention on the part of the slave-owner was that the phrase "brought into" signified a bringing with intent to remain and reside, and that under the federal constitution slave-owners had the right to preserve their property in

[1] The slow and stately progress of justice in those days is curiously illustrated by the history of this case. The slaves were released by the judge who granted the writ in November, 1852. This was affirmed by the general term in December, 1857. The case was finally decided by the Court of Appeals in March, 1860. Mrs. Lemmon's riches must have taken to themselves legs long before even a decision in her favor could have done her any good. The case was held "under advisement" by the general term five years!

slaves brought into a free state simply for the purpose of passing through to another destination. Mr. O'Conor is not blamable for advocating Mrs. Lemmon's claim on statutory and constitutional grounds, but he improved the occasion to declare and elaborate his belief that the institution of negro slavery was "just, benign, and beneficent," and to use language, in the support of this unnecessary claim, unparalleled in any court of justice in a free state, to my knowledge, and that very unpleasantly affected the mass of Northern people at that critical period. He started off in his points with the argument that the negro is essentially, and must always remain, an inferior being unfit to "sustain a civilized social state," and therefore it was right to enslave him. He robustly declared, "That alone and unaided he can never sustain a civilized social organization is proven to all reasonable minds by the fact that one single member of his race has never attained proficiency in any art or science requiring the employment of high intellectual capacity. A mediocrity below the standard of qualification for the important duties of government, for guiding the affairs of society, or for progress in the abstract sciences, may be common in individuals of other races; but it is universal among negroes. Not one single negro has ever risen above it." As to the constitutional obligations he observed, "Portia's mode of keeping promises (Merchant of Venice, act 4, scene 1) is allowable only in respect to facts having the form of contracts, but which are of no binding force or obligation in law or morals. The American citizen, who, applying Shakespeare's doctrine, carries in his bosom a chapel illuminated by the higher law, and devoted to those infernal deities, Evasion and Circumvention, may be justified if the constitutional compact be void; but if it be valid, he violates honor and conscience." In his opening argument at the outset he challenged his opponents to point out any line of the Holy Scriptures which pronounces or implies that human slavery is wrong. From this carefully prepared masterpiece of rhetoric and misdirected ingenuity I extract the following choice passages.

After some sarcasm on "Louis Napoleon," who sought to "disturb" Mrs. Lemmon's "domestic relations," and "invade" her "domestic peace," he observed, among other things: —

"What is there in our judicial history, what is there in our common law, as it is called, or in the sources of our law, to entitle a court of justice, at this day, of its own authority, and irrespective of obedience to the mandates of positive legislation, to pronounce negro slavery unjust, or contrary to the fundamental principles of our institutions? What is there to warrant any court of justice in this state, or in any state of the Union, to pronounce such a sentence as that, preliminarily to an inquiry into the import of the few simple words of plain English contained in this statute? I maintain that there is nothing to warrant it. Still it is manifest that there is no principle in the English common law which inhibits slavery as immoral or unjust, as repugnant to natural right or divine law. In the earliest stages of our existence as a people . . . negro slavery was recognized as just and lawful in this colony. Negroes were held in bondage without a doubt or a scruple as to its justice or morality. . . It will be seen therefore that in its origin our law did not receive from any quarter as one of its elements any principle repugnant to slavery as a civil institution. We received none from divine authority; we imported from England no prohibition of slavery, and the moment we began to make laws, and to lay the foundation of our social order, we established for ourselves a useful civil institution, the status of negro slavery."

Of Lord Mansfield's celebrated utterance in the Somerset case, he remarked: —

"Certainly so much of it as was law had but little significance, while so much of it as was poetry has had considerable effect; it has won for him much unmerited applause. . . We have as authority for our position that it is not evil *per se*, the voice of all mankind in past ages, and of all portions of mankind amongst whom law is

administered at this day. It may be enacted that one shall not hold a slave in a particular state; but the general proposition that slavery is unjust in such a sense that judicial tribunals are bound to treat it as repugnant to natural law, and to deny all rights of property growing out of it, not expressly created by the local law, finds not a living advocate entitled to respect, and not one single judicial authority — I mean one single judicial decision. Some of the ravings of certain persons may indeed be found tending in that direction; but it has never been determined by the judicial tribunals of any country that any right, otherwise perfect, loses its claim to protection by the mere fact of its being founded on the ownership of a negro slave. The proposition that freedom is the general rule and slavery the local exception, has no foundation in any just view of the law as a science. It is one of the fraudulent catch-words of the day, contrived for the worst of purposes and never employed by good men, except when laboring under a delusion. . . The condition of a stranger coming from another state, who is the owner of a slave, in respect to his property in the service of the slave, is exactly the same as his condition would be if he were the owner of a horse or the owner of a barrel of flour under like circumstances. . . I do not know that they can be said to have made any progress. If they have, certainly it has been through the beneficent operation of the slave-trade, and their pupilage under the system now established in the slave-holding states of this Union. There, and there alone, have negroes attained to anything like a comfortable state of existence. Through these instrumentalities alone have any of the race attained the blessings of civilization, the light of Christianity, etc. . . I say therefore that to the black man, when held in slavery, the white man, his master, makes a due return. He treats him precisely as the more intelligent must and should treat his dependent inferiors. Occasional violations of propriety do not affect this question." Africa "seems to have been, in reference to the negro, very much what the quarry is to the architect or the sculptor — a place whence to draw a crude material, useless in its native state, but susceptible, under wise control, of being made useful to the human family. [Sensation.] . . . Negro slavery conflicts with no general law which has ever been recognized. It conflicts with no law of nature which has any authority among men; and lastly in its own characteristics it is not in conflict with any principles of natural justice that are perceptible to a sound mind. It is a source from which might be derived the greatest blessings to millions of the negro race; and it is by no means credible, if we will be enlightened by the history of the past, that any considerable number of the race could attain an equal measure of enjoyment without it. . . Negro slavery cannot be abolished. Since the foundation of this republic it has ever been a main pillar of our strength, an indispensable element of our growth and prosperity. It is now an integral part of our being as a nation. To eviscerate it by fraud, or tear it out by violence, would be a national suicide. To vindicate its essential justice and morality in all courts and places before men and nations, is the duty of every American citizen; and he who fails in this duty is false to his country, or acts as one without understanding. . . . By appealing to patriotism, I seek only to awaken attention. I would, by its aid and through its benign influences, give to every American citizen, ere it be too late, this admonition: Do not turn aside from the truth of history, the teachings of experience, the rational deductions of common sense, and from a mere caprice, without moral necessity, inflict upon your country's material interests and her honor a fatal blow. Do not so act in your capacity as a citizen, that if arraigned before the judgment-seat of practical wisdom, you would find no refuge from a traitor's doom except in the plea of insanity."

These extracts will suffice. *Ex pede Herculem*, and it is indeed a Hercules of forensic debate that we recognize in this wonderful but wrong-headed and wrong-hearted argument. It would be cruel to the great lawyer's memory, as a lawyer, statesman and moralist, to cite these opinions if he had ever changed his mind and repented, but he went to his grave with the same sentiments. It is evident that if he ever entertained an angelic visitant he could not consistently request him, in the words of the pious Abou ben Adhem, to "write him as one who loves his fellowmen." It is a striking commentary on Mr. O'Conor's utter

inability to read the signs of the times, that within three years from the time when he so confidently pronounced that "negro slavery cannot be abolished," it was abolished, and that nobody to speak of, North or South, wishes to see it reinstated!

Although Mr. O'Conor's argument seems to imply his conviction of the utter unfitness of *free* negroes to participate in civil government, yet in the constitutional convention of 1846 he had introduced the article on the elective franchise which was adopted, providing that these inferior creatures might vote if they were freeholders to the amount of $250 and taxed therefor, and freeing all others from direct taxation. At that time, therefore, he seems to have conceded that all privileges in which a negro might reasonably share were not embraced in the system of slavery. At that time Mr. O'Conor seems to have been more liberal than some other members, for one pronounced negroes "merely an excrescence upon our society"; another invoked the "curse of Canaan" against them; another said that giving them the elective franchise would be joining "the cow and the ass in the same yoke"; and still another "believed that slavery had been permitted, in the providence of God, as a means of preparing a portion of the Ethiopian race for the great mission of civilizing the tribes of Africa."

During the civil war Mr. O'Conor favored the cause of the South. So well understood were his sentiments on this subject, that when the Democratic party nominated Horace Greeley for the presidency in 1872, a bolting convention at Louisville nominated Mr. O'Conor. This was against his earnest and sincere protests, but as some ardent Whigs in Massachusetts persisted in voting for Daniel Webster, although he had not been nominated by any party, and in fact, was dead, so 21,559 gentlemen of Mr. O'Conor's way of thinking voted for him in spite of his protests.

To do Mr. O'Conor justice, it must be owned that he never sought nor desired public office of any kind. I say this in spite of Mr. Bigelow's statement that in conversation with him, Mr. O'Conor seemed to think it strange that he had not oftener been taken up for office. He may have thought so and yet not have cared for office.

Mr. Bigelow, in his paper in "The Century" on O'Conor, narrates that Aaron Burr believed that Chancellor Walworth decided all his causes against him from personal pique, because of Burr's advice to him not to publish his rather egotistical address. When the Chancellor's grandson was in late years indicted for murdering his own father, Mr. O'Conor saved his neck (without fee) on the grounds that the deceased treated his wife very badly and the son was subject to epilepsy! I hope Mr. O'Conor was not consciously avenging Burr, who would probably have thought it venial to kill a Walworth, and I do not think he was, for he paid the Chancellor great compliments in the constitutional convention of 1846. That however was when he was getting rid of him and his court.

Mr. O'Conor was above the middle height, spare and erect. His head was well-balanced and fine, his mouth large and compressed, his eyes (I should say) a steely blue, — or perhaps most people would call them gray, — very brilliant and intelligent, severe at will, but ordinarily not unkind. He wore a fringe of beard all around his face. He gave much less thought to the suit he wore than to any of his other suits. He generally went in rather rusty black, and I should guess that a contractor might have made money by agreeing to pay his tailor's bill for $100 a year. He was no believer in Dr. Holmes's aphorism that "the hat is always felt," for he wore one that looked as if it might have come in with the Forrest cases, although it indubitably survived them. He wore this well back on his head, in this resembling Horace Greeley, with whom he probably disagreed in every-

thing else, unless it was his leniency toward Jefferson Davis. (They both went on his bail bond.) He moved on the street, on the few occasions on which I have seen him, with an abstracted air, but with a fine scholarly dignity. An excellent portrait of him accompanies Mr. Bigelow's sketch.

Undoubtedly, in the popular estimation, Mr. O'Conor was like an iceberg — lofty, pure, shining to be sure, but cold, inaccessible and unpleasant to run against. On the other hand, his great countryman and antagonist, Brady, was regarded as a sunlit and smiling eminence, whose sides attracted dwellers and nourished the kindly fruits of the earth. It may well be doubted whether Mr. O'Conor was a lovely and amiable character. One may be permitted to doubt that he yearned, like Abou ben Adhem, to be written as "one who loved his fellowmen." One may say, without much fear of contradiction, that he was a natural aristocrat, and of a somewhat haughty and reserved disposition. He did not mingle easily and familiarly with the community, and cared little for their applause and less for their censure. In his last years, seeking retirement and a healthful air, he insulated himself on Nantucket, where nobody could swim out to call on him, and he there led the life of a recluse. He seems to have been possessed, like Mephistopheles, by the spirit of denial. One of his most distinguished contemporaries and survivors writes me: "Mr. O'Conor was a very inconsistent and eccentric man. He seemed never to have a fixed opinion unless it was adverse to the opinion of the rest of mankind. He championed slavery as a 'benign institution'; he maintained that the Federal executive should consist of several persons; and was 'agin everybody,' as the poor voter, who came to the polls in Bryant's time, proclaimed himself to be." One of the oldest surviving members of the constitutional convention of 1867–8 writes me: "I never heard that O'Conor was in favor of anything but human slavery." The former of these gentlemen is a Democrat, the latter is a Republican. On the other hand, Mr. James C. Carter, who knew him as well as anybody knew him, under the beneficent rule *nil nisi*, etc., while admitting that Mr. O'Conor stood in popular repute as I have stated above, contended that he assumed an austerity that was not natural to him. This somewhat remarkable explanation is made as follows: "In his professional life, in his office, or in the courts where he was most frequently met, he was wont to surround himself with a forbidding and mysterious air, and appeared severe, austere, repellant. Many took this as a manifestation of his real character, whereas in truth it was but one of the instrumentalities of his art by which he often bewildered and confounded his adversaries. At the same time, in the circle of his friends, in his or their homes, he was like the gentlest of men, warm, friendly, generous, magnanimous." Mr. Frederick R. Coudert, also, on the same *post mortem* occasion, after narrating how Mr. O'Conor severely scolded a little shoeblack who intruded on him in his office, and how soon after he sought him out in the street and gave him a new outfit from a neighboring clothing-shop, observes: "If this was meant as an atonement for his impatience, it was a royal atonement. But it was rather a manifestation of his true nature — the other scene was a simulacrum — a false pretense. For there were false pretenses in Mr. O'Conor, and all who knew him knew that he was full of false pretenses of that kind." And Mr. Coudert seems to intimate that the scene in the office was enacted for the benefit of the clerks. Thus Mr. O'Conor is made to have assumed a failing instead of a virtue, and run counter to Hamlet's advice to his mother, and to the general conduct of mankind. It must be confessed that if these latter gentlemen are right, this was a very unusual, unamiable and unpleasant form of hypocrisy, and considering the unwavering

consistency with which Mr. O'Conor kept it up, it must have been extremely irksome to him. One could heartily wish that these generous and eloquent defenders could have explained away, on the same hypothesis, his public views of human slavery. It is but echoing the opinion of foes and friends alike to say that he was the very soul of personal purity and professional honor. Truly, a mixed character, lacking in candor and simplicity: if posterity does him injustice, he himself must be much to blame for it, and of this his defiant spirit will be as regardless now as it was when it inhabited its earthly tenement.

Mr. O'Conor was not a humorous man, but still he had a grim kind of pleasantry, and undoubtedly a biting and tormenting wit. His power of sarcasm was very affluent and very "handy." One can easily believe that his speeches against Edwin Forrest were characterized by a "savage eloquence," as Mr. Bigelow tells us. From Mr. Bigelow's account he does not appear to have been widely acquainted with miscellaneous literature, nor to have been a reading man, but he must have read well in his youth to acquire so good a style. He seemed, however, to regard reading as a vice, for he told Mr. Bigelow that "He thought the cheapness of printing in America had made overmuch reading one of the most pernicious forms of dissipation." An eccentric opinion, in which Mr. Bigelow avows his concurrence! Thinking so, why has this accomplished gentleman contributed so much to our literature?

When Mr. O'Conor retired to Nantucket, it seems as if he might gracefully have laid aside his reserve, natural or artificial, and "condescended to men of low estate" on the little island; but I am informed that he did not, but retired himself, not only from the world and the late theatre of his brilliant achievement, but from Nantucket itself and its small population of curious observers of the lion of the sea-girt desert. The truth is, I think, that he was not a democrat, but an aristocrat, and not an easy and tolerant aristocrat. I would not call him arrogant, but supremely indifferent to his neighbors, and profoundly conscious of his own unquestionable superiority. He did not make his retirement a mask for continued control in the affairs of his late domain, like Charles V. in the convent of Yuste, but he did sometimes yearn to be out in the world again. On one occasion he told Mr. Bigelow that he was "spoiling for a fight," and on another, having come to New York, and overcome a hackman who overcharged him, he avowed that it was worth the journey from Nantucket just to beat that fellow!

At Nantucket, however, he unostentatiously exemplified the most beautiful and lovable trait of his character — his fidelity to early benefactors. When he first entered on practice in New York, Mr. Pardon, a merchant, indorsed his note for some three hundred dollars, to enable him to buy his first law-books. Some sixty years later, in charge of his house at Nantucket he put his adopted daughter, a great-granddaughter of that unforgotten benefactor, and dying, he left her that house with its furniture, his library, his watch, and one-third of the rest of his estate.

Some years before his death Mr. O'Conor was so seriously ill that his life was despaired of for a long time, and the country expected the news of his demise at any moment. But he, doubtless mindful of the old writer's assertion that "man doth not yield himself unto death save through the weakness of his feeble will," and not being quite ready to go, resolved that he would not, and he did not. His recovery was an amazing assertion of the power of the human will, — in Mr. O'Conor's case an imperial attribute. If old Glanvill could have witnessed his death, he would have confessed that his assertion was wrong in at least one instance. To prove himself an exception to most men in many points, he built a great country-house

at Nantucket, when he was eighty years old, and managed to live in it two years.

With all his beneficence and open-handed generosity, Mr. O'Conor left a very large fortune — for a lawyer. It has been estimated by those in a position to know, at eight hundred thousand dollars. He owned eleven acres of land, with his town house, on Washington Heights, worth from three to four hundred thousand dollars, and he once owned a house in Fifth Avenue. His library is said to have cost him one hundred thousand dollars, but it realized at auction sale less than thirty thousand dollars — another proof that law books are poor property.

NOTE. — While Mr. O'Conor was engaged in his criticisms on the Court of Appeals, a remarkably clever skit appeared in the Albany Law Journal (Vol. 12, p. 127), entitled "Verses in an Album," but who wrote it, or whether it was originally contributed to that journal, I cannot tell after this lapse of time. The verses are as follows: —

'Tis human to err, I know,
  And I've heard of the nods of Homer,
But to call *me* fallible — O
  That is an absurd misnomer!
For I never nod, not I, 'pon honor,
I nod? Go to, I'm Charles O'Conor.

The rest of the bar, 'tis true,
  In its want of wisdom feels
That a decent respect is due
  To the voice of the Court of Appeals.
But my court of last resort, 'pon honor,
Of first and last is Charles O'Conor.

My brethren everywhere —
  Weak men and sore deluded —
By what the court declare
  In honor feel concluded.
But I, the head of the bar, 'pon honor,
I'm only concluded by Charles O'Conor.

If the bench would avoid rebuff,
  Let 'em always manage to fix it
To sneeze when I take snuff
  And follow my *ipse dixit;*
So shall they acquit themselves with honor,
And gain the affirmance of Charles O'Conor.

'Tis an ancient silly saw,
  Who wrote it deserved the rod,
Which tells, in speaking of Law,
  That "its seat is the bosom of God."
Its seat — and I say it upon my honor —
Is found in the bosom of Charles O'Conor.

With me the profession will die,
  Who denies it utters a whopper,
And the Court that's against me — ah why
  Will our Judges have motives improper?
I'm never improper, not I, 'pon honor,
I'm proper, and modest:
  Yours, CHARLES O'CONOR.

My attention has been called to two errors in the first part of this sketch. Mr. O'Conor was never "district attorney of New York," but in the year stated he was appointed United States district attorney for the southern district of New York. Mr. Brady did not come into the Forrest case until after the trial. The defense was conducted by John Van Buren.

The Lawyer's Easy Chair.

. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

"THE DOGS OF CELEBRITIES." — Under this title the "Strand Magazine" for October gives many pictures of dogs, in some instances accompanied by their owners, as Patti with her "Araboe," Baroness Burdett-Coutts with her "Pet," and Mr. Justice Hawkins with his "Jack." His lordship is presented in profile, in wig, gown and bands, with one arm affectionately thrown around "Jack," who faces the audience. This is a pleasing portraiture. 'Arry 'Awkins his halso fond hof ha 'orse, we believe. "The Strand" says: —

"But before we proceed further it would be idle to neglect the dog, whose legal wisdom is supposed to surpass that of many a junior barrister — 'Jack,' the inseparable associate, both at home and on the Bench, of Mr. Justice Hawkins. The anecdotes — many of them no doubt apocryphal — which are related in legal chambers and Temple common-rooms of 'Jack,' whose portrait conjointly with that of his learned master is here given — would fill a whole issue of this magazine. 'Jack' accompanies his master everywhere — except to church. Evidently his taste does not extend in that direction. Mr. Justice Hawkins in a letter to the writer says: 'I can say that a more intelligent, faithful, and affectionate creature never had existence, and to him I have been indebted for very many of the happiest hours of my life."

Great lawyers before this have been fond of dogs. Eldon was portrayed with his dog "Pincher," and according to a remark which the chancellor pretended he had overheard, was at least by one person thought to look the wiser of the two. Erskine had a favorite dog, always present at consultations, dressed in wig and bands, to the scandal of the solicitors, who said that the dog seemed to pay more attention to the business than his master. Would that "The Strand" would give us some of those anecdotes of "Jack."

TECHNICALITIES. — The modern codes of practice were intended to abolish technicalities in pleading, and are supposed to have done so, and to have effectuated the result that the parties to a suit are fully apprised beforehand of the real character of the claim and the defence, and cannot suffer from surprise in this regard. It is true that the codes have enacted that the pleadings shall contain respectively a plain and concise statement of the facts constituting the cause of action and the defense. But it seems that the courts have been astute to defeat this requirement and design, in their construction of what may be proved under a bare general denial. It would seem, for example, that under a general denial in an action on a promissory note, nothing by way of defense should be allowed except to show that the defendant did not execute the paper. By express statute, at least in New York, he cannot prove payment, nor usury, nor outlawry, nor any other affirmative defense. But suppose the note has been fraudulently altered since he signed it — can he show that under a general denial? The courts hold that he may, on the theory that his denial that he executed that contract as charged covers the case. But how does this apprise the plaintiff of the defense of alteration? Clearly it does not, and the real defense must frequently surprise him. There is something wrong here, and it ought to be corrected by requiring such a defense to be pleaded.

BROUGHAM'S NOSE. — Among the most delightful reading are the memoirs and letters of the "Bawston set," — Prescott, Sumner, Ticknor, Lowell and Motley — especially the pictures of foreign society which all of them except Lowell afford. Running over Motley's Correspondence recently (which is much more entertaining than Lowell's), we find some admirable portraits of Lord Brougham, which every lawyer ought to read. Motley says:

"Let me give you a photograph while his grotesque image still lingers in the camera-obscura of my brain. He is exactly like the pictures in 'Punch,' only 'Punch' flatters him. The common pictures of Palmerston and Lord John are not like at all, to my mind, but Brougham is always hit exactly. His face, like his tongue and his mind, is shrewd, sharp, humorous. His hair is thick and snow-white and shiny; his head is large and knobby and bumpy, with all kinds of phrenological developments, which I did not have a chance fairly to study. The rugged outlines or headlands of his face are wild and bleak, but not forbid-

ding. Deep furrows of age and thought and toil, perhaps of sorrow, run all over it, while his vast mouth, with a ripple of humor ever playing around it, expands like a placid bay under the huge promontory of his fantastic and incredible nose. His eye is dim, and could never have been brilliant, but his voice is rather shrill, with an unmistakable northern intonation; his manner of speech is fluent, not garrulous, but obviously touched by time; his figure is tall, slender, shambling, awkward, but of course, perfectly self-possessed. Such is what remains at eighty of the famous Henry Brougham." ... "Lord Brougham interests me as much as any man. He is now eighty years of age, but I do not see that he is much broken. His figure is erect, not very graceful, certainly, but active. His face is so familiar to every one, principally through the pictures in 'Punch,' as hardly to require a description. The whole visage is wild and bizarre, and slightly comical, but not stern or forbidding. Like his tongue and his mind, it is eminently Scotch, sharp, caustic, rugged, thistleish. The top of the head is as flat as if it had been finished with a plane. The brain chamber is as spacious as is often allotted to any one mortal, and as the world knows, the owner has furnished it very thoroughly. The face is large, massive, seamed all over with the deep furrows of age and thought and toil; the nose is fantastic and incredible in shape. There is much humor and benevolence about the lines of the mouth. His manner is warm, earnest, eager, cordial. I was with him half an hour yesterday, and he talked a good deal of the question of Cuba and the slave-trade. He was of opinion that the claim to visit must be given up; that there was no logical defence for it; but he spoke with a sigh and almost with tears of the apparent impossibility of suppressing the slave-trade, or of preventing in America the indefinite extension and expansion of slavery." ... "Then came Lord Brougham, looking as droll as ever. There certainly never was a great statesman and author who so irresistibly suggested the man who does the comic business at a small theatre as Brougham. You are compelled to laugh when you see him as much as at Keeley or Warren. Yet there is absolutely nothing comic in his mind. On the contrary, he is always earnest, vigorous, impressive, but there is no resisting his nose. It is not merely the configuration of that wonderful feature which surprises you, but its mobility. It has the litheness and almost the length of the elephant's proboscis, and I have no doubt he can pick up pins or scratch his back with it as easily as he could take a pinch of snuff. He is always twisting it about in quite a fabulous manner." (Motley must mean, like an elephant in a fable! Otherwise he would not have been guilty of such a use of the word "fabulous.") On arriving at Holland House for dinner, "there were but two persons in the room. In the twilight I did not recognize them, but presently I observed the familiar proboscis of Lord Brougham wagging in a friendly manner towards me."

Brougham was doctored at Oxford, in 1860, at the same time with Motley, and the latter thus describes him on the march through the streets to the scene:

"Nothing could be more absurd than old Brougham's figure, long and gaunt, with snow-white hair under the great black porringer, and with his wonderful nose wagging lithely from side to side as he hitched up his red petticoats and stalked through the mud."

Motley also draws attractive pictures of Lyndhurst at eighty-six, as, for example:

"Nothing can be more genial, genuine and delightful than Lyndhurst's manner . . . I like his society because of the magnificent spectacle he affords of a large, bright intellect setting in 'one unclouded blaze of living light,' without any of the dubious haze which so often accompanies the termination of a long and brilliant career. Everybody looks up to him with reverence and delight. He is full of fun, always joking, always genial, and alive to what is going on around him from day to day. He has made two or three very good speeches this session, and is going to make another, and there is not a sign of senility in anything that he says."

Motley records that Brougham and Lyndhurst were always chaffing one another. He heard Lyndhurst declare that Brougham once went upon the woolsack in plaid trousers, and with his peer's robe over his chancellor's robe. Brougham denied the trousers, but did not deny the double robes. "Lady Stanley observed that the ladies in the gallery all admired Lord Chelmsford for his handsome leg. 'A virtue that was never seen in you, Brougham,' and so on."

We get a glimpse of Judge O. W. Holmes in a letter from his father to Motley in 1860:

"I am just going to Cambridge to an 'exhibition,' in which Oliver Wendell Holmes speaks a translation (*expectatur versio in lingua vernacula*), the Apology for Socrates; Master O. W. Holmes, Jun., being now a tall youth, almost six feet high, and lover of Plato and of art." (!)

GLADSTONE'S HORACE. — The G. O. M., not being very busy of late, has made a metrical translation of the Odes of Horace. It is an astonishingly clever performance. Mr. Gladstone evidently lacks some of the niceties of a practised versifier, but he is generally skillful and remarkably faithful to the sense, and always vigorous. His metres are varied, but he makes no attempt to imitate the original metres, and he struggles for conciseness, sometimes at a great cost. Occasionally he misses the sense, as for example, notably, in the last line of the first ode of the first book, which he renders:

"Count me for lyric minstrel thou,
The stars to kiss my head will bow."

Such is not the sense of "Sublimi feriam sidera vertice." The phrase does not mean that the stars will stoop, but that the poet will strut and exalt his head to them. As we have not had many cares of state on our mind of late, we think we can do this better, as for example:

"Grant me the lyric poet's praise,
And to the stars my head I'll raise."

Among recent American translators, Mr. Sargent renders the passage thus:

"But I shall touch the starry skies
If thou vouchsafe to write my name
Among the bards of lyric fame."

But Mr. Sargent does not tell us what he will touch the skies *with*. Mr. Field gives it thus:

"And if you place me where no bard debars,
With head exalted I shall strike the stars."

The first line of which is rather uncouth in sense and in sound.

Again, in the fourth ode of the first book Mr. Gladstone renders:

"Pallida mors æquo pulsat pede pauperum tabernas
Regumque turres, o beate Sexti," —

"Oh Sextius, Furtune's favorite, the kingly tower alike
And pauper's hut pale death will strike."

Mr. Sargent renders this:

"Pale Death before them stalks impartially,
Whether the portals be
Of peasant or of prince — hovel or tower —
Alike all feel his power,
Oh, happy Sextius!"

Mr. Sargent is diffuse and Mr. Gladstone misses the idea of the crushing foot of Death. Let us diffidently move the following amendment:

"Oh, happy Sextius! pale Death's foot will strike
The tower of kings and peasant's hut alike."

THE CHANCELLOR'S TERM. — Something has been said recently in these columns concerning the notion prevalent in England that the term of judicial office is shorter in this country than there, and the opinion was here expressed that this is an error. Just now an incident has occurred which emphasizes the fact of the uncertainty and brevity of the Lord Chancellor's term of office, and the absurdity of allowing the first law-officer of the kingdom to be subject to the fortunes of his political party, as it would be absurd for the Chief-Justice of the Supreme Court of the United States to come in and go out with each changing administration at the White House. We are indebted to the ever excellent "Notes from London" in the "Scottish Law Magazine" for the following account of the incident in question: —

"These two officers, the greatest functionaries of the whole system, played a little comedy at the Guildhall on the occasion of the Lord Mayor's banquet, which sounds like a version of the amenities that occurred between Betsy Prig and Sairey Gamp when their relations became too strained for silence. If it wasn't a quarrel in public, the printed word must convey a very wrong impression. It may have been only their fun; but, as one reads, the feeling is strong that, if it were, they have not mastered the art of humorous expression; and their chaffing, if such it were, like that intellectual entertainment often does, seemed to end in right-down earnestness and bad temper. It was a question of who should respond for the judiciary as the real head of it. The poor sheriff got mixed, and, knowing the Lord Chief Justice was to respond, apologized to the Lord Chancellor for the toast not being entrusted to him. This was not pleasing to the new Lord Chief Justice, who naturally magnifies his office. The instincts of the fighting advocate were roused, and he said, 'I beg to say that the Sheriff had no cause of complaint. My noble friend, great and distinguished as he is, is, after all, only a fleeting, temporary, political, quasi-judicial person. I claim to be one of the permanent judges of the land.'

"To whom the Lord Chancellor in reply, 'The Lord Chief Justice has said that I am but a fleeting character in the judicial world. However true that may be, I reflect that at least my career has not been so fleeting, but that this is the third Lord Mayor's banquet at which I have been present, and I think that under those circumstances I might well believe you would all desire that it should be left to the Chief Justice to respond for the Bench on the first occasion on which he appears in his present office.'

"There is a healthy ring of genuine human nature in this little outburst, which comes as a great relief from the solemn conventionalities and platitudes about the fearlessness and incorruptibility of the judges and the devotion and courage of the Bar with which we are usually wearied on these occasions."

How long a period three Lord Mayors' banquets cover we do not know, but it is a queer standard by which to measure the term of the Lord Chancellor's office. But Lord Chief Justice Russell is right; the Lord Chancellor is only a "fleeting, temporary, political, quasi-judicial person," and the soup that he eats at the Mansion House should be mock-turtle.

DIVORCE IN OHIO. — Recent statistics of divorce in Ohio expose a most shocking state of affairs, as disclosed in one of our Ohio exchanges, namely, about one divorce to every twelve marriages in the year from July, 1893, to July, 1894, or 2,753 divorces in all! In 1892-1893 the number was 2,913, and in 1891-1892 it was 2,737. In three years, 8,403 divorces! The total number of suits brought during the year was 3,696, and 2,918 were pending when the year began. There were 858 cases dismissed during the year. In one county 399 divorces were granted. The women get about 73 per cent of the divorces. It is significant that 1,380, or more than half the whole number, were granted for absence and neglect, while only 385 were granted for adultery, and the

usually prolific cause of "cruelty" furnished only 567. The causes were as follows: —

	Granted to Husband.	Granted to Wife.
Adultery	196	189
Absence and neglect . .	400	980
Cruelty	51	516
Drunkenness . .	47	276
Fraud	10	12
Miscellaneous . . .	26	50
Total	730	2,023

It looks very much as if this country would equal its former record of 322,000 in twenty years.

NOTES OF CASES.

WIFE HARBORING A DOG. — In Strouse *v.* Leipf, Alabama Supreme Court, 23 Lawyers' Rep. Annotated, 623, it was held that a wife is not liable for harboring a vicious dog on her own premises, although by law she holds her estate separate, and her husband is not liable for her torts in which he does not participate. This is an elaborate examination by Stone, J., at the conclusion of which he observes: —

"Let us recur to the facts of this case. The dog had been on the premises for several years. No present act of negligence is charged against husband or wife which led to the escape of the dog and the consequent injury of the plaintiff. The fault charged was and is that a dog with known vicious propensity was kept on the premises, and that, escaping therefrom, he inflicted the injury complained of. The wrongful act was the keep of the dog. This pertained to the government of the household and premises, — the economy and administration of the domestic affairs. It was not the act of a moment, or the work of an hour or a day. It was continuous in its nature, and must be charged to the account of the head — the governing head — of the family. For this injury no suit could have been maintained at common law against the husband and wife jointly. It would have been adjudged to be his act, his wife, at most, acting conjointly with him, and under his presumed control. Nor has the statute wrought any change in this bearing of the question. If the wife had any part or lot in the keep of the dog, it cannot be classed as her tort, 'in the commission of which he did not participate.' She could not keep the dog without his consent and participation. Hence the case is not brought within the provisions of the statute.

"A further argument: Let us suppose the husband had been sued, and he had pleaded in bar that the wife owned and kept the dog. Every one will say such defense would be frivolous. The husband, the head and governor of the family, must be held accountable for the economy and administration of the household. This power and right have not been taken away or impaired by the statutes securing to married women their separate estates. We are aware that we have given to this subject a somewhat extended consideration. We have done so because it brings before us, for the first time, the inquiry to what extent, if any, our married women's laws have changed the relations of the husband to the household and its government. We have felt that so grave a question should not be slurred over, but should be clearly and definitely settled; and, notwithstanding our statutes have revolutionized the property rights of the wife, they have effected no change in the headship — the dominion and control — of the husband over the household, or in the government of the home and its appurtenants."

The contrary of this has been held in Shaw *v.* McCreery, 19 Ont. 39; 42 Ab. L. J. 241; Quilty *v.* Batty, 135 New York, 201. In a recent Colorado case, husband and wife were held properly joined in such an action, it not appearing to whom the dog belonged; and in McLaughlin *v.* Kemp, 152 Mass. 7, it was held a question of fact whether the wife harbored the dog with knowledge of its vicious propensities.

SUNDAY BARBERISM. — The Michigan Supreme Court, in People *v.* Bellet, 57 N.W. Reporter, 1094, held that a statute forbidding barbers to exercise their calling on Sunday is valid, not depriving the citizen of property without due process, nor abridging his privileges or immunities, nor being class legislation. The Court said on this last point: —

"By class legislation we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another, in like case, offending. In Liberman *v.* State (26 Neb. 464), an ordinance of the city prohibited the keeping open of any business house, bank, store, saloon or office, excepting telegraph offices, express offices, photograph galleries, railroad offices, telephone offices, hotels, restaurants, cigar stores, eating houses, ice-cream parlors, drug stores, etc. It was contended that the ordinance was open to the objection that it did not operate upon all citizens alike; that the respondent was compelled to close his place of business on Sunday, while drug stores, tobacco houses and others in competition in business were not required to do so. But the Court held the act valid. In the present case it may have been the judgment of the Legislature that those engaged in the particular calling were more likely to offend against the law of the State providing for Sunday closing than those engaged in other callings. If so, it became a question of policy as to whether a more severe penalty should not be provided for engaging in that particular business on Sunday than that inflicted upon others who refuse to cease from their labors one day in seven."

THE LAW OF THE ROAD. — The statute law of New Hampshire requires persons driving on highways and meeting others to turn to the right of the center of the travelled part. But in Brember *v.* Jones, the supreme court of that State recently decided that where it appeared that there was sufficient room for both par-

ties to pass, and that the collision might have been avoided if plaintiff had exercised due care, he could not recover, though defendant did not turn to the right. The court observed:

"To warrant a recovery where both parties are present at the time of the injury, as well as in other cases, ability on the part of the defendant must concur with non-ability on the part of the plaintiff to prevent it by ordinary care. Their duty to exercise this degree of care is equal and reciprocal. Neither is exonerated from this obligation by the present or previous misconduct of the other. The law no more holds one responsible for an unavoidable, or justifies an avoidable, injury to the person of one who carelessly exposes himself to danger, than to his property, similarly situated, in his absence. He who cannot prevent an injury negligently inflicted upon his person or property by an intelligent agent 'present and acting at the time' (State *v.* Manchester L. & R. Co. 52 N. H. 528, 557: White *v.* Winnisimmet Co., 7 Cush. 155, 157; Robinson *v.* Cone, 22 Vt. 213), is legally without fault, and it is immaterial whether his inability results from his absence, previous negligence, or other cause. On the other hand, his neglect to prevent it, if he can, is the sole or co-operating cause of the injury. No one can justly complain of another's negligence, which, but for his own wrongful interposition, would be harmless (Parker *v.* Adams, 12 Metc. [Mass.], 415; Nashua Iron & Steel Co. *v.* Worcester & N. R. Co. 62 N. H. 159, 163).

"No negligence on the part of the defendant is shown, other than the legal negligence of not seasonably turning to the right of the centre of the highway. Whether the defendant's legal negligence, in violating the law of the road, rendered him liable to the plaintiff in damages, depends upon the determination of the question whether the injury could or could not have been avoided by the exercise of ordinary care by the plaintiff, whether it was or was not the legal cause of the injury. The fact that the defendant was violating the law of the road does not, as matter of law, warrant a recovery by the plaintiff (Damon *v.* Scituate, 119 Mass. 66, 68). If the parties were reversed, and the defendant was seeking damages from the plaintiff, the defendant's legal negligence, in disregarding the statute, would not necessarily, and as matter of law, defeat a recovery (Steele *v.* Burkhardt, 104 Mass. 59; Spofford *v.* Harlow, 3 Allen, 176). The question would still be, whose fault caused the collision? (State *v.* Manchester & L. R. Co. 52 N. H. 528, 557). The fact that a party was acting in violation of law when an injury was done to his person or property by the wrongful act of another does not deprive him of his action for damages, unless the injury resulted from the unlawful act (Woodman *v.* Hubbard, 25 N. H. 67; Norris *v.* Litchfield, 35 N. H. 271, 277; Nutt *v.* Manchester, 58 N. H. 226; Sewell *v.* Webster, 59 N. H. 586; Wentworth *v.* Jefferson, 60 E. H. 158; Lyons *v.* Child, 61 N. H. 72: Welch *v.* Wesson, 6 Gray, 505)."

In England the law of the road is to turn to the left. Pictures of English milking scenes represent the milker on the left side of the cow. We formerly supposed this was the engraver's mistake, but it is the English custom. The "Troy Times" had a picture of Gov. Morton in the act of taking the oath of office, with his left hand up. Would that oath be legal?

EXTORTION — EVIDENCE. — In People *v.* Gardner, a recent decision of New York Court of Appeals, two interesting points were passed upon. The first was that an attempt at extortion may be committed when the defendant supposed he was committing it, although in fact he was being decoyed. A woman, who kept a house of prostitution, testified that the defendant approached her and promised that if she would pay him money he would refrain from accusing her of that offence, and that in consenting she was acting merely as a decoy for the police. The statute provides that extortion may be committed by obtaining property from another by force or "fear," and that an "attempt" is "an act done with intent to commit a crime, and trusting, but failing to effect its commission." The defendant's counsel argued that "the fact that his threat did not inspire fear inducing any action on the part of Mrs. Amos, an element essential to constitute the completed crime of extortion, renders it impossible to sustain an indictment and conviction for the lesser crime of an attempt at extortion."

This view was taken by a majority of the judges of the General Term, but their decision is reversed by the Court of Appeals, Judge Earl delivering the unanimous opinion, holding that an attempt is not deprived of its criminal character by the fact that in the nature of things unknown to the defendant it could not succeed, likening the case to an attempt to pick an empty pocket. Judge Earl said:

"It is now established law, both in England and in this country, that the crime of attempting to commit larceny may be committed, although there was no property to steal, and thus the full crime of larceny could not have been committed" (see People *v.* Moran, 123 N. Y. 254). . . . "In Reg. *v.* Goodchild (2 Carr. & Kir. 293), and Reg. *v.* Goodall (2 Cox, Cr. C. 41) it was held under a statute making it a felony to administer poison or use any instrument with intent to procure the miscarriage of any woman that the crime could be committed in a case where the woman was not pregnant. It has been held in several cases that there may be a conviction of an attempt to obtain property by false pretenses, although the person from whom the attempt was made knew at the time that the pretenses were false, and could not, therefore, be deceived."

It was also held that no error was committed by the trial judge in forcibly compelling the prisoner to stand up in court, so that he could be identified by a witness. This was put on two grounds: first, that the court could control the conduct of the prisoner in court as to sitting or standing, etc.; and second,

that this did not compel him to give evidence against himself. We agree with the "New York Law Journal," that "there is something to be said on the other side," but we think the holding is right, because it did not compel the prisoner to do or to disclose anything that is unusual or usually concealed, like exposing an arm to show tattoo marks or fitting a foot into a shoe or a mould of a track.

PRIZE FIGHTING.— We have observed, and expressed the observation, that judicial decisions seem to be much influenced by the financial or other interests of the particular locality in the particular subject of the litigation. Thus the Maine courts sedulously protect ownership in ice; those of Pennsylvania allow much latitude to the smoke of iron-furnaces although it amounts to a nuisance; English courts seem to allow fox-hunters to ride rough-shod over other people's lands in chase of the noxious and dangerous fox; Texas courts frequently regard a mule as worth more than a man; and now the supreme court of Louisiana has thrown its protection about the great New Orleans industry of prize-fighting. In State *v.* Olympic Club (46 La. Ann.), 24 Lawyers' Rep. Ann. 452, it was held as follows:

"1. A criminal statute denouncing what is commonly called prize-fighting to be a misdemeanor, or punishable by fine or imprisonment, coupled with a proviso that the provisions of the act shall not apply to exhibitions and glove contests between human beings, which may take place within the rooms of regularly chartered athletic clubs, presents a question of fact to be determined by the court or jury as to whether any given contest or series of contests come within the designation of the statute as a prize fight or within the scope and meaning of the proviso as a glove contest.

"2. As the State of Louisiana is in court seeking the forfeiture of the defendant's charter on the ground that the corporation has committed acts *ultra vires* of its charter, and is met with the provisions of an act of her own legislature which, in terms, authorizes just such contests as the witnesses describe the club contests to have been, this court will be excused for declining to disturb a finding of a jury in favor of the defendant on a question of fact.

"3. Conceding such contests to be violative of good morals and of a sound public policy, the remedy comes plainly within the prerogative of the legislative department of the government, which alone can be looked to for relief."

We take it that this statute does not authorize a substantial prize-fight even under the guise of "a glove contest" in the rooms of an "athletic club." We take it also that these "glove contests" are dangerous. We know they have frequently resulted in death. But at all events a blow that renders a man insensible for several minutes must be dangerous. In spite of the apparent doubt of the court in this case, we have no doubt that these contests are generally bloody. If they are not, the cultured gentlemen who attend them complain loudly and want their money back. The following extract from the opinion in question makes us ashamed of some lawyers:

"The next witness whose testimony has attracted our notice is a prominent lawyer, who furnishes a like description of the Olympic contests as the first witness did. The men who participated in those contests were men of scientific training, almost without an exception. He does not think any of the contestants were hurt very much. He saw one or two of them bleeding from the nose or mouth, and possibly saw one bleeding from the ear. States that he witnessed the Sullivan-Kilrain fight in Mississippi. The next witness is a leading lawyer of the New Orleans bar. He states that he witnessed several of the Olympic Club contests, and instances the Corbett-Sullivan contest, which he describes much in the same manner as other witnesses have done. That he saw nothing that was objectionable or brutal in that contest. He testifies — as other witnesses had done — that the assemblage of people who witnessed these contests was orderly and well-behaved; or, as the first witness states, these assemblages of people, in point of personal respectability and behavior, were above the average of ordinary political assemblages. This witness is a member of the school board, and a gentleman of first respectability. The next witness is also a prominent city lawyer of high reputation and a man of affairs. He states that he has witnessed quite a number of the Olympic Club contests, and his description of them, and the manner in which they were conducted, is quite the same as that of other witnesses whose testimony we have commented on. His description of the effect of these contests upon the contestants physically is unique: 'Q. The exhibitions which you have described, were they at any time bloody, or was blood shed during any of those contests? A. Well, when two men get opposite to each other and begin boxing, unless one has a pretty tough nose, there is going to be a bloody nose. I have had a bloody nose myself twenty times when I was taking boxing lessons,' etc. With regard to the cruelty or brutality of the Olympic contests, this witness's statement is also quite unique: 'Q. Was there anything brutal or inhuman about it? A. In my judgment, no, sir. As compared with that popular game nowadays known as football, which I think the American people have gone crazy about, the contests that I have seen at the Olympic Club are superior in every respect, and in point of humanity as appealing to the æsthetic senses.'"

We may subscribe to the comparison made by the last witness in respect to foot-ball, if not in respect to political meetings; but still we may be pardoned for believing that courts ought to lean toward discountenancing these plainly brutal affairs.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

LEGAL ANTIQUITIES.

AMONG the Greeks it was customary to imprecate the most formidable curses on those who should attempt to violate the wishes of the testator.

According to Tacitus, wills were unknown among the Germans.

RECENT DEATHS.

THE LATE RT. HON. SIR JOHN THOMPSON.

IN the GREEN BAG for March, 1891, the writer of these lines had occasion to give a brief biographical sketch of the Canadian statesman whose life closed so tragically at Windsor Castle on the 12th of December last. When that article was written, Sir John Thompson was minister of justice in the government of Sir John MacDonald: and nobody could then predict that Sir John MacDonald and two successors in the office of premier should pass away before the close of the parliamentary term. Death, however, has claimed Canada's three prime ministers, Sir John MacDonald, Sir John Abbott, and Sir John Thompson, within the past four years.

Readers of the article to which allusion has been made are already aware of the principal events of the career of Sir John Thompson down to 1891 — his birth, his rapid rise in his profession and in provincial politics, his distinguished success on the bench, and his more distinguished triumphs in the House of Commons of Canada, where at almost one bound he took a front rank as a parliamentarian. When Sir John MacDonald died in June, 1891, the Governor-General called upon Sir John Thompson to form a new administration. With modesty rare among public men, he declined to accept the high trust, but urged that some older and more experienced man should assume the leadership. The result was that Hon. Mr. Abbott (afterwards Sir John Abbott) formed a new government, Sir John Thompson retaining his old portfolio of minister of justice. A few weeks, however, demonstrated that although not the nominal leader, his great gifts made Sir John Thompson the real leader of his party. In November, 1892, Sir John Abbott was obliged through ill-health to retire from the government, and Sir John Thompson had to accept the premiership. In the House of Commons he had acquired as complete a mastery as had been exercised by Sir John MacDonald in his palmiest days.

In 1893, Sir John Thompson acted as one of the British arbitrators in the Bering Sea Commission at Paris, and as a member of that august international tribunal he acquired fresh honors for himself and new distinction for his country. In recognition of his services Her Majesty the Queen was pleased to appoint him a member of her privy council — the highest distinction to which a colonial statesman can aspire.

The parliamentary session of 1894 was a most laborious and trying one for the Canadian premier in consequence of the many important measures passing through parliament and of the prolonged illness of some of his colleagues; and over-work brought on the insidious malady which caused his death. After the close of the session he endeavored to recruit his health; and in the autumn he visited Europe. On the 12th of December, a few weeks after he had attained his fiftieth year, he was sworn in as privy councillor by the Queen, and a few hours after the ceremony, in her historic castle, he suddenly expired. Truly did Lewis Morris sing of him:—

> "Dead at the crest, the crown,
> And blossom of his fortunes, this strong son
> Of our great realm sank down
> Beneath the load of honors scarce yet worn."

His death caused most profound grief through-

out the whole British Empire, but more especially in Canada, where he was so well known and so greatly esteemed. The Queen as a special mark of royal favor never before shown to any of her subjects, ordered one of her greatest warships to convey the remains to Halifax; and there, in the home of his boyhood, with funereal pomp and pageantry surpassing anything ever before witnessed in Britain's immense colonial empire, all that was mortal of Canada's noblest and cleanest statesman was laid at rest. C.

FACETIÆ.

THE following letter was recently received by a lawyer in New York State: —

Mr. ——: Come Down to Day. Case Salt & Batray, or Send Police Justis Down ameatley Knocked Down in my Own Hotell 3 times without any Provocation I am not able to come up I want you to take Him Beforr Half the Pepel.

Yours

———.

LAST winter Mr. Justice Harlan delivered a lecture on the Bering Sea Arbitration before a large audience of law students in a western city. His Honor, after taking up the legal side of the question, described graphically and learnedly the habits, migrations and peculiarities of the seal, with elaborate references to other animals which seemed to offer instructive analogies.

A few days after, a student who had read law a few months was asked how he liked the lecture. "Oh, very much," replied he, "very much indeed — very instructive — in fact I think I learned more Natural History from Justice Harlan than from all of Blackstone."

OLD Grizzle was a man of will,
And money, too, galore.
He quarreled with his relatives,
With him, they calmly bore.

For men must die, and Grizzle did,
But with his latest breath,
He gave his money to the poor.
He had a will in death.

ONE of the most famous French advocates, Langlois, was asked by the President of the Parliament of Paris why he took upon him to plead bad causes. He answered, with a smile, that he did it because he had lost a great many good ones.

NOTES.

SOME of our modern judges would do well to bear in mind the story of Lord Mansfield's advice to an old army officer, who knew little of law, and who had been appointed governor of a West India Island. The most appalling duty which the governor had to perform was the administration of justice, and in his ignorance he addressed Lord Mansfield in a tone of great concern, saying he knew nothing of law, and asking what he should do as the presiding officer of the local Court of Chancery on the island to which he was going, "Tut, man," said Mansfield, "decide promptly, but never give any reasons for your decisions. Your decisions may be right, but your reasons are sure to be wrong."

A TERRIBLE disease seems just at present to be epidemic among the members of the Bar. A "poetic mania" has seized them. The malady has appeared in a malignant form in Kansas, two prominent lawyers being the victims. We are indebted to the Kansas City "Star" for the following account of its ravages: —

The damage suit of J. J. Smith against Kansas City, Kas., which was tried in the Court of Common Pleas in Kansas City, Kas., last week, is the cause of considerable merriment among the members of the Wyandotte County Bar. Mr. Smith was represented by Colonel L. C. True, and the City by City Counsellor Reese. It is the first case on record in that court in which the argument was made in poetry, the plaintiff getting a verdict apparently on the strength of the poetic appeal to the jury.

When the evidence was all in Colonel True delivered his argument. It was a short statement of the case and included this novel address to the jury: —

Is there no place on the face of the earth
Where charity dwelleth, where virtue has birth?
Where bosoms in kindness and mercy will heave,
And the poor and the wretched shall ask and receive?
Is there no place on earth where a knock from the poor
Will bring a kind angel to open the door?
Ah! search the wide world wherever you can,
There is no open door for the moneyless man.

Go look in your church of the cloud-reaching spire,
Which gave back to the sun his same look of fire,

Where the arches and columns are gorgeous within,
And the walls seem as pure as the soul without sin;
Go down the long aisle — see the rich and the great,
In the pomp and the pride of their worldly estate;
Walk down in your patches, and find if you can
Who opens a pew for a moneyless man.

Go look in the banks, where Mammon has told
His hundreds and thousands of silver and gold;
Where, safe from the hands of the starving and poor,
Lies pile upon pile of the glittering ore;
Walk up to the counter — Ah! there you may stay,
Till your limbs have grown old and your hair turns gray,
And you'll find at the bank not one of the clan
With money to lend to a moneyless man.

The jury returned a verdict for $1,200 in favor of Mr. True's "Moneyless Man" in the shortest kind of order.

Yesterday was motion day in the Common Pleas Court, and City Counsellor Reese argued a motion for a new trial in another case. He began this way: "Colonel True, in his argument in the Smith case a few days ago, quoted from the case of the 'Moneyless Man,' reported in the Boys' and Girls' Recitation Book, price five cents.

"The unfair impression that the quotation made on the jury, the Court, and also on myself was so apparent, that it left a lasting impression on me, and in a dream on the same night I repeated the above stanzas to an intelligent little terrier dog. When the canine said — for dogs will talk in a dream — 'If that poetry is worth $1,200, I'll give you some that is worth $10,000,' I patted the dog on the head and said 'Go ahead.' The dog raised himself on his hind feet, put my best spectacles on his nose and said: —

'Gentlemen of the jury, attend, if you can,
To the sad tale of woe of the moneyless man;
He stands here before you, in want, as you see;
He pleads not his merits; he pleads poverty;
He can't go to the church, his patches preclude;
He can't go to the bank, get a note there renewed;
His only last chance for wealth is the town;
Take pity on me, and make it come down.
Gentlemen of the jury, have pity, pray do;
If my story be false, my counsel is True;
Look not on my failings, pass over my sin;
Look, look, I beseech you, just look at my shin;
Poor shin, badly skinned on the sidewalk down there,
Please give me a plaster of dollars, and spare
Not the city. It's big; but pray help, if you can,
My noble good lawyers, and the moneyless man.'

"The little dog then lay on his back, with his four feet in the air, and winking his other eye, said: 'That may not be poetry, but you must admit that it is good dog-erel.' 'Well, Joe,' said I, 'there is not much poetry in it, but there is lots of truth,' and then — well, I woke up."

Mr. Reese's effort did not meet with such success as Mr. True, at least it did not convince Judge Anderson, and the motion for a new trial was overruled. An appeal will be taken to the Supreme Court. Mr. Reese's poem will accompany the transcript, as it is a part of the record in the case.

THE following circular, received by mail, is so unique that we cannot refrain from giving the issuer of it a little free advertising: —

"THE COLORED LAWYER
RICHARD E. KING, ESQ.,
Law Office, Residence and Restaurant,
Are connected and established at
43 WEST ST., OPP. CALVERT ST., ANNAPOLIS, MARYLAND.
Who is the first Colored Lawyer ever admitted to the Bar of Anne Arundel County, Md.

Here the colored people and the kind public can have all kinds of legal business promptly transacted.

Where all kinds of good meals and lunches are served at all hours, cheap for cash.

Will practice in all the Courts in Maryland, Virginia, and in Washington, D.C., also before the Committees of Congress and the Bureaus of the U. S. Executive Departments.

Special attention paid to collection of bounties, pensions, debts, rents; houses and lands to let and for sale; drawing of contracts, deeds, mortgages, bills of sales, leases, wills or other instruments.

All titles and conditions of property secured, and estates settled. All legal and serviceable advice given in all business transactions.

Also a bureau of employment is established here, where many good servants are always for hire.

This law office will be known and conducted as the colored people's headquarters for the transaction of business.

Hot coffee, tea, chocolate and fresh milk always ready."

A SINGULAR CASE. — It may be safely said that the case of State *v.* Hall, in which the opinion of the Supreme Court of North Carolina was filed lately, has had no parallel. Hall, standing on the North Caroline side of the line, fired and killed a man just over in Tennessee. He was tried and convicted in North Carolina. On appeal, this was reversed on the ground that "in contemplation of law," Hall was in Tennessee when the killing was done. He was then arrested and held as a fugitive from justice. The judge below refused to discharge him. On appeal the Supreme Court by a major-

ity of one decides that he must be discharged because, not having been in Tennessee at the time of the killing, he cannot be a fugitive from justice.

Justice Clark dissents (Justice MacRae joining in the dissent) on the ground that if, in contemplation of law, Hall was in Tennessee at the time of the killing, so that he cannot be tried in North Carolina, in the same contemplation of law he must be a fugitive from justice, for he cannot now be found in Tennessee, but is in North Carolina. He says, "If a mob occupying the Jersey side of the Hudson should shell the city of New York, or from the opposite shore of the Delaware should cannonade the city of Philadelphia, under the decisions of the courts they would be liable to no punishment in New Jersey, because "in contemplation of law" the mobs were in New York and Pennsylvania. But if it is true, as contended by counsel, that the members of the mob cannot be extradited because the mob never was in those cities, it would be a singular state of things, and would place those cities, as well as Savannah, Memphis, St. Louis, Louisville, Cincinnati, and hundreds of other border towns, at the mercy of any mob which might assemble with weapons of long range, across the state line."

"Civilized man must recoil from the practical ruling that the territory adjacent to state boundaries is a 'No man's land' and that murder is privileged if committed across a state line." The two dissenting judges think that, as murder has been committed, if the murderer cannot be tried in North Carolina, he should be delivered up to Tennessee to be tried. That extradition is not a criminal, but a remedial statute, and should be liberally construed to effect the object intended, which is, that an offender shall not escape trial because not to be found in the state where he committed the crime, when he can be found in another state of the Union. The majority of the court rely upon precedents. The dissent rests upon the reason of the thing, and what is deemed by it the true construction and intent of the Constitution.

LITERARY NOTES.

THE NEW SCIENCE REVIEW for January has two interesting communications in the direction of that consideration of "Mental Training," by W. G. Jordan, in the October number, which attracted such wide-spread attention. These are, "The Dangers of Examinations," by Major-General A. W. Drayson, and "The Amateur in Science," by Grant Allen, both of them highly worthy of perusal by all advocates of an advanced education.

"The price of liberty," said Jefferson, "is perpetual vigilance." The price of science is perpetual heresy.—GRANT ALLEN, in *The New Science Review, for January.*

AN old-fashioned sea story full of interest and adventure, with a strong love motive, is begun by W. Clark Russell in the January COSMOPOLITAN. "Ouida" succeeds Froude, Gosse, Lang, and other distinguished writers with an installment of the "Great Passions of History" series. The present "Theatrical Season in New York" is critically considered by James S. Metcalfe, editor of "Life," and there are stories by Tourgée, Howells, and the famous French writer François Coppée.

MCCLURE'S MAGAZINE for January demonstrates anew the thoroughness of Miss Tarbell's study of Napoleon's career, both by her remarkable summary of his services to France as a far-sighted ruler and law-giver and founder of institutions, and by the remarkable discovery she made of a contemporary document written by a grenadier of the Consular Guards, describing the battle of Marengo, and the famous stand of the Consular Guards. A new Jungle story by Kipling, and a thrilling battle story by Conan Doyle, show these authors at their best.

WITH the first number in January, LITTELL'S LIVING AGE entered upon its *two hundred and fourth volume.* The field of periodical literature, especially in England, is continually broadening, and including more and more the work of the foremost authors in all branches of literature and science. Presenting, in compact and convenient form, all that is most valuable of this work, THE LIVING AGE becomes more and more a necessity to the American reader, for, by its aid alone, he can conveniently as well as economically keep well abreast with the literary and scientific progress of the age and with the work of the ablest living writers.

THE extent of the United States is recalled vividly by Julian Ralph's article, "Charleston and the Carolinas," in the January HARPER'S. While winter is having its way in some two million square miles of Uncle Sam's territory, yet there is a sunny side even to the first three months of the year, and the center of all this charm is Charleston. This number is rich

in illustrated articles, and in addition to the serials contain five short stories by well known authors.

THE January REVIEW OF REVIEWS, in its "Progress of the World" (editorial) department, discusses present problems in public health administration, municipal reform in the United States, the movement for deep waterways from the great lakes to the Atlantic Ocean, the Nicaragua Canal question, the proposed arbitration of the boundary dispute between Venezuela and Great Britain, the payment by our government of damages to Canadian seal poachers, the prospects of civil service reform, the demand for a bank-note currency, the change in the Canadian Premiership, the disposition of English visitors to instruct Americans, and the recent action of the American Federation of Labor.

W. D. MCCRACKAN, A.M., one of the ablest of contemporary writers upon the principles and institutions of representative government, contributes a thoughtful and forcible paper to the January ARENA on "Politics as a Career." Among the encouraging conclusions reached by this life-long student of every form of democracy, ancient and modern, is that no honest man can enter political life in America to-day except as a reformer, and that as a reformer he will be treated with scorn and contumely and have little or no influence.

THE POPULAR SCIENCE MONTHLY never flags in its task of giving to the general public the new and broader views of Nature, including man, that scientific investigators are opening up. In the leading article of its January number many of the wonders that astronomers have discovered are brought within the view of amateurs with small telescopes. It is the second of a series of papers illustrated with star-maps which Garrett P. Serviss is contributing under the title "Pleasures of the Telescope." In "Twenty-five Years of Preventive Medicine" a history of sanitation in this country is given by Mrs. H. M. Plunkett "Ethics in Natural Law" is the title of an essay in which Dr. Lewis G. Janes criticises the famous Romanes lecture by Prof. Huxley.

THE CENTURY for January presents a varied list of attractions. In addition to the Napoleon, which marches along rapidly toward Bonaparte's first military success, and which is richly illustrated by the work of contemporary and other artists, there are illustrated articles on Canton, dealing with the punishment of criminals and with the interesting river population, on "The Armor of Old Japan," on "Festivals in American Colleges for Women," setting forth the recreations of Bryn Mawr, Mt. Holyoke, Smith, Vassar, Wellesley, and Wells Colleges, besides a fully illustrated article by Mr. Hiram S. Maxim on his "Experiments in Aërial Navigation."

AN article in the January ATLANTIC which will be likely to attract the attention of thoughtful readers is Mr. John H. Denison's "The Survival of the American Type." With a courage and frankness not always found in writers on public affairs he describes the political situation, especially in the larger cities. The whole paper is suggestive, and will probably excite comment of various kinds.

IN the January number of SCRIBNER'S MAGAZINE, Noah Brooks begins a group of three papers on American Party Politics with a most informing account of "The Beginnings of American Parties," relating the political complications with the same nearness of view as though he were a contemporary observer. The group of papers will furnish an admirable introduction to the leading historical plan of the year which begins in the March number — President Andrew's brilliant narrative of "The Last Quarter-Century in the United States."

BOOK NOTICES.

LAW.

HAND-BOOK OF THE LAW OF CONTRACTS. By WM. L. CLARK, JR., West Publishing Co., St. Paul. Law sheep. $3.75.

This is the last addition to the "Hornbook Series" issued by the West Publishing Co., for the use of law students. Mr. Clark presents the principles of the law of contracts in a clear, concise manner, accompanying them by full explanations and illustrations. The citations are numerous, including nearly ten thousand cases. The work is admirably adapted to the student's needs, and will find favor with our law teachers.

THE FEDERAL INCOME TAX EXPLAINED. By JOHN M. GOULD and GEORGE F. TUCKER. Little, Brown, & Co., Boston, 1894. Cloth. $1.00.

This little manual will prove of much value and assistance not only to the legal profession but to all who are so unfortunate(?) as to come within the provisions of the Income Tax. The decisions and practice affecting the income tax laws of the time of the Civil War have been used by the authors to elucidate the present statute, and as those rulings and decisions will undoubtedly be adopted and fol-

lowed by the courts in passing upon the present act, the victims of this distasteful legislation will be able to judge pretty accurately of their status under the Act of 1894. Messrs. Gould and Tucker are the first in the field, but will doubtless be followed by other writers upon this important subject; still, for a book of ready reference, we think this compact, clear and concise work is likely to hold its own against all competitors.

A TREATISE ON THE LAW OF BENEFIT SOCIETIES AND LIFE INSURANCE. Voluntary associations, regular life, beneficiary and accident insurance. By FREDERICK H. BACON, of the St. Louis Bar. SECOND EDITION. The F. H. Thomas Law Book Co., St. Louis, 1894. Two vols. Law sheep. $12.00 *net.*

The great number of new decisions on the law of beneficiary insurance during the past six years has rendered a new edition of this valuable work of Mr. Bacon a positive necessity. Upward of twelve hundred new cases and nearly five hundred pages of new text have been added, and much of the old text has been re-written. In its present form the treatise is an exhaustive discussion of the law of benefit societies and life insurance, to date, and as such should be welcomed by the profession.

AMERICAN PROBATE LAW AND PRACTICE. Applicable to all the states. By FRANK S. RICE. Matthew Bender, Albany, N. Y., 1894. Law sheep. $6.50 *net.*

This treatise is an attempt on the author's part to collate, classify, and exhibit the rules that characterize and govern American Probate Courts, and to furnish a practical guide to the whole field of Probate Law and Practice. The principles of the law are stated tersely and precisely and the text is remarkably free from all technical obscurities. The work covers a field which has been neglected by our law writers, and should be of great assistance to the practitioner. We have no doubt it will well stand the test of constant use and reference. The typographical work and paper leave nothing to be desired.

PRACTICE IN ATTACHMENT OF PROPERTY FOR THE STATE OF NEW YORK. With complete forms. By GEORGE W. BRADNER. Matthew Bender, Albany, N.Y. Law sheep. $3.50 *net.*

The object of this work is to present to the practitioner the rules of law governing the attachment of property in the State of New York. It is, we believe, the only work of the kind giving the complete practice and forms in attachment down to date. The author seems to have done his work carefully and thoroughly, and New York lawyers will undoubtedly find the book of great assistance.

A REVIEW IN LAW AND EQUITY FOR LAW STUDENTS. Together with a summary of the rules regulating admission to practice throughout the United States. By GEORGE E. GARDNER of the Massachusetts Bar. Baker, Voorhis & Co., New York, 1894. Half sheep. $2.75 *net.*

Students preparing for admission to the bar will find this work of especial value, as it contains a brief, simple statement of the leading principles of both law and equity. One has only to master its contents to be fully equipped for any examination to which he may be subjected. Some of the subjects treated in the book, which embraces an entire course of law studies, are the following: The Feudal System, English Tenures, Real Property, Personal Property, Contracts, Quasi-Contracts, Evidence, Equity, Pleading, Torts, Bills and Notes, Agency, Bailments, Corporations, Criminal Law, Domestic Relations, Wills, Devises, Legacies, Partnerships, Sales, etc., etc.

GENERAL DIGEST of the Principal Courts in the United States, England and Canada. Refers to all reports official and unofficial, first published during the year ending September, 1894. ANNUAL, being VOL. IX of the series. Lawyers Co-operative Publishing Co., Rochester, N.Y.

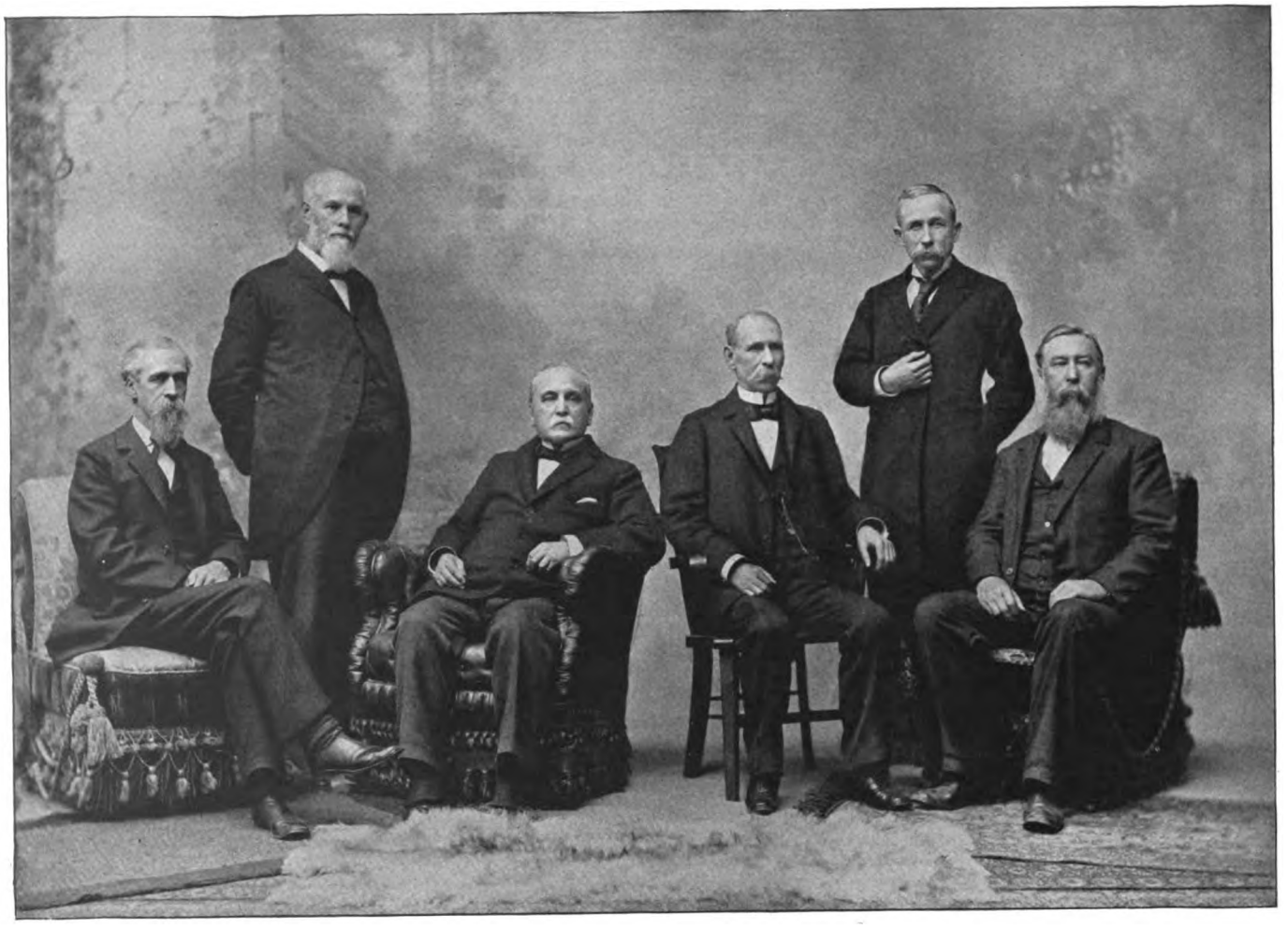
This Digest thoroughly covers the case law for the year ending September, 1894, and even outdoes its only competitor in the number of its references. It is essentially what its name implies, a General Digest, in which the matter is well arranged and classified, and is, besides, apparently reliable and accurate. The publishers deserve a good word for the evident pains they have taken to make the work complete in every respect.

BOOKS RECEIVED.

A SYSTEM OF LEGAL MEDICINE. By Allan McLane Hamilton, M.D., and Lawrence Godkin. Two vols. E. B. Treat, New York.

COMMENTARIES ON THE LAW OF INJUNCTIONS. By Chas. Fisk Beach, Jr. Two vols. H. B. Parsons, Albany, N.Y.

RECOLLECTIONS OF SIXTEEN PRESIDENTS. By Richard W. Thompson. Two vols. The Bowen Merrill Co., Indianapolis.



THE SUPREME COURT OF OHIO (1895).

THADDEUS A. MINSHALL. FRANKLIN J. DICKMAN. MARSHALL J. WILLIAMS. JOSEPH P. BRADBURY.
JACOB F. BURKETT. WILLIAM T. SPEAR.

The Green Bag.

VOL. VII. No. 3. BOSTON. MARCH, 1895.

A SKETCH OF THE SUPREME COURT OF OHIO.

I.

BY EDGAR B. KINKEAD, OF THE COLUMBUS BAR.[1]

THE subject of this article is "A Sketch of the Supreme Court of Ohio." To attempt to write more than a mere sketch for the purpose intended would be impracticable, and involve much time and research, as a history of the many facts, incidents, and anecdotes connected with the Supreme Court of Ohio and its component parts — the judges — would fill a volume. An yet how interesting and instructive! It may be suggested that there is a vacuity in American legal literature which apparently is not within the power of any one to adequately fill, though there have been slight attempts at preserving interesting and instructive reminiscences of lawyers of great ability. What a field it is! Many members of the legal profession there are who have come and gone, whose lives have been worthy of emulation and example, and filled with characteristics, incidents, and anecdotes, which, if preserved, would guide those who follow. Great lawyers appear in cases which reach the courts of last resort where their briefs are coldly digested for insertion in the report of the opinion of the court, thus forming the only record which may tell the story of their legal lives. How incomplete! But of those of the eminent lawyers who are called to a seat upon the bench of the Supreme Court a little more of their character and ability becomes a matter of record. In no way can some of the most valued items in the history of the lives of such men be preserved than by biographical sketches of deceased judges and lawyers. Thus may the merits and virtues of those eminent in the profession be recorded for the emulation and guidance of those who are to follow them, even long after their names, like their bodies, shall have mouldered to the almost forgotten dead. Obituary addresses delivered by close friends of deceased members of the profession at Bar Association meetings occupy a good field.

When we peer into the history of the great men who have sat upon the bench of the Supreme Court of the Buckeye State, we are unable to catch more than a passing glimpse. "The shades troop about us, and flit hither and thither in shadowy confusion." A man seems just to have reached the point where he is of the greatest use to his people and his country, when he disappears, and another takes his place. So it has been, and so will it ever be. But let us to our task, which seems prosaic enough, though there is a fascination in a measure compensating the labor involved.

We have said "The Supreme Court of the Buckeye State," and indeed, what can be more appropriately connected or associated with the judiciary than the soubriquet "Buckeye," which has been applied for so many years to the State of Ohio, as its origin may

[1] I am greatly indebted to Judge Joseph Cox, of Cincinnati, as well as to my associate in business, Hon. N. R. Hysell, for material aid in the preparation of sketches of judges.

probably be traced to the time when the first court was held at the point of first settlement at Marietta? It is recorded in history that the opening of the first court at Marietta was an event of great moment, and attended with display and ceremony. It was on the 2d day of September, 1788, when the vicinity of the little pioneer settlement was a barren wilderness, and Indians were plentiful. Despite the fact that there was not sufficient cleared space to hold a procession, the sturdy and proud old settlers did not propose to be thwarted in their purpose. They cut a path through the forest to Campus Martius Hall, where the court was held, through which the procession of proud settlers marched. It consisted of the high sheriff with drawn sword, citizens, members of the bar, supreme judges, and common pleas judges. The Indians were interested spectators of this wonderful incident, and were so much pleased with the appearance of the high sheriff with his drawn sword that they called him "Hetuck," meaning in their language the eye of a buck, which was reversed, calling it "Buckeye." And thus originated the soubriquet now applied to the state.

RETURN JONATHAN MEIGS.

A few suggestions upon the importance of the judicial office may not be inappropriate. A lawyer devoted to his profession would, as a rule, rather occupy it than an executive position. No extravagant language is used when we say that there is no official position of more importance. Individual rights rest more largely in the hands of judges than elsewhere. There are the executive, legislative, and judicial departments of government. Of the three, the judicial power is in many ways supreme. The power exercised by the executive, federal or state, sinks into insignificance as compared with that of the judiciary. This view finds support in an historical incident in another state. Judge Gaston, once a noted judge of the Supreme Court of North Carolina, for whose character and attainments Chief Justice Marshall had such regard that he was often heard to say that he would willingly resign, if by so doing he could secure the appointment of Judge Gaston in his stead, was solicited by the dominant party of his state to become United States Senator. This he declined upon the ground that the duties of the post he then filled were "as important to the public welfare as any services which I could render in the political station to which you invite me." History tells of two instances, at least, where the governmental executive and legislative branches have assumed supreme power; but in peaceful times their acts, when found necessary, are controlled by the judiciary. The American executive, legislative, and judicial departments are peculiar to this country, and unlike other governments, are separated

by carefully drawn lines, but are co-ordinate departments of the government. This was the result of the wisdom of the forefathers, fraught with lessons learned from hardships endured in mother countries. This distinction did not exist in other governments, where much confusion prevailed between the various departments. It was therefore natural that the same misconception should to a certain extent pervade the minds of early settlers, and we find that even in the early history of Ohio there were those who clung to the idea that the legislative was the supreme branch, but fortunately were in the minority. The principle of the supremacy of legislative acts found an early grave in the history of Ohio, when it was undertaken to impeach that sturdy, eminent, youthful President Judge of the Third Circuit, Calvin Pease, because he saw fit to assert his judicial independence by pronouncing portions of the act of 1805, defining the duties of Justices of the Peace, unconstitutional. This was indeed a bold stand to take at a time when the question of the power of judges to take such action was not by any means a settled one, not having been expressly conferred by the Constitution. Judge Pease did not have the benefit of the learning of those masters of constitutional law, Marshall, Kent, and Story, but could only look to that unsettled state in other countries. No other country could be looked to for light upon the question, as none had a similar Constitution. That acts of Parliament were beyond attack was well understood. Lord Coke had declared that the power and jurisdiction of Parliament was absolute and not considered within bounds, and Blackstone maintained the same doctrine.[1] Imagine, then, Judge Pease standing alone in a western unsettled state, looking far into the future, fully comprehending the dangers to the American Constitution in failing to uphold the principle that it was the judicial duty to determine whether or not acts were within constitutional limitations! His was a strong mind indeed. He probably fully realized that many of the people of his day were imbibed with the principle of inviolability of legislative acts.

JOHN C. SYMMES.

The attempted impeachment of Judge Pease and his associates on the bench for this act demonstrating independence of thought and superiority of the power of the judiciary is one of the most notable recorded acts affecting the Ohio judiciary. And the close call which Judge Pease had in his trial shows how completely the idea of supremacy of legislative power invaded the minds of men at that time. But his acquittal even by a small margin marked one of the most important epochs of principle in the history of the state.

It is reasonable, however, to suppose that Judge Pease and his associates were aware

[1] Chase's Blackstone, 15 n.

of the case of Trevitt *v.* Weedon, decided by the Superior Court of Rhode Island in 1786,[1] which was the first case in which an act of the Legislature was declared void, because it conflicted with the provisions of the state Constitution. These two cases are the only ones in the history of the American judiciary, where attempts were made to impeach judges as criminals for refusing to enforce unconstitutional enactments. The right of the judiciary to declare legislative enactments unconstitutional is not based upon the superiority of the former; but because they are required to declare what the law is, and when the Legislature transcends the limits prescribed by the Constitution, it is then their duty to indirectly overrule the action of the co-ordinate department. (Marbury *v.* Madison, 1 Cranch 170.)

ETHAN ALLEN BROWN.

It may now be said that in our license of construing the Constitution, and in the disposition of public opinion, there is no anchor save the Constitution itself. The power of declaring an act of the Legislature invalid because in conflict with the Constitution has even been exercised by a justice of the peace. An instance of this kind once occurred in Washington County, Ohio, where suit was brought before a magistrate for the recovery of a tax assessed upon a dog under a statute which was passed by the Legislature authorizing it. Recovery was denied by the justice, because he deemed the law unconstitutional, and so declared it. The question was thereafter brought before the Supreme Court in Holst *v.* Roe, 39 O.S. 340, where the law imposing a *per capita* tax on dogs was held to be an exercise of police power, and not of the taxing power vested in the General Assembly, so the justice was about half right. It may be presumed that if the justice had been educated in the elastic doctrine of police power, he would have decided the case differently.

The judicial history of Ohio is marked by four important and interesting epochs: —

1st. The rude provision for protecting life and property before the territorial courts were organized.

2d. The period of territorial courts.

3d. That under the first Constitution of the state, adopted in 1802.

4th. That under the present Constitution, adopted in 1851.

First Epoch. — The first permanent settlement by white persons in that part of the Northwest Territory now embraced in the State of Ohio was made at Marietta, Washington County, April 7, 1788, by forty-seven men, mostly officers and soldiers of the Revolutionary War, and was led by General Rufus Putnam. The spot selected at the junction of the Ohio and Muskingum Rivers was a beautiful one, although then covered by a heavy forest. It had the additional

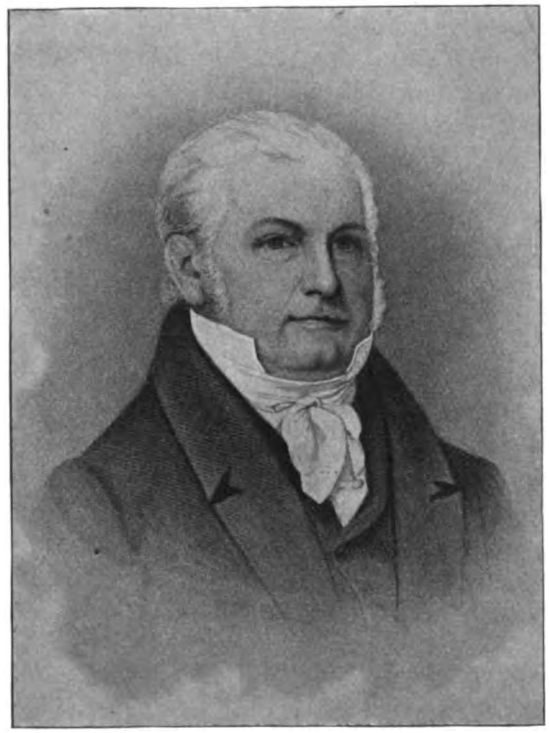
[1] Arnold's History of Rhode Island, Vol. 2, c. 24.

attraction of having been in Justinian's days the site of a large and permanent settlement by people whose only history so far as is written in the high conical mounds, great squares of earth, covered ways reaching to the river in the shape of huge earthen embankments, burial cists, ruins of ancient habitations, memorial and religious mounds, or immense forts of earth or stone.

Some of them are preserved now within the limits of old Marietta.

Around these ancient settlements were numerous Indian tribes claiming the land, and jealous of their rights.

The pioneer settlers were for a short period without local government, and like all settlers in a new country felt the necessity of laws for the protection of their person and property. No steps had yet been taken towards the formation of the government provided by the ordinance of the Territory of the Northwest, and the Governor appointed, General Arthur St. Clair, had not yet arrived. The emigrants were therefore without civil laws or civil authority to enforce them.



CALVIN PEASE.

In this emergency Col. Return Jonathan Meigs, a distinguished Revolutionary officer, who had crowned a long series of brilliant actions in that war by his distinguished bravery in storming Stony Point with Gen. Anthony Wayne, was selected to draw up a system of regulations, which were adopted by the emigrants as their rule of conduct and protection until the proper authorities should arrive.

To give these regulations publicity, a large oak tree standing near the confluence of the rivers was selected from which the bark was peeled of sufficient space, and on it the written regulations were nailed. Colonel Meigs was selected as the authority to enforce them, and for that purpose was unanimously invested with full power. This is a striking illustration that in whatever condition man is placed the necessity of some form of government is felt.

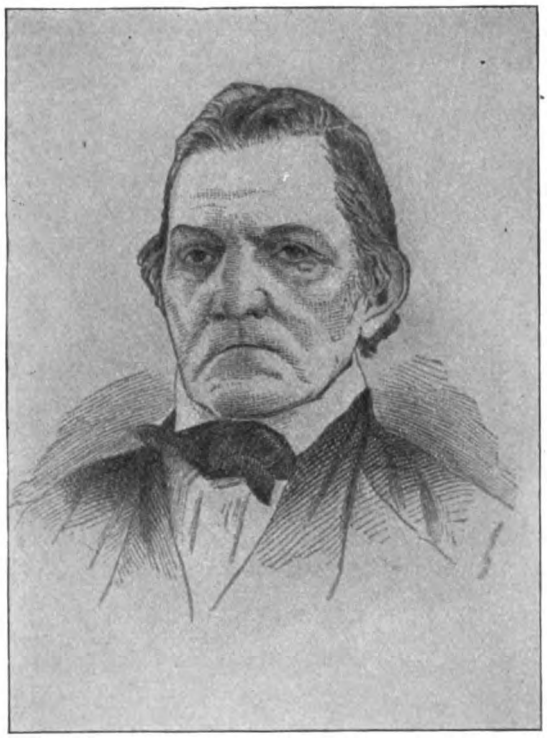
As a strong evidence of the good character of the people it is said that during the three months of the existence of these rules, but one difference arose among the people, and that was compromised. This well justified the assertion of President Washington "that no colony in America was ever settled under such favorable auspices as that which has just commenced at the Muskingum. Information, property, and strength will be its characteristics. I know many of the settlers personally, and there never were men better calculated to promote the welfare of such a community." The same kind of provision for protection was made at Cincinnati, and William McMillan appointed to enforce them. There was, however, but one prosecution under them, and that was of a party for robbing a garden of some vegetables, and he received as punishment ten lashes.

Second Epoch: Territorial Government. — The ordinance of Congress "for the government of the territory of the United States Northwest of the river Ohio" was passed on the 13th day of July, 1787, and was the fundamental law of the territory. It provided for the appointment of a governor and three judges to whom legislative power was delegated until the population of the territory should reach five thousand free male white inhabitants of full age, when a general assembly was to be then organized. During the period, when the legislative power was vested in the governor and judges, there were so many contests between the three legislators that the people became very much dissatisfied, and consequently welcomed the day when they could have a voice in the affairs of the government. The ordinance did not provide whether the Governor had more or equal power with the judges in legislative matters. Gov. St. Clair claimed superior power, which was frequently exercised by him. Their power, however, was very much restricted, the ordinance providing that: "The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress, but afterwards the Legislature shall have authority to alter them as they think fit." The governor and judges commenced their legislative duties in 1788. It was no easy task under the restrictions placed upon them to enact a consistent code, one suited to the wants and necessities of the people. In some instances, original statutes were enacted and published to complete what they deemed to be a proper system of laws, and these were considered as of doubtful character. In subsequent years, when individual rights became dependent upon them, it was a matter of some delicacy as well as a difficult task for courts, when called upon to place a construction upon some of the earliest legislation, and determine its validity. This duty, however, could not have been imposed upon a wiser head than Peter Hitchcock, upon whom a portion of the responsibility was placed. Judge Hitchcock (in Ludlow *v.* Heirs, 3 Ohio, 555) well expressed the difficulties encountered in the formation of a new state, when he said: "To prepare laws which shall meet the exigencies of a people collected not only from every state in the Union, but also from almost every country in the civilized world, is no easy task. People coming together in this manner, and forming a new society, will entertain different views of policy according to the prejudices which they may have imbibed in the different countries from whence they emigrated. When to this circumstance is added the consideration of the limited nature of that power, which was delegated to the first legislative authority in the territory northwest of the river Ohio, it is not surprising that there should be some apparent inconsistency in their acts. It is much to be regretted that the only evidence we have of the construction given to the early statutes by the courts, at or about the times these statutes were adopted or passed, is derived from their records and from loose tradition."

The first judges appointed under the ordinance of 1787 were John Armstrong, Hon. Samuel Holden Parsons, and James Mitchell Varnum, who constituted the first Supreme Court of the territory. John Armstrong did not accept, and never served as judge, and John Cleves Symmes was appointed in his stead. Inferior to this court were the county court, courts of common pleas, and the general quarter sessions of the peace. Single judges of the common pleas, and single justices of the quarter sessions were clothed with certain civil and

criminal powers to be exercised out of court.' The judges who succeeded Parsons and Varnum were S. H. Parsons, John Cleves Symmes, and William Barton.

In September, 1789, George Turner was appointed in place of Mr. William Barton, who declined. In March, 1790, Gen. Rufus Putnam succeeded Judge Parsons, deceased, and Joseph Gilman was appointed in place of General Putnam, who had been appointed Surveyor-General of the United States lands in December 22, 1796. On February 12, 1798, Return J. Meigs, Jr., was appointed in place of George Turner, resigned. Judge Symmes occupied the bench during the life of the territorial court prior to the first territorial Legislature, and with Gilman and Meigs occupied the bench at the meeting of the convention of the territorial Assembly.



JACOB BURNETT.

The act establishing the territorial Supreme Court was passed by Gov. St. Clair, John Cleves Symmes, and George Turner, June 6, 1795, and published at Cincinnati, being adopted from the Pennsylvania Code. It provided that: "There shall be holden and kept, twice in every year, a Supreme Court of record, which shall be called and 'stiled' The General Court; the sittings of which court, to commence at Marietta, in the county of Washington, on the third Tuesday of October, yearly and every year; and on the third Tuesday of March, at the town of Cincinnati, in the county of Hamilton, yearly and every year. And the judges of said court and every of them shall have power and authority, when and as often as there may be occasion, to issue forth writs of *habeas corpus*, *certiorari*, and writs of error, and all remedial and other writs and process, returnable to the said court, and grantable by the judges by virtue of their office." While this court was authorized to review all decisions of inferior tribunals, no appeal could be taken from its judgments and decrees. The judges spent equally as much time in their saddles as upon the bench. They together with the court officials and lawyers traveled on horseback from court to court, carrying with them blankets, horse-feed, and food for themselves, camping out in the wilderness at night. There were neither taverns, bridges, nor even roads in their route. They traveled from Cincinnati to Marietta. Returning from thence to Cincinnati, they would then go through the forests to Detroit, being out many days on a single journey. One of the principal points to be observed in purchasing a horse was whether or not he was a good swimmer.

A most excellent precedent was established by the governor and judges in a resolution passed by them, August 18, 1795, as follows: "Resolved, That where persons sufficiently learned in the law can be found

to fill the benches of the courts of common pleas, it would be the safer way to commission them during good behavior." Ohio has not clung to the theory of long judicial terms as closely as have other states. One of the English judges not long ago frowned upon an American decision, because he said the terms of the judges were too short to insure good decisions, and hence English judges would not follow American decisions. That is too bad indeed. But the English judge is not altogether right, as in some states, and especially in the United States Courts, the judges have remained on the bench longer than have some English judges. The term of judges of supreme courts should not be less than ten years.

Third Epoch: Under the First Constitution of 1802. — In 1802 the eastern division of the territory of the United States northwest of the river Ohio became a State, the people in convention assembled at Chillicothe adopting a Constitution on the 29th day of November, 1802, by virtue of which the judicial power of the state, both as to matters of law and equity, was vested in a supreme court, courts of common pleas for each county, in justices of the peace, and in such other courts as the Legislature might establish. The Supreme Court consisted of three judges, any two of whom constituted a quorum, the General Assembly being authorized to add another judge thereto after the term of five years, in which case the judges were authorized to divide into two circuits, within which any two of the judges could hold court. They were to be appointed by a joint ballot of both houses and to hold their office for a term of seven years if they so long behaved well.

The old Supreme Court was the successor of the territorial court. Briefly referring to the territorial epoch of the sketch, in forming the connecting link at this point, it will be remembered that the ordinance of 1787 provided for the appointment of judges to form a court with common law jurisdiction.[1] The Governor and judges of the North-western Territory, by act of August, 1788, denominated this a general court and provided for its sittings.[2] The act of August, 1795, provided for holding a term of this court at Marietta and one at Cincinnati, in each year, for *nisi prius* courts for the trial of issues of facts.[3] The act of 1800 provided for the transmission of the records with the postea endorsed and other proceedings necessary for the rendition of judgments to the General Court.[4] After the state was organized in 1802, the state legislature of April, 1803, abolished the General Court, and vested a portion of its jurisdiction in the Supreme Court, and transferred to it the judgments unsatisfied in the General Court.[5] By virtue of this transfer the records remained in the Supreme Court of Hamilton County.[6]

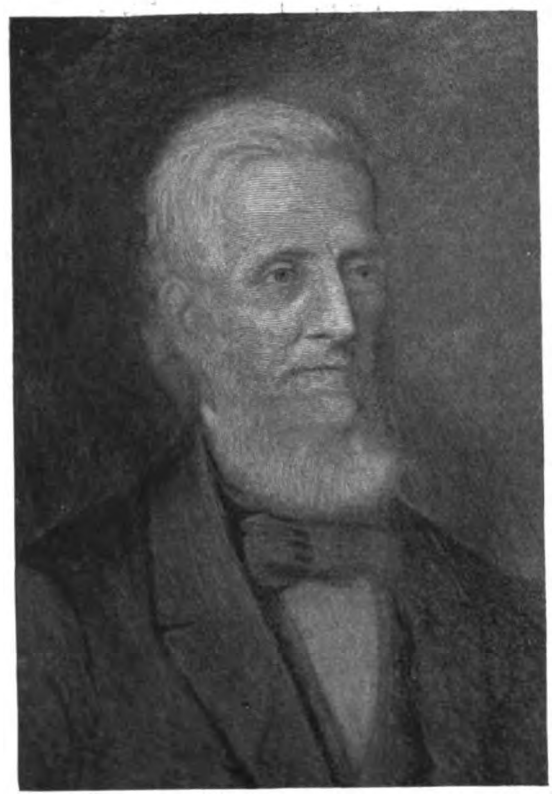
Generally, and for most purposes, the old Supreme Court was a county court, not perhaps altogether so,[7] it being held in Seely *v.* Blair (6 Ohio, 448) that although the Constitution required it to be held in each county in each year, yet there was no territorial limitation upon its authority, and it exercised certain functions operating beyond the county in which it might be then sitting.[8] Its jurisdiction was varied, having concurrent jurisdiction with courts of common pleas to issue writs of error and certiorari;[9] and the act[10] organizing courts gave original jurisdiction to the Supreme Court in all civil cases, both at law and equity, where the matter in dispute exceeded one thousand dollars, and appellate jurisdiction from the court of common pleas in all civil cases in which that court had original jurisdiction.

It had no power to direct proceedings in

[1] 1 Chase, 67. [2] 1 Chase, 97. 1 Chase, 149. [4] 1 Chase, 359. [5] W. 612; 1 Ohio, 317; 3 Ohio, 483; 1 Chase, 359. [6] 1 Chase, 359; 1 O. 317; 3 O. 483. [7] Wayne Tp. v. Green Tp. W. 292. [8] 6 Ohio, 448; 5 Ohio, 249. [9] Barnes *v.* Decker, W. 207. [10] Swan (1841) 222, 43 Ohio Laws, 81, sec. 9.

quo warranto,[1] could not stay the execution of a decree, except upon a bill of review,[2] had no jurisdiction in probate matters,[3] was without power to allow or dissolve an injunction,[4] or enjoin proceedings in chancery in the common pleas courts.[5] It was held by the court in 1849, that its original jurisdiction in cases at law was taken away by the act of March 12, 1845.[6]

In the twenty-ninth year of the life of the state the need was felt for a reviewing court, pure and simple, so that uniformity of decision should prevail for future precedent and guidance. The Legislature, therefore, in its wisdom, passed an act, March 10, 1831, establishing what was termed a Court in Bank. This required the judges to hold a general session at Columbus once each year for the hearing of causes which had been reversed by the judges upon the circuit. From this enactment dates the first court of last resort, as now regarded, in the state, at which time the first steps were taken towards official reporting of adjudications. Those who have not made a close study of the judicial history of the state may not have an adequate conception of the vast amount of work accomplished by the judges under the Constitution of 1802, or of the great importance of the decisions made by them. The most important and difficult task of formulating the foundation of the system of law for the future development and establishment of one of the four greatest states of the Union fell to the lot of the thirty jurists whose fortune it was to occupy the supreme bench from the formation of the state to the date of the adoption of the Constitution of 1851, when the modern and perfect code system of practice and procedure was inaugurated which marks the fourth and last epoch of this sketch.



REUBEN WOOD.

Can we comprehend the magnitude of the task performed by those early expounders of our judicial system, considering the importance of principles of law established, independently of manual labor involved? Only the close student of the early Ohio decisions can fully appreciate it. Each state in a large measure is independent of its sister state so far as concerns its system of law. In the establishment of a system of law, one state may lean upon an elder sister state and on the mother country; but the circumstances, conditions, and demands of its people may require the adoption of different principles, and thus was independence of thought required. The rules of law of other jurisdictions having no binding force or validity *per se* within a state until adopted, the duty was therefore imposed upon the early judicial bench of last resort to make

[1] Ohio R.R. Co. *v.* State, 10 O. 360. [2] Way *v.* Hillier, 16 O. 105. [3] Jos. Hunter's Will, 6 O. 499. [4] Griffith *v.* Commissioners, 20 O. 609. [5] Merrill *v.* Lake 16 O. 373. [6] Vol. 43, p. 81, Sec. 9; 7, W. L. J. 221.

such discriminations as seemed essential to meet the wants and requirements of the people with whose rights they were dealing. The difficulty experienced in performing this duty can be the more fully realized when the fact of the scarcity and lack of books and libraries which existed in earlier times is considered.

Going back to Blackstone's time we read of provincialisms, which have no place in the present age; but we must remember that the limitations upon this doctrine must be prescribed by each new country for itself; and the great western portion of the United States, at the time of the first settlement of the Northwestern Territory, was indeed a new country. The states from which came the pioneers of our state may have determined many questions of law, but it was necessary for Ohio to settle them for itself, simple though they may be. Thus we find one of Ohio's greatest jurists, Peter Hitchcock, at a very early date discussing a question which at present is considered elementary, but had to be first settled in the then infant state. The point cannot be more aptly illustrated than by a quotation of Judge Hitchcock's language in Commissioners *v.* Butt (2 Ohio, 351), when he said: —

"Whenever a question of law has been settled in England, the courts in this country are in the habit of adhering to such decision. It is undoubtedly correct that such should be the case. But to adhere blindly to English decisions when no good reason can be assigned for them, or when no other reason can be assigned than that it has been thus decided, to do this without inquiring whether the same reasons exist in this country as in that, would be foolish in the extreme. It is a useful maxim that when the reason of a law ceases, the law itself should cease. A particular law or rule of law might be very beneficial in England, or in one of our sister states, which, if enforced in Ohio, would be attended with injurious consequences. Influenced by these circumstances, this court has ever been in the habit of looking to the effect which would follow the adoption of any particular rule or decision."

Further illustrating the ideas suggested, quotation is also made from Judge Hitchcock in Morris *v.* Edwards (1 Ohio, 208), where, in discussing the rule of construing contracts, he said: —

"It must be recollected also that this court, in giving construction to contracts, cannot interpret the same terms or word made use of in contracts to mean one thing in one part of the state, and a different thing in another. The rule of law must be uniform with the whole body of the people. The same words used in a grant would convey an estate of inheritance in the county of Trumbull or Hamilton, and it will not be contended that if by general consent of the inhabitants of the county of Trumbull should attach a meaning to those terms which in a grant convey an estate of inheritance, different from that which the law attaches, that the court would be justified in changing the interpretation of those terms to meet the feelings, wishes, or general consent of the people in that particular section. In interpreting contracts, the law of the place where the contract is made is to govern. But in what does the law of Cincinnati and its vicinity differ from the law in Cleveland or Steubenville? We are called upon to know certain facts of public history, which must go to change these principles in that particular section of the country, so far that a rule of law is to prevail different from that which prevails in other parts of the state. If this be correct . . . agreements containing precisely the same terms, and relating to the same subject-matter must be construed to mean different things, according to the understanding of the people in the various counties, or even towns in which they shall be executed. . . . This is carrying the rule that the *lex loci* must govern to an unreasonable length."

As an infant learns its A B C's, so was it necessary that the infant state authoritatively settle the elementary questions for itself. And so could we proceed, referring to many questions of like character showing the great scope of questions which the early judges had to adjudge in the formulation of the jurisprudence of the state. It is but natural that the question raised in the last above-mentioned case should have been made when we reflect for a moment that the judges and lawyers of those days were compelled to travel upon horseback for days in going from court to court, when the distances seemed very great, in the then undeveloped state, — greater indeed than in Blackstone's country; for in the present age of railroads, telegraphs, and telephones, it is impossible to realize distances, as before these means of travel and communication were established.

JOHN McLEAN.

When we reflect, therefore, upon the questions which the early judges had to encounter, without the aid of the books as now (for instead of being able to touch the button and have any law-book in existence laid on their desk in a moment, they had to travel miles to see and examine them), and when we consider the fact that they had to travel from county to county, spending as much time in the saddle as on the bench, we may have a slight conception of the labors by them performed. Judge John C. Wright, in his preface to his reports, says upon this subject: —

"The duties imposed upon this court are so great as to make relief necessary, for it would be difficult to find men of sufficient physical ability to perform the labor. These judges," he says, "now hold court in seventy-two counties each year, requiring twenty-two hundred and fifty miles' travel."

They who still remain to tell us of those days are now few in number, and unfortunately the pages upon the annals of history fail to enlighten us. The meagre incidents and anecdotes found in the biographies of the early judges are the only traces left.

Fourth Epoch: Constitution of 1851. — In its forty-ninth year as a state, the necessities of its inhabitants demanded a change in the judicial system. Consequently, the Constitution of 1851 was adopted by a vote of the people, on the third Tuesday of June, 1851, which took effect September 1st, 1851.

The new Constitution did not create a new state. It only altered, in some respects, the fundamental law of a State already in existence, and this was done pursuant to the old Constitution of 1802, under the provisions of which the convention was called, and the new Constitution framed. It followed, therefore, that all laws in force when the Constitution of 1851 took effect, which were not in conflict or inconsistent with it, remained

in force without an express provision to that effect, and that all inconsistent laws fell simply because they were inconsistent, or all repugnant laws were repealed by implication. It was essential, however, that the repugnancy causing a law to fall should be necessary and obvious; if by any fair course of reasoning the law and the Constitution could be reconciled, the law stood.[1]

It stipulated that the Supreme Court should, until otherwise provided by law, consist of five judges, a majority of whom, competent to sit, should be necessary to form a quorum or to pronounce a decision, excepting in the event of an increase of the number, when all of the judges of a division hearing a case did not concur as to the judgment to be rendered, or whenever a case involved the constitutionality of an act of the General Assembly or of an act of Congress, it should then be reserved to the whole court for adjudication.[2] The General Assembly was authorized to increase or diminish the number of judges of the Supreme Court, and to establish other courts,[3] whenever two-thirds of the members elected to each house concurred therein; but no such change, addition, or diminution can vacate the office of any judge;[4] and such concurrence will be presumed, as every reasonable intendment is made in favor of the correctness of legislative proceedings.[5] In case of the creation of any additional court, the judge must be elected, as the Constitution[6] requires that all judges other than those provided in the Constitution shall be elected, as it is not within the power of the Legislature to clothe with judicial power any officer or person not elected as a judge.[7] Provision may, however, be made for the election of a successor to any such additional judge, but in the absence of words clearly indicating such purpose, no such election is authorized.[1] This relates to the office of any judge created by the Constitution because it has not limited the power of the General Assembly to abolish courts created by the Legislature, nor its power to vacate the office of judges of such courts.[2]

The Constitution required the judges of the Supreme Court to be elected by the electors of the state at large, for such term, not less than five years, as the General Assembly may prescribe, to be elected and their official term to begin at such time as may be fixed by law. In case the General Assembly increases the number of such judges, the first term of such additional judges must be such, that in each year after their first election an equal number of judges of the Supreme Court shall be elected, except in elections to fill vacancies; and whenever the number of such judges shall be increased, the General Assembly may authorize such court to organize divisions not exceeding three, each division to consist of an equal number of judges: for the adjudication of cases, a majority of each division constituting a quorum, and such an assignment of the cases to each division may be made as such court may deem expedient.

In case the office of any judge becomes vacant before the expiration of the regular term for which he was elected, the vacancy is filled by appointment by the governor, until a successor is elected and qualified; and such successor must be elected for the unexpired term at the first general election after the vacancy occurs. (Art. 4, sec. 13, Const.)

The court was required to hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law.

[1] Cass *v.* Dillon, 2 O. S. 607.

[2] Art. 4, Sec. 2 Const.

[3] Art. 4, Secs. 1 and 15.

[4] Art. 4, Sec. 15. (a) Logan Branch Bank ex-parte, 1 O. S. 432. (b) State *v.* Comers, 35 O. S. 458; Peters *v.* McWilliams, 36, O. S. 155. (c) Campbell *v.* Corney, 5 W. L. B. 516, 76 O. L. 256.

[5] Miller *v.* State, 3 O. S. 475. [6] Art. 4, Sec. 10.

[7] Logan Branch Bank ex-parte, 1 O. S. 432.

[1] State *v.* Brown, 38 O. S. 344.

[2] State *v.* Wright, 7 O. S. 333.

The new Constitution also authorized a commission of five members to be appointed for the term of three years from and after the first day of February, 1876, to dispose of accumulated business, having like jurisdiction with the regular court. Upon application of the Supreme Court the General Assembly may, not oftener than once in ten years, provide for the appointment of other commissions. Two commissions have been appointed under this provision, — one in 1876, concluding its labors in 1879; another in 1883, concluding its labors in 1885; and yet the dockets of the court continued and continue to be crowded, of which more will be said later on.

THOMAS SCOTT.

These were the changes under the present Constitution.

We are constrained to digress from the subject for the purpose of referring to one important change wrought by the new Constitution in the administration of justice. Indeed, it was one of the most important features in the judicial history of the state, and was participated in by one who was at one time a judge of the Supreme Court — Judge Kennon. Article 14, sections 1, 2, and 3 of the Constitution provided that the General Assembly should appoint three commissioners to revise, reform, simplify, and abridge the practice of pleading, forms and proceedings of the courts, and abolish the distinction between actions at law and equity, and report to the General Assembly for action. This was the first step taken towards the establishment of a code system of procedure. William Kennon, William S. Groesbeck, and Daniel O. Morton were appointed commissioners, and reported what was known as the Code of Civil Procedure to the fiftieth General Assembly; and that body, on March 11, 1853, adopted it, which has remained with but little change to the present as the Ohio Code. The most important feature connected with the life of the Code was the revision and consolidation made by the thorough and capable members of the bar appointed for that purpose in accordance with the act of the General Assembly passed March 27, 1875. The commissioners appointed for this purpose were Michael A. Dougherty, Luther Day, and John W. Okey. Judge Day was a member of the commission only about a year when he was appointed a member of the Supreme Court Commission, and John Brasee was appointed in his place. Judge Okey was a member for two years when he was elected a judge of the Supreme Court, and George B. Okey, a very able son of an able father, was appointed to complete the important work begun by his father. This commission suggested in their report that there be no change made in any part of it, unless clearly necessary. "In this way," they said, "the Ohio Code will become stable, and the

fruits of this undertaking be preserved for a great number of years;" and so has it been.

The great service rendered by Judges William Kennon, John W. Okey and Luther Day in the formulation and revision of the Code is worthy of special mention.

The judges, therefore, who were on the bench when the Code system was inaugurated, and those who came on for a few years subsequently, like the early judges when the state was formed, had new and important problems to determine, as it became their duty to see that the procedure was started right. All was not harmony upon the adoption of the Code. The system seems simple enough now, but the change was bitterly opposed, and the system little understood at first; its staunchest friend was Judge Joseph R. Swan, whose opinions while a judge of the Supreme Court contain able expositions of many of its provisions. There probably never was a man in Ohio who had a clearer conception of the two systems, and the profession are more largely indebted to him for his services as judge and author than to any other man. The purpose of his work on pleading was to clear the confusion which existed in the minds of the profession, and although not so pretentious as other works, it ranks much higher in many respects.

Concluding this branch of the sketch we come to the much mooted question of Relief of the Supreme Court. For many years the crowded condition of the docket has been a grave problem, difficult of solution. For a number of years members of the Bar of Ohio have been discussing the question, and nowhere has it been more thoroughly considered than at the meetings of the State Bar Association held annually. But it seemed more difficult for that body to arrive at a conclusion than it is for a jury to agree upon complicated questions of fact after listening to able arguments of brainy barristers. Some there were who wanted to put up a fence high enough to keep a certain class of litigants out of the court of last resort. In other words they desired to have a limitation in the amount involved in an action prescribed, so that those whose controversies did not reach the prescribed limit would have been prevented from having one more chance of fighting their battle over and from procuring the opinion of the highest tribunal. Such a provision would often have prevented the determination and final adjudication of grave and important questions on the sole ground of an insufficiency of an amount involved. Such a proposition needs but to be stated to be repudiated by all fair-minded men, and would have been wholly in disregard of the principle enunciated at the opening of the first court, when it was declared that the court was opened for the administration of even-handed justice to the poor and to the rich, without respect to persons. Another class entertained the opinion that the court should be increased in number, and divided in sections. Consequently in the year 1892 the Legislature was prevailed upon to pass and did pass an act, as an experiment, providing for an increase of *one* judge, requiring the court to divide into two sections of three each. But the law has not at this date been placed in practical operation, because the Legislature failed to provide proper conveniences for holding two courts, and the court continues to work as before. The addition to the court, however, has had the effect of facilitating the work in various ways. If we were to express any view upon the subject of reform, it would be the hope that the court continue working as it now is until the legislature increase the court to ten judges, divided into two divisions of five each. There is nothing to be gained by a division of the present number as designed by the present law, except, possibly, a greater amount of work, and that is not all that must be considered. Each suit has already been passed upon by the Circuit Court of three members.

A CURIOUS WILL.

AN English paper vouches for the authenticity of the following extraordinary will.

On the 19th of August, 1784, at the Court of Bailiwick, in the town of D——, was read and published the last will and testament of M. Fortune Ricard, a teacher of arithmetic; and this curious and lengthy document contains the most gigantic bequests ever left by mortal man. A brief summary of some of its salient features is here appended. After private bequests, the testator proceeds to deal with a separate fund of 500 livres = £22 of English money.

"This sum," says he, "proceeded originally from a present which was made me by Prosper Ricard, my much-honored grandfather, when I entered the eighth year of my age. At that age he had taught me the principles of writing and calculation. After having shown me that a capital, with its accumulating interest of five per cent, would at the end of 100 years amount to more than 131 times the original sum, and seeing that I listened to this lecture with the greatest attention, he took twenty-four livres (a guinea) out of his pocket, and addressed me with an enthusiasm which is still present to my mind.

"'My child,' he said, 'remember whilst thou livest, that with economy and calculation nothing is impossible to man! Here are 24 livres which I give thee. Take them to a merchant in our neighborhood, who will place them in trade, out of regard for me. Every year thou shalt add the interest to the principal. At thy death thou shalt employ the produce in good works for the repose of thy soul and my own.'"

In his seventy-first year M. Fortune found that the 24 livres had grown to 500, and disposed of them as follows: —

First, they were to be divided into five equal portions of 100 livres each, and each several portion put out to interest in the same way as the original 24. These were then to be employed as follows: —

1. In 100 years the first sum of 100 livres would amount to 13,100 livres (£5,822). From this a sum of £1,500 was to be given for the best theological dissertation proving the lawfulness of putting money out to interest. Further, three medals were to be given, and the rest of the money spent in printing and circulating the essays.

2. After 200 years the second sum, amounting to 1,700,000 livres (£756,500), was to be employed in establishing a perpetual fund for fourscore prizes of 1,000 livres each: 15 prizes for the most distinguished virtuous actions, 15 for works of science and literature, 10 for arithmetical solutions, 10 for agricultural science, 10 for masterpieces in fine arts, 10 for athletics, etc.

3. After 300 years the third sum, increased to 226 millions (£10,057,000), to be used: 196 millions to establish in the most populous places in France 500 patriotic banks for lending money without interest, the largest with a capital of 10 millions, the smallest of 100 thousand livres. The remaining 30 millions to found museums at Paris, Lyons, Bordeaux. Rouen, Rennes, Lille, Nancy, Tours, Dijon, Toulouse, Aix, and Grenoble. Half a million livres to be spent on each building and grounds, and an income of 100,000 livres to be annexed to each — with a staff of forty literary men and artists of superior merit, "who, at the time of meals, shall be divided into four tables, that their repast may be cheerful without being too noisy"! Free libraries, galleries of natural history, concert halls, theatres, free lectures, are all provided for in this wonderful and comprehensive scheme.

4. At the end of 400 years the fourth sum, amounting, with interest, to 30,000

millions (£1,330,000,000), to be employed in building 100 towns, to accommodate each 150,000 souls, in the most agreeable situations to be found in France. As the testator recognizes that all the specie in Europe would not reach this amount, it is left to the discretion of the executors to buy land and real estate.

5. Finally, with regard to the last sum of 100 livres, amounting nearly, with the accumulation of 500 years, to four millions of millions of livres (136,000,000,000 sterling): six thousand millions to be employed in paying off the National Debt of France, "upon condition that the kings shall be entreated to order the comptrollers-general of the finances to undergo, in future, an examination in arithmetic, before they enter upon their office"; twelve thousand millions of livres (£525,000,000) to pay off the National Debt of England.

"It may be seen," says this astute and far-seeing philosopher, "that I reckon that both these National Debts will be doubled in this period; not that I have any doubts of the talents of certain Ministers to increase them much more, but their operations in this way are opposed by an infinity of circumstances which lead me to presume that those debts cannot be more than doubled. Besides, if they amount to a few thousand of millions more, I declare that it is my intention that they should be entirely paid off, and that a project so laudable should not be deferred for a trifle, more or less.

"I beg that the English would not refuse this slight mark of the remembrance of a man, who was indeed born a Frenchman, but who sincerely esteemed their nation. . . . I earnestly desire that, as an acknowledgment of this legacy, the English nation will consent to call the French their neighbors, and not their natural enemies, that they may be assured that Nature never made man an enemy to man; and that national hatreds, commercial prohibitions, and, above all, wars constantly produce a monstrous error in calculations."

Into the further legacies we do not propose to enter — they include funds for the encouragement of peace, the extinction of State lotteries and sinecure offices, for the increase of priestly stipends — "on condition that the clergy forego their fees for saying masses"; for bringing waste lands into cultivation, for education, for public or municipal houses of labor, where any who demand work shall have it; for hospitals; for the furtherance of the employment and proper remuneration of women, etc.

A modest residuum of some three millions of millions odd livres is left to the discretion of the executors — six in number — who are to be replaced perpetually on the death of any one by the votes or nomination of the survivors. These gentlemen receive nothing from the first sum, but at the end of the second hundred years there is a sum of 125,000 livres unappropriated; of the third, 711,000; of the fourth, 32,000,000, which sums they are requested to accept as a compensation for their expenses and trouble.

The will concludes with the following characteristic paragraph: —

"May the success of these establishments cause one day a few tears to be shed on my grave! But above all, may the example of an obscure individual kindle the emulation of patriots, princes and public bodies; and engage them to give attention to this new but powerful and infallible means of serving posterity, and contributing to the future improvement and happiness of the world!"

WILLIAM ATWOOD,

CHIEF-JUSTICE OF THE COLONY OF NEW YORK, 1701–1703.

By Charles P. Daly, LL.D.,

Ex-Chief-Justice of the New York Court of Common Pleas.

I.

TOWARDS the close of the seventeenth century, the vessels of the notorious pirates known as the Red Men, which then infested the East Indian seas and were the terror of the maritime world, sailed under commissions granted to them ostensibly as privateers, by Fletcher, the governor of the Colony of New York. The place of retreat of these sea robbers was the island of Madagascar, whither their booty was brought, but their vessels were fitted out, manned, and equipped in the port of New York, and New York merchants furnished them regularly with supplies, sending out vessels to Madagascar loaded with everything that these marauders required, and bringing back in exchange bullion, spices, and costly Indian fabrics, together with slaves, procured upon the coast of Africa, which was visited upon the return voyages. New York was, in fact, at the time, a nursery of piracy, which the British government determined to put an end to, and for that purpose it removed Fletcher from the office of governor, and sent out in his place Lord Bellamont, a man of capacity, integrity, and military experience.

At first Bellamont was unable to accomplish anything, either through the indifference or the incapacity of Chief-Justice Smith, who had not been bred to the law, and the corruption of James Graham, the Attorney-General, who was in league with the merchants in keeping up this infamous traffic, by which several of them acquired large fortunes. Bellamont wrote to the home government that, in spite of all his endeavors, piracy would continue in New York for the want of good judges and an honest attorney-general, and suggested that a chief-justice and an attorney-general, who were barristers, should be sent out from England; for Graham, like the Chief-Justice, was not an educated lawyer, and in addition to being corrupt, had not the professional knowledge that was requisite for the proper discharge of the duties of his office. The government acted upon Bellamont's suggestion, appointing in 1701 William Atwood, Chief-Justice, and Sampson S. Broughton, Attorney-General; and in view of the part which these men had in the troublesome events that followed, it will be appropriate to state what is known previously respecting them.

Atwood was a man of a good family, of the manor of Littlebury and Rickenhoe in the county of Essex. He was one of two sons of John Atwood of Broomfield, in Essex. It appears by the record of the license for his marriage in 1678 to Mary Leigh, that he was a fellow of Gray's Inn, and by the records of the Inn that he was admitted a member of that body in 1669; was called to the bar in 1674, and in that year was master of the revels in the Inn.[1]

Whether he had acquired any prominence in the courts as a practitioner I have been unable to ascertain, beyond the fact that the

[1] Morant's History of Essex, Vol. I., 155; id., Vol. II.; Chelmsford Hundred, p. 78; Wright's History of Essex, Vol. I., p. 367; Register of the Marriage Licenses of the Vicar-General of the Archbishop of Canterbury, from 1660 to 1700; Harlein Coll., Vol. XXIII., p. 293; Harlein Coll., Vol. XIII., p. 338; Foster's Registers of Admissions to Gray's Inn, from 1521 to 1881, p. 24.

writer in 1811 of a note to Howell's State Trials, says that in 1688 he "was a very considerable man in his profession," and Atwood's own statement, after he came to the colony, that he was not unknown in Westminster Hall and at the Bar of the House of Lords.[1] However that may have been, he had, at the time of his appointment, become somewhat known as the author, during the twenty years preceding, of publications upon a variety of subjects, legal, historical, political, and theological.[2] In 1680 he published a tract entitled *Juri Anglorum Facies Nova* (A New Face to the English Law), which was of sufficient importance to induce Dr. Brady, the historian, to reply to it, — a man whose writings had been largely devoted to establishing that all the liberties of the English people were concessions from the crown, and who then represented the University of Oxford in Parliament. The next year, 1681, a tract of a legal historical character by Atwood appeared, entitled *Jus Anglorum ab Antique* (The English Law from of Old); and the following year he published another, to show that William the Conqueror made no absolute conquest of England, in the sense of modern writers.[3]

Another publication, in 1689, was in connection with an event upon which the public mind had been greatly excited. Among the acts of James II. against the liberties of the people of England, none were more arbitrary than his removing four of the judges of the King's Bench, that he might obtain from that tribunal the decision shortly afterward given by it in Sir Edward Hale's case, that he was an absolute sovereign, that the laws of England were the king's laws, that he had the power to dispense with any of them whenever he saw a necessity for it, he alone being a judge of that necessity. Chief-Justice Herbert, by whom this decision was pronounced, though an honest and conscientious man, had the most exalted, or as Burnet put it, "high notions," respecting the king's prerogative, which, being known to James, he appointed him unsolicited Chief-Justice of the King's Bench. This decision, under which James could dispense with the test act that required any one before taking a public office, in addition to other obligations, to abjure all belief in the doctrine of transubstantiation, and which he informed Parliament he intended to do, "struck," in the language of Hume, "universal alarm throughout the nation, infused terror into the church, which had hitherto been the chief supporter of the monarchy, and disgusted the army."[1]

When James in 1687 issued his "Declaration for liberty of conscience," which "annulled all oaths by which subjects were disabled from holding office," and followed it up by removing Protestants in numerous instances and appointing Roman Catholics in their places, it necessarily followed that the decision which authorized this use of his prerogative was throughout the kingdom the subject of constant discussion. It was assailed in sermons, books, and pamphlets, in which the Chief-Justice was held up to general condemnation. To express it in his own words, "he had the hard fortune to fall under the greatest infamy and reproach that it is possible for any man to lie under, of perjury and breach of trust, in giving judgment in Sir Edward Hale's case contrary to law and contrary to my knowledge and opinion, which alone made it criminal."[2]

[1] Howell's State Trials, Vol. II., p. 1260; 5 Col. Doc. p. 103.

[2] A Poetical Essay toward an Epitome of the Gospels, 1678; Letter of Remark upon Dr. Kirk's Jovian, 1683; A Commentary on the Life of Edward VI.; Grotius's Argument on the Truth of Christianity, put in English verse, with an appendix concerning the Prophecies, 1686; A Paraphrase of Waller's poem on Divine Love, 1688.

[3] *Argumentum Antinormanicum*, or an Argument proving from Ancient Histories and Records that William, Duke of Normandy, made no absolute conquest of England by the sword, in the sense of our modern writers, London, 1682.

[1] Hume, chap. 70.

[2] 11 Howell's State Trials, p. 1251.

Being, as appears to have been generally conceded, a conscientious man, Sir Edward felt the weight of this public condemnation, and in 1688, the year of James's abdication, being then Chief Justice of the Common Pleas, to which he had been transferred as not sufficiently compliant at the head of the King's Bench, he published what he called his vindication,[1] in which he set forth the authorities upon which his decision was founded. When the vindication appeared Sir Robert Atkyns, afterwards Chief Baron of the Exchequer, had just completed a work upon the king's power of dispensing with penal statutes, in which he gave an exhaustive account of the origin, nature and limitation of this power, and before publishing the work he added to it, as an appendix, an answer, and a very complete one, to Sir Edward Herbert's Vindication; and Atwood in the same year also published an answer to it.[2]

Atwood's reply was not very well written, and is in this respect in marked contrast with the lawyer-like, well constructed and convincing argument of Sir Robert Atkyns. Sir Robert, in his answer, was especially courteous to the Chief Justice. He refers to the high character he bore and does not assume to question the sincerity of his statement in his "Vindication," that he had decided what he conscientiously believed to be the law. Atwood's course was the very opposite. He begins his book by declaring, in a very involved way, his disbelief in Sir Edward's sincerity. He charges him, in another part of it, with "willful falsification or criminal negligence," and at the end of it says that "unless he is much misinformed, the Chief Justice, notwithstanding his assertion of his innocence, may be justly charged with having procured the judgment by "threats and solicitations"; the book throughout displaying the coarse nature of the man and his low grade as a partisan, characteristics he exhibited more fully in New York, where he became one of the worst judges the colony ever had.

In this tract he reviews the cases on which Sir Edward Herbert relied, but does it in such a way as to leave on the mind of the reader only a confused impression. There are passages so involved and obscure, that it is difficult to discover what he means, and in the midst of his examination of cases, he digresses, that he may refer to "the glorious Expedition of the Prince of Orange," whose marvelous successes, he says, "are not only the subject of present admiration, but have been plainly foretold in past ages"; for which he cites the prophecies of Nostredamus the French astrologer, and the writings of Grebner, another vendor of knowledge of the future derived from the stars.

The work, however, shows that he was well acquainted with the early authorities and statutes. It displays considerable acuteness in discriminating cases and fixing the exact limits of their authority, and establishes satisfactorily that those on which Chief Justice Herbert relied did not warrant the construction he put upon them, which was not difficult to do, for Lord Campbell says that when Sir Edward's selection as Chief Justice of the King's Bench was under consideration, two objections were presented, the first of which was that he was conscientious in his opinions and of strictly honorable principles in private life, and the other that he was quite ignorant of his profession.[1]

After the passage in 1689 of what is known as the first act of settlement, vesting the crown in William and Mary, and declaring that the administration of the government should remain solely in King William, an opportunity was afforded Atwood of

[1] A short account of the authorities in law upon which judgment was given in Sir Edward Hale's case by Sir Edward Herbert, Chief Justice of the Common Pleas, in his own vindication. London, 1688.

[2] The Lord Chief Justice Herbert's Account Examined, wherein it is shown that those authorities in law, whereby he would excuse his judgment in Sir Edward Hale's case, are very unfairly cited and as ill applied. London, 1688.

[1] Lives of the Chief Justices, Vol. 2, p. 80.

writing a book that would naturally attract the attention of the government. The difficulty had been, after the flight of James, to determine what could consistently be done, for it was a maxim of the English law that the crown was never vacant; that upon the death of the sovereign it passed, in accordance with this maxim, at once to his rightful successor, and that if the sovereign became incompetent, the only course was to appoint a regent. This William would not accept, nor would Mary agree that the crown should be settled upon her alone. The provision for a king instead of a regent passed the House of Lords only by a majority of two; that body also refused to agree with the Commons that there was an original contract between the king and the people, which James had broken by attempting to subvert the Constitution, and that as he had abandoned the kingdom, the throne was vacant. They concurred finally in the act of settlement, but only by a small majority, and some who voted for it did so as an act of necessity, because nothing else could be done. Many who disapproved of the acts of James, and did not desire his return, maintained notwithstanding that he was the lawful king, who could not, unless with his own consent, be divested of his inherited right to the crown. The Tory party, which was numerous and powerful, were in open opposition from the beginning of William's administration, and had in its ranks those thereafter known as Jacobites; who were divided into two sections, those who were for the restoration of James, with a general amnesty and guarantees for the security of the civil and ecclesiastical constitution of the realm, and those for his restoration without any conditions, "that he might be free either to spare or to punish traitors, and to dispense with any of the laws that he thought proper, being, if he acted wrongfully, answerable only to heaven and not to the people."[1] The question therefore, notwithstanding the act of settlement, continued to be agitated, whether William was the lawful king, and Atwood, the year after its passage, 1690, published a folio entitled "The Fundamental Constitution of the English Government, proving King William and Queen Mary our lawful King and Queen." Such a publication, at such a time, if it displayed any ability at all in showing by historical research and legal reasoning that William and Mary were the lawful, as well as the acting sovereigns of the nation, could not but be regarded with favor by William and his ministers, and Atwood was not the kind of man to allow the government to remain ignorant of the nature and extent of his labors in support of the Protestant ascendancy. He followed this up in 1694 by a treatise on the antiquity and justice of the oath of abjuration,[1] and in 1698 published a small work on the history and reasons of the dependency of Ireland upon the imperial crown of England. It was, I apprehend, in recognition of these services in support of the government, and not from any eminence he had attained at the bar, that he secured thereafter the appointment of Chief Justice of New York.

Broughton, the Attorney-General, was a barrister of the Middle Temple, of long standing, a well-read lawyer and a man of integrity, moderation and good sense. It is somewhat remarkable that a London barrister in good standing, as Broughton appears to have been, should have been willing to take an office in the Colony, the salary of which was only £100 a year, with fees in the Court of Admiralty that probably amounted to £100 more. But he may have been a man of some means, who was influenced by the attraction of a high judicial office, or

[1] Macaulay's History of England, p. 348.

[1] A subject to which further attention had been drawn by a bill introduced and defeated in the House of Commons, providing that all persons holding any office, civil or ecclesiastical, should take an oath before a justice of the peace, abjuring King James, and if they refused, that they should be committed to prison, and remain there until they complied.

possibly by the prospect, in a new country, of a future for his children, for he writes to the Lords of Trade that he had brought with him "eight in family," and did not know "where to fix them, houses in the city were so scarce and dear, and lodgings worse," ending by asking them to allow him to occupy one of the houses of Capt. Kidd, which had been forfeited to the government.[1]

The two officials arrived in New York after a voyage of ninety days, on the 24th of July, 1701, and although the time was unpropitious, being the hottest period of the year, they were invited to numerous dinners and entertainments; every attention was shown to them, and the corporation conferred upon each of them the freedom of the city.

At this time there were two factions in the Colony, known as the Bayard party and the Leislerians, who, after Lord Bellamont's death, were struggling for supremacy, and in the interval between the death of Bellamont and the appointment of his successor, Lord Cornbury, the Leislerians were in power. They were the party that Lord Bellamont had recognized, and as it was at his request that an English barrister had been appointed to fill the office of Chief Justice, instead of being selected, as before, from the Colony, it was perhaps to be expected that the newly appointed Chief Justice would regard favorably the party that had had the confidence of Bellamont. Atwood, moreover, in virtue of his office, was a member of the Council. As such he had duties connected with the administration of the affairs of the province, as distinguished from those that were judicial, which were discharged in a council composed exclusively of Leislerians, and under such circumstances it was not remarkable that he should be in sympathy with those whom, from the outset, he was brought in official connection. But he went far beyond that. He became the leader of the party, and as such one of the most active, unscrupulous, and vindictive of partisans.

[1] 4 Col. Doc. 914, 253.

Broughton the Attorney-General's course was different. In a very short time he formed a correct judgment of the two factions, "between whom," as he said, "he could not discover any more material ground for their differences, notwithstanding the many allegations on both sides, than a desire to be distinguished," and he wrote to the Lords of Trade suggesting that they should get the King to give Lord Cornbury, who it was understood was to be Lord Bellamont's successor, special instructions "to use temper and moderation upon his first coming"; to treat each party with like favor and respect, by which means, he said, "after he has run some course, in such a management, he will be able clearly to discern who are true friends of his Majesty and his government here, and then it will not be difficult for him to determine how to steer himself for the future,"[1] an advice which, if given, Cornbury never followed.

Atwood, in addition to his office of Chief Justice, was also commissioned as the judge in admiralty, with an extensive jurisdiction embracing the New England colonies, New York, New Jersey and Pennsylvania. Lord Cornbury, in an official communication afterward to the Lords of Trade, stated that Atwood and Thomas Weaver, who was then the collector of the port of New York, were both "persons extremely indigent," that they were "partial, unjust, violent and turbulent," who had "contrived and complotted the ruin of the principal inhabitants, so that their estates, which were considerable, might be forfeited to the government for debts due to it." That Atwood, "in the execution of his office as Chief Justice and as judge in almost all cases that came judicially before him, by the chief report of all present, openly, notoriously and most scandalously and with wonderful partiality, in

[1] 4 Col. Doc. 914.

almost all cases where his son was concerned as counsel, espoused and pleaded and gave countenance to such cause and finally gave judgment on that side" (his son's), "by which means justice was perverted, the law abused and violated, and the subject exceedingly injured, which recommended his son to great practice, and large sums of money were by parties given him to buy his father's favor." [1]

If this account of Atwood had nothing to support it but the statement of a governor, whose own conduct as an official was disreputable, it would be received with distrust; but what we know of Atwood's career in the Colony, from other sources, warrants the belief that it was substantially true. Of information derived from other sources is an account, in an abstract of letters received from New York by the Lords of Trade, of Atwood's conduct upon the trial of one Roger Baker, a lieutenant of a regiment of militia in New York, and the keeper of a tavern where the Anti-Leislerians, or Bayard party, were in the habit of meeting, who was indicted for saying that King William was "a nose of wax," who would be "no longer king than the English please." It described how the jury was packed with Leislerians, or, as the account calls them, "Dutchmen," the last one impaneled, who was an Englishman, being reluctantly taken by the sheriff to fill up the jury. Three witnesses only were examined, the first of whom testified that the words were spoken by Baker, but added that they were all very drunk, it being a holiday. The other two swore that they were present during the whole time, that they heard no such words, nor anything like them; that they were all drunk, and that the witness who testified to the speaking of the words was so drunk as to be unable to "stand." Upon this evidence Atwood charged the jury to bring in a verdict of guilty. The jury retired, and after staying out all night returned in the morning with a verdict of not guilty, at which the account says Atwood was very angry, that he refused to receive the verdict and sent them out again; that after remaining out for six hours they returned and again rendered a verdict of not guilty. At this, the account continues, the Judge "grew very passionate and threatened them; that they were sent out again several times," but persisted in rendering a verdict of not guilty, upon which he threatened to fine and imprison them, which, the account says, "so alarmed the eleven Dutchmen" that, upon Atwood's demanding who among them would not agree to a verdict of guilty, they named the Englishman, when, the account states, "the Judge fell upon him with menacing language," and by "hectoring and threatening him, so managed him" that at last he gave his consent to a verdict of guilty, which being rendered, Atwood fined Baker four hundred pieces of eight, a very large amount at that period, and ordered that he should remain in the custody of the sheriff until it was paid and made such an "acknowledgment as the Lieutenant-Governor should think fit." [1]

Atwood afterwards undertook to obviate the effect of this scandalous proceeding, not by denying anything contained in this account, but by stating that the witness who swore to the speaking of the words was a man of good credit, who all the jury declared they believed would not forswear himself; whereas the Englishman was of such ill fame that a jury of his own party found him *in effect* guilty of forgery, whatever a finding *in effect* may mean, and that he took with him in the jury room a law-book of no authority, and by a false application of it misled the jury.[2]

When it was ascertained that Lord Cornbury was appointed, the anti-Leislerian party, of whom Col. Nicholas Bayard was the leader,

[1] 4 Col. Doc. 1010, 1011.

[1] 4 Col. Doc. 810, 957 N. Y. Hist. Soc. Col. for 1880, p. 282.

[2] N. Y. Hist. Soc. Col. for 1881, 282.

determined to make an effort to recover their past influence, and Bayard had addresses to the King, the House of Commons, and to Lord Cornbury, subscribed at the tavern of one Hutchins, an alderman of the city, in which the Leislerians, who then had the control of the House of Assembly, of the Council, and the support of Lieutenant-Governor Nanfan, were charged with enriching themselves by the spoils of their neighbors, and stating that the Assembly had bribed the Lieutenant-Governor and the Chief Justice, the former to sign their bills and the latter to defend their legality; which addresses were signed at Hutchins's tavern by a considerable number of the citizens and by many of the soldiers of the garrison, who, it was alleged, were brought there for that purpose. This greatly exasperated the party in power and especially the Lieutenant-Governor and the Chief Justice. A statute had been passed in 1691 by the Assembly, immediately after the Leislerian insurrection, recognizing the right of William and Mary to the sovereignty of the province, at the end of which was a very loose clause, said to have been inserted by Bayard, or through his influence, declaring that any person who should, by *any* manner of ways, endeavor, by force of arms *or otherwise*, to disturb the peace and quiet of their majesties' government as then established, should be esteemed rebels and traitors, and incur the penalties which the laws of England provided for such offenses. Nanfan, — no doubt upon the suggestion of Atwood, who, Smith the historian says, "stimulated the prosecutions that followed" [1] — determined to have the principals in the getting-up of these addresses convicted, under this statute, of high treason, which was drawn up in terms so general that under it an unscrupulous judge might declare that any act or words, intended to be in any way offensive or derogatory to those in power, was in the formal words of this act an endeavor to disturb the peace and quiet of the government, and was therefore, within the meaning of it, high treason.

Nanfan accordingly summoned Hutchins to deliver up to him the addresses that had been signed, which Hutchins refused to do, upon which the Lieutenant-Governor had him committed to jail. This aroused Bayard, and he with three associates, on the following day, addressed a written communication to the Lieutenant-Governor expressing their confidence in the legality of the addresses and asking for the release of Hutchins. Nanfan sent their communication to the Attorney-General Broughton for his opinion of it as well as of the addresses and of Hutchins' refusal to give them up, and Broughton returned a written opinion to the effect that there was nothing criminal in the addresses, and that the refusal to give them up was not such a contempt as authorized the commitment of Hutchins. This opinion on the part of the prosecuting officer of the Crown was a serious obstacle; but Atwood was equal to the emergency. He and Thomas Weaver, the collector of the port, who was also a member of the Council, succeeded, and, as I infer, with the aid of the sheriff, who was of the Leislerian party, in getting a grand jury together, who found a bill of indictment against Broughton for neglect of duty; that is, for not prosecuting men for an act of high treason, when he had declared in an official communication that the act complained of was not a criminal offense; and Nanfan followed up this indictment by suspending Broughton from his office, whom he could not remove, as he held his appointment from the Crown, and wrote to the government asking for his removal, a request with which it did not comply.

The Council then issued a warrant for the arrest of Bayard and Hutchins for high treason, signed by Atwood, Weaver and two other members of that body, upon which Bayard and Hutchins were committed to jail and a file of soldiers was placed as a guard

[1] 1 Smith History of N. Y., p. 165.

over the prison, to prevent a rescue. This being done, Nanfan issued a commission for a Court of Oyer and Terminer, to be held by the Chief Justice and two of the puisne judges of the Supreme Court, Abraham De Peyster and Robert Walters, who were of the Leislerian party, for the trial of the prisoners, and he appointed Weaver Solicitor-General to conduct the prosecution, an office before unknown in the province.

The accused petitioned that they might not be brought to trial until the regular sitting of the Supreme Court, as they wanted the intervening time to get ready for their defense. The request was denied, and only five days were allowed Bayard to prepare for his trial, which was the first, the intention evidently being to have him tried and convicted as quickly as possible, as it was not known when Lord Cornbury might arrive, and it was by no means certain what view he might take of the proceeding.

It was doubtful if a grand jury could be got that would find a bill of indictment against Bayard, for an offense the punishment of which was death. The Leislerians were chiefly composed of the Dutch and Huguenot part of the population, and Bayard, in addition to being personally popular, was a Dutchman by birth and the son of a Huguenot. Weaver, foreseeing that there might be difficulty, went himself with the proofs before the grand jury, and gave orders that no one should be sent for to appear before them except such as he might name, nor any question asked except such as he should approve. Four of the jurors objected to the presence of the Counsel for the Crown during their deliberations. They also claimed the right to send for any persons and to ask any questions they thought proper, and the reply made by Weaver shows the despotic arrogance of officials in that day. It was that he would have these four jurors "trounced." He took down their names, and Atwood ordered them to be discharged and four others put in their place. But notwithstanding this, and although Atwood charged them that the facts which the prosecuting officer of the Crown would lay before them amounted to high treason on the part of Bayard, the jury, after long deliberation, hesitated and adjourned at a late hour on Saturday night until Monday morning, without finding a bill of indictment against him. This incensed Atwood, who declared that if the grand jury did not find a bill, he would have an information lodged against Bayard for high treason and try him in that way.

On the following Monday the grand jury came into court, and the foreman, who was the brother of one of the puisne judges, De Peyster, handed up the indictment endorsed and signed by him as a true bill, which Atwood immediately took, and *at once* discharged the grand jury. Nicholls and Emot, the defendant's counsel, then informed the court that eight of the nineteen grand jurors were against finding the bill of indictment; and that as the concurrence of twelve at least was necessary to the finding of a true bill, the foreman had no right to present it, and they moved that those of the jury who were present might be examined as to the fact, and the remainder sent for. Weaver's answer to the motion was in the partisan spirit of the period. "When you had the government, Dr. Staats had a bill filed against him by eight out of eleven," which Nicholls did not admit. But Atwood was more adroit. He knew that the concurrence of twelve jurors was essential to an indictment, and denied the motion upon the ground that the jury had been discharged, and that there was no longer any grand jury.

Nicholls then moved to quash the indictment, offering to produce a written statement by eight of the jurors that they had not given their consent to the bill, which Atwood met by the subterfuge that the indictment had then become a matter of record, and that no averment could be re-

ceived to impeach a record, and knowing this to be untenable, declared he would hear no further argument, and ordered the trial to proceed. Bayard's counsel then asked for an adjournment until the following Monday, to which Atwood answered: "No. We will not give Mr. Vesey" (who was then the pastor of Trinity Church) "the opportunity of another sermon against us." And as the trial was about to proceed an incident took place showing the character of the man who was presiding over it. Perceiving that Jameson, a lawyer who was present, was about to take notes, Atwood forbid him to do so. Jameson said he was exercising the right that every attorney had to take notes of a trial for his own private use. Atwood: "You are no longer, sir, an attorney of this court, nor shall you practice until you have purged yourself for signing the addresses. Put up your pen and ink." With difficulty an adjournment was obtained for a day, and on the adjourned day Bayard presented a written statement that the indictment was not found by twelve grand jurors; that the foreman had no power to hand in the one endorsed by him as a true bill; that it had not been agreed to by twelve of the jurors; that there was not one Englishman on the grand jury when the bill was presented, but that they were all of Dutch extraction, many of whom could neither read, write, nor even understand the English language; to which Atwood's answer was, "Let it be entered that it appears to the court that the bill was found by more than twelve jurors."

When the trial was brought on, the proof against Bayard was that his name was signed to one of the addresses, and that he and his son were present at the tavern when they were signed by soldiers and others. The addresses were not put in evidence, but some loose testimony as to their contents was given, which Atwood held was sufficient to show their treasonable character, stress being laid upon the failure of Bayard, in whose possession or under whose control they were assumed to be, to produce them.

Nicholls, in a very able argument, maintained, citing many authorities, that it was no crime to petition the king and the House of Commons. "I don't say," said Atwood, "that it is a crime to petition the king, but it is to petition the House of Commons, in the plantations, for there the king governs by his prerogative, and with the government there the House of Commons have nothing to do." Nicholls replied that it was an every-day practice. He argued that it was not only an ancient right, but was expressly given by an act passed in the reign of Charles II., and that an act in the reign of William and Mary declared that all prosecutions for exercising it were illegal. He quoted the remark of an English judge that to petition is an Englishman's birthright, and especially insisted that the right to petition the governor of a province was apparent, as he was made amenable by statute for any miscarriage of his government that was brought to the attention of the crown.

The ground taken by Atwood that the House of Commons had nothing to do with the government of the colony, and that in New York it was a crime to address a petition to it, as the king alone governed in the colony, involved the anomaly that although an English subject, while in England, had guaranteed to him, both by ancient usage and by acts of Parliament, the right to petition the House of Commons; yet if he became a resident of the British colony of New York, he could be indicted for high treason if he dared to exercise it.

From Atwood's point of view the crime against the king was in appealing to another branch of the government, when the power to rule the colony was vested solely and absolutely in the king under his prerogative. Blackstone says that, in the reign of James I., the unreasonable exercise of what was deemed the king's prerogative — the claim

of more absolute power than had ever before been carried into practice — awakened the sleeping lion, and that when his successor, Charles I., strained the prerogative beyond the example of former ages, the popular leaders overturned the monarchy.[1] The nature and extent of the king's prerogative in a colony like that of New York, which had been acquired by conquest, is a subject the exposition of which would occupy too much space in an article like the present. It is one that I have examined very fully, and in respect to which I am able to state that Atwood's claim that the king, by virtue of it, had the sole, exclusive, and absolute power of governing in the colony, was without foundation.

[1] 4 Black. Com., Book IV., c. 33.

OLD WORLD TRIALS.

IX.

REGINA *v.* BELLINGHAM.

OF all the criminal trials of the present century there is none of which English lawyers have such good cause to be ashamed as that which forms the subject of the present paper. On 11th May, 1812, the Rt. Hon. Spencer Perceval, second son of the Earl of Egmont, and then first Lord of the Treasury, was shot, while entering the lobby of the House of Commons, by a man who had been watching for him near the door, named John Bellingham. The bullet entered Mr. Perceval's left breast, and he died almost immediately. Bellingham made no attempt to escape, and confessed his crime. Practically the only question at issue was as to his sanity. The Prince Regent, afterwards George IV., appointed a special commission to try him, and *four days after the murder*, viz., on 15th May, he was brought before this tribunal, of which Sir James Mansfield was president. The prisoner, we are told, was brought in "heavily ironed on each leg, and advanced firmly up to the front of the bar, where he bowed respectfully to the court. He was dressed in a shabby brown duffle great-coat, buttoned close up to his chin so as to render his neckcloth, which was dirty, scarcely perceptible. He placed his hands upon the bar, and stooped forward as if to listen with great attention to what was passing." On being asked to plead to the indictment, he declared himself not ready to go to the trial, as the documents necessary for his defense had been taken from him. He was directed simply to plead guilty or not guilty. He put in the latter plea. Then his counsel, a Mr. Alley, moved the court to postpone the trial, as there had not been time to communicate with the prisoner's friends who could prove his insanity, and supported his motion by two affidavits by relations of Bellingham's, stating that his insanity was notorious to every one who knew him. The court refused the motion in its indecent haste to proceed to judgment. Then the case was opened by the Attorney-General. The facts, as he stated them, were these: Bellingham had gone to Russia some years before, for a mercantile house in Liverpool, and had been imprisoned at Archangel on a charge of having given information concerning the loss of a ship to Lloyd's coffee-house. After his release Bellingham appealed to Lord Leveson Gower, the British ambassador in St. Petersburg, for redress, but nothing was done. He then returned to Liverpool, and set up in business on his own account. But

his experience weighed upon his mind, and he endeavored to get the British government to take up his case. No one would bring it before Parliament. He then applied to Mr. Perceval, but the Prime Minister declined to interfere. Bellingham then provided himself with pistols, balls, and powder, waylaid Mr. Perceval in the lobby of the House of Commons, and shot him, as we have already stated, fatally in the side. It is a curious circumstance, by the way, that Mr. Perceval was warned by a friend not to go to the House of Commons on the day of the murder, as he had dreamed that he saw the Prime Minister shot by a man wearing a suit of clothes such as Bellingham was proved to have worn on the day. Like Cæsar in the well-known story of Calpurnia's dream, Perceval disregarded his friend's advice, and went forth to meet his Ides of March. Called upon for his defense, Bellingham commenced by thanking the Attorney-General for having brushed aside the plea of insanity which his counsel had set up on his behalf. He then gave an account of the oppressive treatment he had received in Russia, and appealed to the jury as men, as fathers, and as Christians, what would have been their sensations had they been so imprisoned, while his wife who was then pregnant, and his child were compelled to proceed to England from Russia without a friend or protector. He then, after the manner of such persons, read to the jury the mass of petitions which he had forwarded to all classes of public persons, and their replies to his appeals, fiercely denounced Lord Leveson Gower, who was sitting facing him in the court, and concluded his defence by expressing the hope that the serious lesson which he had given would be a warning to all future ministers, and invited the jury to send him back in comfort and honor to his family.

His counsel took up the tale, and three witnesses were produced, who declared Bellingham to be insane; one of them, Mrs. Anne Billet, deposed that the father of the prisoner died mad, and that ever since his return from Russia, he had been considered insane on the subject by all his friends. On one occasion he had taken her and his own wife to the Secretary of State's office to convince them that he should get £100,000 from the government. When he arrived, he was told positively he could get nothing, and yet, when he got into the street, he appealed to his wife as to whether his assertion had not been confirmed, and stated that he would buy a property in the west of England and a house in London with the money.

In charging the jury, Sir James Mansfield laid down what is known as the "right and wrong in the abstract" theory of criminal responsibility. About a century before, in Arnold's case, Mr. Justice Tracy had declared that only a lunatic who had no more intellect than an infant, a brute, or a wild beast was irresponsible. Hadfield's case, however, had disposed of this theory forever, and now Sir James Mansfield told the jury that the question of an insane person's responsibility depended on whether he did or did not know the difference between right and wrong.

After a quarter of an hour's absence the jury returned a verdict of guilty, and Bellingham's trial, which had commenced at ten in the morning, ended at six in the evening in his being sentenced to death. He was executed seven days later.

The whole episode was profoundly disgraceful to the government, to the court which tried Bellingham, and to the public who clamored for his death.

Little more than thirty years afterwards the legal test of responsibility in mental disease was again altered and made to depend on whether the prisoner knew the nature and quality of the particular act with which he was charged at the time of committing it; and here the law of England still nominally stands. But "the rules in MacNaugh-

ton's case," as they are called, in which this test is embodied, are now manipulated by most judges so as to protect the lunatic, who, while knowing that an act is wrong, is prevented by disease of the mind from restraining himself from doing it. LEX.

ROMAN LAW AND CONTEMPORARY REVELATION.

By Rev. George F. Magoun.

AN observant and learned Massachusetts judge, not long since deceased, once said to a friend of the writer, that "in the Roman law there is a mine of interpretation of the writings of the Apostle Paul, all unworked." Now and then a cyclopaedia says the same thing. A fresh and suggestive writer suggests in the "Contemporary Review" for August, 1891, that more satisfactory comments on the writings referred to will be produced when scholars are, "in addition to other qualifications, thorough masters of the history of civil jurisprudence," and that what seems darkness in him more than in other writers is "due chiefly to our ignorance of the intellectual atmosphere in which he lived."

The phrase "illiterate fishermen" is true enough of some of the New Testament writers to make it certain that they will yield no trace of the literature or law of the two great classical races of antiquity. Matthew, Mark, James, Peter, and Jude show none, nor that superior genius, John, nor the physician Luke. And of the recognized letters of Paul only those to persons residing in Rome, in Ephesus, and in the country named from some early European settlers, Galatia, who alone could understand them as Jews could not. And here we find unused the complex details and niceties of Roman law which support no analogies to Christian teachings, which were therefore useless for his purpose. He employs only certain great peculiarities which furnished a "mould" or "costume" for his thoughts not to be found anywhere else.

On the side of the law too, which, from his citizenship and his profession, the Scripture writer who was born neither in Palestine nor in Rome, but in a district of the Greek Asia lying between, knew well, we meet with limitations. It is an interesting circumstance that while the Justinian modifications of the classical law of the republic were due largely to Christianity, the figures of speech and phraseology of the later Scriptures were influenced by the pristine law of the republican and regal periods of Rome.

These considerations should have prevented the assertion some years since in a New England review, by a Colorado writer, that the idea of the sovereignty or kingship of the divine being was introduced into religious doctrine by John Calvin, who had studied Roman law before his preparation for the priesthood. As this idea, according to any chronology, is some centuries older than the time of Calvin or even that of Romulus and Remus, and as all English Bibles contain the eighth chapter of the book of Samuel with its account of the revolt of the Jews, long before either, against theocratic rule, and their demand for a human king resulting in the reign of Saul, respect for chronology should have forestalled this blunder. Not less glaring is the clerical mistake which now and then traces to the Roman legislation the theology of atonement for human sin which prevails in the earlier Scriptures and especially in Leviticus. Our judgment of the real influence upon an Apostle of Christ long after, of the jurisprudence of the empire in which he inherited citizenship, must be disencumbered as to such an influence where it was historically impossible, and

where the tenets he taught, whatever they were, and whatever their truth or error, were connected in his mind with the ancient documents of his faith as a Jew. It is clear enough that the first title of the Justinian Code on the Trinity came from the Christian religion a few centuries older than itself; but it is far from clear that we should place articles of religion common to both Old Testament and New under the rubric or category of a secular institution so many centuries younger than they are.

This point can be exemplified in minor particulars. As we are precluded from finding any hidden or formative allusion to Roman law in an epistle addressed to those ignorant of this law, on whom it would therefore shed no light, so we are not at liberty to find one where a usage referred to was common to all the ancient world. It was to the Romans, indeed, that Paul illustrated freedom from former religious law by Christ, taking marriage as the secular analogue. The wife is bound while her husband liveth; but free or discharged by his death, "so that she is no adulteress, though she be joined to another man." So the soul, dead to the law, may be "joined to another." (Ep. Rom. vii. 1–6.) But in what society—where marriage ever existed—was not this true, and with what adherents of the religion he taught could he not have used the facts by way of illustration?

Ever since men have exercised the right of private property they have had heirs, for one's property must go to some one else on his death; forms of thought and language, then, which are simply in keeping with common Oriental life, are to be interpreted thereby. Examples of this are given in to inherit, heirs, inheritance. In ancient Israel, Eleazar, born in Abraham's house, whether as relative or as servant, and called by him "son of his house," or "son of possession" is a case of ordinary Oriental heirship, with no touch of Roman relations about it, as its occurrence so long before the Twelve Tables shows. So joint heirship of Jews and Gentiles (Eph. iii. 6, Hebr. xi. 9, 1 Pet. iii. 7) cannot be taken out of the ordinary association of inheriting in common. Sound interpretation and scholarly insight require nothing more. If men alone are meant, or men as representative, including women, there was nothing beyond what Asiatic birth and training suggested. These must be traversed in order to refer facts of inheritance under the Pauline proposition, "no male and female, for ye all are one man in Christ Jesus" (Gal. iii. 28), to the Roman law.

It is difficult to accept the surmise of the able writer in the "Contemporary Review," that a reference to the well-known custom of gathering a patrician's freed slaves at the funeral of their emancipator is hidden in Ephesians i. 12–14. If there is one, it seems very deeply and deftly hidden, and quite superfluous. The words are in the revised version: "to the end that we should be unto the praise of His glory, we who had before hope in Christ; in whom ye also, having heard the word of the truth . . . were sealed with the Holy Spirit of promise, which is an earnest of our inheritance, unto the redemption of *God's* own possession unto the praise of His glory." Certainly what here and elsewhere is meant by "redemption" is made to accrue to the glory of God; but one would never think of a group of freedmen at a Latin funeral unless it were ingeniously and elaborately suggested.

In this language has also been imagined an allusion to the Pretorian will, the first instrument ever sealed "as a mode of authentification in the history of jurisprudence." (Maine, "Ancient Law.") In itself such an allusion is far from incredible, as the Romans were wont to enter Asia at Ephesus, and that city became the emporium of a great trade between the western part of the empire and the eastern, and the proconsular capital of the "Asia" of the New Testament.

Through the imperial officer known as *praetor peregrinus* this form of will was there made familiar, as elsewhere outside of the imperial city. Paul's extended residence must have made Ephesians familiar with his style of expression, so if he had needed such an allusion it would have been clear to them. But sealing was common everywhere, aside from the Pretorian will (Maine, p. 264) — private seals, employed instead of signatures, were universal, — and this instrument, with all the validity acquired by successive edicts, did not pass absolute rights of inheritance, such as Paul in spiritual things was wont to assert. The dignity of an allusion to the Pretorian will here — if one there can be, the seal being the only common element — is unquestionable. It was one of those liberalizations of earlier law, which accompanied the extension of citizenship through the empire. Others went along with it which eventually affected the society and the civilization of our modern world. But this was itself only an alternate form of will, and for long little used, the *testamentum per aes et libram* still continuing even later than the empire. So good a scholar as Endicott observes, *in loco*, that "Any purely objective meaning in reference to heathen, or even Jewish customs, seems very doubtful."

Still more doubtful, it seems to me, is any reminiscence of Roman law in Hebrews vii. 22, "by so much also hath Jesus become the surety of a better covenant" (*Ac. Version* "testament"). One can agree readily to the observation that the Pauline figures of speech are logical and legal, not poetical and ornamental, and even see how an habitual recollection of the *familiae emptor* would have been easy here, if he had coupled or made adjacent the thought of the redemptive "purchase" of the church, such as appears in his address at Miletus. (Acts, xx. 17–28. Cf. Clark, "Regal Period," 118.) The purchaser of the *familia*, that is of all the rights, privileges, duties, and obligations existing in and through the family, including property and slaves, is indeed the central and most interesting personage in the ancient mancipation, which, along with the ancient plebeian will, connects the infancy of society with its riper ages. But with other antique formalities described by Gaius in his "Commentaries" (II. § 104), this in time lapsed, and became "a mere figure-head," says Prof. Hadley, and a century before Justinian had been given up. Yet in Paul's day, a century before Gaius, it must still have had a known meaning, which, if he wrote to the Hebrews, he might have employed as significant but for their ignorance as a people of the classical mancipation, *familiae emptor* and all.

This suggests a question more deeply vexed: Does the written will appear anywhere in the text of Paul? The Hebrews were not a will-making people. Yet it is in this same epistle to the Hebrews that the writer — whoever he was — has in mind that of which his readers knew nothing, however familiar he was with it, being purely Roman. (Ep. Heb. ix. 15–20. A. V.) "When the Romans are best known to us," says Hadley, "they were eminently a will-making people . . . If a will was not executed with the precise formalities prescribed, it had by the law of the Twelve Tables no validity whatever." Not only were these formalities, but the will itself — at first unwritten, declared orally in the *comitia curiata*, then placed on waxen tablets with seals of seven witnesses attached — was a purely Roman invention. Mr. Maine doubts if the power to make one was originally known to any other people. "No evil," he says, "seems to have been considered a heavier visitation than the forfeiture of testamentary privileges; no curse appears to have been bitterer than that which imprecated on an

enemy that he might die without a will." All this is not only distinctly non-Hebrew usage; it is anti-Hebrew.[1] Judea "was never Romanized, never colonized by Roman citizens, or subjected to Roman law." ("Cont. Review.") They who regard the ninth of Hebrews as written by Paul have no ground, then, for even imagining that he framed it on the lines of what Phillemore calls "an eminently artificial chapter of human legislation" ("Private Law among the Romans.") Much less those who ascribe this scripture to some converted Jew, a follower of Paul, unversed in foreign institutions. There was, to be sure, a Rabbinical will, a copy of the Roman, unknown before the conquest of Palestine, and, were this an epistle to Rabbis of that later date, their form of will might have been meant and, by them, understood. (Cf. "Cont. Rev." and Jahn, "Bibl. Antiq." 168.) It was, indeed, used only in exceptional cases, and was strange to ordinary Jewish converts, — quite as much so as that which was once only a patrician privilege, with few legatees, was to Roman plebeians. More strange still to such converts was the latter, offering no probable metaphor for a general comparison of the Old Testament regimen and that of the New. The Scripture language: "For where a testament is, there must of necessity be the death of him that made it," is, moreover, loaded with the added difficulty — as given in both English versions — of implying that death came to Him who made the first one of old; but this was God! But more than a recognition of this would carry us too far. Only if the will of Roman law and usage is not meant in Hebrews ix. 15, 16, it is not meant in any writing of Paul whatever.

It may be asked here: why do we still perplex the unlearned by calling the two Biblical volumes, "Old and New Testaments"? The misnomer came down to us, it is true, from so early times as those of Tertullian and Chrysostom. (Smith, "Bible Dict.") Even in New England pulpits, in childhood, we heard the Gospel spoken of as a documentary bequest of our Lord and Saviour at His death! What could the sacred "Testaments" have signified in England when there were but "four examples of wills in existence" in that country? And this was true "down to the middle of the tenth century." (Henry Cabot Lodge, "Essays in Anglo Saxon Law.")[1]

The word διαθήκη, employed thirty-three times in the New Testament, may have the meaning of the Latin *testamentum* where no better can be found; but in thirty-one instances English translators find better ones.[2] Indeed, just before the two verses in which they employ "testament," it is translated by "covenant," and in the very next verse thereafter, the subject matter remaining the same. (Hebr. ix. 16, 17; cf. with 15 and 18.) Why this sudden change? Simply because the "blood" and "death" of Christ have just been referred to; but the old word "dispensation," thereby ratified or made sure, answers better than "testament" or even "covenant," reasons for which cannot here be given, save that it does not imply that the parties in relation stand on an equal footing, as "covenant" does. And did a Roman will ever require a "mediator" or a "surety"? Would one of the late revisers ever think of our lord as the "mediator of a better" will? We shall entangle ourselves in theological exposition if we go farther in this direction. But it is legitimate to say that, in reading the idea of Roman will-making into the text under consideration, that is implied which is not true of it, viz. that the testator

Tacitus, about Paul's time, observed that there were no wills among the German tribes. "The barbarians were confessedly strangers to any such conception." (Maine, Ancient Law.)

[1] The tradition is that St. Austin preached at Canterbury four centuries before this, A.D. 596.

[2] I.e. the Revises.

always died, which Mr. Maine shows might or might not be the case. The mancipation, derived from the more ancient *mancipium*, did not vest a testator's estate conditionally on his death, as "not a few civilians" imagined, or "grant it from a time uncertain, i.e. the death of the grantor." This compels us to look for sound interpretation in another direction, to Hebrew antiquity, and not to Latin.

Our inquiry has led us into the bounded border land between two professions and two great domains of truth. To pursue it farther would carry us across the line into the rich fields of interpretation of contemporary written revelation. We pause in an alluring inquiry; for we have written for well-read lawyers and laymen, and not for Biblical scholars.

A LEGAL INCIDENT.

IS A DEMURRER A PERSONAL AFFRONT? CONFLICTING OPINIONS.

By Camm Patteson.

MANY years ago a young man noted for industry and probity of character, who was six feet seven inches tall and large in proportion, who resided in an inland county in Virginia, and whose education was somewhat defective, determined to study law. He got three books, the chief one of which was "Stephen on Pleading," and after reading them two months without any instructor, applied for and obtained by some unaccountable means a license. He had hardly opened his office before a merchant gave him six accounts upon which he was directed to bring suit. He had no forms except those set forth in an old edition of "Stephen on Pleading," which had been obsolete for more than half a century; he had never seen a Declaration in his life, but he brought the suits. When the cases were called, six of the most enormous documents ever seen in any court-house were placed on the bar of the court; they were not folded in legal style, but were in six tremendous envelopes, addressed to the court, just as though they had been letters. They all commenced as follows: "Charles Creditor complains of David Debtor, who is in the custody of the marshal of the Marshalsea," and so on. Such Declarations were never before seen in America. The counsel for the defendant was an old county court lawyer, not overburdened himself with legal knowledge, but he knew enough to know that these Declarations were demurrable. When the first case was called he rose from his seat in the bar with some difficulty, as he was just recovering from a spell of illness, and said: "May it please the court: I tender a demurrer to the Declaration, and ask the court to pass upon it. In a practice extending over forty years I have never before seen such a Declaration." And he held up the awful looking document, the sight of which caused a suppressed smile on the part of the audience. Now this giant young lawyer lived near the old one. There was an intense rivalry between them, and the manner of the elder member of the bar was far from being pleasant or reassuring. The young man had never heard of a demurrer in his life, and he had not the faintest idea of what it was. In his distress he turned to the writer and asked him what to do. I promptly informed him that he should ask the court to give until the next morning to prepare his defense to the demurrer, which request the court granted. After the court had ad-

journed, the young man asked the writer if a demurrer could be considered a personal affront, and if so he well knew what course to follow. The humor of the situation immediately seized upon and impressed the writer, and he invited the young man to his office and informed him that a demurrer was a very distressing incident in legal proceedings; that it admitted all of the allegations of the plaintiff, but at the same time stated that they were so chaffy, so light, and of such little weight, that they entitled the defendant to a judgment for costs; that in the Colonial days of Virginia there was a well settled tradition that demurrers were considered personal affronts, and that it might be the case now, but I rather thought not; but I would advise him to consult an old and eminent member of the bar, since that time one of the governors of Virginia, and he could safely follow his advice. That counsel caught on to the joke and reaffirmed my advice. When the court opened next morning there was profound silence, when the young man straightened up to his full and enormous height, and in a stentorian but musical voice commenced as follows: —

"May it please the court: I am a young man without experience in my chosen profession, and with but little legal learning. It may be that the statement of the cause of action in this case is inartificial and improper, but I rely on the great Virginia statute of Jeoffails, which is the palladium of the legal rights of the Virginia citizen. That noble statute says, if the case, however badly stated, shows enough for the court to arrive at the true merits of the cause, it is sufficient. Sir, I rely on that noble and commanding statute, made, I am sure, for such cases as this, and to prevent injustice. As to the demurrer, I hurl back the insinuation contained in it that I have stated my cause of action so badly that, admit all I have stated, there is no ground for the action, with scorn and contempt, and if need be with defiance. Sir, I rely on this court to carry out the great principles of eternal justice, and I hope it will rise equal to the occasion. I do not care so much myself, sir, about the infernal demurrer, but the idea that the miserable attorney from the county of —— should attempt to bring into disrepute the honored name and the memory of the great Sir Henry John Stephen, and to strike at him through me, is more than I can bear."

"What do you mean, sir?" yelled the old attorney. "I will hold you to personal account. You talk, sir, about a demurrer being a personal affront; if I only had my usual wind, I would give you a foretaste of what you will often catch at this bar." At this stage of the proceedings a personal altercation was with difficulty averted. The roar of laughter was universal; even the dignified old judge could not repress a smile. He gave me quite a lecture privately for being the cause of such a scene. The demurrer was sustained; the young giant went West, attained a high eminence in his profession, and made a fortune.

SOCRATES AS A CROSS-EXAMINER.

By O. F. Hershey.

THE trial of Socrates, in which a poet, a politician, and a rhetorician appeared for the prosecution, and a philosopher for the defense, can hardly be expected to offer many suggestions to the legal profession. And yet there are few historic trials from which lawyers can learn more. Socrates' defense of himself, as we gather it from Plato and Xenophon, is certainly one of the finest specimens we have of forensic oratory. No trial lawyer of to-day, aided by the examples and experiences of over twenty centuries, could hope to improve upon it. It is easily as eloquent as Demosthenes, and as ingenious as Cicero. The arrangement of his plea is perfect. All the facts and arguments are masterfully marshaled, and every doubt and prejudice of the court is carefully anticipated and allayed. The bit of cross-examination he indulged in repays study; and some of our modern forensic bullies might do well to compare their methods with that of Socrates. One trembles at the thought of what Sir Edward Clarke or Sir Charles Russell, for instance, would do in these days with a witness like Miletus; and compared with their methods, Socrates certainly had cross-examination down to a fine art.

That his defense was unsuccessful was certainly not the fault of the lawyer who conducted it, though it may have been due to the fact that he had a fool for a client. Indeed, it was Socrates' great boast that his superior wisdom consisted in recognizing himself to be a fool, while all his neighbors foolishly imagined themselves wise; and he admits that he was kept so busy going about, telling people what ineffable fools they therefore were, that he had no time for his own business. Under the circumstances one can forgive the court for failing to appreciate his magnificent defense.

There were two counts in the indictment against Socrates. The first charging him with not worshiping the gods of the Athenians, and introducing instead strange divinities of his own; the second with corrupting the youth. The penalty was death.

This was the substance of the indictment presented by Miletus, and hung in front of the office of the ἄρχων βασιλεύς, before whom both the charge and the plea were sworn to. The prosecution was conducted by Miletus, Antynus, and Lycon — the three witnesses on the back of the indictment. The former was an insignificant young tragic poet who opened and conducted the case for the state, and represented the technical charge or indictment proper. Of the two latter Antynus alone was of any consequence. He was a rich radical who hated Socrates probably for mere personal reasons, but made his attack under cover of defending the democracy; and throughout the defense he is treated with sublime disdain.

The Heliastic court before whom the trial took place consisted of probably over five hundred judges; and in addition there was a large audience of Athenians. Socrates, after the manner of Demosthenes in his oration on the Crown, introduces the technical part of the defense in the middle and most obscure part of his speech, and leads up to it by a shrewd attempt to allay the popular prejudice against him as a reputed philosopher and sophist, and to win over the court to some appreciation of the motives that have animated his whole life. Coming to the indictment proper, he determines to slur it over by putting Miletus, its framer, upon

the stand, and by doing so gives the "men of Athens" one of their rarest treats. This man Miletus, Socrates tells them, must be simply jesting, or if not, he must have a low opinion of the intelligence of this court. "He never took the least interest in the things of which I am accused, and I 'll prove it to you. First as to the corrupting youth: —

"Come now, Miletus, tell me, do you not consider it of the greatest importance that the youth should be made as virtuous as possible?"

Miletus says that of course he does; but when asked who makes them any better than they are, he hesitates for an answer, and Socrates nodding to the court, says: "You see how much interest he takes in this matter." Finally Miletus replies that the laws make youths better, at which Socrates smiles and asks for a more specific answer. An inspiration here strikes the witness, and he says the judges make them better.

"Very good," says Socrates, "do you include all the judges?" Miletus is so tickled with his answer that he readily admits that all the judges, senators, hearers, indeed all the Athenians make youth better, excepting only Socrates.

"That's rough on me. But tell me, Miletus, is it the same with horses? (You know more about them than you do about the virtues of youth.) Suppose that all your neighbors trained your horse, of course they would better him, and only your special trainer could harm him?" Socrates puts him through a little of this, and passes on to the next point.

"Now, Miletus, my good man, tell this honorable court whether it is better to dwell with good or bad citizens? And whether bad citizens do not work evil to those near them?"

Miletus admits that they do, and also acknowledges that no one cares to injure himself designedly. He is then led by skillful cross-questioning to accuse Socrates of corrupting youth designedly.

"So you think I have reached that pitch of ignorance," says Socrates, "that I do not know that if I make any one of my associates depraved, I shall thus endanger myself; and yet you say I designedly bring this great evil upon myself." He then goes on to point out how obviously absurd it is to say that he designedly injures himself, so that if he does corrupt youth, he must be doing it undesignedly, for which he can only be admonished and not punished. Miletus is so obviously done up that Socrates does not spoil the effect by any remarks, but takes up at once to the next count.

"Tell us, Miletus, according to the indictment you have preferred, do you mean to say that I corrupt youth by teaching them not to believe in the gods in whom the city believes, but in other strange deities?"

Miletus answers that he certainly does say so, and in reply to some clever questioning is led to say that by his indictment he means to accuse Socrates of not believing in any gods at all, and of teaching others that there are, in fact, no gods. And he even denies that Socrates believes the sun and moon to be gods, but accuses him of saying that the sun is a stone, and the moon an earth. Socrates easily overcomes this:

"As to the sun and moon not being gods, you fancy that you are accusing Anaxagoros, my dear Miletus, and thus you put a slight on these honorable judges and these assembled Athenians, for you imply that they are so illiterate as not to know that the writings of Anaxagoras of Clazomene are full of such assertions. And the youth moreover learn these things at the play and not from me."

Miletus is led to repeat his charge that Socrates believes in no god whatever, and is then twitted with having instituted the whole proceeding for his own amusement or out of pure insolence and wantonness; and again

with presuming on the inadvertence or obtuseness of the court. After getting the poor fellow all worked up Socrates asks him whether he believes that there are human affairs without human beings; or pipers without pipes; or things pertaining to horses without horses. Miletus is silent.

"But answer to this at least, my good man, is there anyone who believes that there are things relating to demons, but does not believe that there are demons?"

The court here compels Miletus to answer, and he says that naturally there are not. Socrates then picks up a copy of the indictment and reads: "Socrates does not believe in those Gods in whom the city believes, but in other strange gods," and then adds in a tone that must have cut to the core: —

"Therefore, Miletus, according to your own indictment I do believe in demons (*το δαίμονιον*) or in things relating thereto. If then I believe in things relating to demons, there is surely an absolute necessity that I should believe that there are demons. Is it not so? It is. (For I suppose you assent since you do not answer.) But with respect to demons, do we not allow that they are the children of gods? You admit this, do you not?"

Miletus says that he certainly does. "That'll do, Miletus," says Socrates; "step down. You must have preferred this indictment for want of some real charge to bring against me. For how could any man of sense suppose me to believe that there are children of gods and not believe in the gods themselves? It would be just as absurd for one to believe that mules are the offspring of horses and asses and then deny that there are such things as horses and asses."

Later on he asks Miletus why, if he corrupted the youth, their relations didn't testify against him, and that is probably the only really serious question he put to Miletus in his whole defense. The cross-examination is the very essence of irony and contempt. And how skillfully he suppresses and still discloses his contempt — ever remembering that some of the jury are probably no better than the witness and therefore sure to resent his abuse. Without intimidation he prevents the witness from defending himself, and without bullying he gets him to make the most conflicting statements and admissions. Surely Socrates as a cross-examiner is worthy of imitation.

The Lawyer's Easy Chair.

. Current Topics. . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

THE DUTY OF BIOGRAPHERS. — The New York "Tribune," in speaking of the sketch of Charles O'Conor recently published in this magazine, says: "It is unpleasant reading, as opening up the disagreeable contests which form the part of Mr. O'Conor's history which members of the bar are most unwilling to remember." This would be a fair criticism if it were any part of a biographer's duty to furnish pleasant reading regardless of truth. It is our understanding that this is not the duty of a biographer, but that his proper office is to tell the truth without regard to its unpleasantness. The writer seems to labor under another delusion, namely, that it is no proper part of a biographer's office to remind any of the acquaintances of the subject of the biography of anything which they do not like to remember about him. The view of biography thus taken by this newspaper writer would deprive biography of all value except as a sort of cosmetic art toward the subject, and a soothing syrup for his friends and acquaintances. This would do well enough for a bar meeting held over the deceased, although even there it is less in fashion than it formerly was, and it was exercised very gracefully and charitably on Mr. O'Conor's behalf by his very eminent professional brethren. But the present generation of lawyers, who know nothing of him, should learn him as he was, not only as to his virtues and talents, which were great and unusual, and which we endeavored to celebrate in the sketch as a whole, but also as to his weaknesses and unpleasant traits, which were public and troublesome. Mr. O'Conor would himself have despised flattery, at least *post mortem*, and would much have preferred justice. He never flattered anybody, nor probably meant to do anybody injustice, but it is his biographer's proper office to describe him as he was, and not as his contemporaries and admirers could wish he had been. Such a life as his is valuable as an example to be imitated in many particulars, to be avoided in some, and it should be fully and fairly summed up. In a later notice the "Tribune" writer says that "Some old grudge or some constitutional defect must render it impossible for Mr. Browne fully to appreciate the subject of the sketch." We are not old enough to have any such grudge, and the constitutional defect is simply an incapability of indiscriminate and fulsome eulogy. We wish to protest against the sentimental notion that a biographer should slur over unpleasant things which were of great public importance and notoriety, and dwell at length only on the favorable aspects of a character. We did not make Mr. O'Conor, we simply find him. The "Tribune's" criticism strikes us as being as ill-founded as would be a complaint of a Chauvinist that Lanfrey's or Taine's observations on Napoleon are "unpleasant reading." This mistaken estimate of the biographer's office is also adopted by Miss Munroe, the woman who wrote that ode on the opening of the Columbian Exposition, in a criticism on Professor Woodberry's recent Memoir of Poe, in the "Critic." That memoir is a very temperate but very truthful statement of the career of that most wayward genius; but Miss Munroe sharply rebukes the writer for his want of "sympathy" with the subject, and for furnishing so much "unpleasant reading." Perhaps Miss Munroe writes the "Tribune" paragraph — it is exactly in her vein. Mr. Woodberry's sketch is "unpleasant reading," but then he did not make Poe. We felt warranted in replying to Miss Munroe in the "Critic," as follows: —

"His is an ungrateful task. To blame him for want of 'sympathy' with his subject is like demanding of the stage-villain that he should 'assume a cheerful expression.' The hard facts of Poe's unprincipled life do not leave much room for the play of sentiment or sympathy. The 'mystic harmonies' must be listened for in the man's writings, and not in his life. . . . The more 'Philistines' like Woodberry and Leslie Stephen, who dare to tell the truth, the better for biography; and the sooner the world is disabused of the notion that vice is in any degree vindicated by genius, the more sensible and the better the world will be. Let us give fewer bouquets and Thanksgiving turkeys to felons and have less sympathy with bad men because they wrote pleasing verses and stories."

Leslie Stephen will be remembered as the writer who dispelled the Alexander Pope legend, and showed him up as the spiteful little liar and backbiter that he was. Like him, we believe in painting Cromwell with his wart.

We had forgotten to include in the sketch of O'Conor a pretty touch found in Richard Grant White's "England Without and Within," recorded in his account of a visit to Leicester's Hospital at Warwick, where one of the brethren "showed me a little piece of embroidery worked by poor Amy Robsart. It was framed and hung up against the wall. The frame, he told me, had been paid for by 'a gentleman in America,' of whom I probably had never heard, 'one Mr. Charles O'Conor, a great lawer.' Mr. O'Conor had seen it 'laying araound loose,' and for Amy Robsart's sake had furnished a frame for its proper preservation."

INNS. — While investigating the law of innkeepers, recently, the Chair man has come across much good reading. Among the most interesting of it is the celebrated opinion of Chief Justice Daly in Cromwell *v.* Stevens, 2 Daly, 15, on the subject of inns and the distinction between them and boarding houses. It amounts to a very considerable monograph on the subject, the most complete to be found in the law books and hardly equaled anywhere else.

Inns have been a favorite subject among novelists, poets and painters. Of modern novelists Dickens is the richest in the treatment of them, and several inns of England have been rendered famous (not infamous) by his pen, and have become favorite pilgrimages of his admirers. Dickens is a master of gastronomy and frequently serves up very toothsome repasts to his creatures at these places, and makes his readers' mouths hunger and thirst for his fictitious food and drink. Of course everybody is familiar with Shenstone's praise of the inn, with Archbishop Leighton's desire to die at an inn, and with Doctor Johnson's declaration that "There is nothing which has as yet been contrived by man, by which so much happiness is produced as by a good tavern or inn." One can easily believe that the Doctor was sincere if Boswell was correct in his narration, that he took two young women from Staffordshire, "pretty fools" he called them, to dine at the "Mitre," and after dinner he put one of them on his knee, and fondled her for half an hour together. Rossetti has depicted this scene on canvas, in which, with his customary awkward perspective, he has made Boswell's head nearer the Doctor's than that of the prim-looking maiden who sits on Ursa Major's knee. Falstaff, who certainly was an expert in the matter of taverns, was of opinion that he was entitled to take his ease in his inn, and he brought Dame Quickly into some trouble by his fascinations exercised at her house. What can be more seductive than the pictures of inns and inn stables by the Dutch painters? In a recent English book, entitled "Coaching Days and Coaching Ways," exquisitely illustrated, one gets a charming impression of the old English inns, and the incidents of stage-coach travel, before the railroads, Mr. Ruskin's abhorrence, came in to spoil all the romance of the road and the traveler's temporary home.

One of the earliest allusions to taverns is that to "the Three Taverns," in Acts xxviii. 15. This was a station on the Appian road, along which St. Paul traveled on his way from Puteoli to Rome. Some years ago Col. Ingersoll made a very amusing argument in the New York Court of Appeals, on the question whether strong drink came within the description of "entertainment" which an innkeeper was bound to furnish travelers at table, and might lawfully furnish without a license to sell liquors. He made an argument that entertained the Court and the Bar, and he produced quite a strong impression by citing St. Paul's observation in coming in sight of the Three Taverns—"he thanked God and took courage" —at the sight of the Taverns, as the witty Colonel would have it. But he, like another famous adversary of religion, "wresteth the Scripture to his own destruction," for Paul was not so fond of taverns as this would indicate. What the Apostle said, was: "And from thence," i.e. Rome, "when the brethren heard of us, they came to meet us as far as Appii Forum and the Three Taverns; whom when Paul saw, he thanked God, and took courage." It was the sight of the brethren, and not of the taverns, that made Paul thankful and courageous.

It was a serious question in Paul's day, and indeed until within this century, whether travelers ought to thank God and take courage, or pray God and lose heart at the sight of an inn, for the innkeepers were very frequently, either by choice or from necessity, a very bad class of men, in league with the highwaymen, thieves and robbers who infested the country and the roads, and followed their victims to and from the inns. Charles Reade, in "The Cloister and the Hearth," gives a terrible idea of the dangers of the inns and of those scoundrel innkeepers who, like Macbeth, "murdered sleep." Dumas, in "Twenty Years After," speaks of innkeepers as "that particular class of society, which, when there were robbers on the highway, was associated with them, and since there are none, has advantageously replaced them." One takes keen pleasure in reading how Porthos' servant, in "The Three Musketeers," lassoed the landlord's fine wine out of the cellar window and served it up to his master, and how Athos barricaded himself with his servant in the cellar of the inn in which he was attacked, and successfully resisted siege for a fortnight, meantime eating and drinking the landlord's best provision, to his landlord's despair and his own fattening.

It was this state of society that led the common

law in those disturbed times, to impose on innkeepers the character of insurers of the guests' property against everything but the act of God and of the public enemies. Exactly why the innkeeper should even then have been subjected to liability for inevitable accident without his fault, as for example, a fire which consumed the goods of the guests without any possible advantage to his coffers or the pockets of confederates, it is difficult to understand. But this ancient dogma of the law, although the reason for it has long since disappeared, is still prevalent, except where statutes have come to the innkeepers' relief. The opinion of the New York Court of Appeals, by Porter, J., in Hulett *v.* Swift, 33 N.Y. 571, did much to fasten the old doctrine of accidental fires on the modern conditions, and was a sad contradiction of the boasted elasticity of the common law and its adaptability to the changed conditions of society; and it led to the enactment of statutes of relief in that state.

It is delightful to read of the warmth, sociability and cheer of the old rural inns of England. On the continent those in the large cities and towns are uniformly excellent. In this country such hotels generally furnish good fare and lodging, and frequently, as in the case of the great and new hotels in New York, put the traveler up in a style of palatial magnificence, but the price of it suggests that the landlord is in a hurry to pay off a mortgage or retire from business. Then there is usually to be encountered and survived the stony stare of the clerk when the guest wants something at a daily rate less than the compensation of a congressman or a judge. Leighton would not have desired to die in one of these, but rather before he got into one. As for the country inns in this land, they are much as they were in 1789, when Washington recorded in his Diary of his tour in New England, that going through Connecticut, he "stayed at Perkins' tavern, which by the bye is not a good one." The lawyer, even in these days, who goes upon the rural circuits, recalls with horror the stuffy chambers, the whitewashed walls, the horsey barroom, and the table reeking with fried things and furnished with thick and chipped earthenware and forks with the silver almost worn off. And then the beds! There is a classic saying that when a man is indignant he writes poetry, and once on such an occasion the present writer was so angry that he burst into verse — had a fytte of anger, so to speak — as follows:—

A BED IN A COUNTRY INN.

CONCEIVE the pangs that the Procrustean guest,
Or Damiens on his dreadful bed of steel,
Or cramped Ginevra in her oaken chest,
Or Lawrence on his hot gridiron might feel!

Couches like theirs could hardly give less ease
Than those which furnish many a country inn,
Buzzed round by flies and gnats, lively with fleas,
Restless as consciences not seared by sin.

Contrived with lofty ridge adown the middle,
Like fell sea-serpents' vertebræ serrated,
Contracted as the highest string of fiddle,
Lumpy like life-preservers full inflated.

Dreaming of falling from the Pyramid
Into the crocodile-infested Nile;
Or from some sharp-topped peak the Alps amid,
Into an icy, deadly, dark defile;

Sore toiling up the treacherous steep again,
Like Sisyphus, with his moss-shunning stone,
Or bumpkin clinging to greased pole in pain,
The weary sufferer may wake and groan.

Dire engine of a parsimonious host,
To murder sleep! I rise betimes soreheaded;
With aching limbs and looking like a ghost,
Depart with hatred in my soul imbedded.

NOTES OF CASES.

CONTRACTING FOR FRAUD. — The law has always sternly set its face against the doers of iniquity and fraud. This lofty moral idea has so worked upon the sensibility of judges that it has caused them to break forth into Latin. Thus chief justice Wilmot, in the famous old case of Collins *v.* Blantern, 2 Wils. 341, exclaimed as to such, "*Procul, O! procul este profani!*" and in Gibson *v.* Minet, 210 Bl. 586, we find:

"Nec lex est justior ulla
Quam necis artifices arte perire sua."

This being so, it seems a little strange that modern courts should doubt for a moment about the impolicy of recognizing a contract by which the parties agree to take no advantage of and ask for no relief from one another's fraud. The question first arose, so far as we know, in Universal Fashion Co. *v.* Skinner, 64 Hun. 294. The plaintiff sued on a written contract embracing a clause stating that its stipulations contained the whole contract, and that no other terms should bind either party. The answer admitted the contract, but set up fraud and false representations by plaintiff's agent in the procuring of it. On demurrer, the answer was held good, O'Brien, J., dissenting, observing, "Where the parties themselves stipulate that the writing contains the whole contract, it is difficult to see upon what theory contemporaneous oral agreements or representations are admissible to vary a written contract." But Andrews, J., said, "An agreement that the plaintiff shall not be liable for the fraud of its own agent . . . cannot be enforced." Van Brunt, J., said the provision added

nothing to the force of the contract, "as the law implies the same." But in this he was clearly wrong, for the law does not make any such conclusive implication. In the absence of fraud the parties certainly could lawfully agree that the writing contained the whole contract and should not be added to or changed by parol. On the other hand, in Tallis *v.* Jacson, '92, 3 Ch. 441, the court refused to upset a building contract because it contained a stipulation that the arbitrator's certificate should be conclusive, and "should not be set aside for any pretense, charge, suggestion, or insinuation, of fraud, collusion, or confederacy." On this the "Law Quarterly Review" remarks: "No doubt it concerns society that fraud should not go unpunished, but the maintenance of contracts concerns it much more. 'If there is one thing,' said Jessel, M. R., in Printing Co. *v.* Sampson, 19 Eq. 464, 'which more than another public policy requires, it is that men of full age and competent understanding, shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice,' and Chitty, J., fully indorses the sentiment in Tallis *v.* Jacson, which case was itself an eminent illustrarion of the evil of interfering with contracts; for had the contract been annulled and the certificate set aside, it would have reopened thousands and thousands of items of account, each item a battleground, and this merely for the sake of some problematic or possible fraud. Such a clause, as Chitty, J., said, 'looks terrific to a lawyer,' because law being based on distrust treats everybody as a probable knave. Business men do not. Hence they accept such clauses and show their sense in doing so; for their optimistic estimate of men is much nearer the truth than the pessimistic one of law."

The question came up very recently in Bridger *v.* Goldsmith, New York Court of Appeals, October, 1894 (38 N. E. R. 458), where a sealed contract of sale of a business contained the following clause:

"It is expressly understood and agreed between the parties hereto, that the said party of the first part has not, in any manner or form, stated, made, or represented to the said party of the second part, for the purpose of inducing the sale of the said business or the making of this agreement, any statements or representations, verbally or in writing, in any respect to the said business, other than that the said party of the first part has been engaged in the piano business in the City of New York since 1867."

It was nevertheless held that the party of the second part was not precluded from proving fraudulent representations by which he had been misled.

"I assume that the fact that a seal was unnecessarily affixed to an agreement for the sale of personal property cannot affect the rights of the parties. Every defense is open to either party that would have existed in case the writing was unsealed. It appears that after the negotiations had been completed and the agreement drawn, the defendant stated, in the presence of the plaintiff, and the counsel for both parties present, that he wanted a clause of this character inserted. The plaintiff's counsel at first objected to it. The defendant's counsel suggested that it would make no difference, and the plaintiff consented that it might be put in. There is evidence in the case tending to show that the plaintiff voluntarily assented to this stipulation, after having been advised by his counsel that it would have the effect of precluding him from subsequently alleging fraud in the transaction, even though it existed in fact. This provision is not a 'covenant,' in any proper sense of that term. Indeed, it can scarcely be considered as any part of the agreement at all. It does not relate in any manner to the subject-matter of the contract. It was a mere statement in the nature of a certificate as to a fact. It did not relate to the property, or to the terms of the sale or the payments, but to the absence of all fraud from the transaction. The clause cannot be given any greater effect than if it had been written upon a separate paper after the execution of the contract, and signed by the parties. The question now is whether it can be given the effect claimed for it by the learned counsel for the defendant—to preclude the plaintiff from alleging fraud in the sale, and pursuing in the courts the remedies which the law gives in such cases. It cannot operate by way of estoppel, for the obvious reason that the statements were false to the defendant's knowledge. He may indeed have relied upon its force and efficacy to protect him from the consequences of his own fraud, but he certainly could not have relied upon the truth of any statement in it. A mere device of the guilty party to a contract, intended to shield himself from the results of his own fraud practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel. If the clause has any effect whatever, it must be as a promise or agreement on the part of the plaintiff that however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction or complain of it, but would forever after hold his peace. It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there was in his own mind at least a lingering doubt as to the honesty and integrity of his conduct. I assume that there is no authority that we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may nevertheless contract with him, in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it, and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such case as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing. It is agreed that, whatever may be said about the fraudulent character of the sale itself, this

particular clause was a bargain fairly made and deliberately entered into by the plaintiff, with full knowledge of its purpose, scope and effect, and therefore the plaintiff should be held to abide by it. But it is not correct to say that even with respect to this clause, the parties dealt with each other at arm's length. The defendant, when suggesting it, had the advantage of his secret knowledge that its statements were false, while the plaintiff, on the other hand, relying upon the truth of the representations made as to the extent and character of the business, was not upon his guard, but assuming that the defendant has told him the truth, was readily induced to sign a statement, which, upon such assumption was obviously of no consequence. In fact, it was but a link in the chain, and the crowning act which was to secure to the defendant the full fruits of the fraud, and thus enable him not only to overreach the plaintiff, but the law itself."

This seems good morals, and it ought to be good law. It certainly seems against public policy to allow parties to bargain for immunity for fraud. It resembles the case of a man selling goods expressly for and to assist actively in an illegal business, and the buyer agreeing not to raise that defense in an action for the price of the goods.

HUSBAND'S LIABILITY FOR COUNSEL FEES OF WIFE IN DIVORCE SUIT.— An interesting question of the liability of the husband, at common law, for counsel fees of his wife in her action for divorce, is recently decided in Wolcott *v.* Patterson, Michigan Supreme Court, 24 Lawyers' Rep. Ann. 629. The court holds that the husband is not liable, and consequently that the wife may make herself liable. This is put on the ground that the statute "clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her of such cost by an order for expense money to be paid by the husband." The court, however, observe that aside from the statute "the authorities are not uniform upon the question, but we think the weight of authority negatives such liability. In some of the states the liability of the husband is asserted. Sprayberry *v.* Merk, 30 Ga. 81, 76 Am. Dec. 637; Porter *v.* Briggs, 38 Iowa, 166, 18 Am. Rep. 27; Langbein *v.* Schneider, 27 Abb. N. C. 228; and in these jurisdictions it is held that the wife is not competent to charge herself with such expenses. Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780; Cook *v.* Walton, 38 Ind. 228; Whipple *v.* Giles, 55 N. H. 139. See however a dissenting opinion of Pettit, Ch. J., in Putnam *v.* Tennyson, 50 Ind. 461. We think the cases which deny the husband's liability are more consonant with the holdings of this court, that one who supplies the wife with goods apparently suitable to her situation in life does so at his peril, and can only recover if the husband has failed to supply necessaries. Clark *v.* Cox, 32 Mich. 204." In an extensive and valuable note in 24 L. R. A. 629, it is said: "Counsel's fees have been looked upon and considered in the light of necessaries, for which the husband would be liable, as upon an implied contract, in Massachusetts, New Hampshire, while the contrary has been held in Alabama, Connecticut, Illinois, Iowa, and West Virginia." We find that the husband's liability has been denied in Shelton *v.* Pendleton, 18 Conn. 417; Clarke *v.* Burke, 65 Wis. 359; 56 Am. Rep. 631; Pearson *v.* Darrington, 32 Ala. 227; Ray *v.* Adden, 50 N. H. 82; Morrison *v.* Holt, 42 N. H. 478; 80 Am. Dec. 120; Coffin *v.* Dunham, 8 Cush. 404; Dow *v.* Eyster, 79 Ill. 254; Peck *v.* Marling, 22 W. Va. 708; Wing *v.* Hurlburt, 15 Vt. 614; 40 Am. Dec. 695; Williams *v.* Monroe, 18 B. Monr. 514; Johnson *v.* Williams, 3. G. Greene, 97; 54 Am. Dec. 491 (Iowa); while the husband's liability has been asserted in Porter *v.* Briggs, 38 Iowa, 166; 18 Am. Rep. 27; overruling Johnson *v.* Williams, *supra*; Musick *v.* Dodson, 76 Mo. 624; 43 Am. Rep. 780; Sprayberry *v.* Merke, 30 Georgia, 81; 76 Am. Dec. 637; Cook *v.* Walton, 38 Ind. 228; Langbein *v.* Schneider, 27 Abb. N. C. 228. The case of Conant *v.* Burnham, 133 Mass. 503; 43 Am. Rep. 532, is not at all in point, although cited by courts and text writers, for it related to the husband's liability for counsel fees in defence of his wife on a complaint against her for being a common drunkard. It appears to us that the true reason of the matter is expressed in Morrison *v.* Holt, *supra*, as follows: "The wife's authority, where it exists, arises from the relation, if not as an incident essential to its preservation, certainly as a consequence of its continued existence, and not as a power reserved for its destruction."

THE YEW-TREE DOCTRINE. — Several years ago we metrically reported in this magazine the celebrated case of Crowhurst *v.* Amersham Burial Board, 4 Ex. Div. 5, in which it was held that if A. maintained on his land a yew tree, whose branches projected over the boundary between his land and that of another person, and that person's horse, on his land, cropped the projecting branches, which are poisonous to horses, and died in consequence, the horse's owner could recover against the owner of the tree. Now that decision has been recently distinguished in Ponting *v.* Noakes (1894), 2 Q.B. 281, an action brought to recover damages for the death of a horse, caused by eating the leaves of a yew tree growing on the defendants' land. The tree grew near the boundary of the defendants' land, which was separated from the plaintiff's by a fence and a ditch belonging to the defendants, the plaintiff's boundary

being on the farther side of the ditch. There was no obligation on the part of the defendants to fence against their neighbor's cattle. The plaintiff's horse ate the branches of the yew tree, which extended over the fence and partly over the ditch, but not over the plaintiff's land. The Divisional Court dismissed the action, holding that there was no liability on the part of the defendants, and that there was no duty on them to take means to prevent the plaintiff's horse from having access to the branches of the tree. It was attempted to bring the plaintiff's case within the doctrine of the well-known case of Fletcher *v.* Rylands, 3 H.L. 330, but the court agreed that it did not apply, because the tree was wholly within the defendants' land. The true test was held to be that pointed out by Gibbs, C. J., in Deane *v.* Clayton, 7 Taunt., at p. 533, where he says: "We must ask, in each case, whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt." If he had not, then (unless the element of intention to injure be present, as in Bird *v.* Holbrook, 4 Bing. 628, or of nuisance, as in Barnes *v.* Ward, 9 C. B. 392) no action is maintainable.

DIVORCE — PROHIBITION OF REMARRIAGE — EXTRA-TERRITORIAL EFFECT OF STATUTE. — It was settled by Van Voorhis *v.* Brintnall, 86 N. Y. 18; 40 Am. Rep. 505, that the prohibition of remarriage in the New York statute of divorce has no extra-territorial effect, and that where the prohibited party went to another state, whose divorce statute contained no corresponding prohibition, for the express purpose of evading the New York decree, and there remarried, and then returned to reside in New York, the marriage must be recognized as valid in New York. This doubtless is the general doctrine. A curious question would arise as to the effect of a remarriage in another state whose statute *did* contain a similar prohibition. Would that be recognized as a valid marriage in the state where the decree was pronounced? We think it would. It would be valid in the state where celebrated, because no decree of that state forbids it. It would be valid in the state where the decree had been pronounced because it would not be a disobedience of that decree, on the ground that such decrees have no extra-territorial effect. It could not be disregarded save on grounds of comity. A case in point is the recent one of Hernandez, 46 La. Ann. 24 L. R. A. 831 (with notes). The official headnotes are as follows:

"The prohibition of article 161 of the code, to the effect that, in case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, is directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded.

"The prohibition of the statute of New York, to the effect that no second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extra-territorial effect, being a penal statute; and it cannot be given the effect of annulling a contract of marriage between persons at the time residing abroad, notwithstanding it was solemnized in the city and State of New York, — the contracting parties announcing their intention to be to thereafter reside in Louisiana, and afterwards actually residing there."

LARCENY BY HUSBAND FROM WIFE. — In Bearley *v.* State, decided in the Supreme Court of Indiana, in September, 1894 (38 N. E. R. 35), it was held that if a husband takes his wife's personal property, under circumstances which, were he a third person, would constitute larceny, he is guilty of that crime. The court said:

"The learned Judge below held the indictment good upon the ground that the recent statutes give the wife exclusive control and authority over her personal property, and have greatly enlarged her personal rights as to the disposition thereof, making contracts, and doing whatever a *feme sole* might do, and that the effect of such statutes is to sever the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position. By virtue of these beneficent statutes, a woman may hold her own property, make her own money, enter into her own contracts, pay her own debts. She may even contract with her own husband. If he defrauds her, she may recover. If a woman may contract, under these statutes, with her husband, and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also, where the circumstances attending the wrongful act are such that, if performed by another, it would constitute a felonious asportation. Under the enabling statutes of Indiana, the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them."

The court cited Ganett *v.* State, 109 Ind. 527, where an indictment was sustained against the husband for arson of his wife's dwelling-house, as the property of "another person," although they both dwelt in it. Good, sound sense!

The Green Bag.

PUBLISHED MONTHLY, AT $4.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

OUR "Disgusted Layman" offers a few more noteworthy comments as the result of his observations during a recent visit to Tennessee.

Editor of "The Green Bag."

DEAR SIR:—I was down at Knoxville, Tenn., about a month since, on some lawsuit business (I am brevet lawyer of our concern), and being thrown in company of lawyers constantly, was rather impressed with two incidents connected with courts, that struck me as interesting, yet would be passed over by you in consequence of your not knowing the inner histories of them. One was the assassination of a judge (a "Chancellor" I think they called him) by the clerk of his court, what they always call "Clerk and Master." The mere assassination was nothing of general or fundamental interest, but the underlying causes were very peculiar and striking, It seems that this Chancellor is only paid $2,500 per year; he holds forth in the capital of the state, his office is a rather high one and he must live in some sort of style; yet it is evident he cannot do it on $2,500 per year. Now he has the appointment of the "Clerk and Master" of his court, which office is worth over $20,000 per year. This particular Chancellor seems to have made a bargain with his Clerk and Master, that the fees and profits of the latter's office should be divided between them. This is the striking feature, that a judge only paid $2,500 per year has the appointment to office where it pays five times as much, and I understood that the practice of making such a division of profits was thought to be common and the rule.

What a shocking commentary on "judicial dignity"? I think that this Chancery Court has charge of sales of property, settlement of bankrupt estates, etc., what is called sheriff's sale in this state, and the clerk of the court is master in such proceedings; I attended the sale of the property we had a lien on, and there was nothing said about the sheriff, it was all "the Clerk and Master." The additional incidents, that the assassinated judge had not only got half the clerk's profits, but had borrowed money in addition that the clerk had borrowed from others, and that he intended to appoint his son clerk instead of the former creditor one, are superfluities to the main point that a judge has to eke out his living by such methods.

An amusing incident that came out while I was there, was some fellow in Knoxville, who had been convicted of bigamy and sentenced to imprisonment, applying to the Supreme Court for a stay of his going to jail, or penitentiary (whichever it was), until he could apply to the governor for a pardon. That struck me as immensely cheeky, but when I read the long-winded opinion of the Supreme Court, that the fellow had been guilty of a very heartless seduction, and had married the girl just to save her character, had deserted her and subsequently, in a different state, had married agan, on the ground that his first marriage was only "a form," it was immense. What struck me as the joke was, that by his application to the Supreme Court, he was making it certain that the decision of the court would either be a strong support of his application for a pardon, or a tremendous argument against it, and as the court sat down on him and called him some pretty hard names, showing that the only plea he set up was his "respectable character" and his cool assumption that he was at liberty to determine for himself how binding his first marriage was, it seemed to me that the Governor would have to have an immense amount of nerve to pardon a man after the Supreme Court saying he wasn't entitled to even a temporary relief from imprisonment. You might be both amused at and interested in these two matters.

Yours truly,

A DISGUSTED LAYMAN.

LEGAL ANTIQUITIES.

ROGER NORTH gives an instance of the lawyer's attachment to mere forms. In his day the Court of Common Pleas used to sit in Westminster Hall, close to the great door, in order that suitors and their train might readily pass in

and out. When the wind was in the north, this situation was found very cold, and it was proposed to move the Court further back, to a warmer place. "But the Lord Chief Justice Bridgman," says North, "would not agree to it, as it was against Magna Charta, which says that the Common Pleas shall be held *in certo loco*, or in a certain place, with which the distance of an inch from that place is inconsistent, and all the pleas would be *coram non judice*. That formal reason hindered a useful reform; which makes me think of Erasmus, who having read somewhat of English law, said that the lawyers were *doctissimum genus indoctissimorum hominum*."

FACETIÆ.

DANIEL C. POMEROY was a criminal lawyer of great prominence throughout New York State, and conducted during his career the defense of thirty-seven murder cases, and not a single client ever reached the gallows. He had a son in whom he took great pride, and who promised to become a chip of the old block. The young man shortly after his admission as an attorney, thought it would be funny to "sit in" with a lawyer at a trial and assist him against the "old man." He made numerous objections during an examination of witnesses by his father, until the latter lost patience, and turning upon him said: "Dick, you either keep still after this, or I'll send for the hired girl to take you home and put you in bed." Dick subsided.

Pomeroy was a stage driver on the old Butterfield line, and gleaned his legal education largely upon the box seat of his coach or while change of horses was being made at the stations. He was associated with others in defense of one Mrs. McCarty, on her trial at Utica for the murder of a man named Hall, of Ogdensburg, who was killed by a bullet from her revolver, which was aimed at another man. Judge Doolittle presided at the trial, and seemed to believe in the prisoner's guilt. The Judge was bitter, and so was Pomeroy. The latter made an objection and insisted upon it rather strenuously. "Mr. Pomeroy," said the Judge, "I am not a horse, and can't be driven." "Well, your Honor, I learned in my early experience to drive mules, and I will try to keep up my former good reputation."

A LAWYER defending a promissory note case went to lunch leaving his books and citations on the table in the court-room. The opposing counsel sneaked back into the room and changed the place of all his bookmarks. In the afternoon the lawyer, taking up his books, referred the court to his authorities. His lordship noted every volume and page carefully, and took the case under consideration. In rendering his opinion he said:—

"I was inclined, after hearing the argument of counsel for defendant, to nonsuit the plaintiff; but I find, on referring to the authorities quoted by counsel, none of them bears on this case, and I am led to think that the gentleman has willfully been trying to insult the court. He has referred to an action of an Irishman who sued the proprietor of a monkey for damages for biting him; to a case of arson, one of burglary, two of petty larceny and three divorce cases, none of which bears on an action to recover on a promissory note. Perhaps the grossest insult to the court is referring to 'Duckworth *vs.* Boozyman,' an action charging defendant with breach of promise. Judgment for plaintiff, with costs."

The lawyer never knew what the matter was, and to this day thinks the judge was out of his mind.

LAWYER (in a whisper).— Here comes the jury. Ten to one they'll acquit you.

CLIENT (after listening to the verdict). — It seems to be twelve to none they don't.

THE following is vouched for as an actual fact, — A lecturer on Criminal Law at one of our law schools, in tracing the history of Criminal Law, quoted: "Whosoever sheddeth man's blood, by man shall his blood be shed." Genesis ix. 6.

Not long afterwards a member of the class was hunting the library diligently for a copy of "Genesis Reports." It is unnecessary to add that he was unable to find the citation under that title.

NOTES.

THE legal whirligig of time has brought a curious revenge through the recent New York election. Three years ago a young lawyer named John W. Goff, in defending an indicted client be-

fore Recorder Smyth, was fined for contempt of court. This consisted in advising his client not to arise for identification by a witness on order of the court — the counsellor taking the point that this was compelling the client to be a witness against himself. Now on New Year's Day, the disciplined young lawyer succeeded the disciplining judge.

ANOTHER and more curious instance of this whirligigging took place in the same city and state some years ago. Early in the civil war time, a young lad named James O'Brien was sentenced to the penitentiary for an alleged riotous act — that however was really a boyish bit of disorder — by Recorder Barnard. Twenty years later the young lad had served as sheriff, and next became a state senator. The Recorder had become a Supreme Court Judge, and as such being impeached, came up for trial before the senate of which James O'Brien was a member. And his vote aided in consigning his former judge to dishonor.

JUDGE WALTER CLARK of the Supreme Court of North Carolina is evidently level-headed. Called upon at the late election to further state his position, he disposed of his questioner by the remark: "I understand five different languages, and I know how to be silent in each of them." Silence proved to be golden to him, for as a consequence he received 100,000 more votes than were ever cast for any man in the state.

A SON of the late Sir Frederick Pollock, the last Chief Baron of the English Court of the Exchequer before its merging into the Supreme Court of Judicature, is soon to visit the United States. He much resembles his father, who in his day was regarded as the most distinguished looking of all his judicial brethren. Like a once renowned justice of the United States Supreme Court, the venerable Chief Baron took a nap pretty regularly about mid-day. His waking was comical. For when his "forty winks" ended he would start to seize a pen and with imperturbable gravity say to the arguing counsel, "What page was your last citation?" The harmless deceit was humored by the Bar, and only once did it provoke tartness. This came when an old serjeant retorted, "Did your lordship refer to the last citation made before your lordship gave Somnus a new trial, or the citation I made when your lordship produced a gap in my argument." Nothing nettled, Baron Pollock imperturbably answered, "The one immediately succeeding the gap."

Upon another occasion a young barrister from a provincial circuit about to make a suggestion regarding an infant heir remarked, addressing Sir Frederick, "I assume that your lordship is a married man and"; — but before he concluded the sentence the Chief Baron with a merry twinkle in his eye at the assembled Bar responded: "It would not be a violent assumption, for I have five great-grandchildren, and the total number of my descendants is eighty-five." A witty barrister present whispered, "Sir Frederick is quoting Pollock's 'Course of Time.'"

A BLACKSMITH of a village in Spain murdered a man, and was condemned to be hanged. The chief peasants of the place joined together and begged the Alcade that the blacksmith might not suffer, because he was necessary to the place, which could not do without a blacksmith to shoe horses, mend wheels and such offices. But the Alcade said, "How then can I carry out the law?" A laborer answered, "Sir, there are two weavers in the village, and for so small a place one is enough! you may hang the other."

LO! THE POOR LAWYER.

AT Halifax, that quaint old city,
There dwelt a lawyer whose renown
For crafty, subtle, fox-like cunning
Spread far beyond his native town.

Like lawyers everywhere, he oft
Found clients who were far more free
To enter into suit of law
Than pay their lawyer's well-earned fee.

An Indian, of the Miami,
For service rendered long ago,
Indebted was to him, and seemed
Contented well to leave it so.

The lawyer waited long; at last
His patience bore no longer strain,
With process, judgment, execution,
He threatened, nor was it in vain.

"Poor Lo" got scared and paid the money,
But lingered after he had paid;
"Why do you wait?" the lawyer asked,
"Me want receipt," the Indian said.

"Receipt!" the limb of law rejoined,
"What know you how these things are done?
Tell me the use of a receipt
And I'll be pleased to give you one."

The red man stood a moment, then
With merry twinkle in his eye,
He said, "S'pose now me sick, me die,
Me go to Heben by an' by;

"The 'Postle Peter come an' ask,
'Ol' Simon, what you want?' me say,
'Want to git in'; an' den he ask,
'You pay dat bill to Lawyer J.?'

"What den me do? Hab no receipt,
Me must go out to find you. Well—
Me fool hab been—to find you den
Me must go hunt all over h—."

—J. A. DREISS, *in The Bohemian.*

LITERARY NOTES.

THE Rev. Samuel J. Barrows, D.D., the editor of the CHRISTIAN REGISTER, and a member of the Board of Prison Commissioners of Boston, contributes a paper to the February ARENA on "Penology in Europe and America," that will be widely read by all who appreciate the value of educational work in prison discipline and reform as an important factor in the social problem. Dr. Barrows is one of the leading authorities in this country on the department of sociology known as Penology, and this paper is the result of a year's travel in Europe, during which he visited all the representative prisons of England, France, Germany, Italy, Hungary and Greece.

TWO articles in the February ATLANTIC will attract especial attention. "The Study of a Mob," by Boris Sidis, a Russian, in which the data are taken from Russian life, and "Russia as a Civilizing Force in Asia," by James M. Hubbard, which presents the other side of the shield

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GENERAL Lord Wolseley makes a most important contribution to the literature of the China-Japan war. In an article in the February COSMOPOLITAN, he discusses the situation and does not mince matters in saying what China must do in this emergency. Two other noted foreign authors contribute interesting articles to this number. Rosita Mauri, the famous Parisian danseuse, gives the history of the ballet, and Émile Ollivier tells the story of the fall of Louis Philippe. From every part of the world, drawings and photographs have been obtained of the instruments used to torture poor humanity, and appear as illustrations for a clever article, by Julian Hawthorne, entitled, "Salvation via the Rack."

MR. E. V. Smalley contributes to the February REVIEW OF REVIEWS an interesting study of civil government in Manitoba, under the title, "Canada's Prairie Province." His account of the institutions of this little-known government on our northern border is extremely enlightening and suggestive. The article is well illustrated.

THE leading article in the February number of THE BOSTONIAN is entitled, "How Washington's Birthday was made a Holiday," in which Mr. Walter G. Chase has furnished letters from Washington Irving, Charles Sumner, Wendell Phillips, Franklin Pierce, and others, as well as the original ode by Oliver Wendell Holmes which directly bore upon the subject.

A MURDER and robbery committed in an express-car on the Rock Island Railroad some years ago, gave the detectives one of the hardest cases they have ever had to deal with. The Pinkerton detective story in MCCLURE'S MAGAZINE for February is a history of this crime, and of the ingenious and patient methods by which the perpetrators were finally brought to arrest and conviction.

IN an article entitled "What is Gambling?" Hon. John Bigelow, in the February HARPER'S discusses an important constitutional amendment lately adopted by the people of the State of New York. The amendment indirectly affects horse-racing and pool-selling in other states, owing to the burning interest in the subject. Whether it affects the twenty-five-cent rubber at whist and the church fair is a problem that Mr. Bigelow propounds in entertaining fashion.

IN SCRIBNER'S MAGAZINE for February, Noah Brooks continues his group of papers on "American Party Politics," with an account of the typical vote of a party, as illustrated by the period from Jackson to Pope—the central idea being the rise and growth of the slavery problem. It is entitled, "The Passing of the Whigs."

A VARIED and attractive table of contents is offered by the POPULAR SCIENCE MONTHLY for February. Chief among the important articles are "The Serum Treatment of Diphtheria," by Dr.

Samuel T. Anderson; "The United States Geological Survey," by Charles D. Walcott; "Brain Development as Related to Evolution," by Hon. G. Hilton Scribner; and "Some Material Forces of the Social Organism," by Prof. John W. Langley.

THE leading feature of THE CENTURY continues to be the "Life of Napoleon," by Prof. William M. Sloane, which, in the February number, reaches the topic of Bonaparte's first military success. After describing the rather shifty policy of Napoleon in relation to the Revolution, Prof. Sloane recounts the circumstances surrounding the famous pamphlet, "The Supper of Beaucaire," and then takes up Napoleon's decisive success at Toulon, and his appointment as a Jacobin general, thus covering, in all, the larger part of the period from the time of the expulsion of the Bonapartes from Corsica to the marriage with Josephine. The article is finely illustrated.

THE NORTH AMERICAN REVIEW for February opens with three timely and important articles on "The Financial Muddle," written respectively by the Hon. J. Sterling Morton, Secretary of Agriculture, Representative William M. Springer, Chairman of the House Committee on Banking and Currency, and Henry W. Cannon, President of the Chase National Bank of New York and formerly Comptroller of the Currency.

Among the short articles which appear in this number are "Images in Dead Eyes," by Dr. Ellerslie Wallace; "Newspaper Row and National Legislation," by Albert Halstead; Washington correspondent of the "Cincinnati Commercial Gazette." "The Cat in Law," by Gertrude B. Rolfe, and "How to Repel Train Robbers," by Lieut. J. T. Knight, U. S. A.

BOOK NOTICES.

LAW.

A TREATISE ON THE LAW OF RES JUDICATA, including the Doctrines of Jurisdiction, Bar by Suit and Lis Pendens. By HUKM CHAND, M. A., Chief Justice City Court of Hyderabad, Deccan, India. William Clowes & Sons, London, William Green & Sons, Edinburgh, 1894.

This is a truly remarkable work, evidencing a most thorough research and a most exhaustive learning on the part of its distinguished author. Although coming from an East Indian lawyer, the treatise is admirably adapted to the needs of the American Bar, more than one-half of the great number of cases cited being from the United States. We know of no work upon this abstruse subject which displays so complete a mastery of the principles involved. It should find a place in every law library.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SEYMOUR D. THOMPSON, LL. D. The Bancroft Whitney Co., San Francisco. 1895. Six volumes, $36.00.

This great work of Judge Thompson, which has been for years in preparation, is finally announced as completed, and the first two volumes will be ready for delivery this month, while the others will follow at intervals of two months. We look forward with great interest to the appearance of the work, which promises to be the most remarkable legal publication since Kent's Commentaries. The general contents may be summarized as follows: —

I. Organization and Internal Government. II. Capital Stock and Subscriptions thereto. III. Remedies and Procedure to Enforce Share Subscriptions. IV. Shares Considered as Property. V. Liability of Stockholders to Creditors. VI. Directors. VII. Rights and Remedies of Members and Shareholders. VIII. Ministerial Officers and Agents. IX. Formal Execution of Corporate Contracts. X. Notice, Estoppel, Ratification. XI. Franchises, Privileges and Exemptions. XII. Corporate Powers and the Doctrine of Ultra Vires. XIII. Corporate Bonds and Mortgages. XIV. Torts and Crimes of Corporations. XV. Insolvent Corporations. XVI. Dissolution and winding up. XVII. Receivers of Corporations. XVIII. Actions by and against Corporations. XIX. Foreign Corporations.

The above titles are divided and subdivided into one comprehensive, orderly and complete work, covering every species of corporations, except those created for governmental purposes.

A SYSTEM OF LEGAL MEDICINE. By ALLEN MCLANE HAMILTON, M. D., and LAWRENCE GODKIN, ESQ., of the New York Bar. E. B. Treat, New York, 1894. Two vols. Law sheep.

This work is perhaps the most important contribution ever offered to medico-legal literature. A remarkable array of legal and medical talent has been enlisted by the editors and articles are furnished by such lawyers as Judge Simeon E. Baldwin, B. F. Cardozo, W. B. Hornblower, R. C. McMurtrie, etc., while besides the editor, Dr. Hamilton, on the medical side we find such well known names as Prof. Jas. F. Babcock, Lewis Balch, Francis A. Harris, Ryerson Fowler, B. Sachs, F. R. Sturgis, V. C.

Vaughan, W. T. Gibb, etc. All of these gentlemen may be called experts in the subjects of which they write, and their statements carry more than usual weight and authority. The scope of the work covers almost every conceivable medico-legal topic, and will be found invaluable to all practitioners who are called upon to discuss such subjects. We heartily commend the book to the profession and bespeak for it the cordial reception to which its merits entitle it.

LIFE SKETCHES OF EMINENT LAWYERS, American, English and Canadian. To which is added thoughts, facts and facetiæ. By GILBERT J. CLARK of the Kansas City Bar. Lawyers' International Publishing Co., Kansas City, 1895. Two volumes.

Mr. Clark gives us in these volumes a vast amount of interesting matter concerning the great lights of the American and English Bars. Short biographical sketches, to which are added extracts from speeches and arguments, together with bright anecdotes etc., make up the contents. The work is designed as a key to the admirable photogravure groups of eminent lawyers published by Mr. Clark a year since. The book will be read with pleasure by the profession and should be preserved as a treasure-house of biographical information. The labor involved in the preparation of such a work must have been very great, and Mr. Clark deserves the thanks of his brother lawyers for the bringing together these sketches of such a host of worthies for their delectation.

COMMENTARIES ON THE LAW OF INJUNCTIONS, as determined by the Courts and Statutes of England and the United States. By CHARLES FISK BEACH, JR. H. B. Parsons, Albany, N.Y., 1895. Two vols. Law Sheep, $12.00 *net.*

Mr. Beach is one of the most indefatigable of our law writers, and with hardly an exception his works have deserved high praise. In this treatise on Injunctions, he has given the profession a very useful and practical book, one which will prove of great aid and assistance. The law as it is to-day is fully and carefully stated and the citations are numerous and to the point. It is an admirable working tool and will find favor with both bench and bar. We commend it to the attention of our readers.

MISCELLANEOUS.

THE WOMAN WHO DID. By GRANT ALLEN. Roberts Bros., Boston, 1895. Cloth $1.00.

The English novel of to-day has been the subject of much severe criticism, and this work of Mr. Allen's is likely to receive its full share of adverse comment. Dealing as it does with a question which strikes at the very root of our social system, and advocating through the lips of its heroine the abolition of marriage, the book is one which few will commend. It is however a relief to find that all the heroine's efforts to revolutionize the social status come to naught, and that she, to a certain extent, sees the errors of her ways and expiates them by taking her own life. The story is powerfully written, is of great interest, and furnishes much food for thought, but we wish the author's talents had been exercised in a worthier direction.

RECOLLECTIONS OF SIXTEEN PRESIDENTS, from Washington to Lincoln. By RICHARD W. THOMPSON. The Bowen-Merrill Co., Indianapolis, 1894. Two vols. Sold by subscription only.

It has fallen to Mr. Thompson to enjoy the remarkable distinction of having seen all the Presidents of the United States except Washington and the elder Adams, and to have met and personally known many of them. Mr. Thompson himself, has been a prominent figure in the political history of our country, and consequently anything from his pen demands a more than usual consideration by the American people. We took up these volumes therefore with pleasant anticipations, but found to our regret that *personal* recollections of our Presidents were almost entirely wanting, and that Mr. Thompson had contented himself with giving simply short histories of the different administrations. These are interesting, but they are not what the reader is led to expect from the title of the book. Many of the author's statements will be taken issue with by students of our political history, but we have not the time or space to point out what seem to us to be remarkable assertions on Mr. Thompson's part. The book, as a whole, is well written and very readable, and a valuable acquisition to political history, but the opportunity for making it *the* work of the day seems not to have been availed of by the distinguished author.

BOOKS RECEIVED.

HANDBOOK OF AMERICAN CONSTITUTIONAL LAW. By HENRY CAMPBELL BLACK. West Publishing Co., St. Paul.

AMERICAN STATE REPORTS. Vol. XL. Bancroft-Whitney Co., San Francisco.

RULES OF EVIDENCE. By GEORGE W. BRADNER. Callaghan & Co., Chicago.

The Green Bag.

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CHANCELLOR JAMES KENT.

BY CHARLES S. MARTIN.

THERE are three men whose names are the most illustrious and enduring in the judicial history of the United States.

One is John Marshall, the masterly Chief Justice, whose penetrating analysis made clear the principles of law and their just and logical applicability to the affairs of men, and whose creative mind expounded the Constitution of our country in such a way as to place it on a foundation which has never since been shaken; another is Joseph Story, the scholar of profound and varied attainments, the able, fluent, and graceful legal writer; while the triangle is completed by the name of one in whom the salient qualities of these two were remarkably combined, and whose biography has yet to be written: James Kent, the subject of this sketch.

He was born on the 31st day of July, 1763, at Fredericksburgh, Dutchess County, in the state of New York. The genealogy of the Kent family is easily traced in this country to Richard Kent, who sailed from London, England, on March 26, 1633, in the "Mary and John" of London, and settled in the neighborhood of Boston.

The Chancellor's reference to his ancestry is as follows: "My paternal grandfather, Elisha Kent, was the son of a farmer in Suffield, Conn., was graduated at Yale College in 1728, married a daughter of Rev. M. Moss of Darby, Conn., preached some time at Newtown, and then settled in the south-east part of Dutchess County in this state. His parish grew, and was afterwards known as Kent's parish.

"My father, Moss Kent, was his eldest son, was graduated from Yale College in 1752, admitted about 1756 to the bar as an attorney in Dutchess County Court. I was sent to Norwalk to school at about the age of five years."

In 1773 he was sent to Danbury to a Latin school under the tuition of Rev. Ebenezer Baldwin, remained there until 1776, and entered Yale the following year.

He records in his memoranda, that the four years' residence at New Haven College were distinguished by nothing material in the memoranda of his life. "I had the reputation of being quick to learn," he continues, "and of being industrious and full of emulation. I left New Haven, clothed with college honors, and a very promising reputation, but the learning at that day was contemptible. My favorite studies were geography, history, belles lettres, etc.

"When the college was broken up and dispersed in July, 1779, by the British, I retired to a country village, and finding Blackstone's Commentaries, I read the four volumes. Part of the work struck my taste, and the work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer."

At the time Kent was graduated, the College staff consisted of the President, one professor, and three tutors, and the diary of President Stiles shows that young Kent had the most honorable appointment.

In November, 1781, he began the systematic study of law in the office of Egbert Benson, then Attorney-General, at

Poughkeepsie, in his "native" county of Dutchess. Benson, afterwards judge, was a very prominent lawyer of his time, noted for a thorough knowledge of the philosophic basis of law, and more deeply versed in technical information than any of his fellow practitioners. The young law student at once displayed the same methodical ways of study and living that characterized his entire life. His diligence was tireless and unconquerable; his character pure; his manner vivacious. He read Smollet's History, Rapin, Hale, Hume, Blackstone "again and again," as he records, and all "the old books of practice."

During his period of apprenticeship Alexander Hamilton had commenced the practice at the bar, and had already evidenced his commanding ability. He became the leader of the New York bar, and as Chancellor Kent afterwards wrote, "being a very great favorite with the merchants of New York, he was employed in every important and every commercial case."

Aaron Burr, subtile and cool, with his pointed arguments, small stature but imposing manner, "rarely lost a case." Melancthon Smith, with keen and metaphysical trend of mind, and Hamilton's ablest opponent in debate, was also a successful practitioner. Then there were Samuel Jones, Brokholst Livingstone, Edward Livingstone, younger brother of the Chancellor, Morgan Lewis, afterwards attorney-general, and many others. Josiah Ogden Hoffman was younger, but soon made known his remarkable talents. In the management of juries he was unexcelled by any other lawyer of his day.

Kent was admitted to the bar of the Supreme Court in January, 1785, at Albany, and in the following April married Miss Elizabeth Bailey, daughter of Capt. John Bailey, of Dutchess County, and sister of Gen. Theodorous Bailey, formerly United States senator, and afterwards postmaster of New York City. In the letter to Thomas Washington, previously mentioned, he writes, "I was twenty-one, and my wife sixteen, when we married, and *that charming and lovely girl has been the idol and solace of my life*, and is now with me in my office, unconscious that I am writing this concerning her." And thus we find him starting on his career: young, healthy, happily married, without one cent of property, in debt four hundred dollars, but endowed with a capital of undoubted courage and sturdy perseverance, gifted with learning and eager for advancement.

On the twelfth day of April of that year he entered into a partnership with Gilbert Livingston, who at that time enjoyed a large and well-established practice. The articles of co-partnership provided for a term of twelve years, and contained a clause giving the junior partner the right to remove from Dutchess at any time after six years.

From 1785 to 1790 the Chancellor's letters record little else than the nature and extent of his studies. In the beginning he devoted one hour each day to Greek, and another to Latin, but he "soon increased it to two for each tongue in the twenty-four hours." The business part of the day, to use his own words, he gave to law, while the evenings he allotted to English literature in company with his wife, whose "sound and vigorous mind" and "correct taste" he always delighted in and appreciated. A more bright or beautiful domestic life from its modest beginning to an unclouded end than that depicted in Kent's memoranda, and contemporaneous testimony, would not be easy to parallel. The working hours he divided as follows: In the morning he read Latin until 8.30, and Greek to 10 o'clock. The following hours he devoted to law or business until the afternoon, when he read French for two hours. His memoranda is interesting on this subject, as it betokens distinctly a keynote to his character. "This division of time has ripened with me into habit, and I adhere to it in a great degree still.

It enables me to do more reading than I otherwise could. No sooner does the mind grow weary with one department but it is instantly relieved by introduction to another. Variety seems to refresh and to animate it."

The April term of 1787 beheld him admitted to the degree of counsel at the bar, and even at this time his reputation had grown extensively, and he was regarded with favor and respect throughout his county. It was at this period, too, that politics began to claim his attention. Alexander, Hamilton's speeches in the Legislature of 1787 aroused his interest, and he soon took his stand with the Federalists, towards whom his allegiance ever remained steadfast, and for whose principles he continuously exercised his voice, pen, and vast influence.

In April, 1790, he was elected a member of the Assembly for Dutchess County, performing zealous and distinguished services in the debates. His correspondence with his brother, Moss Kent, begins to grow with interest at this point.

Gradually his circle of acquaintances widens, and we meet the giants of those days face to face. January 12, 1791, he writes to his brother: "I have dined with Mr. Burr and Lawrence. . . . I have dined and again breakfasted with Mr. Burr, and have received great attention and politeness from him. The insinuation of his manners is equal to the refinement of his taste and activity of his mind," while on January 27 he writes: "You have heard of Mr. Burr's election. I congratulate you because I know it is agreeable to your wishes. I was of the minority."

The contest for the governorship in 1792 was bitter, spirited, and partisan, and in this contest Kent participated actively. The two candidates were Jay and Clinton; concerning the former Kent says, "Such is his independent condition, such his knowledge and experience, such his talents and integrity of heart, that if Providence should but grant us success, we may rationally expect a sudden death to the little intrigues of favorites and party, and on their ruins to arise an administration of rectitude and firmness."

It may be said here that all the correspondence of our subject (and I have examined over nine hundred pages), from the time he accepted public duties to the peaceful twilight hours of his life, fairly glows with devotion to the principles and institutions of free government. "How much ought we to prize and cling fast to the pillars of our free and excellent national government at home!" This sentence contains the sentiment which threads together the great bulk of all his letters.

While fulfilling his duties as a member of the Assembly for a second time, he was nominated for Congress, but received one hundred and thirty-two votes less than did his brother-in-law, Mr. Bailey, the successful candidate. The partnership with Mr. Livingston was dissolved at this time, and Kent removed to the city of New York in the latter part of April, 1793. The memoranda record is as follows: "I carried with me to New York my wife, then in the splendor of her personal accomplishments, a lovely and precious little daughter of upwards of two years of age, whose great debility and sickness during the summer of 1792 had riveted the affection, and awakened the most painful anxieties of her parents, a small well-chosen library, scanty furniture, and one hundred pounds cash, leaving real property behind to the value of two hundred pounds, and this was the total result of my eight years' settlement at Poughkeepsie." The little daughter he mentions died in the following May, an event occasioning great sadness to her parents.

The first summer in New York did not offer much enjoyment to Kent. Besides the need of money and lack of business he missed the beauties and ease of country life, to the former of which especially he was always passionately devoted. The many succeeding years of continuous residence in the city did not accustom him to its cease-

less strife, noise, and confusion. His dream of contentment, as he wrote to his brother, was to live "near you in the country, surrounded by quiet, books, fields, garden, and my lovely wife and daughter." And thereafter a tour into the country during vacation became as necessary a part of his life as that of law or private study.

It was his habit to write of the details and incidents of such excursions; the natural scenery of the country, the special physical features of each settlement, and the names and manners of the men he met, with comment thereon.

The following excerpt from a letter written to his brother in 1795 is a fair example of his method and style: "I visited the President at one of his public levees. They are every Tuesday from 3 to 4 o'clock P. M. You enter and make a bow. The President and company all stand with their hats in their hands, and after exchanging a few words you retire *sans ceremonie*. I saw Mr. Adams, the British Minister, Mr. Hammond, and several members of Congress. The President was dressed in a full suit of plain cloth of a snuff color, with silk stockings, and a sword by his side. His manners were easy, but distant and reserved. His eye was expressive of mildness and reflection. His person was tall and full of dignity. No person can approach him without being penetrated with respect and reverence. Without the brilliancy of Cæsar's talents or the daring exertions of Frederick, such has been his steadiness, good temper, and integrity that no man ever attained a greater ascendency over free minds, or ever reigned so long and so completely in the heart of a sober and intelligent people."

Professional advancement soon came to Kent, however, and some time in December, 1793, he was appointed professor of law in Columbia College. His office practice increased also, and this, together with the preparation of his law lectures, absorbed his entire time. "I read a course in 1794–95," he writes, "to about forty gentlemen of the first rank in the city. They were very well received, but I have long since discovered them to have been slight and trashy productions. . . . I dropped the course after one term, and soon became considerably involved in business, but was never fond of nor much distinguished in the contentions of the bar." This passage from his pen illustrates what his correspondence and contemporaries abundantly prove, namely, that his most characteristic personal trait was frankness. Hypocrisy, deception, or subterfuge he vigorously detested, and all that he did, thought, or experienced, he communicated to his fellow-men with the unreserved simplicity of a child.

In February, 1795, he had prospered to such an extent that for the sum of fourteen hundred and seventy-five pounds, he purchased a house on Pine Street, that narrow thoroughfare which is now a part of the financial and legal centre of New York City, and is hedged on either side by the modern lofty office-buildings.

The law lectures which he delivered were afterwards published, but the sale of them was small and unprofitable. It was his earliest effort that contained the promise of great future achievement along this line of endeavor, though the result somewhat discouraged the author. The first public office he held was that of Master in Chancery, to which he was appointed by Governor Jay in February, 1796. "This office," he records, "promised me a more steady supply of pecuniary aid, and it enabled me in a degree to relinquish the practice of an attorney, which I always extremely hated. It came upon me entirely unsolicited and unexpected." In reply to Jay's private letter to him, stating that the office was vacant, and asking whether he would accept, he writes that he "was content to accept of the office, if appointed." A brief answer, but it brought the appointment on that day. Afterwards he was astonished to learn "that there

were sixteen professed applicants, all disappointed."

At the time of this appointment there was but one other master in New York, and the new appointee soon enjoyed a monopoly of the business, the duties of which were tiring but remunerative.

He was elected a member of the Assembly from New York in the spring of 1796, and was now known as a prominent man. The office of Master in Chancery alone brought in almost enough to support him adequately, but a year only had elapsed when he read in the papers that he had been appointed recorder of the city of New York.

It was his first judicial office, and he gladly accepted it, for it enabled him to be apart from the "drudgery" and conflict of practice, while at the same time it afforded him an opportunity to display and make use of his large learning and accurate judgment. It is written that one day there was a case before him, in which Alexander Hamilton and Richard Harrison were opposing counsel. A nice point was involved, and there was an impression on the minds of both that some old reporter had given a case in which a similar point was involved. After counsel had closed, "Mr. Recorder Kent gave the title of this old case, and where it was, and even the page, names of the barristers who were engaged, and almost the very words in which the presiding judge uttered his decision."

The duties of Recorder and Master in Chancery did not conflict with each other, and by assiduous attention to the demands of those offices he was in a position to renounce all professional employment, except that of counsel in the Supreme Court, and he was also enjoying an ample financial reward for his labors. In February, 1798, he was appointed to the office of a judge of the Supreme Court. Concerning this appointment he writes in his memoranda as follows: "This was the grand object of my ambition for several years past. It appeared to me to be the true situation for the display of my knowledge, talents, and virtue, the happy mean of placing me beyond the crowd and pestilence of the city, of giving me opportunities to travel and to pursue literary pursuits, a taste for which is, after all, the most solid and permanent of all sublunary enjoyments. By the acceptance of this office I renounced all my offices in New York, with all their accumulated income and all my prospects for wealth, for more rural enjoyments and for more dignified reputation.

"Whether or not I judged well for my happiness must be left to the event to decide. . . . This is certain, that the mere men of business and of pleasure, who estimated happiness by the splendid luxuries of the city life, all condemned my choice as mad and absurd. But men of patriotism and reflection, who thought less of riches and more of character, were yet more slow to condemn."

The letter to Thomas Washington concludes with these words: "I find myself now in the middle of my life and a sense of its value and rapidity to be greatly increased in my reflections. This urges upon me constantly the necessity of *improving time* with the utmost diligence, and constantly to make it subservient to all the noble purposes of social and domestic happiness, of public and private duty."

At the time when James Kent was elevated to the Supreme Court, the justices went the circuit when the regular terms of the court *in banc* were not in session in Albany, Utica, or New York. Judge Kent now removed to his former residence, Poughkeepsie, in order, as he records, to resume his studies, ride the circuits, inhale the country air, and enjoy *otium cum dignitate*. This is what he writes: "I never dreamed of volumes of reports and written opinions. *Such things were not then thought of.* In 1799 I was obliged to remove to Albany, in order that I might not be too much from

home. When I came to the bench, there were no reports or state precedents. We had no law of our own, and nobody knew what it was. *I first introduced a thorough examination of cases and written opinions.*

"The second case reported in 1 Johnson's Cases, of Ludlow V. Dale, is a sample of the earliest. The judges, when we met, all assumed that foreign sentences were only good *prima facie.* I presented and read my *written* opinion that they were conclusive, and they all gave up to me, and so I read it in court as it stands. This was the commencement of a new plan, and then was laid the first stone in the subsequently erected temple of our jurisprudence."

Although Kent's strong point was not an appreciation of humor, or that of a maker of wit, nevertheless he was not deficient in these attributes, and was often droll and naive. Instance this: "I could generally put my brethren to rout and carry my point by my mysterious wand of French and civil law. The judges were republicans, and very kindly disposed to everything that was French, and this enabled me without exciting any claim or jealousy to make free use of such authorities, and thereby enrich our commercial law." Of course Kent's authority soon became dominant in the court, as is seen by the volumes in Johnson, after he became chief judge in 1804. At first the practice was for each judge to prepare his proportion of opinions, but this rule became "more honored in the breach than in the observance," and for the two or three years before Kent left the bench, almost all of the opinions were written by him. "I remember," he writes, "that in 8 Johnson all the opinions one term are *per curiam.* The fact is I wrote them all, and proposed that course to avoid exciting jealousy, and many a *per curiam* opinion was written and so inserted for that reason. English authority did not stand very high in these feverish times, and this led me a hundred times to attempt to bear down opposition, or shame it by exhausting research and overwhelming authority."

On the fifteenth day of February, 1814, the Chief Justice was translated from the Supreme Court to the Court of Chancery, and the resulting benefit of this richly deserved honor is well treated in the chapter on the growth of the Constitution contained in the "Memorial History of the City New York." When Kent was made Chancellor, Johnson, his old reporter and life-long friend, was directed by the Legislature to report his decisions; and the New York Court of Chancery now begins a career which for brilliancy, character, and permanency of value has not been surpassed by the court of any other State. Livingstone, the first Chancellor, engraved nothing on its structure that has been handed down, so we are unable to estimate his judicial work; Lansing, the second Chancellor, left behind him some seventy-four chancery rules, but there was no reporter in his time, and so his merits or defects are not recorded. Chancellor Kent, however, was attended by the reporters from the beginning, and his services as Chancellor are known values which need only be studied in order to be ascertained. The material he had at hand was meagre. There was no system of American equity jurisprudence at his command ready for him to expound or apply. As has been well said, he "perceived that to an American lawyer of his day two great and living problems were presented for solution: the relations of the common law of the older country to the new republic, and the relations of the judicature branch of government to the legislative and executive branches in a composite or federal state." But let the Chancellor tell his own story: "For the nine years I was in that office there was not a single decision, opinion, or dictum of either of my two predecessors cited by me, or even suggested. I took the court as if it had been a new institution, and never before known in the United States. I had nothing

to guide me, and was left at liberty to assume all such English chancery powers and jurisdiction as I thought applicable under our Constitution. This gave me grand scope, and I was only checked by the revision of the Senate or Court of Errors. I opened the gates of the court immediately, and admitted almost gratuitously the first year eighty-five counselors, though I found there had been but thirteen admitted for thirteen years before. Business flowed in with rapid tide. The result appears in the seven volumes of Johnson's Chancery Reports. My course of study in equity jurisprudence was very much confined to the topics elected by the cases. I had previously read the modern Equity Reports down to that time, and of course I read all the new ones as fast as I could procure them. I remember reading Peere Williams as early as 1792, and made a digest of the leading doctrines. I always took up the cases in their order, and never left one until I had finished it. This was only doing one thing at a time. My practice was first to make myself perfectly and accurately (mathematically accurately) master of the facts. It was done by abridging the bill, and then the answer, and then the depositions, and by the time I had done this slow and tedious process, I was master of the case, and ready to decide it. I saw where justice lay, and the moral sense decided the case half the time, and then I sat down to search the authorities until I had exhausted my books, and I might once in a while be embarrassed by a technical rule, but I most always found principles suited to my view of the case, and my object was so to discuss a point as never to be teased with it again, and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel."

Kent innovated but seldom; indeed, he expressly stated that he did not intend to do so. On account of this self-limitation it has been said that "he denied himself an opportunity of expressing his own conceptions of equity," but his own words, as above quoted, show that he always found principles suited to his view of the case. The Chancellor at this time was invested with extended authority. Not only did he inherit the powers of a Chancellor under the former English system, but by virtue of his office he sat in the court of last resort, and might argue in support of his own judgment below, though he could not vote. To this extraordinary power must also be added the right to sit in the Council of Revision, and cast a vote on all legislation under the first Constitution.

It will be remembered that the famous Erie Canal bill passed the Senate in 1817, but was subjected to another severe ordeal in the Council of Revision, of which Lieutenant-Governor Taylor was president, one of the most distinguished as well as formidable opponents of the measure. There were present the Chancellor, Chief-Justice Smith Thompson, Judge Jonas Platt, and Judge Joseph C. Yates, afterwards Governor of the State. According to Mrs. Lamb's "History of the City of New York," the Chancellor said it seemed like a gigantic project which would require the wealth of the United States to accomplish, and he thought it inexpedient to commit the State until public opinion could be better united. The Chief Justice said the bill gave arbitrary powers to the commissioners over private rights without sufficient provisions and guards; he was, therefore, opposed. The crisis was alarming. Taylor held the casting vote. Near the close of the discussion Vice-President Tompkins entered the Council Chamber, and took his seat familiarly; he expressed a decided opinion against the bill, remarking that the late peace with Great Britain was a mere truce, and that the credit and resources of the State ought to be employed in preparing for war. "Do you think so?" asked Chancellor Kent. "Yes," was the reply. "England never forgave us our victories; and, my word for it, we shall have another war within two years." The Chancellor

sprang to his feet, and with great animation declared: "Then if we must have a war, or have a canal, I am in favor of the canal, and I vote for this bill." This vote gave the majority, and the bill became a law. Kent's correspondence, while he sat on the Chancellor's bench, was concerned mostly with his private studies and summer tours. To William Johnson, his reporter, he writes: "This moment I have Virgil on my table, and I am determined to amuse myself in reading him forthwith. I have nothing else to do. I have just finished Ferrier's 'History of the Civil Law,' and I am charmed with it. My three children are all with me, and I am of course brimful of happiness"; or again, "I have been amusing myself with the two volumes of Eden's 'Reports.' They are excellent; I have also pored through an immense pile of oriental erudition and geography in Marsden's edition of 'Marco Polo,' and I am now on Raffle's 'Java,' which promises a great feast."

Kent's manner, when presiding, was that of dignified courtesy, blended with considerate and lively interest in the subject-matter before him. His mind was penetrating and alert, and he spoke rapidly. With bores or stupid men, however, he had little patience. It is related that Mr. R., a learned but prosy lawyer, annoyed him by long arguments on trifling points. One day he had taken an exception to some item in a master's report, and was proceeding elaborately when the Chancellor asked him, "How much, Mr. R., is in dispute?" "One dollar and seventy-five cents, your honor." "I won't hear it — won't hear it," said the Chancellor; "would rather pay it myself."

When a valuation was to be made with a report in a case of magnitude and nicety, he said, "Let it be referred to Mr. Jay; if ever there was an honest man, it is Peter A. Jay." And on another occasion it is said he endorsed on his order of appointment these words with reference to the person selected: "Known to me to be an honest man."

The Chancellor's authority, exercised so conservatively, ably, justly, and without fear, naturally excited jealousy and opposition. The phrase "throne of equity" was disliked, and the whole idea of a chancellor was associated with that of a kingship. It was said that the officials and practitioners of the chancery establishment were exclusive, and the politicians regarded Kent as the representative of all they hated. This opposition culminated in the Constitutional Convention of 1821, which Kent and Ambrose Spencer attended, and with all their strength and ability contended against a blind resistance to a just and sensible conservatism.

When Kent retired from office in 1823, he had heard and decided every case brought before him. "This brilliant career," to quote William Allen Butler, "was cut short at the age of sixty years by the operation of the provision in the Constitution of 1821, which perpetuated a similar provision in the Constitution of 1777, disqualifying the higher judicial officers from the exercise of their duties after attaining sixty years of age."

The event was sincerely deplored by the bar, and on July 28, 1824, the members residing in New York City convened in the City Hall, and appointed a committee to transmit an address to the Chancellor at Albany.

This address, replete with praise, appreciation, and couched in terms of endearment, is set forth in 7 Johnson's Chancery Cases, p. 347. Among the committee was Thomas Addis Emmet, a notable leader of the bar, who came to New York from Ireland in 1804, and established himself in his career just as Hamilton's ended; Richard Harrison, John Wells, Josiah Ogden Hoffman, and others.

Similar addresses were presented by the members of the bar, residing at Albany,

and also by those who were attending a term of the Supreme Court held at Utica, including Elisha Williams, Thomas J. Oakley, John C. Spencer, and Benjamin F. Butler: *viri eruditissimi atque clarissimi.*

Immediately after this retirement he visited the Eastern States, accompanied by his only son, William Kent. This son was a worthy inheritor of his father's greatness. Eminent as a lawyer, able as a circuit judge of the first circuit of New York, distinguished as Royall professor of law at Harvard, being the successor of Judge Joseph Story, and beloved as a man. When he died in 1861, the bar of New York City held a meeting to express the feelings of the profession on the sad event. The resolutions passed, and the eulogies pronounced, compose the appendix in Vol. 34 of Barbour's Supreme Court Reports, and the address of James T. Brady therein contained, for impressive eloquence and depth of sympathy, is a model of its kind, and well worth the perusal of any man. On returning from this journey, the Chancellor, for he will always be called the Chancellor, resolved to move away from Albany, and once more reside in New York. He intended to be chamber counsel, for to resume practice at the bar was not consonant with the professional ideas then prevailing. As he said to James I. Roosevelt, afterwards judge of the Supreme Court in New York City, "I would rather saw wood." His own memorandum is as follows: "The Trustees of Columbia College immediately tendered me again the old office which had lain dormant from 1795. I undertook (but exceedingly against my inclination) to write and deliver law lectures. In the two characters of chamber counselor and college lecturer, I succeeded by steady perseverance beyond my most sanguine expectations. I have introduced my son into good business, I live aside of my daughter, and I take excursions every summer with my wife and daughter all over the country. I give a great many written opinions." It may not be out of place here to state that the large law library of Chancellor Kent was, up to about a year ago, in the office of his great-grandsons William and Edwin C. Kent. It was decided to pack the books, and move them, and I had the pleasure of handling and examining many of the volumes at that time. Nearly every one contained marginal notes, and these notes now copied in typewriting number over eight hundred pages. In the early volumes of the Massachusetts Reports are many notes referring to the legal knowledge and keen discernment of Chief-Justice Parsons. There are also pasted in obituary remarks on the death of judges and newspaper articles on their lives. "I have read this volume with pleasure," he writes in a Connecticut Report; "these decisions are to the honor of the court." And this note in 3 Sumner, 230 is characteristic: "When will our judicial decisions be brought to beauty, terseness, and simplicity? The opinion here consumes forty pages, and it might very properly and with sufficient instruction have been compressed within two."

But to return to his narrative: "Having got heartily tired of lecturing, I abandoned it, and it was then that my son pressed me to prepare a volume of the lectures for the press. I had no idea of publishing them when I delivered them." The first volume of his commentaries was published in 1826, and the whole work was completed in 1830, during which time he was chosen president of the New York Historical Society. To dwell at length on this lasting monument to his fame is unnecessary, for wherever law is known, studied, and practiced there is the white mark of acknowledged homage accredited to the great American commentator.

The names of Blackstone and Kent are indissolubly linked together. As Judge Dillon admirably says in his recent scholarly and delightful work, "Laws and Jurisprudence of England and America," "The American bar and people venerate the name

and character of Chancellor Kent. Simple as a child in his tastes and habits throughout his tranquil and useful life; more than any other judge the creator of the equity system of this country, the author of commentaries which, in accuracy and learning, in elegance, purity, and vigor of style, rival those of Sir William Blackstone, his name is admired, his writings prized, his judgments at law and in equity respected in every quarter of the globe (and nowhere more than in England), wherever in its widening conquest the English language, which is the language of freedom, has carried the English law."

Twenty-four years previous to the publication of his commentaries, he with Judge Radcliff had published their Revision of the Laws of New York. Chancellor Kent also published his "Notes to the Charter of the City of New York" in 1829.

From this period on, Kent spent his days in attending to the preparation of new editions of his commentaries, in reading his favorite classic writers (he had read Juvenal, Horace, and Virgil eight or ten times) and books of travel, entertaining distinguished visitors, corresponding with the foremost men of the day, and traveling into different parts of this country.

England's great judges, such as Denman, and Germany's learned scholars, such as Lieber, not to mention our own Edward Everett, Charles Sumner, and Daniel Webster, wrote to him constantly for advice, opinions, or for friendship's sake. Space forbids the quotation of many letters, but here is one from Webster who called Kent "his friend, admirer, and pupil."

"BOSTON, OCT. 29, 1832.

"MY DEAR SIR: — Mr. Calhoun, as you are doubtless aware, has published a labored defence of nullification in the form of a letter to Gov. Hamilton. It is far the ablest and most plausible and therefore the most dangerous vindication of that particular form of revolution which has yet appeared.

"In the silence of abler pens and seeing, as I think I do, that the affairs of this Government are fast approaching a crisis, I have felt it my duty to answer Mr. Calhoun. And as he adopted the form of a letter in which to put forth his opinions I think of giving my answer a similar form. The object of this is to ask your permission to address my letter to you. I propose to feign that I have read a letter from you calling my attention to Mr. Calhoun's publication and then in answer to your supposed letter to review his able arguments at some length, not in the style of a speech, but in that of cool, constitutional and legal discussion. If you feel no repugnance to be thus written to, I will be obliged to you for your assent; on the other hand if any reasons suggest themselves to you against such a form of publication, another can be adopted. I cannot complete the paper before election, as I am at present a good deal pressed with professional affairs; but I hope to bring it to light in the course of next month.

"I have little to say to you, my dear sir, upon political subjects. The whole ground is open to you. I trust you will be one of those who have votes to give, and I devoutly pray that you may yet see some way of uniting the well disposed to rescue us from peril.

"I am, dear sir, with most sincere and true regard, yours,

DAN'L WEBSTER."

HON. JAMES KENT, New York.

It may be added that Webster's request was graciously granted. Some idea of the temper of the times is afforded by the following passage from a letter to Kent, written by Chief-Justice Dagget of Connecticut on October 29, 1832: —

"I declare to you, my friend, though I witnessed the shutting of the port of Boston in 1774, the battles of Lexington and Bunker Hill in '75, the rebellion of 1787–8 in Massachusetts, and the portentous period of 1789, I never felt such fearful forebodings as I now feel."

But of all the letters written to or by the Chancellor, the one he penned and sent to Mrs. Elizabeth Hamilton, the widow of Alexander Hamilton on the tenth day of December, 1832, is easily first in importance

of matter and thoroughness of treatment, and especially valuable as an historical document on account of the position, personal relation, and special knowledge of the writer. The alleged cause of the Burr-Hamilton duel was a clause in a letter signed by Dr. Charles D. Cooper, which read as follows: "I could detail to you a still more despicable opinion which General Hamilton has expressed of Mr. Burr." Hamilton, in reply to Burr's letter demanding an "acknowledgment or denial of the use" of such expression, wrote to the effect that he found the opinion in question to be founded on these words: "General Hamilton and Judge Kent have declared in substance that they looked upon Mr. Burr to be a dangerous man, and one who ought not to be trusted with the reins of government." And it is a fact that for some time Burr hesitated, undecided which one to challenge first. Kent spent some time with Hamilton at the latter's country-seat "The Grange," just before the dawn lifted on that notable eleventh day of July, 1804, when in a quiet nook sheltered by the heights of Weehawken, the great Federalist met his death.

This Hamilton letter is really a memorabilia covering some eighty-five pages in typewriting, and which he divided into three parts: First, his personal knowledge of Hamilton from 1782 to the call of the Convention in 1787; Second, Hamilton's service in relation to the origin and adoption of the Federal Constitution, and third, his subsequent life. I shall quote, in part only, his estimate of Hamilton as a lawyer and man: —

"In the summer of 1784 Col. Hamilton attended the Circuit Court at Poughkeepsie and I had then an opportunity for the first time of seeing him at the bar as a counselor addressing the court and jury. It was an interesting county circuit. Col. Lawrence of New York, Peter W. Yates of Albany, Egbert Benson (my revered preceptor and who still lives a venerable monument of the wisdom, the integrity, the patriotism and the intrepidity of the sages of the Revolution), and some other gentlemen of the profession, whose names I do not now recollect, attended the Court. I was struck by the clear, elegant and fluent style and commanding manner of Hamilton. At that day everything in law seemed to be new. Our judges were not remarkable for law learning. We had no precedents of our own to guide us. English books of practice as well as English decisions were resorted to and studied with the scrupulous reverence due oracles. Nothing was settled in our courts. Every point of practice had to be investigated, and its application to our courts and institutions questioned and tested. Mr. Hamilton thought it necessary to produce authorities to demonstrate and to guide the power of the court, even in the now familiar case of putting off a case for the circuit, and to show that the power was exercised, as he expressed it, in sound discretion and for the furtherance of justice. He never made an argument in court in any case without displaying his habits of thinking, and resorting at once to some well founded principle of law, and drawing his deductions logically from his premises. Law was always treated by him as a science founded on established principles. His manners were gentle, affable and kind, and he appeared to be free, liberal and courteous in all his professional intercourse. This was my impression at the time."

Chancellor Kent was not the man to indulge in extravagant phrases or periods ornate with elaborate emotion and meaningless enthusiasm. He had spent his honored days in weighing facts and probing principles. We can appreciate, therefore, the full value of his words pertaining to Hamilton, who, when living, was either loved or hated, but never treated with the scorn of belittling indifference. And these are his words: —

"I knew General Hamilton well. His life and actions for the course of twenty-two years had engaged and fixed my attention. For the last six years of his life he was arguing cases before me. I have been sensibly struck in a thousand instances with his habitual reverence for truth; his candor, his ardent attachment to civil liberty; his indignation at oppression of every kind; his abhorrence of every semblance of fraud; his

reverence for justice; his sound legal principles, drawn by a clear and logical deduction from the purest Christian ethics, and from the very foundation of all rational and practical jurisprudence. He was blessed with a very amiable, generous, tender and charitable disposition, and he had the most artless simplicity of any man I ever knew. It was impossible not to love as well as respect and admire him. He was perfectly disinterested. The selfish principle, that infirmity too often of great as well as of little minds, seemed never to have reached him. It was entirely incompatible with the purity of his taste and the grandeur of his ambition. Every question appeared to be at once extinguished when it came in competition with his devotion to his country's welfare and glory. He was a most faithful friend to the cause of civil liberty throughout the world, but he was a still greater friend to truth and justice."

The Chancellor was now full of years and full of honors. Columbia, Harvard, and Dartmouth had given him their highest degrees; he had delivered the Phi Beta Kappa address at Yale: he had been tendered a public banquet in New York City on his eightieth birthday, and had been invited by the different bars of the country to be their guest. We find him in March, 1847, writing to his son, concerning the preparation of the fourth edition of his commentaries, that "the labor will be animating and amusing when soft and balmy spring comes." His appearance, which was tall and slender, with strong features, dark eyes, and complexion, had lost very little of its wonted sprightliness and energy, while his mind was clear and strong to the end. His son, William Kent, wrote that the ten last years of his life were the happiest. He was surrounded by his wife, his companion of every joy and sorrow for sixty-three years, and his family, for his son had resigned his professorship at Harvard in order to be near his father. A charming account of the close of Chancellor Kent's life written by his son discloses many interesting facts. It seems that questions on points of law, cases for arbitration and inquiries as to general and constitutional jurisprudence were presented to him from all parts of the United States, and even from the British provinces, to the end of his life. He never remitted his constant readings of the English and American reports, while he found his serenest consolation at this advanced age of eighty-four years in reading literature. His chief delight, however, was in poring over books of travel. He had a passion for one thing — geography. He told his friend, Judge McCoun, that he "was a better geographer than a lawyer." The books of voyages and travels largely outnumbered all others in his library, and to the amusement of his friends he would enthusiastically trace the discoveries in Central Africa and Asia, and accompany Parry and Franklin in the Arctic circles. He would draw maps of routes, islands, and promontories, showing adventurous courses, which his friends possessed as valued and characteristic relics. The summers he passed at his country retreat in New Jersey, and he resided in the city during the winter seasons. He grew mellow with increasing years, and all acerbity of partisan feeling had gone. He reverted with praise to the men whom he had vigorously opposed in his early days, and his opponents reciprocated this good feeling. He was universally known in the city, and had a word of cheer for all. The long day of his life was now drawing to a close, and just before the earthly curtain fell, he gathered his children around him, and spoke these words to them: "I believe in the doctrines of the Prayer-book as I understand them, and hope to be saved through the merits of Jesus Christ. My object in telling you this is that if anything happen to me, as it soon must, perhaps it would console you to remember that on this point my mind is clear. I rest my hopes of salvation on the Lord Jesus Christ."

He died at the city of New York on the 12th day of December, 1847. The bar of that city met soon after his death, and a committee was appointed which duly con-

vened, prepared, and presented appropriate resolutions. Addresses were delivered by Benjamin F. Butler, Daniel Lord, and Hugh Maxwell. As this article is not a study, but a biographical sketch, a critical appreciation of Chancellor Kent's services to his State and Nation, or of his unimpeachable character is not called for here. His life tells its own worth. And Ogden Hoffman was right when he said, "His name is eulogy."

[This brief and inadequate sketch is compiled chiefly from Chancellor Kent's correspondence, including a long letter to Thomas Washington, dated May 1, 1799, Memoranda of his Life, and contemporaneous records. For the use of these abundant materials, I am indebted to the kindness of the representatives of the Chancellor's family, and especially to William Kent and Edwin C. Kent, for their unfailing courtesy and willing aid. — C. S. M.]

THE YOUNG LAWYER.

By John Wayland Peddie.

IT is said, "Necessity knows no law." Therein, perhaps, is the young lawyer a necessity. Anyhow, the average community thinks him a necessity, and tolerates him for that flattering reason. They condone his existence in the hope that by a fruitful future he may retrieve a barren past.

They scarcely realize that somewhere between the disheveled locks and cadaverous cheeks of the youthful lawyer there already lurks some legal lore timidly waiting development. A child does not — unless, perhaps, a Bostonian — read Browning for his first lesson. No, he must, before anything else, peruse the numerous soliloquies written upon the "horse," "rat," "cat," and other monosyllabic subjects that have crept into our primers. After he has fully comprehended that "This is a horse," and its concomitant "Is this a horse?" he may proceed to more complicated and perhaps interesting questions.

So it is with the young lawyer. He must first learn "This is law," and its concomitant "Is this law?" before he can fully grasp such a question as was put by an English judge to a kind but feminine witness: "My good woman," said the learned judge, "you must give an answer in the fewest possible words of which you are capable, to the plain and simple question whether, when you were crossing the street with the baby on your arm, and the omnibus was coming down on the right side, and the cab on the left, and the brougham was trying to pass the omnibus, you saw the plaintiff between the brougham and the cab, or whether, and when you saw him at all, and whether or not near the brougham, cab, or omnibus, or either, or any two, and which of them respectively, or how it was."

No more entertaining spectacle can be witnessed than the typical young lawyer. The older men of the profession look upon him as a sort of masculine ingénue, and concoct all manner of ordeals to put him through. They forget the young lawyer does not need cremation to teach him fire burns. Their attitude towards him might approach *in loco parentis*, had they a clearer recollection of their own hardships. However, the young lawyer is above the vale of tears, and deeds over to his old enemy respect and admiration — confessedly reserving, though, a rather large defeasance clause.

In the young lawyer is all that fosters ambition — pride, caution, and courage, though this trinity of parts he sometimes so unfortunately blends as to make their harmony broken. Pride he must have, for no one else admires him; caution he must have to realize this, and courage to meet it.

If he have in him any metal besides brass, there is a suggestion of hope to be found in the words of an unrecognized poet who sang: —

Tell me not there is no lot for lawyers, young and thin
To fill by strife in this dark life of politics and sin.
With modesty he 'll tread, you 'll see, bright meadows some fine day,
Till he reach this lot where his ancestors rot in sympathetic clay.

So, kind reader, whether judge, advocate, or yourself an embryonic Justinian, look not with scorn upon the young lawyer. Rather help him on his way that there may be fewer of us.

Old judges smile with somewhat the same cordiality upon the young lawyer that they bestow upon the prisoner. They are both being tried, to be sure, but is it not fair to believe one, as well as the other, innocent until proved guilty? No, this would violate all precedent. Not a case can be found to support it. The young lawyer is always guilty — guilty beyond reasonable, or, in fact, imaginable doubt. He has intruded where "Angels fear to tread" — and never do! And with the exception of a few shyly aimed blows at the omnipresent cuspidore, he must make no attack, unless he would suffer annihilation. Let us imagine, though, for the moment that the young lawyer has risen! His face wreathed in sort of *damnum absque injuria* wrinkles! He has assumed the necessary frown supposed to accompany intelligence! What next? Does the judge lean forward with eager expectancy to catch the first word? No, he tilts back with bored disinterestedness to think what train he 'll catch for his suburban home.

But the jury watch him, — poor fellow! In a Mississippi case,[1] we are told that "Juries may use their eyes as well as their ears." What a silly dictum! Those jurors' eyes wouldn't close by command of the whole United States artillery. Every one of the twenty-four is riveted upon the young lawyer as he starts speaking. The same cheerless stare that greeted onion weeds last week, the farmer jury now give the unripe advocate. And as these yeomen of the soil look upon the puerile nicety of the unsoiled, they inwardly chuckle, "I wander what he knows about it, enyhow."

Sometimes at the end of a long and hard fought trial the young attorney for the defense will have his eloquent plea extinguished by some such injudicious advice from court to jury as the following[2]: "You will be left to determine between the demands of public justice and the defense of the prisoner at bar."

Most of the trials of the young lawyer are outside the court room, for — to take the lee-way of an *obiter dictum* — is it not trying to him to have no trials? There is one class of these disappointed young men, however, that we do actually pity. It is made up of hard workers. Of poor young men who, isolated in barren and cheerless rooms, thumb their Blackstone from morn till eve — faithful to their task, though disdained by an unsympathetic world. Despite the numerous jeers at him and jokes that have risen and set, this young lawyer will always be an indigenous disfigurement of our "fair" country. And, even if he be never known except to a few kind Samaritans of the legal profession, some day when he has filled his "lot," others will offer him posthumous praise. But, though their words ring as gold, there still remains an alloy of injustice.

[1] Garvin *v.* State, 52 Miss. 207.

[2] State *v.* Brooks, 4 Wash. 328.

COUPLET AND QUATRAINS.

By Wendell P. Stafford.

Questioner.— Give me a rule how each day should be passed.
Oracle.— As though a trumpet said, "It is thy last."

WHAT THE DAY SAID AT EVENING.

Go and delve a thousand days,
Let each day a thousand be,
Thou shalt never win the praise
I have vainly proffered thee.

A BIRD'S-EYE VIEW OF VERSE.

Well, well, Mr. Poet, your plaint we have heard,
But, we're sorry to add, you are not the first bird
Who has had to snatch up all his chances to sing
Twixt the scratch of a claw and the flap of a wing.

FROM DEEP TO DEEP.

All song is but an echo
From memory's marvellous horn,
And prelude to a sweeter lay
Whose singer is unborn.

THE MUSE IRONICAL.

She would foil Phidias, let Apelles find
Her frown upon his canvas; she would tease
Unto despair tongue-tied Demosthenes.
She loved one poet only. He was blind.

THE QUATRAIN.

To snare the light foot of the Muse,
It only takes four fragile threads.
The trap's a certain one to use —
If you'll but set it where she treads.

A SKETCH OF THE SUPREME COURT OF OHIO.

II.

By Edgar B. Kinkead, of the Columbus Bar.

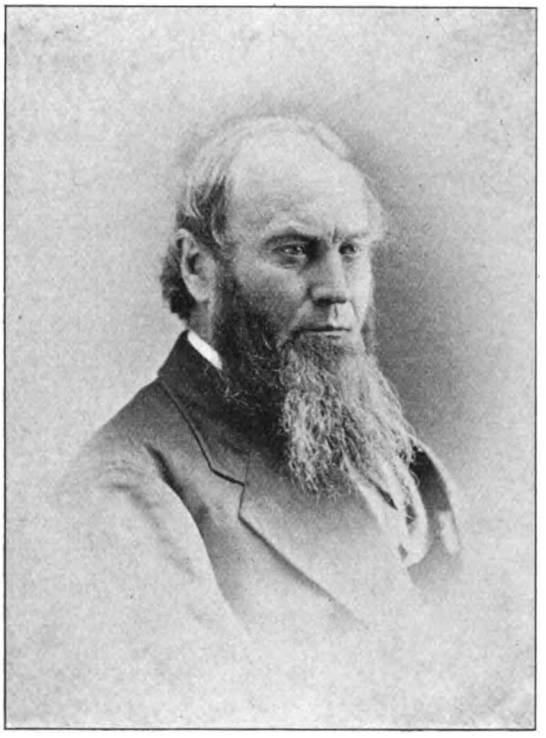
THE JUDGES UNDER TERRITORIAL GOVERNMENT.

In all there were nine judges named under the territorial government, only eight of whom served, John Armstrong and Wm. Barton never having accepted. Sketches of Samuel Holden Parsons, James Mitchell Varnum, John C. Symmes, Gen. Rufus R. Putnam, Return J. Meigs and Joseph Gilman only are given.

James Mitchell Varnum, one of the territorial judges to whom the saying "and we shall not soon look upon his like again" is particularly applicable, was, as his biographer said, "a man made on a gigantic scale," and we shall find in the course of this article no man whose character and attainments are more worthy of emulation, from which more fruitful lessons can be gathered. Too great an honor could not have been bestowed upon such a man in the present age. We cannot but reflect, however, that in the now crowded condition of ambitions a man seldom attains the distinction won by General Varnum at his age. He was born in 1749 in Dracut, Mass., graduated from Rhode Island College, now Brown University, at the age of twenty, with first honors; was admitted to the bar at twenty-two; entered the army at twenty-seven, was a member of Congress at thirty-one, resumed the practice of law at thirty-three; again elected to Congress at thirty-seven; came to the great northwest at thirty-nine, and died at forty. General Varnum had many attainments, being particularly fond of military service, though we are more interested in his legal life. He engaged in many very important suits in the State of Rhode Island, displaying wonderful ability as an orator. He came in contact with such men as Jesse Root, afterward Chief Justice of the Supreme Court of Connecticut, and compiler of Root's Reports, William Channing of Rhode Island, and Dr. Johnson of Stratford, compelling his adversaries to say of him "that he was a man of uncommon talents, and of the most brilliant eloquence." The fashion of those days required members of the bar to be elegantly dressed. "General Varnum appeared with a brick-colored coat, trimmed with gold lace; buckskin small clothes, with gold lace bands; silk stockings and boots; a high, delicate and white forehead; eyes prominent, and of a dark hue; somewhat corpulent; well proportioned, and finely formed for strength and agility; a profuse head of hair, short on the forehead, turned up some, and deeply powdered and clubbed. When he took off his cocked hat, he would lightly brush his hair forward, and with a fascinating smile lighting up his countenance, take his seat in court."

When the Ohio Land Company was organized in Boston, General Varnum was made a director and appointed with Samuel H. Parsons and John Cleves Symmes, judge of the Supreme Court of the Northwest Territory, emigrating to Marietta early in June, 1787. On the 4th of July next the pioneers celebrated the day, and of course Varnum the orator was selected for an address. Upon the historical rolls of Ohio no more patriotic nor beautiful literary gem can be found. The taking off of General Varnum was particularly sad. He was taken with consumption, and being unable to return to his native land, then far away, where he had left his life-partner, he bid farewell to his wife in a most matter-of-fact letter, and yet full of beautiful sentiment, in which he said: "Dry

up your tears, my charming mourner, nor suffer this letter to give too much inquietude. Consider the facts at present as in theory, but the sentiments such as will apply whenever the change shall come. I know that humanity must and will be indulged in its keenest griefs, but there is no advantage in too deeply anticipating our inevitable sorrows. If I did not persuade myself that you would conduct with becoming prudence and fortitude, upon this occasion, my own unhappiness would be greatly increased, and perhaps my disorder too, but I have so much confidence in your discretion, as to unbosom my soul." This letter was written about the 21st of December, 1787, when the twenty-sixth law promulgated by the Governor and judges had been issued. Judge Varnum died on the tenth day of January, 1789, his "funeral being attended with all the ceremony and respect due to so distinguished a person."



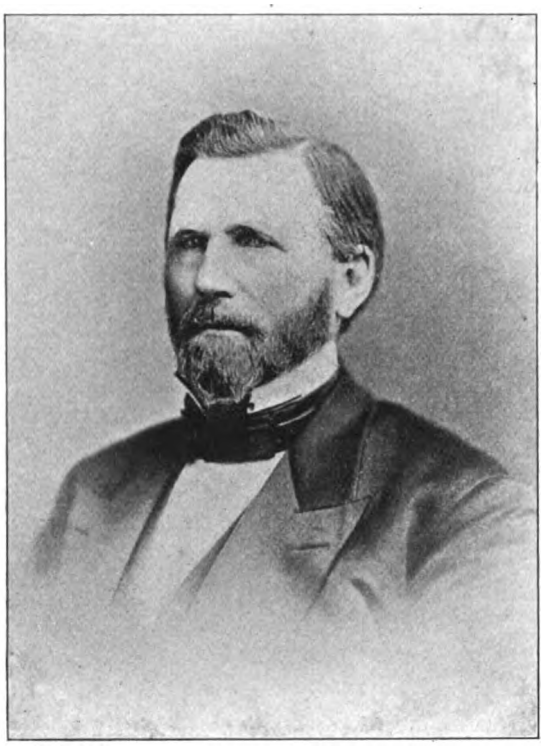
WILLIAM B. CALDWELL.

SAMUEL H. PARSONS was born at Lyme, Connecticut. He graduated at Harvard, was admitted to the bar in 1759. In 1762, at twenty-five years of age he was elected to the legislature of Connecticut and was successively re-elected until 1774. He rendered distinguished military service, attaining the rank of general. He was appointed one of the first judges of the Northwest Territory, his commission being dated Oct. 23, 1789. And in 1789 he was nominated by General Washington Chief Judge, which he held until his death. He came to his death by drowning, while returning to Marietta, in descending the rapids of the Big Beaver River, Nov. 17, 1789, aged fifty-two years.

JOHN CLEVES SYMMES, of New Jersey, was the third member of the first Supreme Court of the Territory, and served throughout the life of the court. He was born in New Jersey, July 21, 1742, and died in Cincinnati, Feb. 26, 1814. He emigrated to the Northwest Territory in January, 1789, settling in the Miami country. He had been a judge of the Supreme Court of New Jersey, being Chief Justice at the time of his appointment. He had also been a representative in the old Congress of 1785 and 1786. His daughter was the wife of President William Henry Harrison.

JUDGE RUFUS PUTNAM was born April 9, 1738, at Sutton, Massachusetts, and died at Marietta, Ohio, May 4, 1824. His father's name was Elisha. Israel Putnam, the great general in the Revolutionary War, was a cousin of Judge Putnam. Judge Putnam's father died when the son was but seven years of age, and his educational advantages were few. Notwithstanding this, however, he was called to fill many important places of trust, and came in contact with the best minds of his day. He served in the war of 1757, of England against France; was made an ensign March 12, 1760, in the reign of George II — his commission

being signed by Governor Pownal of the Colony of Massachusetts Bay. The commission mentioned above is in the library of the college at Marietta, as is also some seventeen others, bearing dates all the way from 1760 to 1796, when President Washington commissioned him as Surveyor-General of the United States. He was selected in 1772 as one of a committee to explore the lands in the south which had been granted to the Provincial troops, and proceeded to perform that duty; but was not allowed to carry it through to the end, as orders came from King George III that no more lands were to be granted, and thus ended the labors of that committee. This order by King George caused great dissatisfaction, and a few years after, when the storm came, the fact that such an order had been issued aided greatly in gaining troops for General Washington's army. Judge Putnam was one of the first to tender his services to his country when the time came for action; he was appointed lieutenant-colonel of Colonel David Brewer's regiment. Although he made no pretense of being an engineer, the fact became known that he had worked as a mechanic under British engineers during the war with France, and he was called upon to construct the fortifications around Boston. Judge Putnam received several very commendatory letters from General Washington, and was considered the only man in the whole country, at that time, able to plan and construct the needed fortifications in and around Boston. When the "Ohio Company" was formed and Congress had made the great Northwest Territory free to all Americans, Judge Putnam's name became so indissolubly connected therewith that it will remain so for all time. He had full charge of all the business of the Ohio Company relative to the settlement of that company's lands. He was made a judge of the Court of Common Pleas, the first court to be organized within the territory, and was also made one of the three judges in the territory. Afterwards he was made Surveyor-General of the United States. In 1792 he was made a brigadier general in the regular army by General Washington. He served as a member of the Constitutional Convention of 1802. He was a consistent Christian, being a member of the Congregational church all his life. No man was, or could have been, better qualified to undertake the arduous task of a leader in the great work of opening for settlement a new country, than was Judge Putnam. Starting at the very bottom, he, by native force of character, ascended to a height where few will reach, and be it said to the credit of those who labored with him that none seemed to envy, but all to rejoice at his success. So deeply did he impress himself upon the Northwest Territory, that so long as histories are printed and read, just so



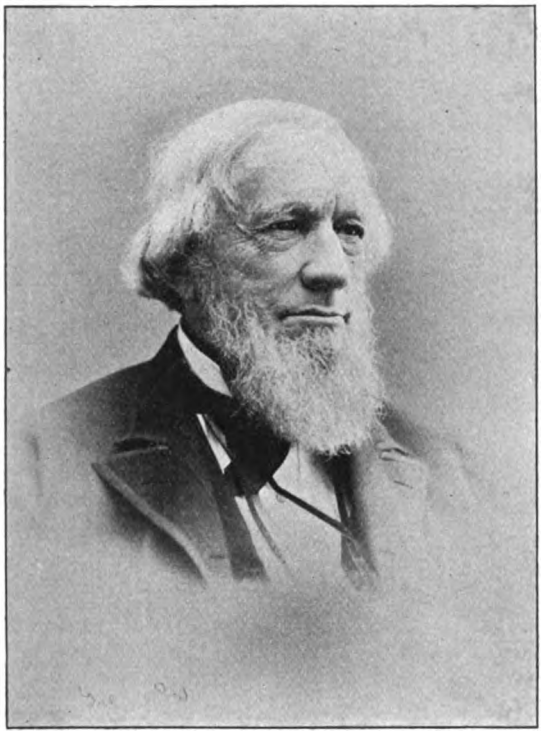
RUFUS P. RANNEY.

long will the name of Putnam live. His was one of those

> "Souls that make worth their center, and to that
> Draw all their lines of action."

RETURN JONATHAN MEIGS was born in Middleton, Connecticut, in 1765. He emigrated to Marietta in the autumn of 1788. He graduated at Yale with the highest honors, and was admitted to the bar before coming west. He performed brilliant service in the war. He became the warm friend of Governor St. Clair. In 1802 he was elected by the legislature a judge of the Supreme Court. The associate judges were Samuel Huntington and George Tod, whose son David was subsequently governor of the State.

President Jefferson appointed him United States Judge for the District of Michigan. Very soon after he entered upon the duties of this office he was nominated and elected Governor of Ohio. The State Senate however declared his election void, as it was said he had forfeited his citizenship by his residence in Louisiana and Michigan. He was thereupon immediately elected judge of the Supreme Court, and was soon after sent to the United States Senate to fill out the unexpired term of Hon. John Smith, who resigned to avoid impeachment for alleged complication with the Burr conspiracy. Judge Meigs was chosen to a full term in the United States Senate from March 4, 1809.



ALLEN G. THURMAN.
(FROM PHOTOGRAPH BY BAKER, COLUMBUS, O.)

In 1810 he was again elected Governor of Ohio. He was appointed by President Madison as Postmaster-General, which position he held for nine years. His declining years were spent in his quiet home at Marietta. He died March 29, 1825.

JOSEPH GILMAN was born in New Hampshire in 1736. He removed to Marietta in 1789. He was appointed judge of the Court of Quarter Sessions by Governor St. Clair, and in 1796 was appointed by the President one of the judges of the General or Supreme Court of the Northwest Territory, and attended sittings of that court at Marietta, Cincinnati and Detroit, serving from Dec. 22, 1796, to March 3, 1803. He died in 1806, aged seventy years.

JUDGES UNDER THE CONSTITUTION OF 1802.

There were in all thirty judges under the old Constitution, two of whom, Judges Caldwell and Ranney, being judges also under the new Constitution, their sketches being found under that head. Many of the judges under the Constitution of 1802 were men of remarkable ability, which was recognized by calling them to fill other important political positions, though it may be a question of opinion whether a governorship, senatorship, or cabinet position is in point of fact a higher position than a place upon the highest judicial bench. It is at least a recognition of ability for one to be called to fill one

of the positions named. The old Supreme Court of Ohio, however, was regarded as one of the ablest courts of the United States, and was acknowledged as such wherever the common law prevailed. Of the judges, there were Huntington, Meigs, Brown and Wood who were elected to the governorship of the State, Judge Ranney being an unsuccessful candidate. Judges Meigs, Brown, Burnett, McLean were United States senators.

Reference has formerly been made to the vast amount of work performed by the older judges, and to the hardships endured by them. In the present age the cry is that our judges are housed up and worked to death, but it was not so in former days. The following story told by Judge Charles T. Sherman portrays the hardships which had to be gone through with by the early courts; it was during the time when Judge Birchard was on the bench. The Supreme Court was in session at Mansfield, and just as it was about to adjourn, late in the evening, there arose a question of practice upon which the judges were divided, and they required a certain work on practice, the nearest copy being at Wooster, forty miles away. Judge Sherman mounted a horse, went to Wooster, got the book desired, and was back at Mansfield before day. The judges decided the case by candle light, and departed for the next county seat. What a difference between then and now! Our Supreme Court sits always at Columbus, and when a book or anything else is wanted, the judges have but to press a button. The opinions of the present court are written by electric light, while the old were written by candle light.

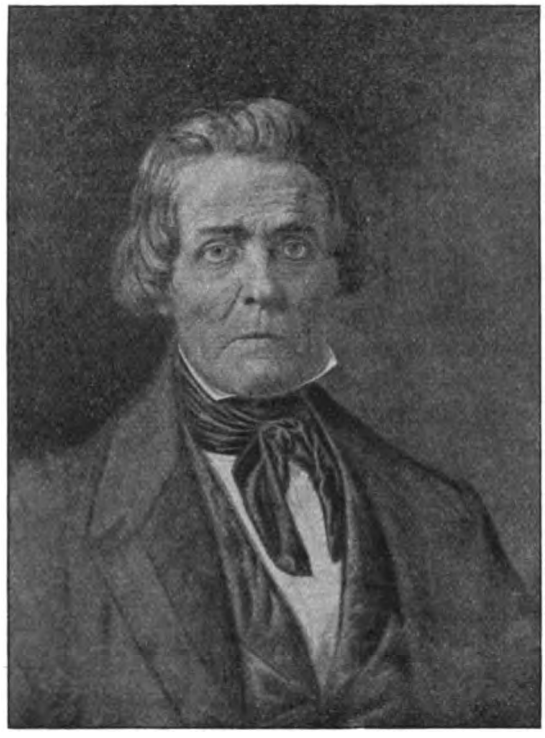
Think of one of the judges of our court riding behind an ox-team for two days to reach the place of holding court. But Judge Lane rode two whole days behind such a team in order to travel from Norwalk to Tiffin, a distance of thirty-five miles, to hold the first court held there in 1824.

Court was held, in those early days, in log cabins, sometimes in those of private citizens, or in log churches. The jails looked like stables, the only difference being that the jail had a lock, the stables none. When court was in session, in one of the northern towns, in the early days, an Irishman had been fined eight dollars for assault and battery. Walking up to the clerk's desk he threw down the money to pay the fine and said, "Now I hope this Demerara team will be satisfied." The clerk asked him what he meant by Demerara team, and he said, "Look up there. You see that president judge and three associate judges? Well, sir, that is a Demerara team — three mules and one jackass."

The "Demerara team" story probably originated in Cincinnati, when a lawyer was endeavoring to obtain a writ in *mandamus* before the old Court of Common Pleas, when, after having convinced the president judge that it should be issued, the associates would not agree to it. The president judge thereupon remarked, "We will take the papers and decide the matter in the morning." On the following morning the president judge announced that "he had carefully examined the papers and was now convinced that the writ ought not to be granted, and could not legally be granted; but my brother associates upon the bench are now convinced that the writ ought to be granted each and all of them; and thus with the tables turned this morning, they still disagree with me; we will further consider this matter." The lawyer however insisted that it was necessary that the writ be granted at once. The president judge said: "We can't help that. I am convinced that you have no rights here, and I will convince my associates." But the lawyer replied "They are a majority, and they will now grant the writ." President judge: "But I mean to convince them *my* way." Lawyer: "They will never go *your* way. This court is a regular Demerara team!" Pres-

ident judge: "What do you mean by that?" Lawyer: "I mean what I say. This court is a Demerara team, composed of one mule and three jackasses; when the mule wants to go, the jackasses won't, and when the jackasses want to move, the mule won't budge a step!" President judge: "This is a contempt of court, brother G., and I fine you ten dollars." Lawyer G.: "No matter what you do — the *ass*-ociates will not go with you." President judge: "Sit down, brother G.; we will have no more of this. If we are a *Dem-error-ah* team, drive on with your *man-dam-us!* We will hear you further in argument."

It is said that for some time after the organization of the court in banc the judges held no public session. They occupied four beds in one room in Russell's tavern in Columbus. The luxury of a separate bed for each was due their judicial position.



THOMAS W. BARTLEY.
(FROM PHOTOGRAPH BY BAKER, COLUMBUS, O.)

In their deliberations it is said that when a case was called, Pease, Chief Justice, said he decided in favor of the plaintiff; Hitchcock and Sherman concurred, Burnett dissented, and the Chief then said, "Sherman, you have good a voice, you may read the papers; we will see what these lawyers say about it." The reporter, Charles Hammond, did not meet the court in banc at Columbus, and at the close of the term, Judge Pease packed up the papers and sent them to Mr. H., with a letter reading something in this wise: "I inclose to you a batch of unlicked cubs of opinions, which you are to lick into shape and publish according to law."

But the biographical sketches of the judges of the old Supreme Court must proceed.

SAMUEL HUNTINGTON was appointed by the first legislature to a seat on the bench of the Supreme Court, March 1, 1803. He was born in Connecticut in 1785, was admitted to the bar, engaging in that profession in his native state until 1800, when he came to Ohio, living at Youngstown, Marietta, Norwich and Cleveland. Was a member of the Constitutional Convention of 1802, and a state senator from Trumbull County. He was a member of the Supreme Court when articles of impeachment were filed against that body, and resigned the judgeship, as he was elected Governor of the State. It has been said of him that "his character for strict integrity, great executive ability and accomplished scholarship was second to that of no incumbent of the executive office."

WILLIAM SPRIGG was appointed April 2, 1803, by the first legislature under the Constitution, assembled at Chillicothe March 1, 1803, together with Return J. Meigs, Jr., and Samuel Huntington as judges of the Supreme Court. He was appointed from Jefferson County, but after a most diligent search and inquiry nothing can be found

having any reference to his life and character. He resigned his position on the bench April 12, 1806, and George Tod was appointed in his place.

GEORGE TOD was elected judge of the Supreme Court on the first day of January, 1807, to fill the vacancy occasioned by the resignation of William Sprigg. He was a prominent lawyer of Youngstown, Ohio, born in Suffield, Connecticut, December 11, 1773, graduated at Yale College in 1795, and taught school at New Haven, read law at the law school of Judge Reeves of Litchfield, Connecticut. He came to Youngstown in 1800, was appointed prosecuting attorney of the first territorial court of Trumbull County. He was made territorial secretary in the first year of his residence, and was senator from Trumbull County to the State legislature in 1810 and 1811. He served with distinction in the war of 1812. In 1815 he was a president judge of the Court of Common Pleas, and afterwards was prosecuting attorney. After retiring from the bench, he devoted his time to the care of his large farm at Brier Hill, which afterwards became so celebrated for its deposit of fine mineral coal, developed by his son, Governor David Tod. He died April 11, 1841. He ranked as a lawyer and judge one of the first in Ohio.

Judge Tod was the first judge placed on trial of impeachment for holding certain acts of the legislature unconstitutional and void, being duly acquitted. He was elected to the office of prosecuting attorney in 1836, which was the last office held by him, and his last appearance before the public was in 1840 as chairman of a large convention, held at Warren, of the friends of his old commander General Harrison, who was then a candidate for President.

DANIEL SYMMES, of Cincinnati, was a nephew of John Cleves Symmes, and brother of Captain John Cleves Symmes, the advocate of the theory of concentric circles and polar voids. His father, Timothy Symmes, only full brother of the hero of the Miami purchase, was himself judge of the inferior Court of Common Pleas in Sussex County, New Jersey, but came west soon after his elder brother, and was the pioneer at South Bend, Hamilton County, Ohio, where he died in 1797. Daniel was born at the ancestral home in 1772, graduated at Princeton College, and came out with his father; was made clerk of the territorial court, studied law and practiced some years at Cincinnati, after Ohio was admitted was a State senator from Hamilton County and Speaker of the Senate; upon the resignation of Judge Meigs from the Supreme Bench in 1804, was appointed to his place and held it until the expiration of the term, when he secured the post of Register of the Cincinnati land office, and performed its duties until a few months before his death, May 10, 1817.

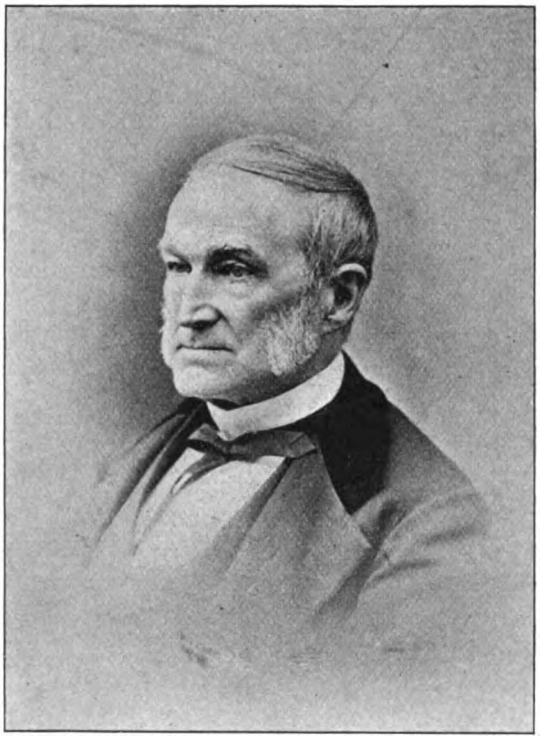
THOMAS SCOTT was born October 31, 1772, in Skypton (Washington), afterwards Alleghany County, Maryland. Judge Scott wrote a very interesting account of his life, from which quotations and notes are taken: —

"The parents of my father were Scotch-Irish. They emigrated from Ireland, and settled in Berks County in the State of Pennsylvania shortly after the Battle of the Boyne. They were Protestants, and had sustained heavy losses by the Catholics previous to that battle. My father, through his paternal ancestor, traced his descent in a direct line from a very ancient aristocratic family, and from his maternal side in a direct line from the old Dukes of Buccleugh. The ancestors of my mother were English and Welsh."

Judge Scott became an itinerant minister in the Methodist Episcopal Church in 1791, and came to Ohio in that capacity. Further, quoting from Judge Scott's autobiography, he said: —

"In the winter of 1800, after having read law for two years under Hon. James Brown at Lex-

ington, Ky., I was admitted to the practice of law; and in the spring of that year I removed my family to Flemingsburg, Fleming County, Ky., where I was appointed prosecuting attorney for the county, and obtained some little practice in that county, and in the counties of Mason and Bracken. But I did not succeed well in either of those counties. Although well versed in the elementary principles of law, yet I had never read a single book which treated on practice either in courts of law or equity. Besides that, nearly the whole force and influence of the Methodist Episcopal Church within the range of my practice, ministers and people, with a few honorable exceptions, were exerted against me to prevent me from obtaining practice. Their opposition arose from the fact of my having, as they said, left the ministry to become a lawyer. The influences they brought to bear on me extended to Ohio, and have continued to operate politically and professionally from that day to the present time." . . . "In 1801 I was admitted to practice in the territorial courts of what is now the State of Ohio. In April, 1801, I moved my family to Chillicothe, Ohio, and began the practice of law in the territory."



JOSEPH R. SWAN.

After Dr. Tiffin had been nominated for governor of the new State in 1801, he resigned the offices held by him, and Judge Scott was appointed to fill them. They were: prothonotary of the Court of Common Pleas, clerk of the Court of Quarter Sessions, and clerk of the Court of Probate. In 1803 he was appointed prosecuting attorney of Adams County. At different periods Judge Scott held the position of prosecuting attorney for the following counties: Franklin, Highland, Adams, Scioto, Gallia, Jackson, Pike, and Ross.

In 1809, was elected judge of the Supreme Court of Ohio. Judge Scott was the first man in Ohio to receive a commission as a justice of the peace under the Constitution. He was again elected a judge of the Supreme Court of the State in 1810, and was made chief justice, which place he held until 1815, when he resigned and resumed the practice, as the salary of a judge was, as he says, "not sufficient to support me and my family, and educate my children."

In 1815, was elected representative to the General Assembly from Ross County, served one session. In 1822, was appointed on the commission to revise the general laws of the State, Francis Dunlevy and Thomas Ewing being the other members of the commission.

In March, 1829, was commissioned register of the land office at Chillicothe by President Andrew Jackson, which office he continued to hold from that time until President Polk was inaugurated, when he was retired by that official.

THOMAS MORRIS. — In 1809 the Legislature elected Thomas Morris judge as a reward for his services in the important trial against Tod and Pease. At the next Legislature, 1810, the Legislature declared the

judicial office vacant. The judges had in 1809 been reduced to four, but the Legislature reduced it to three. This cut Morris out, who never presided in the Supreme Court, and the only official act he ever performed was to administer the oath of office to Sheriff Lindsey. He was the son of Isaac Morris, a Baptist preacher, and was admitted to the bar in 1804, and was one of the most distinguished and ablest lawyers in Ohio. He represented the State in the Senate of the United States, where he sat in ability and power among the highest men in that great body. Judge Thurman once said that the time was when Judge Morris was one of the first lawyers of all the western territory.

WILLIAM W. IRVIN was appointed to the Supreme Court on the tenth day of February, 1810, with Thomas Scott and Ethan Allen Brown, but no traces of his life seem to be left.

WILLIAM Y. GHOLSON.

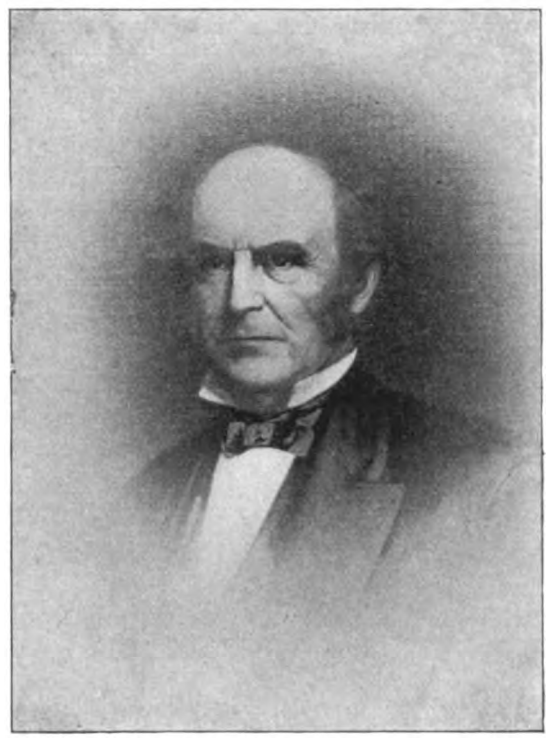
ETHAN ALLEN BROWN was born July 4, 1766, in the State of Connecticut. Before coming to the western country he received all the educational advantages obtainable, and was a student of Alexander Hamilton when he was at the height of his celebrity as a lawyer, orator and statesman. He was admitted to the bar in 1802 at the age of thirty-six years.

In 1804 he took up his residence at Cincinnati, where he entered the practice of his profession, taking a very high position at the bar. In 1810 he was elected by the legislature, judge of the Supreme Court, which office he held for eight years.

In 1818 he was chosen Governor of Ohio, and in 1821 elected to the United States Senate. In 1830 President Jackson appointed him minister to Brazil, from which position he retired in 1834. After twenty years of distinguished public service he sought repose in his bachelor home at Cincinnati. But President Jackson urged him to accept the commissioner generalship of the Land Office, which he did, and after two years' service retired. He died Feb. 24, 1852, in Indianapolis, Ind., after a long and useful career. His picture appears in the March number of this magazine.

JUDGE CALVIN PEASE was born at Suffield, Hartford County, Connecticut, Sept. 9, 1776. His education was meagre, being only such as the common schools of his day furnished. He read law in the office of Gideon Granger, his brother-in-law. Was admitted to the bar in Hartford County, Connecticut, in 1798, and began practice in New Hartford, where he remained only two years, removing to Ohio in 1800, settling at Youngstown. Was appointed the first postmaster of that town. He moved to Warren in 1803. Was admitted to practice by the General Court of the Territory at Marietta in October, 1800. The County of Trumbull was organized July 10, 1800, by

Governor St. Clair under the Territorial government, and the first term of the Court of Common Pleas and General Quarter Sessions held on the Western Reserve was held at Warren, Aug. 25, 1800. Judge Pease was appointed clerk, holding the office until the Constitution of 1802 was adopted. The first session of the Supreme Court under the Constitution was held at Warren, Trumbull County, on the first Tuesday of June, 1803. The first judicial act passed divided the State into three circuits, and Judge Pease was appointed, by the Legislature, president judge of the third circuit, in April, 1803, when only twenty-seven years of age. He held the office until Mar. 4, 1810, when he sent his resignation to Governor Huntington. After his resignation Judge Pease resumed the practice of his profession, and for several years was the agent of the Post Office Department, rendering important services to the Government, by assisting to map out mail routes, etc.



MILTON SUTLIFF.

In 1812 he was chosen to represent his district in the State Senate, and in 1815–16 was made a judge of the Supreme Court of Ohio; when his term expired in 1822–23 he was elected to another term of seven years. In 1830 his last term expired, and again he began the practice which he kept up so long as he lived. In 1831 he was elected a representative to the Legislature from Trumbull County, which was the last office ever held by him. It was said by one who knew Judge Pease well, that "His forensic arguments, though not florid and brilliant, but frequently sparkling with wit and humor, were able and effective, and but few lawyers were more successful in their practice." "As a member of the Bar, he was much respected, and always fair and honorable in his practice; and never sought an advantage not due to truth and justice." He was said to be an adept at relating anecdotes about lawyers in different parts of the country. He told a good one of a prominent professional man in the east. "Mr. — swore in the presence of some one to whom it was offensive, who asked him if he swore before his wife? 'Oh,' said Mr. —, 'we are not particular; sometimes she swears *first*, and sometimes I do.'" He was a good lawyer, but he did not care to read much law. The lawyers complained that he did not keep up with the current decisions reported in books to which he did not have access. His reply was: "When I was appointed judge I only contracted to work up the stock on hand, and the Legislature are too mean to give me a salary sufficient to study any more." Judge Pease died at his residence in Warren, on the 17th of September, 1839, leaving a widow and three children.

Judge Thurman, in relating his first visit to a court room, said of him: "There sat, presiding, one of the finest specimens of

manhood that I ever saw, Calvin Pease, then Chief Judge of the Supreme Court of the State, as the title was then, dressed in a way that would make a dude faint, the most perfect dress I ever saw on a man, and the nicest ruffles to his shirt bosom, looking the very *beau ideal* of a gentleman of the olden times. By his side sat Peter Hitchcock. Now what a team that was! Woe unto the man who had a bad cause and tried to palm it off onto them; he was just as sure to catch a drubbing as ever was a man who offended an Irishman and got a licking for it. What great men they were! Hitchcock was on the bench much longer than Pease, though Pease achieved a wonderful reputation, and a deserved one, so much that Mr. Ewing once said to me — when I say Mr. Ewing, everybody knows that I mean Thomas Ewing — that of all the judges he had ever appeared before, in his opinion Calvin Pease was the greatest. On the bench Pease was stern and dignified, but when off the bench he was jocular and fond of telling stories. A reference to the attempted impeachment of Judge Pease has been made in the first part of this article, and his portrait also appears there.

JOHN MCLEAN was born March 11, 1785, in New Jersey, removing to Ohio in 1797. His family being poor, he attended school as much time as could be spared from work. At eighteen he was employed in a subordinate position in the Clerk's office of Hamilton County, joined a debating society, and studied law under Arthur St. Clair, son of Governor St Clair, who was one of the ablest Territorial lawyers. Admitted to the Bar in 1807, he located at Lebanon, Ohio, where he soon obtained a good practice. He was elected to Congress in 1812, and re-elected in 1815. In 1816 elected a judge of the Supreme Court of Ohio, where he served six years, until he was appointed by President Monroe in 1822 Commissioner of the General Land Office. In 1823 the President appointed him Postmaster-General, in which position he made a complete revolution, establishing a system placing it in successful operation as one of the most important departments of the government. President Jackson tendered him the Postmaster-Generalship and Secretaryship of War, which he declined. The President then appointed him to the bench of the United States Supreme Court, which he accepted. Judge McLean was a man of magnificent presence, and in personal appearance the most dignified and majestic personage who ever sat on the bench. He remained on the bench thirty-two years, till his death in 1861. In addition to his opinions in the General Reports of the Court, he published several volumes under title of McLean's Reports.

JESSEP NASH COUCH was born at Redding, Conn., August 3, 1778. From early youth he was a lover of books. He graduated from Yale College in 1802 with first honors, in a class composed of men who afterwards became distinguished and honorable citizens. Judge Couch came to Ohio in 1805, locating at Chillicothe. His certificate of admission to the bar is dated Chillicothe, Feb. 23, 1805, and signed by Daniel Symmes and William Sprigg, judges of the Supreme Court. This certificate, together with his college diploma and Blackstone, are still preserved as valuable mementoes by Col. Charles E. Burr of the Columbus bar, whose family was connected with Judge Couch.

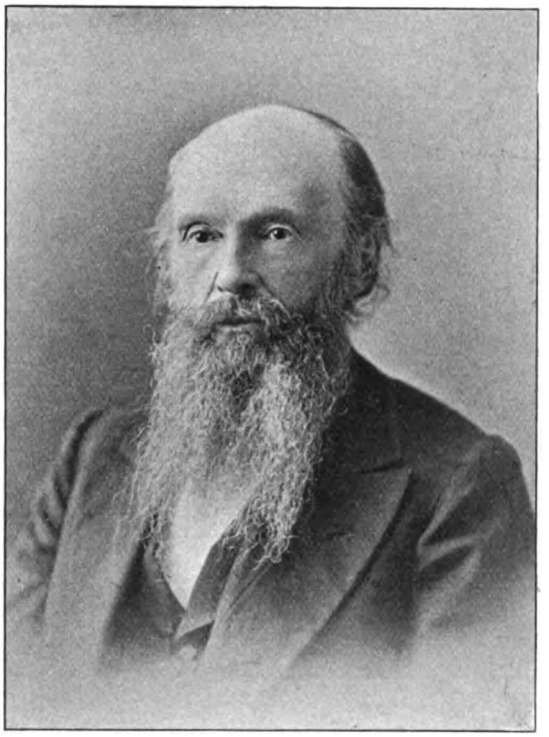
His accession to the bench of the Supreme Court, dated February 16, 1816, being commissioned by Thomas Worthington, then governor of Ohio. He continued in office and in the regular discharge of its duties up to the time of his death, which event occurred at Chillicothe on the 29th of June, 1821.

Judge Couch was a great student throughout his entire life, accumulating an extensive library. He left his law library to Judge Thompson, an intimate friend, and his mis-

cellaneous library, a very large one for those days, he bequeathed to his eldest sister, Mrs. E. N. Burr.

In politics Judge Couch was moderate in his views, but gave to the administrations of Madison and Monroe his steady support. In moral character he was above reproach, adhering strictly to the principles of his Puritan education.

JACOB BURNETT, LL.D., was born in New Jersey, on the 22d of February, 1770, and died in Cincinnati, Ohio, on the 10th of May, 1853. He was educated at Nassau Hall, Princeton, graduating with high honors in 1791. He read law under Judge Boudinot, at Newark, and in the spring of 1796 was, by the Supreme Court of the State, admitted to practice. He at once proceeded to Cincinnati, Ohio, when that now prosperous city consisted of a few frame houses, and forty or fifty log-cabins, with a population of one hundred and fifty people all told, the estimated population of the Northwestern Territory, at that time, being but about fifteen thousand. He was appointed, under the ordinance of 1787, by President John Adams, a member of the legislative council of five persons, for the Territory. Judge Burnett remained a member of this council until its dissolution by the organization of the Territory into a State. He was the author of the greater portion of the territorial laws, and has been spoken of as Justinian, that great law-giver. He retired from the active practice of law in 1817. In 1821 he was appointed a member of the Supreme Court Bench, and was afterwards elected to that position by the Legislature. He resigned from the Bench in 1828, after having been elected to the United States Senate, to fill the place made vacant by the resignation of General W. H. Harrison. He accepted this high honor, as no other man has done, in Ohio, with the express understanding that he was not to be re-elected; and what is still more strange, in the light of subsequent history, he positively refused to accept a re-election. On leaving the United States Senate, he left politics behind him, never to re-enter the same.



LUTHER DAY.

About the time of his election to the Supreme Court Bench of Ohio, he was elected professor of law in the University of Lexington, Virginia, from which institution of learning he received the honorary degree of doctor of laws, Nassau Hall, his alma mater, conferring the same degree upon him.

Judge Burnett was a man of strong likes and dislikes, and it was said of him, "that once you had his friendship you always had it, unless proven absolutely unworthy of the same." A believer in the inspiration of the Bible, his conduct, both public and private, was beyond criticism. When Blennerhasset was to be tried as an accessory to Aaron Burr in his treasonable conspiracy against

the government, Judge Burnett, together with Richard Baldwin, was selected to defend him.

PETER HITCHCOCK was born October 19, 1781, at Cheshire, New Haven County, Connecticut, and died March 4, 1854, at Painesville, Lake County, Ohio. He attended the common schools until he reached the age of seventeen, when he entered Yale College. His father being poor, young Hitchcock was compelled to earn the greater part of the money necessary to defray the expense of his education; he did this by teaching school during vacation and also during a part of the college term. After leaving college he began the study of law, and was duly admitted to practice in March, 1804. He opened an office in Cheshire, where he practiced for two years. In 1806 he decided to go west, and accordingly came to Ohio, settling at Burton, Geauga County, taking up a farm which he retained as his home while he lived. He found life a weary struggle as he was compelled to teach school, practice law, and clear and cultivate his farm. But his fame grew, and it was not long until he was looked upon as the leading lawyer of that section of Ohio. In 1810 he was elected a member of the Legislature from his county; in 1812 he was sent to the State Senate, and re-elected in 1814. A portion of the latter term he was the presiding officer of that body. He took a leading position both in House and Senate, and in the fall of 1816 he was elected a member of the Congress of the United States, where he entered upon his duties as a member the following year.

Before the termination of his term he was elected, by the General Assembly of Ohio, a judge of the Supreme Court of Ohio, for a term of seven years. In February, 1826, he was again elected for a similar term. In 1833 and 1835 he again sat as a member of the State Senate, and presided over that body during one session. In 1835 he again became a judge of the Supreme Court, but failed of re-election to succeed himself; but in 1845 he was again put on the Supreme Court bench where he served as Chief Justice until 1852, when he retired from public life at the age of seventy years, having spent more than forty (40) years as a law-maker and an expounder of law.

He was a delegate to the Constitutional Convention of 1850, and took a leading part in all of the proceedings of that body. Many of his suggestions were incorporated into what is now the fundamental law of Ohio.

Judge Hitchcock will always be regarded as one of the great men of his day, and, in fact, it will not be saying too much to state that none greater have occupied the bench since his time. As a judge he shirked no labor, but was always found willing to give the greatest attention to the duties of the important trusts placed in his hands. It is said of him that, "Rarely if ever in a hurry, he was always full of business." Being possessed of a strong physical frame, he was, during the greater part of his life, blessed with the best of health. No mental strain seemed too great for him, and by constant study his strong mental faculties had been brought up to a very high standard indeed. "When the last call came for him it found him ready to respond with his case well in hand, and all the records made up in such a way that there is little reason to doubt the final result. Full of that love for man which is only another name for love of God, it is certain that such souls will be well received by that God which we are told in the good good Book 'is all love.'"

"Who lives to nature rarely can be poor,
O what a patrimony this! a being
Of such inherent strength and majesty,
Not worlds possest can raise it; worlds destroyed
can't injure."

Judge Hitchcock was said to have been a most diligent student of the statute law; frequently lawyers read from a whole table-full of English and American authori-

ties, and at the end old Peter would reach out and get the twenty-ninth volume of the Ohio Statutes — the revision then in force — and read two lines from the statutes that would kill the lawyer as dead as a herring, taking infinite pleasure in doing it. His ways, while upon the bench, were often blunt, brusque, and burly, and he was always sure to say something during the progress of a trial to cow a lawyer engaged before him. On one occasion, while holding court in Cincinnati, a lawyer who believed in the use of law-books to convince judges had filled the large lawyers' table with an immense pile of books. The judges came in, and Judge Hitchcock saw the huge pile of law-books. When court opened, Judge Hitchcock adjusted his spectacles on his nose, looking meaningly and menacingly at the lawyer, and then at his law-books piled and spread upon the table, sarcastically and cuttingly observed: "Brother R., do you mean to *rile* the court with all these books? I will have you know, sir, that this court *does not keep a law*-school!" Brother R. replied in cutting tones through his nose: "But on this occasion, I will have the court to know that I do keep a law-school, and I mean to teach you judges a bit of law into the bargain." Judge Peter did not have anything further to say, and the lawyer proceeded.

On another occasion a young lawyer remarked, at the close of his argument, that the papers in the case and his brief would show conclusively the merits of his client's side, and he hoped and trusted that the court would *read* them. Judge Hitchcock thereupon remarked: "Do you mean to insinuate, sir, that the court does *not* read the papers in the case? You are impudent, sir!" The lawyer replied: "I do not insinuate at all, nor am I impudent. I merely ask the court to read the papers, and the ground of my polite request lies in the fact that, taking account of the last decision your honors made against me, I don't believe the court *looked at* the papers at all, let alone *read* them." Judge Peter, in *sotto voce*, observed to his brother upon the bench, "I wonder if the young man is not about half right?" Some of the lawyers present thought he was *all* right.

GUSTAVUS SWAN was born in New Hampshire in 1787. Leaving his father's house at an early age, it was with much difficulty that he procured an education. He decided to come west, first stopping at Marietta, where he was admitted to the bar, and remained a short time. He then visited Chillicothe, Cincinnati, and finally Franklinton, where in the spring of 1811 he decided to permanently locate, being induced so to do because of the fact that the State capitol was likely to be in Columbus. In 1814 he left Franklinton, and opened an office in Columbus.

In 1812 and again in 1817 he was a representative in the State Legislature. In 1823 he was appointed to fill a vacancy in the office of presiding judge of the Court of Common Pleas, and during his service upon that bench he was appointed to fill a vacancy which occurred in the Supreme Court. He sat one year upon the latter bench, or to the end of the term which he had been appointed to complete. He resumed practice in 1831. He also became engaged in business pursuits, being president of the Franklin Bank of Columbus, and was very successful in this enterprise. He was appointed one of the commissioners to establish the State bank system, and when the organization was complete, he was unanimously chosen president of the State bank. Judge Swan in his day was recognized as a sound lawyer, an able advocate, and an accomplished business man. He died on the seventh day of February, 1860.

A LEGAL AVIARY.

By R. Vashon Rogers.

In Basle, in 1474, an unfortunate cock laid an egg! In this nineteenth century such an act would be but a nine days' wonder, or the gallant bird would find a resting-place in some dime museum; but in the days when Christopher Columbus was young such an act was unlawful and of immense and serious importance. And no wonder, for from such eggs sprang the cockatrice, with its death-darting eye. This egg being produced, quickly the criminal law was set in motion against Sir Chanticleer. He was hurried to court, formally arraigned, and having pleaded not guilty, had counsel assigned for his defence. The prosecution proved that cocks' eggs were greatly sought after for mixing in certain magical preparations with such things as "eye of newt, and toe of frog, wool of bat and tongue of dog," *et id genus omne;* that a sorcerer would rather have such an egg than own the philosopher's stone, and that, in pagan lands, Satan employed witches to hatch such eggs and from them proceeded animals most hostile and injurious to persons of the true Christian faith.

The advocate for the poor bird admitted the facts of the case, but asked where was the evidence of any legal animus — any *mens rea* — in his client, or of any harm being done to man or beast; besides, quoth he, the laying of the egg was an involuntary act and therefore not punishable by law. Further, if sorcery was imputed, the cock was innocent, for the books contained no record of Satan ever having made a compact with one of the brute creation.

The public prosecutor, in reply, alleged that though the devil did not make unholy contracts with the brute creation, nevertheless he sometimes entered into them; and that the case mentioned in the Scriptures of the destruction of the swine possessed with devils was conclusive authority for the punishment of the accused, even though he was an involuntary agent. So the poor cock was convicted and condemned to a cruel and ignominious death, as a sorcerer, and (with the fatal egg) was burned at the stake with all due form and judicial solemnity.

Hemmerlin, a most celebrated lawyer of Zurich, records all the voluminous pleadings in this case in his "*Tractatus de Exorcismis.*"

Far more prosaic was the trial, in the Birmingham County Court, of an action brought by little Miss Florence Walford against George Mathews to recover damages for injuries sustained by her because the defendant wrongfully and negligently kept a savage and dangerous cock-fowl, knowing it to be savage and dangerous and accustomed to injure mankind, whereby Florrie was pecked and injured. The judge had never heard of such a case before, but as the evidence proved that the cock had aforetime showed its vicious nature by pecking other children, and the defendant, knowing it, had not shut up the savage and dangerous bird, his Honor gave a verdict of one pound damages and sixteen shillings, the amount of Miss Walford's doctor's bill. Whether this peccant fowl was stewed, or boiled, or broiled, the reporter saith not.

At the last sittings of the court of Queen's Bench, in Montreal, one Ernest Bolduc was indicted for creating a public nuisance by keeping two roosters which crew all through the night, and especially in early morn. There were five witnesses for the prosecution; one swore that one of the birds was the largest he had ever seen and made most unearthly noises, "with his lofty and shrill

sounding throat": to him "the trumpets of the day" were as distasteful as Marcellus deemed them to be to sprites and fairies, dire witches or baneful planets. The counsel for the defence eulogized the place in history occupied by the rooster from the days of the Greeks and Romans to the present hour, — it was the most useful of domesticated fowls — it was the "*roi de la basse cour*," and its crowing was pleasant to hear. A citizen, he held, had a right to play the piano, or sing, when he pleased; who then could interfere with another citizen, who took pleasure in hearing his rooster sound his clarion shrill? Judge Wurtele, in charging the jury, cited the case of a Dutch ambassador in London who had been brought before the magistrate on a similar complaint: he pleaded the want of jurisdiction of the English court to try him, and so escaped; but only for a time, as Her Majesty of Holland, when she heard of it, ordered him to do away with his roosters. That case was an authority. His Honor held that the rights of one man were limited by those of others, that there was a place for everything, that the country and not the crowded city was the proper place to keep fowls. The jury's verdict was, Guilty. The fine, as the obnoxious owners of the strident voices had already been taken out of the city, was five dollars or eight days in jail. ("Montreal Daily Star," Oct. 15, 1894.)

In legal circles it is not quite clear which hen is the mother of the chick, the one that lays the egg or the one which hatches it. Judge McAdam, of New York, appears to have decided in favor of the sitting hen. Counsel cited by our esteemed contemporary, the "Albany Law Journal," differ from the learned Judge. One says, "Hatching is a mechanical process and not at all characteristic of motherhood. Indeed science has demonstrated that it is not the hen at all which hatches, but heat; so that the sitting hen is simply a natural radiator. There cannot be a mother without there being a father. A chicken doesn't ask who his father is. Yet it is clear that only the hen that laid the egg could have been mother to that father, and hence to the chick." The discussion in this case arose as follows. Farmer A had some fine chickens, and seeing one like his in B's yard claimed that it must have come from an egg which one of his hens had chanced to have dropped on B's premises, and so must be his, A's. Another, learned in the law, said, "It is merely a question, not between hen and hen, but between farmer and farmer. The law is clear, and the maxim 'that he who does a thing through another does it himself' applies. Therefore farmer A, through his duly authorized hen, laid the egg on B's premises. . . . The egg being there, farmer B came, and by his duly authorized agent, his sitting hen, hatched out the egg, whence the chicken in dispute. Now there was nothing which compelled farmer B, through his hen, to hatch out that egg. Having chosen to do so he must be held to the consequences, and I think he is clearly chargeable with notice (in the eyes of the law) that he, farmer B, had not, through his hen, laid that egg, and that therefore it was an egg laid by some other farmer. This being so, the law is clear. Farmer A is entitled to the egg which he, as aforesaid, laid, and its proceeds and natural increase; at most farmer B is entitled to a mechanic's lien for work, labor, and services in hatching out the egg. (42 Alb. L. J. 242.)

The Welsh in their early days paid considerable attention to poultry. In the laws supposed to have been enacted by Howel the Good (who died A.D. 948), we have the worth of fowls thus given: "A hen is one penny in value. A cock is two hens in value. Each chicken is a sheaf of oats, or a farthing, in value, until it shall roost; after that a half-penny, until it shall lay, or until it shall crow, is its value; and after that its value is a legal penny." A goose and a gander were equal in value, in North Wales,

to a hen and a cock respectively. "The worth of a brood-goose is as much as the worth of her nest: and there ought to be in her nest twenty-four goslings. The worth of each of these is a half-penny, or a sheaf of barley; and that until they lay, and after that each is one legal penny in value; thus a brood-goose is twelve pence in value." (Ven. Code, B. III. ch. XI. and XII.) In the other parts of Wales, but why we cannot tell, a goose was as valuable as a gander, and a cock only equal to a hen (perchance there was woman suffrage there), and the codes say that a gosling, while it remained under the wings of its mother, was one curt penny in value; from its quitting its mother's wings until August it was worth one legal penny and on the first of August it became of the same worth as its mother, two legal pence. (Gwent. Code, B. II. ch. XV. and XVI; Dim. Code, B. III. ch. XXXIII.) According to these laws a stealer of tame fowls was more leniently dealt with than other thieves: he was not liable to be hanged, nor to be sold as a slave, nor to a dirwy, nor yet to a camlwrw, as were others who stole: he was set free upon paying to their owner the legal worth of the fowls. Of course the owner had to prove his property: the law required that, when swearing to an animal, the claimant should take the right ear of the creature by his left hand, and, laying his right upon a relic, swear. "There is no ear to a bird, how then is it possible to swear to it?" asks old Howel Dha, and he answers himself, "The hand can be placed on its head; and if a tame fowl, then swear there was no true owner of it other than himself." If a cock or a gander injured a male of his own kind no recompense had to be made by the owner of the one to the other; but otherwise if a pugnacious cock killed any other animal. (Dim. Code, B. III. ch. VIII.; Anomalous Laws, B. XIV. ch. 26; Ib. B. IV. ch. I.)

People in that principality who raised poultry had to keep them at home, for thus saith the law: "Whoever shall find geese in his corn, let him cut a stick as long as from his elbow to the end of his little finger, and as thick as he may will, and let him kill the geese in the corn with the stick; and those he may kill out of the corn let him pay for. Geese that may be found damaging corn, through a barn or through a corn-yard, let a rod be tightened round their neck and let them remain there until they die. Whoever shall find a hen in his flax-garden or in his barn, let him detain the hen until the owner shall release her with an egg; or, if he catch the cock, let him cut one of his claws and let him loose, or take a hen egg for him for every hen there shall be in the house. (Dim. Code B. II. ch. XXV.) It would add to the peace of civilized communities were some definite laws like these in force now-a-days.

When husband and wife resolved to part company, and made the necessary division of the joint property, the law said that the man was to have all the poultry and one of the cats, the rest of the cats went to the wife. (Dim. Code, B. II., ch. I.)

The Kuran holds every fowl accountable for the injuries done to each other, but reserves their punishment for the life to come.

A couple of hundred years ago those interesting tribunals, the ecclesiastical courts, were wont to hurl their fulminations against birds when they considered them injurious. Baron de la Hontan relates that the Bishop of Montreal, more than once, excommunicated the wild pigeons in Canada, because their number was so great they did great damage to the fruits of the earth (Nouveaux Voyages dans l'Amérique Septentrionale, Let. XI.); and Chasseneux mentions an excommunication, by a bishop, against sparrows that troubled the worshippers in a certain church and otherwise misconducted themselves.

We would refer our readers to the third volume of the GREEN BAG (p. 351), for an interesting Scotch case of a carrier pigeon

that came in contact with the inner part of a cat.

We admit that it is not a usual thing to find pigeons damaging the roof and ceilings of a house. Tougel's pigeons, however, used to make a practice of sitting on the top of Lee's house, and while there they amused themselves by picking out the mortar between the slates, or tiles, in consequence of which the rain, in damp little England, leaked through to the ceilings. An action of damages was brought, but the judge of the County Court observed, "Although there can be little doubt that as a question of conduct, and I may say of morality, the defendant ought to compensate the plaintiff," still he was under no legal liability to do so.

Here, surely, was a case where a bishop would have been useful, or a man might have defended the top of his castle with his fowling-piece. Long years before, Doddridge, J., had said, "If pigeons come upon my land I may kill them, and the owner has not any remedy, provided they be not taken by any means prohibited by statute." "The Chief Justice, however, held that the party had *jus proprietas* in them, for they are as domestics, and have *animum revertendi*, and ought not to be killed, and for the killing of them an action lies." The reporter, with more coolness than is usually shown in the present day, adds, "the other opinion is the best. (Dewell *v.* Sanders, Cro. Jac. 490.) The case appears to be against the County Court judge above quoted, for Bailey, J., says that in it the Court soundly decided that the erecting of a dove-cote was not a common nuisance, but that an individual might sustain a private injury from the doves, and that was cognizable before the justices in eyre. (Hannan *v.* Mockett, 2 B. & C. p. 940.)

A whole aviary full of foreign birds occupied the attention of Lord Abinger on one occasion. Mrs. Freestone, who carried on business in the bird line in London, sold Mrs. Butcher, the wife of a country curate, during the short space of ten months, some seven or eight hundred birds, such as lories, avadavats, love-birds, bishop-birds, cardinals, quakers, cut-throats, mannikins, and other kinds: these Mrs. Butcher bought apparently because the wife of that other preacher of righteousness, Noah, had had them in her floating-palace aviary. They cost in all over £959. True, Mrs. Butcher had money of her own, the birds had been charged to her, and she had paid part of their cost; then she stopped paying, and so Freestone sued the poor parson for the balance of the account. At the trial Lord Abinger told the jury that such birds were not necessaries for the wife of a clergyman, and that the circumstances did not show that she was the agent of her husband so as to bind him; that it was the bounden duty of tradesmen, when they found a wife giving extravagant orders, to give notice to the husband immediately if they intend to hold the unfortunate man liable. The parson had been wise enough to sell some of the birds and pocket the money; the judge considered that did not affect his liability, because as soon as the wife had bought the birds they became the property of the husband. The only bill, therefore, that Mrs. Freestone got by her action was one of costs from the attorneys. (Freestone *v.* Butcher, 9 Car. & Payne, 643.) By the way, we think Mr. Irving Browne in his poetical report of this case (II. GREEN BAG, 200) is too severe upon the poor lady: it appears to us (after deep pondering) that her purchases were made, in the main, for the purpose of improving her clerical husband and exciting his ambition, note the love-birds, the quakers, the bishops and the cardinals; even the cut-throats were appropriate to his name, if not to his nature or profession. By a strange coincidence, the case that comes after this bird case in the work of industrious Carrington & Payne is a cat case (Brooks *v.* Field, Ib. 651).

The numbers from Mrs. Butcher's aviary were as naught to the flocks from a certain vivary which the court had to consider in all their blackness and noyfulness in Hannan *v.* Mockett (2 Barn. & C. 934). The plaintiff complained that divers great quantities of rooks had been and were used and accustomed to resort and come and to settle, build nests, and breed, and rear their young in and upon certain trees growing and being in a close he lawfully owned, by which means he had been and was used and accustomed to kill and take divers great quantities of the said rooks and their young, and thereby divers great profits and advantages had accrued and still ought to accrue to him, etc., yet the defendant, well-knowing, etc., but contriving and wrongfully and maliciously intending to injure the plaintiff, and to alarm, affright, and drive away the said rooks and to cause them to forsake and abandon the said trees of the plaintiff and their nests built therein, and to prevent other rooks from resorting thereto, and settling in and upon the said trees, and to deprive the plaintiff of the profits and advantages so arising from the said rooks and the young thereof, as aforesaid, did on divers days and times, wrongfully and unjustly cause divers guns loaded with gunpowder to be discharged near the land of the plaintiff, and with the noise of the discharges of the said guns and the smell of the said gunpowder, did disturb, terrify and drive away divers rooks, then being in or near the said close and trees of the plaintiff, insomuch that a thousand rooks, which before that time had been used and accustomed to resort and come to the said trees, and to settle, build nests, breed and rear young, in and upon the said trees, flew away and abandoned the said close and trees, and the nests built therein, and wholly forsook the same, and a thousand other rooks which were then about to resort to and settle in and upon the said close and trees, were thereby prevented from so doing; whereby the plaintiff was prevented from killing and taking rooks young and old, in such plenty as he might and would have done, and thereby lost the profits and advantages which might and otherwise would have accrued to him. For all this injury, Hannan only asked the reasonable sum of £200 damages; the jury were somewhat sympathetic and gave him £10. The Court however held that the action was not maintainable, inasmuch as rooks were a species of birds *feræ naturæ*, destructive in their habits, not known as an article of food or even alleged so to be, and not protected by any act of parliament; that the plaintiff had not been at any expense with regard to them; and could not therefore have any property in them, or show any right to have them resort to his trees, or to keep them there to the injury of his neighbors.

The judge in this case said that the legislature has generally looked upon birds of the rook kind as nuisances. Henry VIII. fulminated one of his bolts against choughs, crows and rooks. His act recited that they destroy great quantities of corn, as well in the sowing as in the ripening and kernelling thereof, that they make a marvelous destruction of the covertures of thatched houses, barns, ricks, stocks, etc., and it ordered every one having land in his occupation to do as much as in him lay to kill such birds, on pain of grievous amerciament. The statute also directed that nets should be provided to catch these birds of evil omen and hoarse croakings, and that for ten years the people should yearly assemble and discuss how best to do for these birds. Elizabeth Tudor disliked these "noyful fowl and vermin" as much as did her burly father, and offered a price for their heads, a penny for those of three old birds or twice that number of the young, or of eggs (24 Hy. VIII. ch. 10; 8 Eliz. ch. 15.) If King Hal had not been such a skeptic he would have believed what the venerable Bede tells us of the crows who carried away part of

the thatch of St. Cuthbert's hut to build their nests: the saint rebuked them, and they not only made him an apology, but brought him a piece of hog's lard to make amends.

Sometimes "killing is no murder," likewise in certain cases "stealing is not larceny." Wild animals or birds (*feræ naturæ*) cannot be the subject of larceny unless they be dead, tamed, confined or reclaimed. Young partridges, hatched and reared by a hen, while they remain with her and from their inability to escape are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, even though the hen is not confined but is allowed to wander over the owner's premises; so with peahens and swans on a public river and pigeons in a cote. (Reg. *v.* Shickle, L. R. 1 C. C. 158; Com. *v.* Beaman, 8 Gray. 497; Dalt. Inst. 156; Reg. *v.* Cheafer, 5 Cox C. C. 367.) Turkeys are not wild animals now, whatever they may have been, although they may still be found wild and unreclaimed in many parts of America. Mary Turner was indicted in North Carolina for stealing "one turkey of the value of five cents." (Query, Was it worth Mary's while to steal such a skinny bird as this must have been; or was it worth the State's while to prosecute for such a tuppenny ha'penny affair?) Mary was convicted; a motion for arrest of judgment on the ground that the indictment failed to state that the turkey stolen was a tame one; that it should have negatived the presumption that the bird in question was wild and unreclaimed. The motion was sustained: but the Supreme Court reversed the decision on the ground that "our domestic turkey is not a creature *feræ naturæ*, and that the rule applicable to animals *feræ naturæ* of having to allege that the creature was dead, tame, confined or reclaimed, did not apply when the defendant was indicted for stealing one of our "domesticated" gobblers. (State *v.* Turner, 66 N. C. 618.) In the days of King David Kalakaua a similar decision was given by the Supreme Court of the Hawaiian Islands. (Browne's Hum. Pha. Law, p. 140.) The case of Miss Minnie Turner and her five-cent turkey reminds us of another case in which the maxim *de minimis non curat lex* was set aside: the legislature of British Guiana passed an act protecting humming-birds, and forbidding them being killed, sold or exported for trade purposes.

The case of some freshly imported young parrots came up in Swan *v.* Saunders. (2 Q. B. Div.; 44 Law Times, 424.) The question was, were they domestic animals within the statute anent cruelty to animals. The Court, while declining to say that a parrot might not become a domesticated animal when thoroughly tamed and accustomed to the society of human beings, held these freshly caught young things were clearly different from fowls and other poultry, and not tamed and domesticated. So, like many other bipeds, while they had to bear the ills of civilization, they were not entitled to share its blessings. On the other hand it has been held that the term "domestic animal" includes any pet bird, such as a parrot, a canary, or linnet; and that linnets kept in captivity and trained as decoy-birds for the purpose of bird-catching were "domestic animals" within the meaning of the act for the more effectual prevention of cruelty to animals, in England. (Colam *v.* Pagett, 12 Q. B. Div. 66.) And in Indiana a domestic fowl has been held to be an animal within the meaning of a similar act. (State *v.* Bruner, 111 Ind 98.) Kelly, C. B. held that cutting the combs of cocks, whether to fit them for fighting or winning prizes at exhibitions, was to "cruelly ill-treat, abuse or torture the birds." (Murphy *v.* Manning, L. R. 2 Ex. Div. 307.)

Wharton, in his work on "Evidence," mentions an interesting case in which a bird not only appeared in court, but actually spoke there, recommending a settlement of the

action. This was a suit of Wolfe *v.* Jones. Wolfe was a widow, and Jones a butcher. The plaintiff sued the defendant for killing a cockatoo parrot belonging to her. Jones said he had taken the bird for an owl. (What a goose he must have been!) To show his blindness the mate of the deceased was brought into court, whereupon it coolly told one speaker to "shut up," recommended the contestants "to shake hands," and then, apparently considering it had earned a fee, asked for "sugar."

One of the most solemn and impressive forms of an oath in China is the cutting off the head of a cock in court, with the prayer that so the witness may perish if he swerves from the truth.

A tail-piece. At the Regina trials after the Riel rebellion in the Canadian Northwest, 1885, it was hard to make some of the Indians understand the legal terms in which their offences were set forth. For instance, no term could be found to convey to the untutored mind the idea of the Queen's crown, against which he was charged with conspiring. This was explained to One Arrow as being "the great Mother's big war-bonnet with feathers in it."

WILLIAM ATWOOD,

CHIEF-JUSTICE OF THE COLONY OF NEW YORK, 1701–1703.

By Charles P. Daly, LL.D.,

Ex-Chief-Justice of the New York Court of Common Pleas.

II.

EMOT followed up the argument of Nicoll by the further point that by the statute of 25 Edward III, prosecutions for treason were limited to the six cases specified in the Statute, and that nothing contained in the petitions, or the getting up, or the signing of them, could by any possibility be brought within any one of these cases. He referred to the historical fact that this act of Edward III had been passed to prevent judges taking upon themselves to declare anything to be treason they thought proper, and called attention also to the subsequent act in the reign of Henry II, which, after reciting that so many penalties had been imposed by Statutes, in the preceding reign of Richard II, that "no man knew how to behave himself, or what to do, speak or say," and it therefore enacted that "for no time to come should any treason be judged otherwise than was ordained by the Statute of Edward III." This was a formidable objection, for it was clear that Bayard's case was not within any one of those enumerated in that Statute and that he could not be convicted under it. But Atwood was fertile in expedients and devised a way of his own of getting over this obstacle. The statute of Edward III, after specifying the six cases to which prosecutions for treason were thereafter to be limited, contained a further provision that if any case of supposed treason, not specified in the act, should thereafter occur, that the judges "should tarry without any going to judgment, until it was declared before the King and his Parliament that it ought to be judged treason," under which it was held that the concurrence of one of the houses of Parliament was not sufficient, but that the King and both houses must concur, which was equivalent to an act of Parliament creating a new case of treason. Atwood told the jury that this provision showed that the act

was intended for England alone, as any thing that would be treason at common law that was not provided for in it had to be, to use his expression, "adjourned into Parliament"; that this meant the Parliament of England, and that this provision therefore showed that the Statute had no application in the colonies. The prisoner, he said moreover, had not been indicted under the act of Edward III, but under a colonial act passed by the New York Assembly in 1691, which had been approved by King William, who had the right under his prerogative to make anything he thought proper to be high treason in the colony, his power in that respect being as great as that of Parliament; by which ruling Atwood relieved himself from all restraint and was enabled to do the very thing that this statute of Edward III was enacted to prevent, a judge declaring whatever he thought proper to be high treason.

The act of Edward III had been passed a hundred and fifty years before North America was discovered, and to suppose it was not meant to apply to any territory over which the dominion of England might thereafter extend, if applicable, was an idea to occur only to a man in the position of Atwood, who was determined to find some excuse for evading it. The limitations it imposed were of such value to the liberty and life of a British subject, that Coke calls it "this blessed act," and says that all subsequent statutes upon the subject "agree in magnifying and extolling it."[1] It was then and has always been the doctrine in England that statutes that were in force when a territory is conquered and made a part of the British dominion are thereafter in force there, if applicable, and that this important statute was then in force in New York did not admit of question.

Ten years previously Leisler and Milborne were indicted and convicted under it for high treason. After they had been executed Leisler's son brought the proceedings upon their trial and execution before the British government in the form of a complaint. It was referred to the Lord Commissioners whose duty it was to investigate such applications, and they, after "hearing the whole matter," reported to William III that in their opinion Leisler and Milborne had been tried and condemned according to law, which, it may be assumed, the legal advisers of the Crown would not have done if they had had any doubt as to whether the statute of Edward III was in force in the colony. They upheld the regularity and validity of the conviction, but "as an act of mercy" recommended that the attainder be removed, so that the estates of Leisler and Milborne might be restored to their heirs, with which King William complied.[1]

When Leisler and Milborne were tried, the act of Assembly, under which as Atwood held Bayard was indicted, had not been passed. It was enacted about a month afterwards. But this act could in no way affect the statute of Edward III or make it inapplicable thereafter in the colony, for it was not in the power of the Assembly nor in the power of the King, by approving an act passed by it, to establish any law in the colonies in conflict with so fundamental a statute as that of Edward III, which, like Magna Charta and the Bill of Rights, had become a part of the English Constitution and one of the bulwarks of English liberty, even if there had been any intention to do so, which it was evident there was not. The title stated the purpose for which this act of the Assembly was passed: "An act for the quieting and settling of the disorders that have lately happened in this province and for securing their Majesties' government from like disorders." It had a long preamble referring to the late violation of the true faith and allegiance that was due to their Majesties by setting up a power over

[1] Coke's Institutes.

[1] Smith, History of New York, Vol. I, 118-119, 1830.

the subject in the colony, without their authority; for the preventing of which in the future, it declared that there could be no power exercised in the province but which must be derived from them and their successors, and it recognizes and acknowledges that William and Mary, who had then been in the exercise of the regal authority for two years, were the lawful sovereigns of the British dominions and alone had the right to rule in the province; after which followed an enactment that any one who should thereafter by force of arms or otherwise endeavor to disturb the peace and quiet of the government as then established, should be deemed rebels and traitors and incur the pains, penalties and forfeitures that the laws of England had provided for "such offences"; plainly showing that the criminal act that was meant was the setting up of a power over the subject in the colony without the sovereign's authority, as Leisler and his associate had done, for which they were lawfully convicted of high treason.

There was nothing in the act of Assembly denoting any intention to interfere with the statute of Edward III or to make any thing high treason that was not made so by its provisions. Nothing giving a judge in the colony the power to declare that the signing, or inducing others to sign a petition to the House of Commons reflecting injuriously upon those charged with the administration of the colonial government was high treason for which those who signed such a petition, or got it up, could be hanged, drawn and quartered. The interpretation that Atwood put upon this act of 1691, his ruling in respect to the statute of Edward III, and his whole conduct from the beginning, was to give his design to destroy a political rival the color and sanction of a judicial proceeding, by whatever means that formality could be obtained.

Emot raised another important point, which was that upon the trial of all indictable offences, the jury are the judges as well of the law as of the facts; that having in all such cases an absolute power to acquit, they were necessarily judges of the law, for the reason that, after an acquittal by a jury, the accused could never again be put upon trial for the same offence.[1]

This involved a question of great interest from the long legal controversy to which it gave rise both in England and in this country, especially in criminal prosecutions for libel, to which I shall have occasion hereafter to refer[2] in a more celebrated case that arose in the colony, that of Peter Zenger, in which this point was raised and sustained by the verdict of the jury.

Some few years previously, that is in 1680, Sir John Haines published, in England, a pamphlet advocating this right on the part of the jury in criminal cases that was much read at the time, and which Emot may have seen. But the question had been agitated before the publication of this pamphlet,[3] and the controversy was kept up long afterwards. Atwood undoubtedly knew that a jury had the right in any indictable offense to render a general verdict of not guilty, whatever might be the law or the evidence. Thirty years before "it was determined in a case of great notoriety growing out of the prosecution of William Penn, that upon the trial of an indictable offense the jury have a right to give a verdict of not guilty although the court may direct them as matter of law to find a verdict of guilty, and that a judge has no authority, as was done in that case, to fine and imprison jurors because they did not return such a verdict as he had directed." The question was regarded as of such importance that it was heard before fifteen judges sitting in the Exchequer as a court of review, fourteen of whom concurred in the judgment.[4] As Atwood was a lawyer

[1] The King and Mowbery, 6 T. R. 638.

[2] In a forthcoming work on the judges and lawyers of the Colony of New York.

[3] Buschel's Case, Vaughan's Reports, 1670.

[4] Buschel's Case, Vaughan's Reports.

in London of such standing as to be selected for Chief Justice of one of the colonies, and displayed upon this trial such a familiar knowledge of criminal procedure as to baffle the counsel upon many technical objections which they raised, he could not but have been acquainted with a case of such celebrity, for it had been elaborately reported, and the result of it incorporated in the ordinary treatises of that time.

But Atwood had no intention, if he could prevent it, that the jury should understand that they had the power, no matter what might be the evidence, to return a verdict of not guilty. He therefore took no notice of the point when Emot presented it, nor in his charge of the jury, anticipating doubtless from the positive instructions he meant to give them that they would promptly render a verdict of guilty.

He told them in his charge, as before stated, that the prisoner was indicted not under the statute of Edward III, but was tried solely under the act of the House of Assembly in 1691, that the overt acts alleged in the indictment had been proved, and amounted under this act, to high treason by "the signing of libels against the government of the Colony and thereby enticing the people to cast off and disown it, especially by soldiers signing complaints against their superiors, which tended to mutiny and sedition," which was, he said, high treason by the common law; that the prisoner, by bringing the addresses to Hutchins' tavern, had made himself guilty of all that was done there by soldiers and others, and that the jury could not do otherwise than find him guilty.

But the earnestness with which Emot had pressed his point that the jury were the judges of the law as well as the fact, which Atwood had not controverted as he had everything else that had been presented in favor of the prisoner, had not escaped the attention of the jury, and instead of promptly returning a verdict of guilty as they were instructed to do, they remained out until nine o'clock in the evening, when, being Saturday night, the court adjourned until Monday morning. After the opening of the court on Monday, the jury, upon being brought in, asked for instruction respecting the evidence. The foreman read something from minutes he had taken of the testimony, upon which it would seem the jury were not agreed. What it was does not appear from the report of the trial, but that it related to the crime of high treason is indicated by what followed. The counsel for the prisoner denied that any such testimony had been given, and Atwood told the jury that after delivering his charge he could give them no direction as to the evidence, but that he could as to the law, and then suggested that if they had any doubt upon the question of high treason, they could find a verdict of guilty, and then the prisoner could be relieved by a motion in arrest of judgment.

This was an intentional evasion of his duty, which was to tell them that in a case of doubt they could render a special verdict, finding the facts, and leaving the question of law entirely to the court. The right of the jury, where they were in doubt as to the law, to find this special verdict was given by a statute passed as early as the reign of Edward I. It was enacted for the benefit of the jury, to relieve them of the responsibility of finding a verdict of acquittal, as there was then a proceeding known as an attaint, in which they could be called to account for their verdict, and punished, if it were adjudged under that proceeding that they had given a false one.

But a special verdict by the jury, simply finding the facts, would have thrown upon Atwood and his two associates the sole responsibility of convicting Bayard of high treason for simply signing or getting up the petitions. With all his audacity, Atwood was too shrewd to take such a responsibility,

as in that event the accountability for the act would undoubtedly have centred upon him. What he wanted was to secure a general verdict of guilty by the jury, not only for its public effect, but for the advantage it would give him towards sustaining his rulings upon the trial, upon a motion to arrest the judgment for error. Emot, who at once comprehended what was intended, and would probably be the result of the wily suggestion of the Chief Justice that the prisoner could be relieved by a motion in arrest of judgment, broke out with the exclamation, "This is not fair to give the jury a handle to find the prisoner guilty, in expectation of relief by a motion in arrest of judgment, for they are both judges of the law and fact, as the case is now circumstanced. If they will enslave themselves and their posterity, and debar themselves of all access to their Prince, they are worse than negroes."

Atwood, "This is not to be suffered to offer these things to the jury after they have received their charge. Therefore be silent"; and although he had previously told the jury that he could not, after having charged them, say anything to them further respecting the evidence, he now, to overcome this sally on the part of Emot, addressed them again for the space of half an hour, aggravating, in the language of the report, "the supposed crime."

When he had got through, Emot again rose, but Atwood commanded him to be silent, and would allow nothing more to be said. He had accomplished what he thought necessary to counteract any impression that Emot's remarks may have made, and was successful, for the jury went out, and at three o'clock in the afternoon returned with a verdict of guilty.

A motion was made in arrest of judgment, which was elaborately argued, but every point taken was overruled. Bayard was then brought up for sentence. He was asked if he had anything to say why it should not be passed upon him. He answered that he had nothing more than what his counsel had offered, to which Atwood hypocritically responded, "I am sorry to find you so unrepentant of your crime, — so heinous and abominable in the sight of God and man. — I hope God may open your eyes that you may be convinced and repent of your crime," and then delivered this horrible sentence of the law: —

"That you be carried to the place from whence you came; that from thence you be drawn upon a hurdle to the place of execution; that there you be hanged by the neck, and being alive, you be cut down upon the earth (and that your bowels be taken out of your belly and your privy parts be cut off, and you being alive, that they be burnt before your face — and that your head be cut off), and that your body be divided into four quarters, and that your head and quarters be placed where our Lord the King shall assign, — and may the Lord have mercy upon your soul."

When it was delivered, Bayard asked if he might be allowed to answer what the Chief Justice had said preceding the sentence. Atwood said No, and the scene ended with an exclamation on the part of Bayard that recalls Luther's final utterance at the Diet of Worms: — "Then God's will be done." Hutchins was tried shortly afterwards, was convicted, and the same sentence was passed upon him.

Upon Bayard's return to the prison, the sheriff told him that the two associate judges had refused to consent to the sentence of death, unless the Lieutenant-Governor would promise to grant a reprieve, if applied for, until the Queen's pleasure was known, and that upon that promise being given, they had united in the sentence.

This was probably true, for whilst those who were clamorous for the conviction of Bayard may have felt a grim satisfaction at the prospect of his being hanged himself, as he had been instrumental in causing Leisler to be hanged, without the

possibility of interference on the part of the Crown, the more sober-minded and shrewd among them, in all probability, took a different view of the matter. The two cases were not alike. Bayard had not taken possession of the government by force, administered it, and attempted to hold it thereafter against the authorized representative of William and Mary, as Leisler had done; in addition to which the Leislerians had vehemently denounced the summary execution of Leisler before the King's pleasure could be known. It had been their chief political capital and the means by which they had come into power. To do, therefore, in Bayard's case, the very thing which they had so bitterly denounced in the case of Leisler, would have been so grossly inconsistent as to make it apparent that if they did so, they would not as a political party remain in power.

The Lieutenant-Governor Nanfan, as subsequently described by Lord Cornbury, was a young man of so little experience, or knowledge, that Atwood and Weaver, he said, were able to draw to themselves and their party the whole administration of the government.[1] It is said in the account of the trial, that several leading and influential citizens interested themselves in favor of a reprieve, and either through their influence, or from an apprehension of the consequences if the sentence was carried into effect, a scheme was devised, in all probability by Atwood, to grant a reprieve, if Bayard would admit that he had been justly convicted of the crime for which he had been tried; thereby securing his acknowledgment of the validity of the proceedings against him, which would not only shield Atwood, but if Bayard brought an appeal to the King and Privy Council, would have put him in the position of applying for the reversal of a judgment which he had himself admitted was right.

Emot drew up an application for a reprieve, and together with Bayard's son, brought it to Nanfan, who, when it was presented, "got into a great passion," and declared that no reprieve would be granted, unless Bayard "would confess his offence, and ask pardon for it," "and that if he did not sign a written acknowledgment to that effect within a day, that the warrant for his execution would be signed. I have assumed that this scheme was of Atwood's devising, as the active and leading part he took in the matter of the reprieve, and everything contained in the documents that have come down to us, indicate it. He probably thought that if Bayard were convinced that he would certainly be hanged on the day fixed, if he did not comply, that he would, to save his life, make this written acknowledgment. If he did so, he knew little of the nature of the man with whom he had to deal, for, however revengeful Bayard may have shown himself in bringing about the immediate execution of Leisler, and whether or not he had been, as Bellamont believed, "the go-between" in procuring commissions from Governor Fletcher for pirates, under the guise of privateers, on this occasion, when his life was in peril, he showed a manly courage and deep-seated religious convictions. When Nanfan's reply was communicated to him, his answer was that he would never wrong his conscience by accusing himself of a crime that he had not committed. His reply was probably as unexpected as it was embarrassing. So far as the prisoner was concerned, it admitted of no other course but to grant the reprieve, or execute him, and this they were not prepared to do, for in addition to the reasons already given, Bayard had been for years one of the most conspicuous men in the colony. He was, as has been said, a Hollander by birth, who had been brought to New Amsterdam, when a child, by his widowed mother, who was a sister of Gov. Stuyvesant; and his father being a Huguenot, he was a representative of those that

[1] 4 Col. Doc. 1011.

had founded New Netherlands, and as such was of the class of whom the Leislerian party was chiefly composed. When the colony passed into the hands of the English in 1664, he became, from his knowledge of the English language, a most useful man in all official relations between the Dutch and the English, in whom Nicholl, the first English governor, placed the highest confidence. He was secretary of the province in 1673, was mayor of the city of New York under Gov. Dongan, and is said to have drawn up its first charter, now known as the Dongan Charter. He had been several times a member of the Governor's Council, and had shown great public spirit by supplying the colonial government with money from his own funds to meet emergencies. When Leisler usurped the government, Bayard commanded a regiment of militia in the city, and having the good sense to see that there was no ground whatever for Leisler's pretence that his taking possession of the government was necessary to secure the sovereignty of William and Mary in the Colony, had refused to join Leisler, who in consequence subjected him to a long and cruel imprisonment.

Atwood no doubt saw, as clearly as any one, the far-reaching consequences that would follow the summary execution of such a man, and bent all his efforts to extort from him, if possible, the desired acknowledgment. He instructed Weaver to direct the sheriff to tell Bayard, as coming from him, that unless he sent a petition in which he confessed his crime, he should have no reprieve, but would be hanged according to his sentence, and to tell him further that "the people of the town were very hot to have him executed," which the sheriff, who was in the Leislerian interest, not only did, but urged him to comply, saying that it would only be regarded under the circumstances as a forced confession to save his life, and that he, the sheriff, would always be a witness to the fact. Bayard's answer was that it would be accusing himself to his own ruin, that of his family and of his posterity, and that he would rather die ten deaths than do it. He consented, however, to send another petition, stating that if it were high treason to have signed the petition to the House of Commons, that he was ignorant of it, to which Nanfan replied that "he misliked this more than the former petition." The sheriff, to convince Bayard of the imminency of his position, told him that efforts had been made to get Nanfan intoxicated, so as to secure from him the death warrant, as had been done with Lieutenant-Governor Slaughter in Leisler's case; that the sheriff had himself averted one of these attempts, but that there was every reason to fear that the death warrant would be procured in this way, and urged him strongly to make the acknowledgment to save his life. Bayard then sent for two clergymen of the city, and submitted to them the question if it would be safe for him, as a Christian, to falsely admit that he had been guilty of a crime that he had not committed, and upon their answering that it would not be, he became immovable, declaring that he must submit to what Providence seemed to have ordained for him. More coercive measures were then resorted to. He was put in irons; all intercourse with him was interdicted, except by permission from the Lieutenant-Governor, and a guard of soldiers was placed over the prison. One of the clergymen went to Nanfan, and was allowed to send a message to Bayard to say that if he would, in general terms, confess his offense without admitting that he had been guilty of high treason, he would get a reprieve. He was also told by the sheriff that the mayor of the city and several prominent citizens had interposed in his behalf, and he was permitted to write to them to continue their good offices, to which the mayor replied, advising him to comply with the request made to him as far as his conscience would allow him in connection

with which he was told that Nanfan had declared that he would sign the death warrant for his execution the next day. But he would not yield. The day following he was allowed to receive a communication from his counsel, Emot, to the effect that if he would admit that he was sorry for the offence he had given, Emot thought the reprieve would be granted. To this last suggestion, though with much hesitation, he yielded and sent a petition with that statement, which was satisfactory to Nanfan, but Atwood objected, and insisted that the reprieve should not be granted, unless Bayard inserted in his petition "the *crime* I have committed." This Bayard refused to do, but worn by his confinement, and exhausted both in mind and body, he at last, at the earnest solicitation of his friends and of every one about him, consented to insert the words "the offence with which I have been charged," and as nothing more could be got from him, the reprieve was granted.

When Bayard was reprieved, the sheriff told him that he, the sheriff, and the Lieutenant-Governor, were very particular friends, that Nanfan had told him not to release Bayard upon giving bail unless a certain lady conveyed to the sheriff a tract of land near the town, of the value of £1,500, and that if he consented to obtain it, not to discharge him until the deed of conveyance was delivered, which Bayard positively refused to do; and at this juncture intelligence was received that the vessel with Lord Cornbury on board was in the lower bay, and Daniel Honan, a member of the Bayard party, a man of unsavory reputation, when secretary of Governor Fletcher, upon receiving this information, succeeded in reaching Cornbury before he came to the city, and made such good use of his time as to apprise the new governor of everything that had occurred, and with the assistance of some others to secure him in the interest of the Bayard party.

In the first official intercourse between Atwood and Cornbury, which became necessary immediately after the latter's arrival, "his lordship," as Atwood expressed it, "discovered a prepossession to the Chief Justice's prejudice," and he interpreted rightly, for one of Cornbury's earliest acts was to send a written order to the sheriff to release Bayard and Hutchins, which the sheriff refused to recognize, as being without authority; whereupon Cornbury, who had little regard for forms of law or legal objections, sent a detachment of soldiers to the prison, by whom the sheriff was arrested and brought to the fort, which the Governor followed up by suspending him, and directing the mayor to take upon himself the office of sheriff, with authority to execute it by deputy, which was done, and Bayard and Hutchins were released.[1]

Whilst a series of charges were being prepared against the Chief Justice, the Governor maintained a ceremonial politeness towards him, inviting him twice to dinner, and in Atwood's peculiar phraseology "accepted of *no mean* entertainment" from him.

When the charges were formally presented, Atwood says, he demanded a hearing, which the Governor promised him he should have; a promise, he says, which he did not keep, but at the next meeting of the council, when the Chief Justice came in, pronounced a "sentence prepared in writing," suspending Atwood from exercising the duties of his office. This was followed by the removal of Atwood, Weaver, the two associate judges, De Peyster and Walters, and Dr. Staats from the council, the appointment of five others in their places, and the suspension of Weaver from the exercise of the two lucrative offices he held of receiver of the revenues of the Crown and receiver of the customs. He also removed the associate judges, De Peyster and Walters, from the Supreme Court, and appointed ex-Chief Justice Smith and Dr. Bridges in their places. In addition to

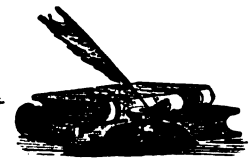
[1] N.Y. Hist. Soc. Col. 1880, pp. 287, 288, 289.

this, the Governor was about to grant warrants for the arrest of Atwood and Weaver, upon what ground does not precisely appear, upon learning which they fled to New Jersey, from whence they found their way, Atwood under the name of Jones and Weaver under that of Jackson, to Virginia, where they succeeded in procuring a passage in an English man-of-war, and returned to England.

When Bayard and Hutchins were released from prison, they sent a petition to the Queen and Privy Council, that they might be allowed to appeal to it from the judgments and sentences against them, setting forth in detail all the circumstances. Their application was referred to the legal advisers of the Crown, who reported that the proceedings were extraordinary, and that the appeal should be granted, which was allowed. Bayard also brought suits for damages against Atwood, the two associate justices, and some of the grand jurors, claiming in each suit £10,000 damages, and with the assistance of his two counsel, the notes he was enabled to take himself, and the recollection of persons who were present, prepared a full report of the trial, which was printed in the autumn of 1702[1] in New York, by order of Lord Cornbury, and reprinted in London in 1703, the London edition having a detailed statement of what occurred after the trial.

[1] 4 Col. Doc. 972.

The Lawyer's Easy Chair.



. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

"BORN FREE AND EQUAL." — An attentive reader — of the Declaration of Independence as well as of this poor "Easy Chair" — reminds us that in criticising Mr. Astor's "Pall Mall Gazette" for attributing the phrase quoted above to the Declaration, we ourselves were in error in rendering it "created free and equal," and points out that it really stands, "created equal." But as he also points out, this renders the original misquotation all the worse for Mr. Astor. We may add that the phrase, "created equal," taken with the context, is not an assertion of intellectual or moral equality, but only of an equality of natural rights, among which are "life, liberty and the pursuit of happiness."

A BEAUTIFUL LIFE. — The death of Judge Erskine, of Georgia, came with something of suddenness, although he was eighty-three years of age, and his strength had been gradually declining for a number of years. Few lives of public men have been so useful, so well rounded, so full of honors. Few men have had such a serene and cheerful old age. He had within himself the elements which enable a man to retire from life's bustle and tread the declining path with contentment. His judicial career is familiar to the readers of this magazine and to the bar of this country. He was one of the few Federal officials who won the love and respect of the people of the South during the period of reconstruction, not by undue favoritism, but by even-handed and high-minded justice. His portrait hangs in two court-rooms in Georgia. His declining years have been passed at Atlanta in the companionship of friends and books. There the beautiful old man sat and chatted and read and wrote and smoked; hearty but dignified; simple, but investing his manners with a touch of old-fashioned courtesy; pure and warm-hearted; full of culture and familiar with the best literature; with a humor that brightened intercourse, and a vivacity that appealed to young as well as old. Among his latest occupations was the writing of some part of his autobiography, the first part of which the writer of these lines has read — a graphic picture of his toilsome and adventurous youth, and of his life as a sailor and his miraculous preservation from death by shipwreck. It is to be hoped that this may be made public, but it can hardly be possible that he completed the task. For many years it has been one of the present writer's pleasantest privileges to correspond with this charming old man. One of the last letters that he could have written (dated Jan. 11th) is now before us, which is characteristic of his fondness for the stage and of his wide reading. He says: —

"I was on pleasant and cordial terms with the late Edwin Booth for several years before his death. Some three or four years ago, in the month of November, he invited me to lunch with him at the Players' Club, of which I am a member. It was his 59th birthday. We sat alone. I was speaking of his Sir Giles Overreach, when something was said about literary felonies. I remarked that Bulwer's line in Richelieu was a palpable theft. He said, 'Ah, my dear Judge! where did he get it?' I replied, 'From Henry the Fourth of France. Bulwer's line is this,' said I, 'and you are the only man to give it. I have heard Macready — you excel him there. Here it is,' said Erskine: 'The pen is mightier than the sword.' Conchini (whom you know of) had been maltreated in the Court of Requests, which was an integral part of the Parliament. Conchini went to the king and complained; to which the monarch replied (I give the words from the second volume of my History of Henry the Great, p. 315): 'Do not pretend to pick a quarrel with my parliament; the sword you carry, sir, is not so keen-edged as are the pens of those gentlemen.'"

Bartlett in his new Dictionary of Quotations does not allude to this, although he gives Burton's "The pen is worse than the sword."

It reminds the present writer that his body is waxing old when he reflects that three of his four most intimate correspondents no longer address him — Charles James Folger, David Dudley Field, and John Erskine, men strong and wise, but as widely different in characteristics as men can be, save that they all loved books and scholarship. Many charmed hours have we spent in this good man's company, and seldom have we found one so free from pretentiousness. Once we complimented him in entire good faith on his superb head of flowing white hair. "Man, it's a wig!" said he. But Judge Erskine's

head was crowned with glory, because it was found in the way of righteousness.[1] In one's ever narrowing circle of friends, these old associates are sorely missed, *sed scriptæ literæ manent.*

PIPE AND POUCH. — "Pipe and Pouch, the Smoker's own Book of Poetry," is the title of a very dainty little volume, compiled by Joseph Knight, of Boston, and published by his company. Doubtless it will appeal to most lawyers, for we take it that most lawyers smoke. We hope that few of them chew. Three of Lowell's poems, and one by Aldrich and one by Lamb, are in the book, and almost all the rest are characterized by humorous or pathetic merit. There are few names of lawyers among the authors. Those which we recall are Daniel Webster and Judge Finch of New York. Brander Matthews, was educated to the law. Mr. Knight, in the preface, says that Newton was smoking in his garden when the historic apple fell. But it did not fall. The story is probably as baseless as the earlier one of the apple in Eden. We do not know where Mr. Knight gets his authority for classing Napoleon among the smokers. He made a good deal of smoke in his time, but we have never heard that it was from tobacco. He snuffed. Mr. Knight further says that "while nearly all the poems here gathered together were written and perhaps could only have been written, by smokers, several among the best are the work of authors who never use the weed, one by a man, two or three by women." That phrase, "two or three," is a safe one, for while the presumptions are in favor of Eva Wilder McGlasson and Kate A. Carrington, and are almost conclusive as to mother Amelia E. Barr, yet we gravely fear that the pale poetess of passion, Ella Wheeler Wilcox, is perfectly honest in singing, "I like cigars." Mr. Knight does not specify the man in question, but we know him, and it is quite safe to say that his poem displays more imagination than any of those by the smokers. It was to this man that the late Judge Neilson, of Brooklyn, once offered a cigar, which was declined with the explanation that he never smoked. "What! did you never smoke?" said the Judge. "Never." "Well, that is one of the best things you never did," replied the genial wit. The Chairman has so much respect for this non-smoker that he reproduces his poem below: —

THE SMOKE-TRAVELER.

When I puff my cigarette,
Straight I see a Spanish girl,—
Mantilla, fan, coquettish curl,
Languid airs and dimpled face,
Calculating, fatal grace;
Hear a twittering serenade
Under lofty balcony played;
Queen at bull-fight, naught she cares
What her agile lover dares;
She can love and quick forget.

Let me but my meerschaum light,
I behold a bearded man,
Built upon capacious plan,
Sabre-slashed in war or duel,
Gruff of aspect, but not cruel,
Metaphysically muddled,
With strong beer a little fuddled,
Slow in love and deep in books,
More sentimental than he looks,
Swears new friendships every night.

Let me my chibouk enkindle,—
In a tent I'm quick set down
With a Bedouin lean and brown,
Plotting gain of merchandise,
Or perchance of robber prize;
Clumsy camel load upheaving,
Woman deftly carpet weaving,
Meal of dates and bread and salt,
While in azure heavenly vault
Throbbing stars begin to dwindle.

Glowing coal in clay dudheen
Carries me to sweet Killarney,
Full of hypocritic blarney,—
Huts with babies, pigs and hens
Mixed together, bogs and fens,
Shillalahs, praties, usquebaugh,
Tenants defying hated law,
Fair blue eyes with lashes black,
Eyes black and blue from cudgel-thwack,—
So fair, so foul is Erin green.

My nargileh once inflamed,
Quick appears a Turk with turban,
Girt with guards in palace urban,
Or in house by summer sea,
Slave-girls dancing languidly,
Bow-string, sack, and bastinado,
Black boats darting in the shadow;
Let things happen as they please,
Whether well or ill at ease,
Fate alone is blessed or blamed.

[1] In the Judge's house hangs a portrait of Mrs. Cleveland inscribed in affectionate terms in her own hand. The Judge, who sometimes "dropped into poetry," apostrophized it as follows: —

"Hads't thou appeared with those entrancing eyes
On Ida's mount, beside the sacred three,
Whose charms contended for the golden prize,
Paris had Venus passed and fled to thee,
To crown thee queen of beauty, love and purity."

Enclosing us the verses he thus commented on them: "When I wrote the verses, I wrote, 'To crown,' but now on reading it, I think it would have been better if I had written, 'To hail' or 'And hailed.' Had the golden apple been a wreath or crown, it might have been better. Possibly at the writing I was thinking of the manner the darkies carry apples, squashes, potatoes, etc., on their heads. But you know 'Homer sometimes nods.'"

With my ancient calumet
I can raise a wigwam's smoke
And the copper tribe invoke, —
Scalps and wampum, bows and knives,
Slender maidens, greasy wives,
Papoose hanging on a tree,
Chieftains squatting silently,
Feathers, beads, and hideous paint,
Medicine-man and wooden saint, —
Forest-framed the vision set.

My cigar breeds many forms, —
Planter of the rich Havana
Mopping brow with sheer bandanna,
Russian prince in fur arrayed,
Paris fop on dress parade,
London swell just after dinner,
Wall street broker — gambling sinner!
Delver in Nevada mine,
Scotch laird bawling "Auld Lang Syne,"
Thus Raleigh's weed my fancy warms.

Life's review in smoke goes past, —
Fickle fortune, stubborn fate,
Right discovered all too late,
Beings loved and gone before,
Beings loved but friends no more,
Self-reproach and futile sighs,
Vanity in birth that dies,
Longing, heart-break, adoration, —
Nothing sure in expectation
Save ash-receiver at the last.

So far as we can recall, the law has had very little to say about tobacco, except in the form of statutes prohibiting cigarettes to young boys. The law has however decided that tobacco in any form is not a necessary for the price of which an infant can make his father responsible, and Judge Taft, of Vermont, has held that cigars are "victuals or drink" which must not be furnished to an incubating jury. But the law could find nothing objectionable in this novel collection, nor could Anthony Comstock, unless perchance it may be one of the aforesaid Ella's effusions, which suggests that she had indulged not only in a surreptitious cigarette, but also in a cocktail. But where there is much smoke there must be some fire.

BUSINESS DEPRESSION. — The last year has been one of marked commercial depression in this country, in which the lawyers have suffered with the rest, for contrary to the popular impression, they are only successful in prosperous times. This professional depression, it seems, has prevailed in England, and we derive a vivid notion of it from "Notes from London" in the "Scottish Law Review," from which we learn that the Benchers have difficulty in renting the chambers in the Inns. This writer also says: —

"No one who has not been behind the scenes knows what depression has existed amongst the members of the bar. In the same space of time probably there were never a greater number dropped out of the ranks to seek a subsistence which had become hopeless to expect in wig and gown. Several curious cases came under my own notice, and I have heard of others. One man took to writing detective stories as a specialty, drawing on his experience of the police courts and the Old Bailey and his imagination for his stock-in-trade. He has not made a particularly brilliant success of it, but he has the satisfaction of having made a living, which he could not do before. Another, who was fortunate enough to have the knack of sketching, got, to his great satisfaction, an engagement on an illustrated paper. A third man betook himself to a piano factory in the east-end, either as partner or tuner or something, I don't exactly know what, but at any rate he made a living. A fourth utilized some interest he had in the manufacture of playing cards; and a fifth, most curious and best of all, took to growing tomatoes and flowers in one of the Channel Islands, either on his own account or, I believe, in conjunction with another member of his own unsatisfactory profession; and I should not be surprised to hear that others had gone into the jam trade, having remembered Mr. Gladstone's advice to practitioners of another decaying industry."

BROUGHAM'S NOSE AGAIN. — Lawrence Hutton, in his recent book, "Portraits in Plaster" (Death Masks), remarks: —

"Probably no single facial organ in the world has been the subject of so much attention from the caricaturists as the nose of Lord Brougham. It is doubtful if any two consecutive numbers of any so-called comic or satirical journal appeared in England in Brougham's time without some representation of Brougham's nose. The author of 'Notes on Noses' thus spoke of it: 'It is a most eccentric nose; it comes within no possible category; it is like no other man's; it has good points and bad points and no points at all. When you think it is going right on for a Roman it suddenly becomes a Greek; when you have written it down cogitative it becomes as sharp as a knife... It is a regular Proteus; when you have caught it in one shape it instantly becomes another. Turn it and twist it and view it how, when, and where you will, it is never to be seen twice in the same shape; and all you can say of it is that it's a queer one. And such exactly,' he added, 'is my Lord Brougham... Verily my Lord Brougham and my Lord Brougham's nose have not their likeness in heaven or earth... And the button at the end is the cause of it all.'"

The ablest nose, if not the most wondrous in conformation, that ever adorned an American face, was that of Edwin P. Whipple, the Boston essayist and lecturer. Its proprietor was an unrivaled connoisseur of wines, and could infallibly tell the brand and frequently the year of the vintage of any wine by its *bouquet*. Of Brougham, Hall Caine in his powerful novel, "The Manxman," gives the following description from the mouth of a fresh young Manx lawyer in London: —

"Heard old Broom in the House last night, and to-day I lunched with him at Tabley's. They call him an orator

and the king of conversationalists. He speaks like a pump, and talks like a bottle running water. No conviction, no sincerity, no appeal, . . . if this is what London calls a great man, I'll kick the ball like a toy before me yet."

This book of Mr. Hutton's, adorned with pictures of the casts from many distinguished faces, is very readable. The noblest and most beautiful of all is Napoleon's — the face of one born and fit to rule the world. Naturally that of Thackeray has no nose to speak of, and that of Wordsworth a great deal to speak of. Those of Sam Johnson and Ben Caunt, the prize-fighter, have a good deal in common. The least dead-looking and pleasantest is Cavour's. Agassiz's is very noble and attractive. Curiously enough, Charles Sumner's might answer for Falstaff. Sheridan's is pitiful. Tom Moore's looks distressed, as if some one were singing his "Melodies" out of tune. Palmerston's has a beak like a bird, and Beaconsfield's ought to have, but it has not, but it has that little lovelock on his forehead. Cromwell's looks singularly amiable. Swift's looks imbecile, and Charles Twelfth's does not look mad. Grant's shows a grand head and a peaceful face. Franklin's does not exhibit the wisest man of America. Aaron Burr's is the face of a tricky and resolute man. Webster's head is grand, but the nose is not equal to it — what nose except Napoleon's could be? Bentham's is positively grotesque — Harlequin's. It gives one singular sensations to peruse these unconscious lineaments, beyond the power of self-posing or artistic flattery. Some of the subjects ought to be very glad that they cannot view their own death-masks. There are few lawyers among them — Curran, Lincoln, Clay and Calhoun are the only ones in addition to those mentioned above.

NOTES OF CASES.

REFERENCE — LONG ACCOUNT. — A decision of great importance, and which will probably be rather surprising, is that of the Court of Appeals in Steck *v.* Colorado Fuel and Iron Co., 142 N.Y. 236; 25 L. R. A. 67, that long accounts in a counter claim, in an action on contract where plaintiff's claim is disputed, will not justify compulsory reference, in view of the provision of the Constitution for "trial by jury in all cases in which it has heretofore been used in the colony of New York," since the practice in the colony permitted a set-off only with plea of payment, which admitted plaintiff's claim, and the provision in the Colonial Act of December 31, 1768, for reference of actions involving a "long account either on one side or the other" was applicable to a counter-claim only when the plaintiff's claim was admitted. In the course of a long and careful opinion Earl, J.. observes: —

"I have examined all the old works on practice, and all the earlier reports, and have found no trace or hint of a practice that would authorize a reference in such a case as this; and since the adoption of the revised statutes, and the introduction of the code practice, I am confident there is no reported decision of any court of this state which sanctions the reference of an action merely because the answer involves a long account, when, upon the cause of action alleged in the complaint, standing by itself, either party could could demand a jury trial, except the decision in the court below in this case, and in the cases where, upon appeals to this court, the decisions of the lower courts were reversed. If it should be asserted that the right of trial by jury had, by the practice and usage of the courts, become curtailed, prior to any of the modern revisions of the Constitution, so as to give the meaning of the guaranty as to jury trial a more limited scope than it had in the Constitution of 1777, I answer that the assertion is unfounded."

Andrews, C. J., and Finch and O'Brien, JJ., dissented, the former writing an elaborate opinion, in which he declares that in six old reported cases a reference was granted not only when the plaintiff's claim was put in issue, but where it was actually litigated on the trial, and he declares that such was the old English practice and that such has been the rule in New Jersey and Kentucky. He also argues that in construing the constitutional provision for jury trial, "the principle which governed the colonial practice permitting compulsory references is to be applied," and that "the principle established by the colonial legislation was that actions on contract involving litigations of long accounts 'on either side' should be referred for trial to referees, to relieve jurors from perplexity, and to prevent the obstruction of justice. This legislative power was not abrogated by the Constitution." And finally that the cases relied on by the majority of the court, viz.: Townsend *v.* Hendricks, 40 How. Pr. 143; Welsh *v.* Darragh, 52 N.Y. 590; and Untermyer *v.* Beinhauer, 105 N.Y. 521, are distinguishable because they are cases either of tort and not of contract, and for that reason not referable, or for damages for breach of contract. In conclusion he says: —

"The rule here contended for is plain, simple, and practical. It is consistent with the Constitution. It is in harmony with the public policy upon which statutes for compulsory references are based. The opposite rule violated the language of all statutes on the subject framed since colonial times. It is based on views so close and critical that they can be comprehended only with difficulty. It puts it in the power of a plaintiff, by exaggerating his own claim, to prevent its admission by the defendant, and thereby defeat a reference of a long account arising on a counter-claim. If the order in this case is reversed, the court will, I think, reverse the practice which has prevailed in the courts of this state without question for more than a hundred years. It is the strongest confirmation of the view that the words 'on either side' mean what they plainly

import, that no suggestion can be found in any of the reports, so far as I can discover, of the limitation now contended for. If a practice prevailed in opposition to the natural import of the words, a trace of it would have been found. There would have been some judge or lawyer who would have queried how this could be. The distinction is between actions of a referable quality, and such as are not referable by their very nature. In the one class the court may compel a reference, if on 'either side' there is a long account; in the other no reference can be compelled however many items of damage there may be. I think the order should be affirmed."

Behold, how certain our laws be!

EXTRADITION — SHOOTING ACROSS STATE BOUNDARY. — A case of first impression is State *v.* Hall, North Carolina Supreme Court, 40 Cent. Law Journ. 148. Defendant, being in North Carolina, fired a shot across the boundary and killed a man in Tennessee. He was tried for the murder in the North Carolina court, but it was held that the Tennessee court alone had jurisdiction (114 N. C. 909). Then the Tennessee authorities tried to extradite him for trial in the Tennessee court, and the North Carolina Court, two judges dissenting, hold that this cannot be done, because as he is deemed to have been in Tennessee at the time of the killing, he is not a fugitive from justice. The reasoning of the Court is substantially complete in the following sentences: —

"To hold that a person who is liable to indictment only by reason of his constructive presence is a fugitive from the justice of a State within whose limits he has never gone since the commission of the offense, involves as great an error as to maintain that one who has stood still, and never ventured within the reach of another, has fled from him to avoid injury. One who has never fled cannot be a fugitive. Jones *v.* Leonard, 50 Iowa, 106; 7 Am. & Eng. Enc. Law, 646, and note 1; *Id.* 647.

The Supreme Court of Alabama, in a case exactly in point (*In re* Mohr, 73 Ala. 503), state the principle applicable here with great clearness and force. The defendant was charged with cheating by false pretences a prosecutor in the State of Pennsylvania, though it was admitted that he had never actually gone within the limits of that State. The Court said: —

"It is clear to our minds that crimes which are not actually, but are only constructively, committed within the jurisdiction of the demanding State, do not fall within the class of cases intended to be embraced by the Constitution or act of Congress. Such at least is the rule unless the criminal afterwards goes into such State and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have fled from a State, in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime." That Court cited to sustain this view, among other authorities, Whart. Cr. Pl. (8th Ed.) 231; Kingsbury's Case, 106 Mass. 223: *Ex parte* Smith, 3 McLean, 121; Fed. Cas. No. 12,968; and Wilcox *v.* Nolze, 34 Ohio St. 520.

It seems to us that we should join the dissenters. If the legal imagination is to be employed to transport the killer to Tennessee, at the time of the killing, in order to enable him to escape responsibility, it may healthfully be exercised in transporting him back in order to prevent his evasion of the penalty. The force of constructive presence in the one case is just as violent and absurd as in the other. If there is any such thing as criminal estoppel it exists here. Shall a man be tolerated in saying, "I was in Tennessee," when tried for murder in North Carolina; and in saying, "I was in North Carolina," when required to answer in Tennessee? If this reasoning is valid, here is a fearful *casus omissus*.

HIGHWAYS — USE OF. — It was recently held, in Jackson *v.* City of Greenville, Mississippi Supreme Court, 16 South. Rep. 282, that an adult person, playing with a dog on the sidewalk of a city street, is not making such a reasonable use of the street as to entitle him to recover damages against the city if he is injured by a defect in such sidewalk. The Court laid stress on the fact that the plaintiff was an adult, and should have "put away childish things." The Court distinguished Varney *v.* Manchester, 58 N. H. 430; 42 Am. Rep. 592, when the plaintiff was held entitled to stand on the sidewalk and view a procession; and Murray *v.* McShane, 52 Maryland, 217; 36 Am. Rep. 367, where the plaintiff was justified in stopping for an instant with his foot on a door-sill to tie his shoe; and Duff *v.* City of Dubuque, 63 Iowa, 171; 50 Am. Rep. 743, where he stopped at a hydrant to get a drink. In City of Chicago *v.* Keefe, 114 Ill. 222; 55 Am. Rep. 860, a child was held warranted in rolling a hoop on a sidewalk; — he was still lawfully "traveling." In New York the courts do not resort to such a quibble, but hold outright that children may lawfully play on the sidewalk; McGuire *v.* Spence, 91 N. Y. 303; "a proposition too plain for comment," McGary *v.* Loomis, 63 N.Y. 104; 20 Am. Rep. 510. The Massachusetts court is peculiarly severe on children — will not allow them to ride on turntables, nor play "old man on the castle" on a plank sidewalk, Blodgett *v.* City of Boston, 8 Allen, 237; nor "tag" on the street, Tighe *v.* City of Lowell, 119 Mass. 472; but it would let a jury have their say about the carelessness of a boy stopping to look at toys in a window, while on his way with his father's dinner, and of an adult driver stopping to pick berries. Hunt *v.* Salem, 121 Mass. 294; Britton *v.* Cunningham, 107 Mass. 347. The

Maine court also would not approve school children's playing and scuffling on the street, although Judge Goodenow (correctly named), dissented, saying: "We must expect of children the habits of children, and that they will be mirthful, joyous and sportive, while regularly on the way, as travelers, to and from school." And the same court would not suffer boyish baseball on the street, McCarthy *v.* Portland, 67 Me. 167; 24 Am. Rep. 23. But these New England cases were under statutes which only required the keeping of the streets safe for "travelers." In Donoho *v.* Vulcan Iron Works, 75 Mo. 401, the court considered that a boy on an errand for his mother might lawfully stop to watch some more fortunate boys playing in a sand bank. A grown-up man, fooling with a dog on the sidewalk, is different, and perhaps it is well enough to discourage such pranks.

DEADLY WEAPON — PIN. — A pin thrust down a baby's throat, thereby killing it, is a "deadly weapon." So say the North Carolina Court, in State *v.* Norwood, 20 Southeast, Rep. 712. The Court said: —

"The question whether an instrument with which a personal injury has been inflicted is a deadly weapon depends, not infrequently, more upon the manner of its use than upon the intrinsic character of the instrument itself (State *v.* Huntley, 91 N.C., 620). We may expect death to ensue from pushing such a pin down the throat of an infant, just as we may look for death or serious bodily harm as a consequence of firing a pistol into a crowd of human beings, or at a particular person."

EXHUMATION OF BODY FOR AUTOPSY. — In Wehle *v.* U. S. M. Acc. Assn., the Superior Court of New York, held (12 N.Y. Law Jour.) that exhumation would not be allowed, although the policy on which the action was brought provided that "any medical adviser of the association shall be permitted to *examine* the person or body of the insured *in respect to any alleged injury or cause of death*, when and as often as he requires. The Court cited Granger's Ins. Co. *v.* Brown, 57 Miss. 308; 34 Am. Rep. 446, and observed: —

"When a body has once been buried, the law, having a proper respect for the dead, a just regard for the sensibilities of the living and for the due preservation of the public health, has jealously guarded the grave against ruthless intrusion. Exhumation has been tolerated only upon consent of the next of kin, for substantial reasons satisfactory to the family and which appealed to the finest instincts of their nature, or upon permission of the proper municipal authority, in extreme cases, to answer the imperative requirements of justice or some urgent public necessity which overruled the apparent impropriety and made the act legal. Dissection is justified only where other and less objectionable means of ascertaining the cause of death fails. Here the death was evidently by drowning; the circumstances clearly demonstrated the fact, and the coroner's jury so found. An autopsy after burial would have looked like a handing over of the body, as under suspicion, for mercenary ends, for experimental, not scientific or legal purposes; would have been considered indecent, shocking to the sensibilities of the relatives, and an act "at the bare idea of which nature revolted" (King *v.* Lynn, 2 T. R., 733). It was unnecessary, and nothing that appears in the case would justify it. It would therefore have been sacrilege to have disturbed the dead man's grave or mutilated his remains, which, by every notion of propriety, should be allowed to rest in peace."

DAMAGES — PROSPECTIVE CHILD. — It has been lately held that no recovery can be had for the loss of services and society of a prospective child, through injuries to the mother resulting in miscarriage. Butler *v.* Manhattan Ry. Co. 14 N.Y. 417; Tunnicliffe *v.* Bay C. C. Ry. Co., Minnesota Supreme Court, 61 Northw. Rep. 11. The New York Court said: —

"Where the inquiry relates to the value of the life of a child, cut off in infancy, there are some material facts, capable of proof, which may be placed before the jury and which afford some aid in estimating the pecuniary loss suffered by parents or other relatives. The age and sex of the infant may be proved; its mental and physical condition; its bodily strength, and, generally, whether there was the apparent promise of a continued or useful life, or the contrary. The speculation which, in the present case, the jury were permitted to make had not even these safeguards, slight as they are. They were allowed to estimate the pecuniary interest which a husband had in the chance that an embryo, not yet quickened into life, would become a living child. The sex could not be known, and if born alive the infant might have been destitute of some faculty or so physically infirm as to have made it a helpless charge. There are no elements whatever upon which a jury could base any conclusion that a pecuniary injury had been suffered by the plaintiff from the loss of the unborn child, and this inquiry should have been excluded from the consideration of the jury as too remote and speculative to form an element in the recovery."

The Minnesota Court cited Bovee *v.* Town of Danville, 53 Vermont, 183, where the Court would not even allow for the mother's grief, observing: —

"If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If like Rachel she wept for her children, and would not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented."

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

MONTGOMERY, ALA., March 6, 1895.

The Editor of the "Green Bag,"
Boston, Mass.

DEAR SIR,— I have just read the story of the condemned blacksmith in the "Facetiae" printed in the current number of your paper.

It recalls a story that was told here on a pettifogging lawyer who was in the practice when I first came to the bar. The lawyer's name was Dalton Williams, and he was principally distinguished because he was never known to have a book, an office or the price of a meal, and nobody had ever seen him do any work.

It seems that a valuable slave had been convicted of a capital offence, was sentenced to death, and the day of execution had come. In those days executions took place in public, and, as usual, a very large crowd had gathered to witness this one. While the crowd was waiting for the proceedings to commence one negro was heard to say to another: "I wonder what dem white folks want to hang dat nigger fur? Dat nigger is wuth eighteen hundred dollars of any man's money. Why doan't dey go and hang Mas' Dalt Williams? He ain't wuth nuthing to nobody."

I don't vouch for the truth of the story, but it was told on "Mas' Dalt" with great effect and always had the effect of putting him to immediate flight, and of depriving him of the coveted drink which he was frequently trying to secure from any gathering of lawyers, basing his claims on his connection with the "profession."

Yours most truly,

LEGAL ANTIQUITIES.

"WHEN I was Chancellor," says Lord Bacon, "I told Gondomar, the Spanish Ambassador, that I would willingly forbear the honor to get rid of the burthen; that I had always a desire to lead a private life." Gondomar answered that he would tell me a tale: "My lord, there was once an old rat that would needs leave the world; he acquainted the young rats that he would retire into his hole, and spend his days in solitude, and commanded them to respect his philosophical seclusion. They forbore two or three days; at last, one hardier than his fellows ventured in to see how he did; he entered and found him sitting in the midst of a rich Parmesan cheese!"

FACETIÆ.

Magistrate (to Witness). Why didn't you go to the help of the defendant in the fight?

Witness. I didn't know which one of them was going to be the defendant.

MR. STORY, the sculptor, who began life as a lawyer, tells a good story which illustrates the fact that the emphasis which punctuates has as much to do with determining the sense of a sentence as the meaning of the words.

Once, when he was called upon to defend a woman accused of murdering her husband, he adduced as one of the proofs of her innocence the fact of her having attended him on his deathbed, and said to him, when he was dying: "Good-bye, George!"

The counsel for the plaintiff declared that ought rather to be taken as a proof of her guilt, and that the words she used were: "Good, by George!"

A LAWYER who makes a specialty of patent business, no matter just where his office is located, was called to the further West in a case involving a mortgage on a farm. The preliminary hearing was before an old-fashioned justice of the peace, who had no high regard for the ways of men from the city. At some point in the case the magistrate put in a few remarks, and the visiting lawyer

collided with him. The discussion grew warm, and at last the magistrate, forgetting his dignity and his position, became personal.

"Who are you, anyway?" he blurted out.

"Well," replied the lawyer, "I'm an attorney."

"P'raps you are, but I never heard one talk like you do. What kind of a one are you?"

"I'm a patent attorney."

The magistrate rubbed his chin for thought.

"Well, all I've got to say is," he said slowly, "that when the patent expires, I don't believe you can ever get it renewed again."

MRS. SIMKINS had just heard that her husband had been called upon to serve on a jury.

"John Simkins on a criminal jury!" exclaimed Mrs. Simkins. "Well, all I can say is that I congratulate the criminals."

"Why, Mrs. Simkins; is your husband a very merciful man?"

"Merciful! Why, John Simkins wouldn't hang a pictur', unless he was jest made to!"

THERE used to be a funny old lawyer in central Maine, whose learning was not profound nor his wits sharp. Tradition says that an officer, who had occasion to arrest him for some offence, used a quit-claim deed for the purpose — not having a regular warrant. This experience was supposed to have sharpened the lawyer's ideas somewhat, and added to his knowledge, for afterwards a brother attorney said: "I don't believe Brother B—— could be arrested again on a quit-claim deed. He's got too sharp for that." Then after a moment's silent reflection he added: "But I think he might still be arrested on a warrantee deed."

THE late Mr. John Wilder May, while district attorney for Suffolk County, Massachusetts, wrote and published a treatise on the law of insurance, and some time afterwards, while contemplating publishing a second volume, happened to meet the late Mr. George Sinnott, and said to him: "I suppose, Mr. Sinnott, you know my book on insurance." "Oh, yes," said Sinnott, "I know it." "I call it," continued May, "'May on Insurance,' but I am about to publish a second volume, and it struck me that rather than call the two volumes 'May on Insurance,' it would be better to change the title of the first, and call it the first of May, and the second the second of May; how does it strike you?" "I don't know anything about your second volume," said Sinnott, "but it strikes me you had better call the first one the first of April."

NOTES.

IT has always been realized that there are many perils to be encountered in the ball-room, and many a deep wound has been inflicted there. But happily the part affected is usually the heart, and that, as Josh Billings has said, is, next to the gizzard, the toughest bit of meat in the whole body, and has great recuperative capacity. Perhaps it is partly for that reason the law does not regard such an injury as *per se* affording any cause of action. Sometimes, however, a limb is broken, and then, that being an injury of which the law does take cognizance, relief may be sought in the courts against anyone who has been guilty of any neglect or breach of duty which caused it. Such a case is in fact mentioned in the *Argus* of last Saturday. It is there stated that a young lady of Newark in Nottinghamshire, who broke her leg at a dance, has brought an action against her partner on the ground that it happened owing to his clumsiness. No particulars are given, and we are left to conjecture whether the accident happened in the waltz, barn dance, or kitchen lancers. It is not even stated what defense the partner intends to rely on, but many suggest themselves. The young lady may have got tied up in her train, owing to her own carelessness or negligence, or she may have been a "hard-mouthed stumbling brute," as a well-known English M.F.H. is said to have once described a partner who fell with him during a dance. It will be interesting to hear how the case goes, but meanwhile it may be instructive to consider what obligation a man incurs by asking a girl to dance. He does not, it is submitted, undertake to convey her round the room a number of times and then to deliver her again to her chaperone in as good order and condition as he received her, the Act of God and of the Queen's enemies excepted. In fact, though it may seem ungallant to say so, there is no consideration for his incurring any special obligations with regard to her, beyond what he owes to her from the fact of her having put herself to a certain extent under his protection and control at his invitation. It is submitted therefore that at most his liabilities are those of a gratuitous bailee, or of a man who offers a friend a ride in his buggy, and that he is liable only for gross negligence. Giblin *v.* McMullen, L.R. 2 P.C. 317; Moffat *v.* Bateman, L.R. 3 P.C.

115. The matter may be looked at from another point of view. It is possible to regard the man's request as an offer of himself to the young lady for the purpose of being utilized as a partner for a dance. The question then arises whether there is sufficient consideration moving from her to him to raise the implied warranty that he is reasonably fit for the purpose for which he is required. But even if this point should be decided against the man, he can go to the jury on the question whether she did not voluntarily take the risk of his fitness, not relying on any implied warranty at all. These questions were very fully gone into in the somewhat analogous case of the bailment of a cab-horse. Fowler *v.* Lock, L.R. 7 C.P. 272; 9 C.P. 751, n.; 10 C.P. 90. We are inclined to think that the man should succeed on the question of fact, and that the young lady ought not to be allowed to rely on any implied warranty of fitness. It is to be hoped, however, that the Newark case is the last case of the kind we shall hear of, and it will be recognized in future, as it has been always in the past, that the only obligation imposed on a man in a ball-room is that he should behave as a gentleman. If anyone fails in this respect, there have always been found very effectual means of dealing with him outside the law courts.—*Australian Law Times.*

In a Cattaraugus (N.Y.) tar-and-feathers case the other day the plaintiff's lawyer described his client's experience as follows: "And thereupon some persons then and there assembled applied a quantity of coal-tar to the person of the said Blowers, and after applying the said tar to various parts of his person . . . afterward decorated, beautified and adorned the person of the said Blowers with a large quantity of hen's feathers, worth to the value of $1, and after, and in other ways, and by other Christian and legitimate methods, remonstrating with the said Blowers for his evil practices, invited and urged the said Blowers to depart from the town of Humphrey, which said Blowers then and there proceeded to do with great speed, scattering hens' feathers and dropping coal-tar and profanity at every jump."

In one of the Black-Letter Year Books it appears that someone had been so unkind as to call a preacher a fool, with a good theological prefix to the fool. The preacher brought suit for slander and the defendant justified, that what he said was not slander but gospel truth, and he showed that the words spoken could not hurt the clergyman, "for that it was a maxim of the common law" that "a parson might be a good parson and still be a fool." The court so held, but said that had the words been spoken of a lawyer or doctor it would have been otherwise, or, as the reporter of this case puts it in his early Norman English: "Parce que on peut estre bon parson et grand fou; d'un attorney aliter."

One of the learned justices of the Maine Supreme Court, than whom no man better knows how to appreciate a really amusing thing, was holding court at Ellsworth and, according to honored custom, called in a local clergyman to open the session with a supplication to heaven. This worthy gentleman came, and after a chat with the justice proceeded to address the giver of all good and perfect things thus: "Almighty God; we beseech thee to bestow upon the presiding justice the wisdom which he so greatly needs!" The learned recipient of the blessing never heard the rest of that remarkable prayer, which, in truth, was cut short by disorder in the court, strongly resembling half-smothered laughter from the direction of the clerk's desk. It is said that the same judge once opened court after a prayer which began this way: "Oh, Lord, we pray thee to overrule the decisions of the court to thine own honor and glory."

When Judge Parsons was a practising lawyer he was once employed to plead two cases in court which were precisely alike, but in one he was engaged for the plaintiff, in the other for the defendant, says the "Lewiston (Me.) Journal." It happened that both cases were tried the same day. He spoke for half an hour to the first jury; the case was given to the jurors, and they had retired. When he appeared before the second jury he made use of very different arguments from those employed by him before, of which the court took notice, reminding him that he seemed to have changed his tune, and repeated to him what he had said a few minutes before. Mr. Parsons fixed his keen eye upon the judge and replied, "May it please your honor, I might have been wrong half an hour ago, but now I know I am right." He proceeded, and when the juries re-

turned it was found he had gained a verdict in both cases.

In a Georgia case, the judge giving the opinion says that "Montgomery C. J. was providentially prevented from presiding in this case." This may have been a whack at Montgomery C. J. or at the lawyer who argued it before the weary judge. This isn't quite as bad, however, as the theological slip of a Nebraska judge in a Supreme Court case, in which he holds that "the law presumes against the carrier unless he shows that it was done by the king's enemies or by such an act of God as could not happen by the intervention of man." His opinion of the relative positions of God and man recalls the story of the Adams County justice who had occasion to punish a party for gross profanity used in open court. "For taking the name of Almighty God in vain," said this worthy successor of Mr. Justice Shallow, "I shall fine you ten dollars, and for offending the dignity of this court you will pay a fine of fifty dollars and costs or go to jail."

LITERARY NOTES.

A paper that will attract a wide circle of readers is Frances E. Willard's strong plea for "Scientific Temperance Instruction in the Public Schools" in the Arena for March. The world-wide reputation of the famous temperance and woman's advocate insures a great audience for everything she writes, and her opinions always command respect.

The two chief characteristics of science — the thoroughgoing quality of its research and the wonderful progress that it gives to the arts — are both prominent in The Popular Science Monthly for March. The opening article is a vivid illustrated description of "The Birth of a Sicilian Volcano," by Prof. A. S. Packard. In a fully illustrated article on "Copper, Steel, and Bank-note Engraving," the various divisions of the engraver's art, and some of the measures taken to prevent counterfeiting of bank bills, are clearly explained by C. W. Dickinson, Jr. Mr. Bela Hubbard undertakes to point out "The Lesson of the Forest Fires," a terrible feature of which in 1894 was the loss of life involved. In an article on "Scientific Method in Board Schools," Prof. H. E. Armstrong, F. R. S., makes it plain that what scientists are calling for in education is the teaching of the *method*, not the *facts* of science. "The Mother as a Power for Woman's Advancement" is a wholesome and feeling view of the woman question, by Mrs. Burton Smith, an earnest Southern woman.

The Atlantic Monthly for March contains the opening chapters of a striking serial entitled "The Seats of the Mighty," by Gilbert Parker. It deals with the life and adventures of a young captain in a Virginia regiment, afterwards of Amherst's regiment at the time of the fall of Quebec. It will run through several numbers, and is one of this popular author's most powerful stories. Fiction is further represented by the first installment of a two-part story by Grace Howard Peirce, entitled "Gridou's Pity," and additional chapters from Mrs. Ward's serial, "A Singular Life." Two papers of importance are "Immigration" and "Naturalization," by H. Sidney Everett, and the second of Mr. J. M. Ludlow's papers, "Some Words on the Ethics of Co-operative Production.

Elbridge T. Gerry sets forth the reasons why in his opinion capital punishment should be revived, in an article entitled "Must We Have The Cat-o-nine-tails?" which appears in the March number of the North American Review. Among the short articles published in this number are "How to Prevent Strikes and Lockouts," by Stockton Bates; "The Political Importance of Hawaii," by Lieut. J. A. Harman, U. S. A., "Past Extra Sessions," by Charles M. Harvey; "The Danger of the Federal Judiciary," by Henry Wollman, and "Banks for the People," by Lee J. Vance.

In variety and significance of theme, wealth of illustrations and eminence of contributors, McClure's Magazine for March will be found a very notable number. Such names as Wm. E. Gladstone, A. Conan Doyle, and Stanley J. Weyman are sufficient to establish the reputation of any publication, and when to these are joined many other celebrities, one may be sure of finding a tempting feast provided for him. The number is by far the best yet issued.

One of the most important projects ever undertaken by Scribner's Magazine begins in the March number with the first installment of President E. Benjamin Andrews's dramatic narrative, "A History of the Last Quarter-Century in the United States." The first installment deals with the United States at

the close of Reconstruction, and among the incidents described are the Chicago Fire, the Tweed Ring, the Rise of the Liberal Party, the Ku-Klux Klan, Black Friday and the Treaty of Washington.

THE complete novel in the March issue of LIPPINCOTT'S is "A Tame Surrender," by Capt. Charles King. Departing from this author's usual field, the purely military, it deals with the Chicago strike, the riots and their suppression, and the loves of a United States lieutenant and a high-minded young lady who works a typewriter. It is her "tame surrender," after long resistance, which gives the tale its title.

THE CENTURY'S "Life of Napoleon" has caught the popular fancy in a most surprising way, and copies of the magazine have been hard to get unless purchased within a few days of issue. "With each installment," says the "Critic" of March 2, "the value and thoroughness of the work becomes more manifest." The present revival of interest in Napoleon has been only a lucky coincidence for THE CENTURY, as Professor Sloane's history was projected, and its publication in 1895 decided upon, long before there was, even in France, any unusual interest in the character of Bonaparte.

NO question is more interesting or more important to the future of the human race than that of heredity, which forms the subject of an article by St. George Mivart in the March HARPER'S MAGAZINE. The writer opposes the Darwinian theory of natural selection, of which Professor Weismann is the chief advocate, and adopts the theory of Darwin's predecessor, Lamarck, that living organisms are changed by their surroundings, and that they transmit to their offspring the characteristics so acquired. This theory, Mr. Mivart contends, settles the whole question.

BOOK NOTICES.

LAW.

HALF A CENTURY WITH JUDGES AND LAWYERS. By JOSEPH A. WILLARD, clerk of the Superior Court of Massachusetts. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

No man has more friends among the legal profession than the genial clerk of the Superior Court, and no one has had a more intimate acquaintance with the Bench and Bar of Massachusetts for the past fifty years than he. This book of reminiscences and anecdotes therefore possesses an unusual attraction for the legal fraternity in New England, and will be read with almost equal zest by every lawyer in the country. It is written in an easy conversational style, and Mr. Willard evidently knows how to tell, as well as appreciate, a good story. Some of the anecdotes have been heard before, but they bear repeating, while many of them are entirely new. We wish we had time and space to give our readers a taste of some of the good things the book contains, but they will find a perfect feast provided for them by Brother Willard, of which they should partake at the earliest opportunity.

COMMENTARIES ON THE LAW OF INSURANCE. Including life, fire, marine, accident and casualty, and guaranty insurance in every form as determined by the courts and statutes of England and the United States. By CHARLES FISK BEACH, JR., of the New York Bar. Houghton, Mifflin & Co., Boston and New York, 1895. Two vols. Law sheep. $12.00.

The scope of this work covers almost every conceivable question likely to arise under the law of insurance. Mr. Beach appears to have prepared this treatise with more than ordinary care, and gives us a very clear and concise statement of the present law of insurance. So far as we can judge from such examination as we have given the work, it is admirably adapted to the practitioner's needs. Considerable space is given to the discussion of disputed questions by the courts, and to an attempt to differentiate and distinguish cases apparently in conflict.

HANDBOOK OF EQUITY JURISPRUDENCE. By NORMAN FETTER. West Publishing Co., St. Paul, Minn., 1895. Law sheep. $3.75.

This is the latest addition to the "Hornbook Series" published by the West Publishing Co. for student's use. Mr. Fetter has succeeded in making a dry subject attractive and at the same time giving a very lucid statement of the principles which underlie and govern this important branch of the law. Students will find the book a valuable assistant in their study.

RULES OF EVIDENCE as Prescribed by the Common Law for the Trial of Actions and Proceedings. By GEORGE W. BRADNER. Callaghan & Co., Chicago, 1895. Law sheep. $5.00 *net.*

In this treatise Mr. Bradner demonstrates the possibility of treating even such a broad subject as

evidence within the reasonable limit of a single volume in such a manner as to give to students, for whom the work is especially designed, a clear understanding of its principles and rules. Mr. Bradner has chosen to cite meagerly from the older cases, but he has given us the latest cases to be found, and in this respect the work possesses a value not to be found in the older treatises. The arrangement is excellent, and practitioners as well as students will find this book of much aid and assistance.

HANDBOOK OF AMERICAN CONSTITUTIONAL LAW. By HENRY CAMPBELL BLACK. West Publishing Co., St. Paul, 1895. Law sheep. $3.75.

This is an admirable exposition of the leading principles and settled doctrines of American constitutional law, and will be valuable not only to the legal student, but to all interested in the subject. The learned author has carefully arranged these principles in the form of a series of brief rules which are explained and amplified in the subsidiary text, and supported by the citation of pertinent authorities. The book will commend itself to all who examine it.

MISCELLANEOUS.

OUT OF THE EAST. Reveries and Studies in New Japan. By LAFCADIO HEARN. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

These sketches give one an admirable idea of Japanese life and character. The closer one is brought in contact with this remarkable people, the greater seems to become one's respect and admiration for them, and Mr. Hearn writes with an evident love for both the country and its inhabitants. His style is charming, and every page is pervaded with the soft dreamy atmosphere of the "Orient." The chief characteristics of the Japanese, an almost childlike simplicity of thought and life, and a deep sense of filial duty, furnish an object-lesson which western nations might study with profit. The book is in every way one of the most fascinating we have read for a long time.

STORIES OF THE FOOT-HILLS. By MARGARET COLLIER GRAHAM. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

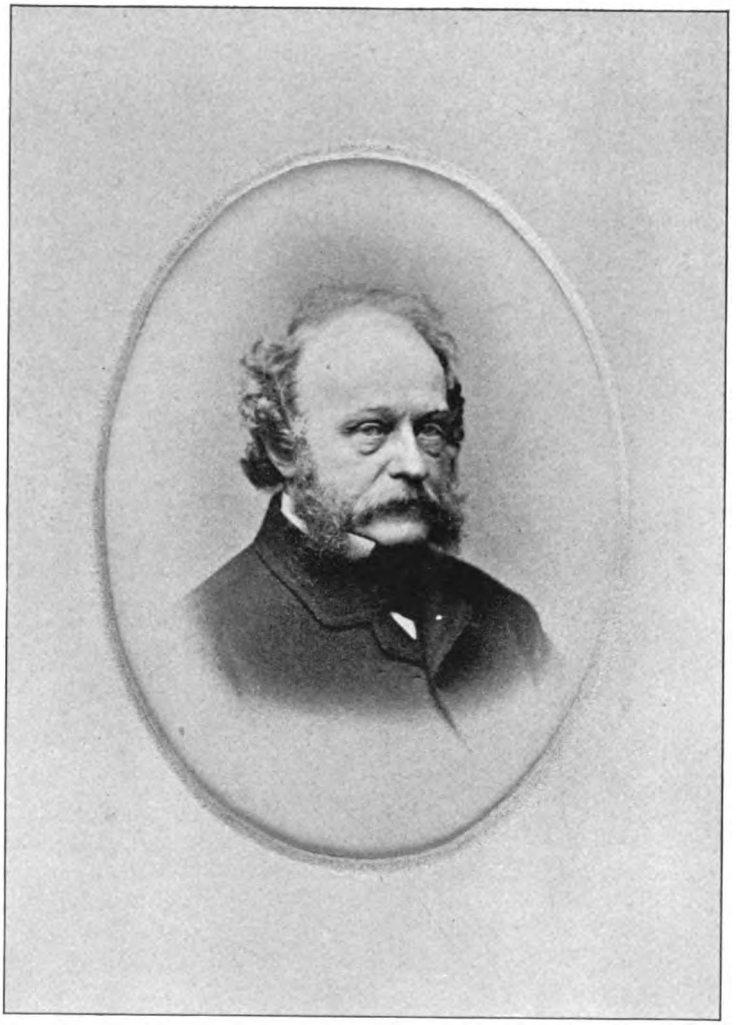
Most of the stories which make up the contents of this volume have, we believe, already appeared in the "Atlantic," but in their present attractive form they are more readable than ever. Mrs. Graham is a remarkable delineator of character, and her stories are charmingly fresh and original. It is a pity that she does not favor us oftener with the products of her pen, for she is certainly one of the most promising of the writers of to-day.

THE RIGHT HONORABLE W. E. GLADSTONE. A Study from Life. By HENRY W. LUCY. Roberts Brothers, Boston, 1895. Cloth. $1.25.

This is a most delightful book, one which makes the "grand old man" appear even "grander" than ever before. Mr. Lucy has not given us a biography of Mr. Gladstone, but has been content to rapidly sketch, in chronological order, the main course of his phenomenally busy life. The events of his political career are portrayed in a most interesting manner, giving the reader a clear insight into the remarkable character of this wonderful man. The book is one which American readers will peruse with eminent satisfaction.

AS OTHERS SAW HIM. A Retrospect, A.D. 54. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

This purports to be a description of the principal events in the life of Christ as seen through Jewish eyes, by one who finally voted for his death in the council of twenty-three. The book is interestingly written and vividly describes the scenes so familiar to us all. A strong argument is made from the Jewish standpoint.



The Green Bag.

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JOHN VAN BUREN.

BY A. OAKEY HALL.

"A man so various that he seemed to be
Not one, but all mankind's epitome."
Dryden's "Absalom."

IT was the misfortune of Mr. Van Buren's long legal career that his particular resultant fame became more or less obscured by his witty quality, his social popularity, and his aptitude for politics. The last element was inherited from his father, Martin Van Buren, whom his contemporaries of all parties agreed in denominating the most able politician that New York State — always the school of remarkable politicians — ever produced. In considering John Van Buren as advocate and counsellor it would be difficult, however, to segregate his legal from his social and political fame. His career must be properly viewed in its triune bearings.

He was native of a New York county — Columbia — which has given to the Bar and Bench of the Empire State more jurists of renown than any other of its rural counties. In this connection may be recalled from the top of the list the names of Edward Livingston, the three Vanderpoels, John H. Reynolds, John W. Edmonds, Benjamin F. Butler (of Jackson's cabinet), Ambrose L. Jordan, Theodore Miller, T. Bailey Myers and Samuel J. Tilden. John Van Buren's life extended from his birth in February, 1810, to his death on shipboard in October, 1866. His early education was had at the still noted Kinderhook Academy, and from thence he entered Yale College and took baccalaureate in 1828. One of his classmates whom I have met referred to Van Buren's college popularity, his remarkable memory, and his powers as a debater, as alternating logic and wit with a precocity that foretold a brilliant future. He was a notable among students; for professors and collegians recognized him as the son of a father who had successively become Governor of the State, and its Federal Senator while manipulating the great Democratic "machine" known then, and to subsequent history, as the Albany Regency. Young Van Buren ever mourned the loss of his mother, who had died when he was but nine years old; and in after-life he often regretted to intimate friends that no feminine surroundings had tinctured his progress towards manhood. Upon graduating he entered the law office of Benjamin F. Butler, then at work as a reviser of the New York statutes, and who had an office in Albany where he was a political power, and which office he soon vacated to become Attorney-General of the United States. The legal memory of this Benjamin F. Butler, who antedated his Massachusetts namesake by many years, is kept green by the illustrious presence at the New York Bar of his son and personal replica, Wm. Allen Butler. John Van Buren proved of clerical service to his preceptor in the preparation of reviser's notes, and in after-life he often referred to his schooling at Albany in statute-making. He proved to be a diligent student, and an acute observer of his legal surroundings and of court procedures; for Albany was the headquarters of the Supreme Court and of the appellate Court of Errors.

His legal studies were, however, interrupted by the appointment of his father as Minister to the British Court and his own selection as secretary to the legation: yet not until by favor he had been admitted to the bar. Perhaps it would be slightly inaccurate to say that in consequence of this translation to London his legal studies were interrupted. The young lawyer who mixes much and variously with men and manners is doubtless continuing his studies — acquiring the tact and knowledge of human nature so necessary for success at *nisi prius*. He passed part of the years 1831 and 1832 in London, but through the casting vote of Vice-President Calhoun the Senate rejected the elder Van Buren as Minister, when son and father returned to Albany. This rejection, remarks Benton in his volume entitled "Thirty Years in the United States Senate," popularized Martin Van Buren at the north, and practically led to his succeeding the jealous and revengeful Calhoun as Vice-President and to his afterwards becoming President of the United States. The incident of rejection embittered John Van Buren, and made him an Anti-Calhounist in afterlife and a foe to the political South. It had an undoubted influence upon his joining in 1846 the Free Soil faction of the New York State Democracy — known in partisan slang as "Softs," and as opposed to the "Hards," who supported the claims of the South to non-interference with slavery in States or Territories. For John Van Buren, although like his father usually wearing an impassive demeanor and face, and usually credited with being cold in feeling, was really emotional, and carried prejudices as well as sympathies to occasional extremes. While resident in London, he had mixed with all its circles, and became especially popular from his winning ways in fashionable society. He was a frequent visitor to old Westminster Hall, there practically continuing law studies by observing the play of London's Bar or Bench. And as son of the American Minister he of course had free entrance to courtrooms and the two Houses of Parliament. Thus he enjoyed what President Eliot of Harvard once called "education by observation."

Throughout life, after his return from London, John Van Buren bore the popular title of "Prince." At a court ball he had danced with the then Princess Victoria, who seemed to enjoy his attentions. An account of these appeared in a letter written by a traveling American correspondent to his newspaper, and duly published. The daily *Courier and Enquirer* of New York City — an organ of the Whig party and Anti-Van Buren in tone — editorially commented on the letter in a vein of badinage, indicating how the son of a great Democrat could assume aristocratic pretensions. The newspaper leader denominated him an American Prince flirting with the British Princess and future Queen. Other newspapers of the Whig stripe, and immediate political gossip, caught at the pleasantry; and from that time the phrase Prince John Van Buren became as much linked with his personality as was the word "Beau" with the clever West End dandy whose too familiar "Wales, ring the bell" had lost him the friendship and prestige of royal association, and finally consigned him to exile at Boulogne-sur-mer on the French coast, and to appropriate application in his last sad years of the famous line, "See Swift expire, a driveller and a show."

Thenceforth until his death the newspaper and popular voice generally referred to John Van Buren, whenever occasion for the reference arose, as "Prince John." And during his father's eight years' residence in Washington as Vice-President, and next as President, the belles and matrons of its then brilliant society eagerly sought for the distinction of dancing with the American Prince who had clasped the waist of Britain's Queen in the giddy waltz. He is represented as having been at first restive under

the appellation, but I have often heard his political and legal compeers familiarly greet him with a "How are you, Prince?" Although much sought after in the matrimonial markets of Albany, New York, and Washington, he finally made a distinctive love match in becoming the husband of the daughter of an Albany judge who had passed her maidenhood "far from the madding world's ignoble strife," and to whose alluring memory he remained faithful as her widower all of the years succeeding her untimely death.

He practically rejoined the Albany Bar on his father's retirement from the Presidency, and entered upon a prominent legal career. At that time Albany sustained to the rest of the State of New York the juridical relation which London holds to England as the capital wherein appeals from *nisi prius* are heard, and where reside agents for lawyers practising at interior towns or cities. He was, therefore, extensively "briefed" before the Court of Errors, as Wendell's reports show. At that time he was about thirty-five years of age, and possessed every physical advantage and charm which can grace the orator. He was tall, and of rosy complexion, with magnetic eyes, a graceful poise, and a voice that could at will and in accordant effect drop to the social and confidential purr, or rise to the alto in vehement denunciation, or use the basso of objurgation or recrimination. I once heard him before the United States Court opposed by Rufus Choate, while I was a law student; and it was difficult to decide whose tones of the two were the most flexible or melodious. Each possessed equal flow of Saxon diction, and each a natural animation of manner. Perhaps Mr. Van Buren was the more logical, and Mr. Choate the more persuasive. But persuasion attached to the former's powers before a jury early in his career.

Albany County and two adjacent counties lapsed into the throes of organized rebellion against legal procedures that were instituted by farm landlords against tenants in the matter of evictions and non-payments of rents. Feudal incidents appertained to tenures that were founded in colonial times, and sought to be continued under republican government. Some tenants resisted — much as is now the case in Ireland — upon strictly legal incidents; but their great majority fought the landlords out of sheer brute resistance and in hopes to escape paying rent at all; and these fought, not only with forms of law, but with political weapons. The contest has passed into the law reports, and into the political history of New York, under the name of "the Anti-Rent War." Anti-renters finally formed a political party, and elected local prosecutors, constables, sheriffs, and even, in time, selected judges and panels of jurors. John Van Buren was early retained as counsel by the landlord — or as it was popularly termed, the "patroon" — interest, and for several years he actively engaged before juries and appellate courts in proceedings against the anti-renters. "Ah!" sometimes exclaimed a few of the cynical and demagogical, "Prince John is displaying the aristocratic sympathies that he acquired in London." In his legal conflicts similar expressions often taunted him, but he repelled them with inexhaustible humor and wit; for he was ever master of repartee, and it was always proverbial advice to his antagonist: "Don't interrupt Van Buren with sidewise parentheses, for his retorts will put you at a disadvantage."

Mr. Van Buren possessed three qualities that are regarded as inestimable to the advocate — retentive memory not only of ideas but verbally accurate, and quickness of apprehension with readiness of speech on the occasion sudden. In those Anti-rent conflicts he always confronted a very strong bar, for the combined tenants claimed Parnells in the legislature, and received large subscriptions of money towards bettering their organization and objects. The shrewdest

attorneys and astutest counsellors were employed for the league of tenants. Sheriffs armed with writs would be attacked and beaten off on the highways. It was at one time almost impossible to serve process without involving physical combat. The tenants active in opposing the law were usually disguised as Indians, and used among themselves false names, and thereby escaped identification whenever the strong arm of the criminal court was raised against them. Mr. Van Buren was then as always fertile in intellectual resources, and these were adroitly used by him in his litigations for the landlords. His successes excited the attention of party leaders at a time when the excesses of the tenantry seemed to culminate in social chaos. The legislature — at that time exclusively clothed with the power of choosing State officers — selected him (A.D. 1845) as Attorney-General, and thus he became official guardian of the landed interests and the stated chief prosecutor of the rebellious tenants. In that capacity he was early called upon to prosecute an indictment against a notorious Anti-renter for felonious action toward officers of the law. The accused was known in the league by his nickname-alias of Big Thunder, and under that alias as well as by his true name as a farmer was placed on trial before a judge who was one of Attorney-General Van Buren's intimate friends, political as well as in private. During the trial an altercation arose between the Attorney-General and the opposing counsel, who was of eminence. The latter, stung by some sarcastic observation from Mr. Van Buren — and I may digressively remark that generally the man of wit is master of sarcasm — retorted with a blow, which the Attorney-General countered. The Judge felt that he must notice the contempt, yet appeared disposed to favorably regard the provocation given to Mr. Van Buren. The latter, hearing thereof, privately sought the Judge during an adjournment and said substantially: "If you let me off our opposite party will attack you, and say it was an act of partial friendship. Send me to prison for a few hours, while you fine the other fellow; but be sure to first humiliate him with a lecture. Besides, judge, I hit him a 'Big Thunder' of a blow; and my pugilism was not, at all events, in contempt." The reason for the sentences in regard to the contempt that were given in accordance with this suggestion was not then known; although in after years the judge freely narrated it; and the public were disposed at the time to harshly criticise him because sympathy leaned against the agressor. To the latter, however, a professional blow was interposed from the jurors, who convicted his client. During the trial it transpired that there was a perfect tribal organization for resistance against officers of the law, scouts and videttes being posted to announce any approach of a sheriff with process by the shrill blowing of a horn. During the taking of evidence the Attorney-General wrote and handed to his junior counsel — afterwards my partner, the late Aaron J. Vanderpoel — a doggerel verse. Negro minstrelsy was then greatly in vogue. and the ballad of its day in popular keeping was entitled "Out of the way, ole Dan Tucker, you're too late to come to supper." Parodying it Mr. Van Buren wrote: —

> "High on the rocks ranged the Indian crew,
> On his horn Big Thunder loudly blew:
> 'Git out of the way, Sheriff Tucker,
> You're too late to spoil our supper.'"

When it is added that the name of the Deputy was that of the hero of the song parodied, the witty appositeness can be seen. The anecdote will serve to illustrate the boyishness — may I punningly add buoyancy — that so often characterized Mr. Van Buren's mood, — a mood often appertaining to Daniel Webster, according to the well-known published anecdotes of him from his faithful henchman, Peter Harvey. "No man can be called truly great," observes Bulwer in one of his Caxtoniana, "unless he can

unbend at times like the well-seasoned ashen bow of our ancestors."

Mr. Van Buren was removed from office as Attorney-General by the operation of the State Constitution of 1846 that made it elective; and he then (1847) removed to New York City. He had been requested to stand for delegate to that Constitution, but had declined; for he was averse to detail, and in his profession always imposed mere details upon the attorneys associated with him. For that reason he several times declined offers to become a legislator or congressman or candidate for the Federal Senate. Nevertheless he left his impress on that Constitution, for he was made ancillary draftsman, by reason of his experience in anti-rent litigations, of one provision prohibiting assemblages of disguised men, and of another limiting agricultural leases to a short specified term of twelve years — thereby destroying the long leases and semi-feudal tenures that had in operation caused the anti-rent troubles. The State reports of Nicholas Hill and Hiram Denio present many arguments, recitals of facts, and decisions regarding those disturbances.

Arrived in New York, Mr. Van Buren formed a legal partnership with Hamilton W. Robinson, who was afterwards a judicial comrade with Chief-Justice Charles P. Daly on the bench of the Common Pleas. Mr. Van Buren could not have selected a more fitting associate. His own brilliancy, impulse, and tendency towards what has been denominated the pyrotechnics of a *nisi prius* lawyer became excellently tempered with the calmness and learning that accompanied Mr. Robinson wherever he trod legal paths, and were assisted by the latter's patience and addiction to detail. "Of course you will be beaten," was a remark I once overheard addressed to a legal adversary of that firm; "the question is an open and riskful one, and you are to contend with one of Robinson's labyrinthine briefs fortified by Van Buren's adroitness, persuasive powers, magnetic intercourse, and grand oratory." The observation implied a just eulogy of both Robinson and Van Buren. The texture of the former's legal mind can be well estimated by inspecting the headnotes and marginals of Robinson's reports or his own incisive opinions.

The legal firm even at starting obtained excellent business, but Mr. Van Buren became mainly employed by outside attorneys. His first *cause celèbre* in New York City arose when he was employed by Edwin Forrest, the actor, in his notable suit against his wife for divorce: wherein he named famous co-respondents, and among these the poet, N. P. Willis, and a famous British military officer. Mrs. Forrest, under the guidance of Charles O'Conor, who united in his own person the brilliancy and adroitness of Van Buren to that learning and aptness for research and patience in detail which characterized Robinson, retaliated with a cross suit, naming especially as co-respondent Miss Josephine Clifton, a popular actress of the period, and who had traveled with the actor as his leading lady and dramatic support. The trial proceeded, while popular prejudice was operating against Mr. Van Buren's client on account of his supposed engendering of the Astor Place riot that was directed in opposition to his rival, Macready; and while newspaper sympathy was with co-respondent Willis, and naturally with the lady. So far as the American preliminary of trial by newspaper was concerned, popular verdict had been already rendered against Forrest before the actual jury trial began. Thus Mr. Van Buren, on entering upon combat for client, and against the new issue that demanded a cross decree which at all events neutralized the plaintiff's action, was heavily handicapped. To that aspect was added a presiding judge — Thomas J. Oakley, one of the greatest jurists New York State ever honored, yet one who insensibly to himself could be swayed by prejudice or sympathy. During the pro-

tracted trial, as nearly all lawyers agreed, Judge Oakley leaned heavily in favor of the lady both in acceptance and rejection of evidences, as well as by comment upon the proof in his final charge to the jury. Moreover, Mr. Van Buren was further handicapped before the jury by the constant presence of his client, who from time to time indulged in stage play of countenance, shrugs, scowls, and facial applause, all of which did not impress the jurors in his favor. They dismissed the actor's claim, but upheld that of the lady, to whom they awarded the divorce with alimony. During the legal combat, which of course excited widespread popular interest from the notability of parties, co-respondents, and counsel engaged, Mr. Van Buren, handicapped although he was, displayed his best points as advocate. Ever on guard, like an experienced swordsman in a Parisian duel, and appreciating the skill and fence of his great antagonist, O'Conor, he never lost coolness nor courage, nor missed opportunity for cross-examination lunges or interjectional summings up to the jury, in which he avoided recklessness, and for which he became noted in all his *nisi prius* cases. His veiled retorts to the judge at times proved to be wonderful specimens of rhetorical implication, his tongue sometimes hovering over the dangerous border lines of contempt and, indeed, cool insolence. Merciless was his cross-examination of the main witness named Doty, who appeared against his client, and testified to adulterous acts between actor and actress in a state-room of a Hudson River steamer of which the witness was steward. The whole examination satisfied nearly every hearer except jury and judge, — but especially attending members of the bar, — that the witness was committing perjury. Mr. Van Buren rained interrogations upon him, scarcely allowing the witness time for breath between those and his answers; and the counsel adroitly jumped from incident to incident without allowing the witness to rest attention upon anything consecutive or chronological. Here I may digress to say that this witness was, after the trial, indicted for perjury while I was District Attorney of the county, and conducted the prosecution for the people. The Recorder before whom Doty was tried had been then recently elected, and had reached the bench in his old age from a practice solely devoted to civil cases, and without any experience in criminal law. The circumstances again handicapped Mr. Van Buren in organizing the prosecution. Much corroboratory evidence was strangely excluded because of misconception on the part of the Recorder of Starkie's or Greenleaf's rules of evidence. The jurors were told by counsel for accused that the case was one of persecution and revenge, an idea favored by Forrest's attitude on the stand when denying Doty's testimony. Miss Clifton was dead. So with excluded corroboration the case virtually resolved itself into one of oath against oath; and Doty was acquitted. As Mr. Van Buren and I left court together (he had refused to take active part in, but had rendered constant aid by advice, suggestions, promptings, and counsel), he remarked, "What else could be expected with 'doty age' on the bench assisting a Doty in the dock?" The solution of the contradictory evidence came to me later. Technically the accused was guilty of perjury, but morally not; for the incidents he testified to really transpired, but he had changed the venue of them from a bagnio to a steamboat for domestic and family reasons, threatening his own marital condition. He could explain his own presence on a steamboat, but not as visitant to a house of ill-repute.

Mrs. Forrest's subsequent private life satisfied a large number of her previous sympathizers that the divorce should have been awarded against herself. But Mr. Van Buren immediately began appeal procedure with the pertinacity and devotion to a client's interest which always characterized

him. He was a professed disciple of the celebrated doctrine expounded by Henry (afterwards Lord Chancellor) Brougham, during his memorable defense of Queen Caroline, as to the tenacious relation a counsel sustained towards a client. Appeal after appeal came from Mr. Van Buren not only as to main issues but against the enormous alimony that Judge Oakley imposed upon the client; and the contests extended over several years. Forrest *versus* Forest concerns the indices of many volumes of New York reports. In all those contests the fecundity of Mr. Robinson in making motions and in taking interlocutory appeals excited the admiration of the whole profession, as did the courage of Mr. Van Buren. To use the lingo of the P. R., "although knocked out in one round the latter would come up smilingly in the next." However, in Mr. O'Conor he had found an antagonist equally pertinacious with himself. During all the years of litigation Mr. O'Conor advanced every disbursement, and throughout acted without receipt of fees. His personal pride, which was Milesian to the heart's core, had been aroused: for Forrest on one occasion, when meeting him in a railway carriage, foolishly attempted to assault the lawyer, but was prevented by bystanders. Finally, however, Forrest was adjudged to pay the accrued alimony with interest, and out of it Mr. O'Conor was fully reimbursed.

This long and tedious litigation, coupled with the drain upon the purse of Mr. Forrest — and his fees to Mr. Van Buren were princely — worried the actor and caused him to become irascible and peevish. Moreover the contest injured his popularity: although critics agree that some of his best acting — notably in the character of Lear, — was witnessed during his later days.

The Forrest litigation had embarrassed the general business of the firm of Robinson and Van Buren. Indeed it is a maxim among New York lawyers, "Beware of Jarndyce cases that absorb your general litigation." Friends of Mr. Van Buren began to notice that the wear and tear of the divorce litigation had injured his general health and robbed his cheeks of their wonted floridity, and his step of its uniform elasticity. Nevertheless he continued actively at the Bar, but the calls upon him were spasmodic; although mentally he showed no psychological correspondence with his physical weakness.

While the appeals of the Forrest litigation had slowly progressed, the Presidential contest between candidates Pierce and Scott intervened; and into the campaign Mr. Van Buren was literally dragged. That is the word to use, for his sympathies were not fully with the Democratic candidate, who was suspected of kindly leanings toward the maintenance of slavery as a national institution. And Mr. Van Buren had previously given birth to the epigram: "Congress has no more power to make a slave than to make a king."

Here it will become appropriate to consider Mr. Van Buren as the politician. Where has lived, or still lives, the great lawyer who was or is not active in public affairs? Can we refuse to such a one the duality of interest in jurisprudence and politics when we recall the figures of Marshall, Taney and Chase, or of Story and Woodbury, from the judicial mirage; or those of Wirt, Webster, Seward and Sumner from the joint ranks of Bar and Senate? When Mr. Van Buren in 1847 left Albany — then, as now and always, a very hothouse for the growth of political fruit — and next arrived in New York, he had determined, as he assured friends, to quit politics as even incidental to professional pursuits. Doubtless he could have kept that resolution had not his father become in 1848 the Presidential standard-bearer of the Free Soil Democracy. Or except for the co-incident fact that John Van Buren's soulful sympathies were with that party had the movement been disintegrated from paternal connection. This event oc-

curred just previous to the beginnings of the Forrest litigation; and when Mr. Van Buren entered upon the pursuit of that *cause celèbre* he was mentally worn out through his incessant labors as orator on political hustings during tours through the Northern states. On the hustings, and in Ohio literally "on the stump," he had brought to his hearers the same magnetism and gifts of art and oratory with which he had familiarized juries. At that time, he was perhaps best popularly known to the public at large as a partisan orator, and less as a lawyer. Throughout his partisan career, he appreciated that political instruction, standing rhetorically alone, was a pill which required a sugar-coating of pleasantry, to be well swallowed. That coating he gave with an unction of oratory that had not been noticeable in the arena of politics since the earlier days of John Randolph, or the later days of Sergeant S. Prentiss and Tom Corwin. During the Cass-Taylor-Van Buren campaign, Mr. Van Buren was, during a speech, "hetchelled"—to borrow a word from the English hustings that means "bothered by questions, for explanations, from auditors"—by a bystander, who in the course of his interruptions—these, Mr. Van Buren always bore with extreme good humor—observed that "he never could bring himself to stomach free-soil sentiments." The interruptor was a man of influence in the neighborhood, and some one on the platform whispered to Mr. Van Buren, "down him." The latter, accepting the hint, said, "Perhaps my friend will allow me to answer him with an anecdote. In my native village there was a patient to whom his physician said, 'Your symptoms are dangerous, but a simple remedy will check them. You will have to drink a quart of hot catnip tea in order to recover.'

"'Then I must die.'

"'Nonsense, you can soon swallow the liquid.'

"'Ah yes, Doctor, but you mentioned a quart, and my stomach only holds a pint.'

"Perhaps," concluded the speaker, still fastening his glittering eye,—Ancient Mariner-like,—on the interrogator, "our friend's brain yonder can only hold a small point (pronouncing the word in the old-fashioned style as "pint") of political wisdom." The laughter that followed may be imagined. And it was in similar and appropriate repartees that Mr. Van Buren's strength as a public speaker consisted. I select another instance from a score crowding my memory. During the General Scott campaign Mr. Van Buren was inveighing against a standing army. "Hold on," cried a Whig in the audience, "what president was it who in a message pleaded for a large standing army?" Every one present recognized that Martin Van Buren was meant: and the laugh turned upon the orator. He instantly rallied, and turned the current by asking, "Would the gentleman wish me to turn State's evidence against my own father?"

This felicity was once very especially notable when before a jury his opponent was Daniel Lord Junior—as his name was invariably spoken and written. In the course of his address Mr. Lord told the jury that "only a miracle or Divine interposition could prevent on the facts a verdict for my client."

"Divine interposition! forsooth," ironically exclaimed Mr. Van Buren in reply; "does the gentleman use the Junior after his name boastfully as being closely related to the Senior Lord of the universe?"

During the Lincoln and McClellan campaign of 1864, Mr. Van Buren on one occasion was taunted with "being a pupil of Jefferson Davis." "True in part," he rejoined; "I have always been as a Democrat a pupil of Jefferson, but minus the Welsh name of Davis."

In social life and at club or public banquet Mr. Van Buren was proverbially facile in the role of an amusing raconteur. Es-

pecially so when, as president of the Dutch St. Nicholas Society, he led its "feast of reason and flow of soul," or acted as president of the Manhattan Club, of which he was the acknowledged founder; and wherein hangs an oil portrait of him much resembling the picture that accompanies this article. Those of this generation who have had the pleasure of meeting Mr. Chauncey Depew when he was at the bar, or is on the stump, or is at a public banquet, will fully understand what manner of man John Van Buren was as lawyer, politician, stump speaker and social *bon vivant*, when I pronounce Mr. Depew in manner, vein and speech very much in all those respects a double of Mr. Van Buren.

But like many lawyers who burn their candle of life simultaneously at the social and the professional ends, Mr. Van Buren early in the year 1866 began to show signs of physical decay, although only fifty-six years old. He had been worried too by some financial reverses, and he had edited manuscripts left by his father as a history of political parties and superintended publication. Wherefore his physician ordered a European trip, and Mr. Van Buren passed the ensuing summer abroad, but without any curative relief. A vacancy in the office of Recorder occurred while he was in London, and his political friends procured a promise from the appointing power that John Van Buren should have the place if his health would permit. Wherefore he set out to return before he was really able, and he died while on shipboard, during the voyage home — one of the lawyers of a class cynically described in a recent novel, "who work hard, live well and die poor."

SHOULD WOMEN BE ADMITTED TO FULL CITIZENSHIP?

By Percy L. Edwards.

BY amendment to the Federal Constitution we have raised the emancipated negro of the South to a plane of political equality. This action was believed to be righteous and just, because human as well as divine law seemed to dictate it, and we call it an act of justice.

The American Indian not disabled by tribal relations enjoys the same franchise. And, again, American citizenship, as the law stands, permits, aye, encourages to come to the polls the semi-citizenized foreigner who often, as the writer has observed, does not possess the qualification necessary to enable him, unassisted, to know for whom or what he is voting.

And yet we refuse to recognize our women as worthy to occupy the same plane of political equality. The assertion is here ventured that there does not exist a more unrighteous thing in the code ethical of the world. Especially would this be so in those cases where women are property owners and called upon to pay a just proportion of the taxes. Would you tax her, at the same time refuse her a voice in the disposition of public affairs? You do do this. Upon what boasted principle of right did you refuse to be taxed by the officers of George III.? You even refused to take your medicine in taxed tea, and in a fit of "tantrums" it was dumped into the waters of Boston Harbor. Why did you do that? Because you contended for a principle based upon the plainest kind of justice, clear to the understanding of all but a stupid, infatuated and sordid king.

Now, a principle is a settled rule of action, a rule to guide future conduct. If there was any justice in the principle

contended for in "no taxation without representation" of our forefathers of Revolutionary times, there is the like justice in the principle involved in this discussion when it applies to women holding property subject to taxation.

As suggested above, there are two classes of women whose rights are somewhat differently affected by the law as it stands. The classes are, first, women who pay taxes; second, women who do not pay taxes. Every intelligent person will agree with me in the assertion that the principle of justice requires that a distinction should be made in favor of the class of women who pay taxes to help meet the running expenses and improvements necessary to the good government of the commonwealth where they may reside, in common with the men of the same community. Cases have arisen affecting the property rights of the individual citizen in relation to the municipality, or its officers, where it has been argued that the remedy for an injury must be sought for at the polls. This panacea for the ills of political mismanagement or wrong-doing might be applied with great burlesque effect to woman in her present attitude to the law. "But the law takes good care of the property of women." Yes, so it does, it is established as a sort of self appointed guardian, but with proper sanction, and in the case of married women, who are all blessed with real bright husbands, of course, it is charged with advice to treat these women with the same consideration with which "idiots, insane persons and children" are treated, at least in any contractual relation. What a commentary it is on the logical force of this legal disability of married women when the spectacle is presented of a highly intelligent, cultured woman, of force of character, nourishing a man of besotted mind and body.

With Elizabeth Barrett Browning one must say: "You forget too much that every creature, female as the male, stands single in responsible act and thought, as also in birth and death."

Are the teachings of the Old Testament to be held responsible for much of the mistaken sentiment as to woman's weakness in this respect? Has Biblical research and study strengthened this sentiment of relative inferiority in modern times? This conclusion may be doubted. But there is no doubt of her exalted place in the life of Christ.

> "Not she with trait'rous kiss her Saviour stung,
> Not she denied him with unholy tongue;
> She, while apostles shrank, could danger brave,
> Last at His cross, and earliest at His grave."

The divine conception of woman made her a helpmate and consolation to the life of man. The same divine conception of their relation in marriage consists perhaps in the *oneness* of husband and wife. Their home and possessions, common enjoyment of both, their earthly interests inseparable. But all this rests upon sentiment rather than legal right. No one would wish to disturb this sacred relation of man and woman. It should not be disturbed. The removing of a legal disability such as this which rests upon women is a simple act of justice. It is not leading "a revolt against marriage in its true import," as stated by the Rev. John M. Williams in a recent paper, nor does it "owe its genesis and inspiration largely to the absence of domestic affection." I am aware that, perhaps, severe reflections of this kind might with much justice be cast in the direction of the work of some women of very radical ideas, who pose as the leaders of political reform, and who whisper their wrongs in closets, and shriek them on the public platform. But it is a sufficient reply to this argument to say, that this handful of Quixotic women do not voice the grand sentiment which swells and rolls as do the waves of any great social evolution having its genesis in the sentiment of justice.

The Rev. Mr. Williams further says:

"Woman's suffrage inculcates 'the individuality of woman as related to her husband'; it emphasizes the dualism, as against the unity of husband and wife, and assumes that their interests are so diverse that two votes are necessary to represent them. The spectacle of husband and wife on the way to the polls, carrying antagonistic votes, suggests anything but domestic harmony."

That this view of the matter is the mere effervesence of sentimentality may be seen in the very next paragraph.

"The wondrous undefined fascination of the lady who is a lady is of great price, but like the aroma of the flower is easily despoiled.

'A rift within the lute
By and by may make its music mute.'"

I am aware that the strongest argument made against giving to women the elective franchise is based upon sentimentality. This sentiment is a natural growth, just as the love of a parent for a child. It has had centuries of fostering care in the heart of man. The habit of considering women in this light alone has become second nature. But it is not to be considered as presenting a question as hard of solution as the change of the Ethiopian's skin. A study of the history of the Old and New Worlds will, in places, very forcibly remind us that sentiment has been washed from its mooring places many times by the great waves of change, which forever beat upon the shore of Time, leaving only the memory of what was.

The change in sentiment in regard to women has reached full-orbed dimensions. In the exercise of the elective franchise, as admitted by the reverend gentleman above named, women would gain in individualism. And if this rounding out of her individualism, by the removal of a disability as cruel as unjust, did dispel any part of the "aroma" of her once "flower-like existence," then the loss of this sweet sentiment would naturally assist in a metempsychosis greatly to be desired, because of its benefit to society in exalting woman to her rightful position beside man. Does the Rev. Mr. Williams wish us to assume that he has been antagonistic to all the efforts which women have made in the past fifty years for equal social and political recognition? If so, argument with him would be worse than useless. You might as well argue with a blind man over the subject of color. If women have bettered their condition by this effort for equality with men during the present century, then this same process of "dualism" has been going on and widening the gulf between husband and wife, and at the same time it is admitted much good has resulted to the social standing of women. Why, it is comparatively a few years ago when the doors of our colleges were closed in their faces. The learned professors raised their hands in holy horror at the suggestion that women should be received into the sanctified precincts of learning only established by the gods for those of Apollo-like form. One very learned and beloved president of a state university in the West, rather than submit to the disgrace of presiding over a number of curly-headed young women in common with the "boys," and being apprehensive of (your pardon, Mr. Williams)

"A rift within the lute
By and by to make its music mute,"

resigned his place at the head of this institution, which owed much of its rising popularity to him, and went sorrowfully off to a foreign land to die of a broken heart.

And yet to-day this institution stands ahead of all others in the land in point of popularity, and the equal of any upon its merits.

About one in five of its students are women, and their choice of work does not differ very materially from that of the men, except in the professional departments, where women are not found in the same proportion.

The work done by the women of this

university is as good as that done by the men. Indeed in some branches they may be said to excel their competitors. This advancement of women to higher education was the evolution of a sentiment that came as naturally in the order of things as the change of sentiment in relation to the servitude of the black man. But it required a struggle and a great deal of energetic expansion of public sentiment. It is said by a late writer and student of this phase of social development, Sarah K. Bolton, in her little book on the subject of higher education of women, that formerly people went to Cambridge to look with reverence upon the beautiful buildings where Bacon and Milton gained inspiration, and where Newton, Pitt, Byron, Macaulay and Tennyson walked in ivy-covered courts and under the shade of the majestic overhanging trees. Now they go to see what one of the grandest institutions of the world is doing for the higher education of women. American women are now found at these English institutions who are a credit to themselves and us as a nation. In our own country there are from eighteen to twenty thousand women pursuing a college course, and now the question is not whether it is wise for women to seek this higher place in the social scale. The fact is that women are seeking this position. Would those who oppose the onward march of women in this social progress of the age, have us go back to the old regime when women had made no effort, at least no concerted effort to make herself the helpmate and equal of husband or brother? Certainly not. What she has gained in concession from the schools, and the excellent use she has made of her opportunity, has won our admiration and increased our respect for her. Yet this was merely the opening wedge for her ultimate social and political equality. And I believe, from the evidence we have before us of the high degree of intelligence and good sense of woman, wherever put to the test, when permitted, she will exercise her right of the ballot with as good judgment as her husband or brother.

The Rev. Mr. Williams concludes his argument by committing the bad blunder of a self-contradiction. He says: "Women who could be induced to vote would, with relatively few exceptions, vote like their husbands, and consequently not materially change results. Mrs. Coggswell, formerly a woman suffragist, says, 'Not two women in Wyoming would vote for a Republican, were her husband a Democrat, and *vice versa*.' Indeed most of the women take their votes from their husbands, and without looking at them cast them into the ballot-box."

The first thing apparent here is the squarely inconsistent statements of the writer. He has but just spoken of the awful "spectacle of husband and wife going to the polls carrying antagonistic votes." Then is it not more pleasing to have them go to the polls arm in arm carrying the same kind of ballot? Then again, if Mrs. Coggswell is reported correctly, I should say that it is more than likely, from her sweeping assertion, that she belongs to the class of women denounced by our friend as one who "whispered in closets and shrieked on public platforms."

As to the assertion that "women take their votes from their husbands," this much may be said, while this may be true of Wyoming, it is the most unimportant portion of this great country, at least so far as its social characteristics are concerned. Then did the writer have any means of knowing the truth or falsity of this statement, except Mrs. Coggswell? Such a statement in reference even to Wyoming is difficult of belief. The writer could hardly mean to make this assertion general in its character, since many of the States vote under a system which does not permit of its ballots being carried around in the pockets of even those husbands who belong to the "ring." There is absolute secrecy in the booths at the polling places under the Australian system of bal-

loting and no ballots are allowed outside the polling place. Here then such an argument would fail. Fall by its own weight. Indeed such argument borders on the ridiculous. Why is it that the ministerial calling should tend to the production of bigots? What else but bigotry is shown in the repeated refusal to place women on an equality in the church council, where the progress of thought plainly suggests a place for her.

But a short time since the State of Michigan was shocked its whole breadth and extent, by the most disgracefully outrageous conduct of the citizens of one of its small villages, aided by citizens of other parts of the county. The affair was the lynching of a man who had committed a desperate crime. The circumstances of the lynching were of the most fiendish and appalling description, in which young boys figured, and even some women applauded. Decent citizens all over the county and of the neighboring towns, stood appalled with the sense of disgrace which had fallen on them, when along comes a minister of the Gospel of Christ, and in a characteristic style justifies the whole thing. Such a fellow is certainly a disgrace to the cloth he wears.

The women of this country, led on partly by the grand efforts made by English women, and encouraged by a growing sentiment in their behalf among the men of the class that help to shape public sentiment and policy, have accomplished much that is an honor to them and a credit to this country. It is to be assumed that the large body of the women of this country, as of any other, are engaged in domestic duties, which are more congenial, and fill full the hours at their disposal. This is "the hand that rocks the cradle." This the body of women to whom we must look for endorsement of any policy affecting woman, if it is to be authoritative. These women form the bulwark of social purity. Names would not be advisable. But there are many good women of this class, a type of whom is found in Mrs. Spurgeon, the wife of the noted English divine, who are lending their aid and endorsement to the work of their more active sisters.

Many of them may say, "We do not care to exercise the right of franchise." No matter, if you don't exercise the right. You shall have the disability removed, which is an everlasting reproach to a dominant sex, and be placed on an equal footing with husband and brother, whether you choose to exercise this right or not.

I have too much faith in the intelligence and good sense of women to believe that they will be entirely subservient to dictation in this matter of casting a ballot. Natural sense of purity, coupled with a fair amount of shrewdness, are elements inconsistent with such servitude or indifference. Besides, whenever an opportunity is given to test this thing the proof furnishes a contrary belief.

The women of Kansas have enjoyed municipal suffrage since 1887. In Kansas City 3482 registered. In Leavenworth 3245. In Topeka 4000 and Wichita 2464, and in proportionate numbers in the smaller cities and towns. The women hold the balance of power in many of the cities and towns of the State. Every grade of society of women is interested, old and young. They did not run any "women's" ticket. Through social relations and organization they did just what might be expected of them, lent their aid to the support of the moral element and helped to elect the best men.

At the election which soon followed on the heels of registration, most of these women voted. The best women voted. Newspaper accounts claimed that no elements of disorder entered into this election. "To-day no man in Kansas doubts that women want to vote, and will do so if they have a chance. The general result at these municipal elections in Kansas was a complete refutation of much that had been claimed by oppo-

nents of the equality of woman ideas. She voted intelligently for the best results.

In some other States women are given the elective franchise so far as municipal affairs are concerned. The latest State to concede this much, Michigan, spoiled the effect of its concession, like a schoolboy who, with a grimace, concedes his unjust attitude, by adding an educational test. If the women of Michigan refuse to accept this legislative concession, it will not be remarkable.

For many years the right to vote at school elections and to be eligible to such offices has been conceded to women. Will it be claimed for a moment that our school system has been harmed because of this? On the contrary many good results may be shown where women have had a voice in the official management of schools.

The people of Detroit, Michigan, are proud of the women members of its Board of Education. The intelligent effort of these women is acknowledged to be a great help in the administration of school affairs in that city. And the statement is made upon such good authority as the "Cincinnati Times Star," that wherever women have been allowed the control of schools, as they have been in many towns of Pennsylvania, the results have been highly satisfactory both to parents and pupils.

To be sure some fault was found with the work, or rather that nothing was done to bring about a revolution in the system of public education of the city of New York, by the few women appointed on the school boards by Mayor Hewitt.

The cause, they were in a hopeless minority, and bitterly opposed by the majority. Was it at all surprising that they could accomplish nothing? Had these women been given full control many of the abuses which afflicted the public school system of New York would certainly have enjoyed a short life under their administration. But they do not seek full control. Woman in her highest and broadest development should occupy the place of helpmate and counsel to her husband, upon equal footing. Anything more is undesired. Anything less is unjust.

Her most noble work, of course, is seen in the happy home. A daily sustenance of the husbahd in his labors, the encouragement of high endeavor, to maintain the best standard of honor and duty, to stimulate, encourage and uplift, which from the beginning of civilization has been the highest, noblest work of women. And may she not better fill this place in our lives when unfettered by degrading distinctions? She may not choose to try her unpinioned wings, being by nature easily contented, but give to her this liberty so that she may know her complete social and political equality.

If, with the gradual removal of prejudice and change of sentiment, the enlarged liberty of action conceded to woman has proved her worthy of the trust imposed in her intelligence and goodness, then it is but just to go a step further and receive her into full fellowship. Beyond any doubt women as a body have been improved by their enlarged sphere of existence, and they have helped to improve the great body of society.

A DRAMATIC DENOUEMENT.[1]

ALEXANDER HAMILTON and Aaron Burr were occasionally associated in the trial of a cause. On such occasions they were almost irresistible. It is related that, on one occasion, they were retained to defend a man indicted for murder, and who was generally believed to be guilty, though the circumstances under which the crime was committed rendered it a deeply interesting case of circumstantial evidence. During the progress of the trial, as the circumstances were developed, suspicion began to attach to the principal witness against the prisoner. Burr and Hamilton brought all their skill in cross-examination to bear on the witness, in the hope of dragging out of him his dreadful secret. But with singular sagacity and coolness he eluded their efforts, though they succeeded in darkening the shadows of suspicion that fell upon him, and strengthening their convictions of their client's innocence.

Before the cross-examination of the witness was concluded, the court adjourned for tea.

"I believe our client is not guilty, and I have no doubt that Brigham, that cunning witness, is really the guilty man, but he is so shrewd, cool, and deep, that I am fearful his testimony will hang poor Blair, our client, in spite of all we can do," said Hamilton to Burr, while on their way from the court-room to their hotel.

"I agree with you; Blair is not guilty, and that Brigham is, and I believe we can catch him. I have a plan that will detect him, if I am not wonderfully mistaken," said Burr. He then proceeded to explain to his associate the nature of his plan.

"You may succeed," said Hamilton, after listening to the plan. "It's worth trying at any rate, though you have a man of iron to deal with."

After tea, Burr ordered the sheriff to provide an extra number of lights for the evening session, and to arrange them so that their rays would converge against the pillar in the court-room near the place occupied by the witness.

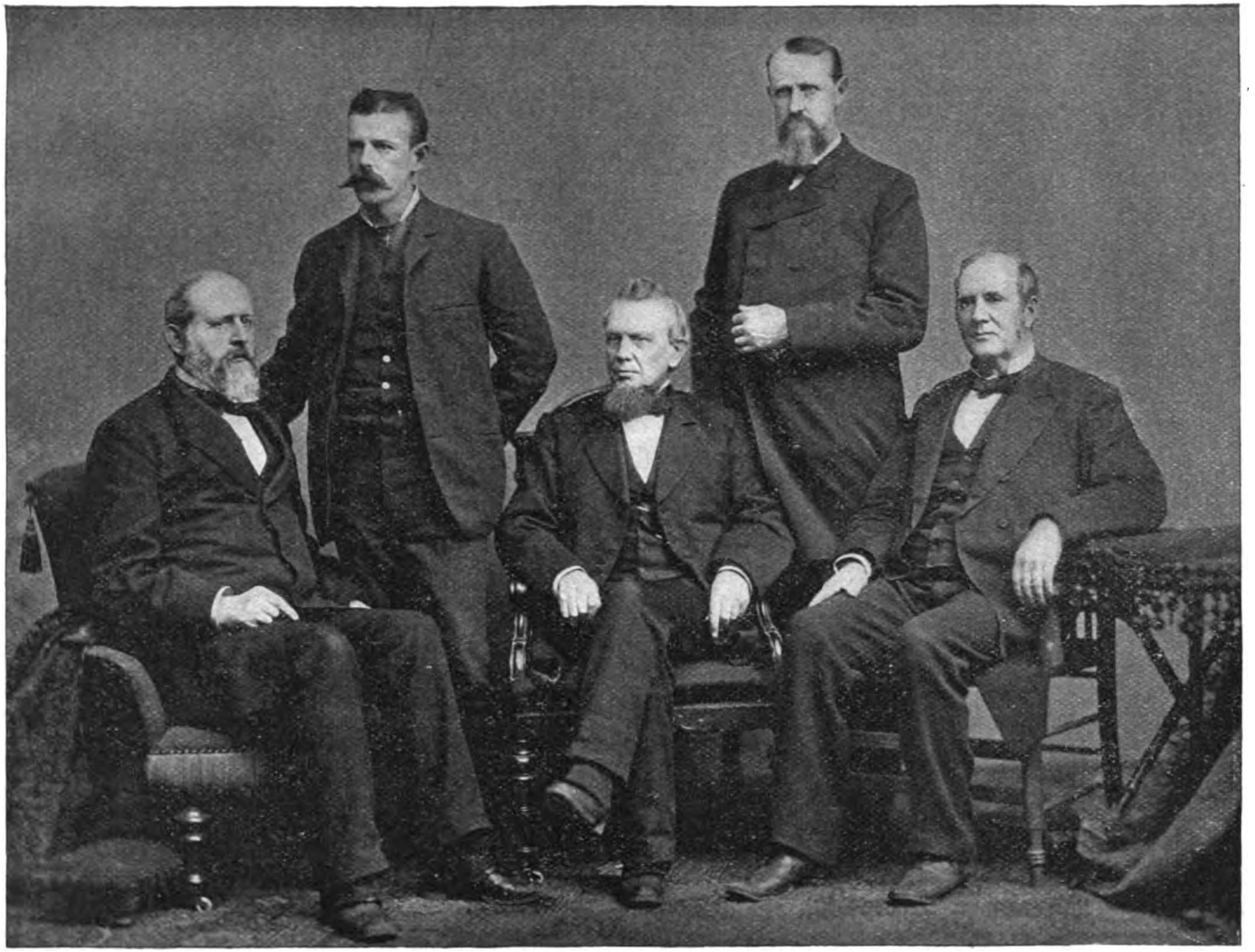
The evening session opened, and Burr resumed the cross-examination of the witness. It was a test of the profound skill and subtlety of the lawyer, the self-possession, courage and tact of the witness, standing on the very brink of a horrid gulf, calmly and intrepidly resisting the efforts of the terrible man before him to push him over. At last, after dexterously leading the witness to an appropriate point, Burr suddenly seized a lamp in each hand, and holding them in such a manner that their light fell instantaneously upon the face of the witness, he exclaimed in a startling tone, like the voice of the avenger of blood: "Gentlemen of the jury, behold the murderer!"

With a wild convulsive start, a face of ashy pallor, eyes starting from their sockets, lips apart, his whole attitude evincing terror, the man sprang from his chair. For a moment he stood motionless, struggling to regain his self-possession. But it was only a momentary struggle; the terrible words of the advocate "shivered along his arteries," shaking every nerve with paralyzing fear. Conscious that the eyes of all in the court-room were fixed upon him, reading the hidden deeds of his life, he left the witness stand, and walked shrinkingly to the door of the court-room. But he was prevented by the sheriff from making his escape.

This scene, so thrilling and startling, may, perhaps, be imagined, though it cannot be described. It struck the spectators with silent awe, changing the whole aspect of the trial.

The false witness was arrested, two indictments found against him: one for murder, another for perjury. He was acquitted on his trial for murder, but subsequently convicted of perjury, and sentenced to a long imprisonment.

[1] From Lawyer and Client, by L. B. Proctor.



THE SUPREME COURT OF OHIO, 1878.

WILLIAM W. JOHNSON. WILLIAM WHITE. GEORGE W. McILVAINE.

NICHOLAS LONGWORTH. JOHN W. OKEY.

A SKETCH OF THE SUPREME COURT OF OHIO.

III.

By Edgar B. Kinkead, of the Columbus Bar.

Charles R. Sherman, father of Senator Sherman, was born May 26, 1778, in Norwalk, Conn. He was the son of Taylor and Elizabeth Sherman. Judge Sherman the elder was a man of ability and learning, and the subject of this sketch received the best education that the times afforded. He read law in the office of his father and Judge Chapman. Admitted to the bar in 1810; was married the same year to Mary Hoyt of his native town. In 1811 he came to Lancaster, Ohio, bringing his wife with him. Ohio was at the time a frontier state, and much of its territory remained a wilderness. It was a long and weary journey from that New England home to this then wild west, and a great portion of the journey was traveled on horseback, carrying their infant child in their arms. He soon established himself in practice in this adopted home, and his rise was very rapid indeed. With a well-cultivated mind and one stored with the very best information, it was no wonder that his reputation was soon established. His was a mind which could not be kept within any prescribed limits, but was constantly going out into that wider field of knowledge which is so well calculated to broaden and improve the best qualities both of mind and heart. In 1823 he was elected by the Legislature to the bench of the Supreme Court of Ohio; he was associated with Judge Pease, Burnett, and Judge Hitchcock, all names of renown in the judicial history of Ohio. Under the Constitution of 1802, the Supreme Court was compelled to hold an annual term in each county in the state, two of the judges officiating. Judge Sherman, it was said, made friends in every court-room in which he presided. He died at Lebanon, June 24, 1829, at the age of forty-one years. He had gone to Lebanon to hold court, and nothing seemed more certain than that there was a long and successful life ahead of him; in fact he had not yet reached the middle plain of his career when disease overtook him, and in a few days he was numbered among the dead. Public sorrow was great, as all had come to love Judge Sherman for those noble traits of character which made him stand like a god among men. There is no doubt that had he lived, still higher honors still awaited him.

Elijah Hayward was elected a member of the Supreme Court from Cincinnati. He was one of the lawyers of the old court-house at Cincinnati in 1825, and once a partner of David Wade. He was at one time a member of the Legislature of Ohio. He was said to be a good man and a good lawyer.

John M. Goodenow was born in New Hampshire in 1782; was admitted to the bar at Canton, Ohio, in 1811, and practised at Steubenville; was elected to Congress in 1829, and while filling that position was appointed upon the supreme bench of Ohio, but soon resigned because of ill health. He removed to Cincinnati, where in 1833 he became president judge of the Court of Common Pleas. He died July 20, 1838. It was said of Judge Goodenow that the paradox that victory is sometimes more fatal and ruinous than defeat was particularly applicable to his life; that he could not bear prosperity; that the breath of popular applause and the sunshine of prosperity seemed to paralyze him. Upon one occasion Judge Goodenow, while in practice, argued a *habeas corpus* case involving questions of great importance, discussing them

with unusual warmth, denouncing with great bitterness those who entertained opinions different from his own. The case was argued before Judge Benjamin Tappan, who held against Goodenow, from which a bitter controversy between Tappan and Goodenow arose, resulting in an action for slander brought by Goodenow against Tappan, reported in 1 Ohio, 61. The point of difference in the case was as to whether the common law in relation to the punishment of crimes was ever in force in the State, Goodenow maintaining that it was not, while Judge Tappan held that it was, and was in the wrong. Judge Tappan set out fully his views in his opinion in Tappan's Reports, Ohio *v.* Lafferty, p. 113, claiming that the common law was in force, as there was no statute prescribing the forms of procedure, arguing at great length. Judge Goodenow was so incensed and wrought up over the matter that he wrote and published a book entitled, "Historical Sketches of the Principles and Maxims of American Jurisprudence, in Contrast with the Doctrines of the English Common-Law, on the Subject of Crimes and Punishments." The object and purpose of the book was to show that we have no common law crimes in Ohio. This was so held in Mitchell *v.* State, 42 O. S. 386.

There has been a great desire on the part of members of the bar to see this volume written by Judge Goodenow, but it seems impossible to find a copy.

The same quarrelsome disposition followed him when he became judge in his new home in Cincinnati, and differed with his associates as to the appointment of a clerk, which finally resulted in his resignation from the bench. He frequently came in contact with Samuel Culbertson of Zanesville, who held the verdicts of juries in his hand. They were matched against each other on one occasion in a slander case. Goodenow had a plain case for the plaintiff. Culbertson made a pathetic appeal to the jury, and concluded by turning to Goodenow, who was walking back and forth with his hands behind him, and exclaiming: "But, gentlemen, you must prepare for a storm. I see the dark clouds rising, and there is Goodenow sucking wind!" Goodenow started as if stung by a serpent, made a loose, disconnected address, and secured a verdict for one dollar damages.

Goodenow was a man of great energy, with a hasty and irascible temper. He would at times unbend and make himself sportive and playful, though it was unnatural. His temper lacked the coolness and self-command essential to a skillful use of those formidable but double-edged weapons — satire and irony. He submitted without a murmur to what is supposed by some to be the fate of a good lawyer — to work hard, live well, and die poor.

HENRY BRUSH came to Ohio from New York in 1803, engaging in practice at Chillicothe for twenty years. It was said that he did not rank high in ability. He was prosecuting attorney in 1808 and 1809; a member of the Legislature in 1810, of the Ohio Senate in 1814, and of Congress from 1819 to 1821, and afterwards a member of the Supreme Court.

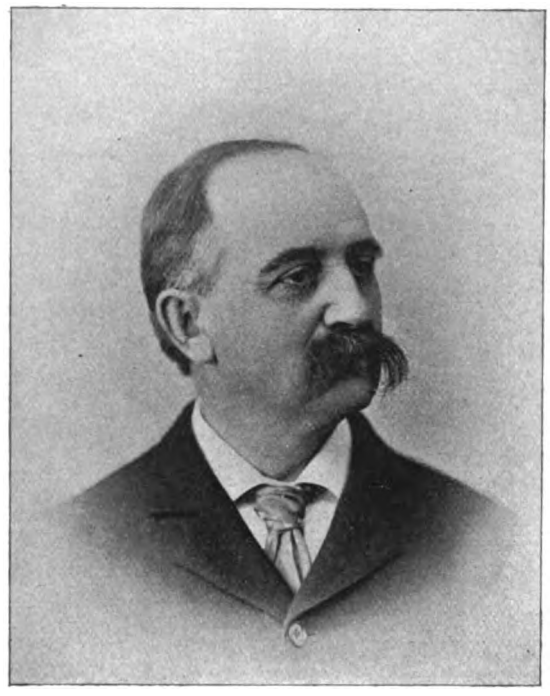
In 1838 he abandoned the practice of the law, and took up farming. He died in Madison County in 1860 at the age of eighty years.

REUBEN WOOD was born in Vermont in 1792. Served in the war of 1812. Emigrated to Ohio in 1818, settling in Cleveland. When he landed at the mouth of the Cuyahoga River, he found only a hamlet of huts. Mr. Wood was compelled to apply to the Supreme Court then in session at Ravenna, for authority to practice law, and on account of his poverty took the journey from Cleveland to Ravenna on foot. Though his possessions, when he first settled, consisted of his wife, daughter, and a silver quarter of a dollar, he soon stepped into a lucrative practice.

In 1825 he was elected state senator, and

was thereafter appointed presiding judge of the Common Pleas Court, and judge of the Supreme Court. He had considerable to do with shaping the judiciary of the state.

In 1850 he was elected by the Democratic party Governor of Ohio, taking his seat in 1851. It is said that during his administration the State was very prosperous, and that the gubernatorial office had never been more worthily filled. The new Constitution of 1851 went into effect, March, 1851, thus vacating the office of Governor. He was renominated and elected, taking his seat as Governor the second time in January, 1852. He was a candidate for the Presidency at the great Democratic Convention at Baltimore in 1852, but was defeated by Franklin Pierce. He resigned the chief executive office in 1853 to accept the consulate at Valparaiso, South America, but returned within a year to Ohio, and for a short time resumed the practice of the law. He died October 1, 1864.



GEORGE K. NASH.

He was a great character. His tall, erect form and commanding mien won for him the title of the "Old Cuyahoga Chief."

JOHN C. WRIGHT was a native of Connecticut, born August 17, 1784, and died in 1861 at Washington, D.C. He came to Ohio soon after it became a state, settling in Steubenville, and was admitted to the bar in 1810. He filled several county offices, and in 1822 was elected a member of Congress, serving three successive terms. In 1830 he was elected a judge of the Supreme Court, but resigned in 1835. In 1853 he had charge of the editorial department of "The Cincinnati Gazette." He was more suited to the practice of the law than any other calling, and as a forensic debater had few equals. Judge Wright was the author of Wright's Reports, the first reports of the decisions of the Supreme Court ever published. After leaving the bench, about 1834, he went to Cincinnati, where he formed a partnership with Timothy Walker, a lawyer of much repute, the firm being Wright & Walker. We must give a story told by Judge Carter in his anecdotes of the bar. Judge Wright was in conversation one day with a Yankee gentleman, recently from the hub of the universe: —

Boston. — "So I see, Judge Wright, you have a Massachusetts gentleman for your partner."

Judge. — "Yes. He is a Boston Walker, and a good talker."

Boston. — "So I've heard: quite a scholar, too?"

Judge. — "The best in the world; a *walking* encyclopædia — a complete Walker in that respect."

Boston. — "Ah! I am told he is rich, very wealthy?"

Judge. — "Yes. He has walked himself into something in that way."

Boston. — "Just like all intelligent and

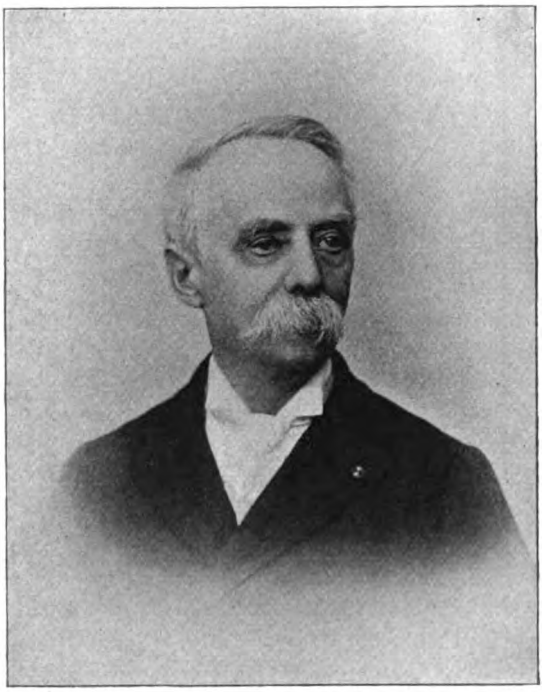
learned Bostonians who immigrate to the West. They all get rich. I suppose Mr. Walker made his wealth by the practice of the law?'

Judge. — "No, not by a great deal. Lawyers don't make money by the practice of the law. My friend, Mr. Walker, made his money by investing in *matter o' money* with a lady."

Boston. — "Aha! Yes, yes. Aha!" Exit Boston.

Judge Wright was very intimate with Grandpa Harrison, being, with Judge Burnett, called the conscience keeper of the General. Judge Wright would sometimes say that it was better to be a keeper of the good conscience of the General than the hunter-up of the conscience of Martin Van Buren.

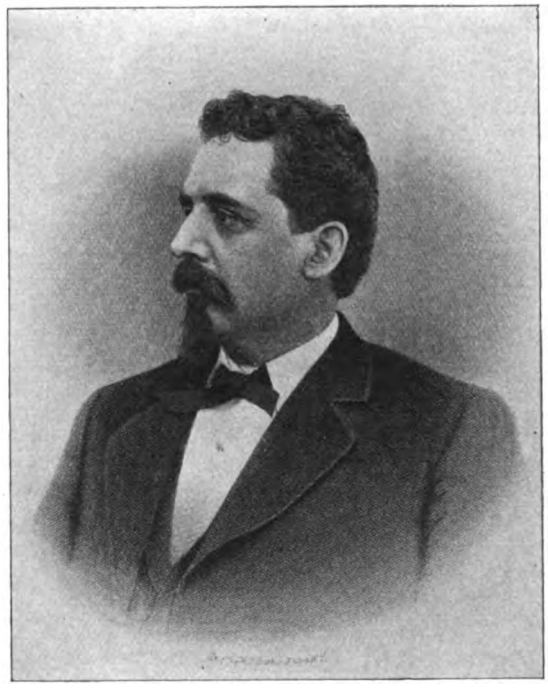
Judge Wright was a very small man, not very attractive, had a very large head, prominent face, and not handsome features. A story is related by the quaint Judge Carter about Judge Wright, while in Congress, where he had the reputation of being a very able but ill-looking Congressman. On one occasion, one Davy Crockett, a fellow-representative, was visiting a menagerie of animals; coming to a cage of monkeys, there was one large, grinning, full-faced monkey, and as Crockett looked at him, he observed to his companion, "Why, that monkey looks just like our friend, Judge Wright from Ohio." Upon turning around, Davy Crockett found Congressman Wright himself, when he said: "I beg pardon, Judge Wright, I beg pardon; an apology is certainly due somewhere, but for the life of me, I cannot tell whether it is to you, or to the monkey."



MOSES M. GRANGER.

JOSHUA COLLETT. This distinguished lawyer and judge was born in Berkeley County, Va. (now West Virginia), November 20, 1781. Having obtained a good English education, he studied law at Martinsburgh, in his native county. About the time he reached the age of twenty-one he emigrated to the Northwest Territory, and stopped temporarily at Cincinnati, where he remained about a year. While he was at Cincinnati, the first Constitution of Ohio was adopted, and Warren was created a county, with a temporary seat of justice at Lebanon. In June, 1803, before the first court had been held in Warren County, he established himself at Lebanon for the practice of law, and was the first resident lawyer in the place. Here it may be said he commenced the practice of his profession, in which he afterward became distinguished, both at the bar and on the bench. Modest, diffident, unassuming and unpretending to a degree seldom met with, he had great difficulties to overcome. He traveled the whole of the first judicial circuit, comprising the counties of Hamilton, Butler, Warren, Clermont, Montgomery, Miami, Greene and Champaign, and was thus brought into competi-

tion with the older and distinguished lawyers of Cincinnati and the Bar of the whole Miami Circuit. Notwithstanding the embarrassments resulting from his modesty and diffidence, and the learning and eloquence of his competitors, his knowledge of the law and his sound judgment made him a successful practitioner. In 1807 he was appointed prosecuting attorney for the county of Warren, a position he held for ten years, when he was succeeded by his pupil, Thomas Corwin. The diligence, integrity and ability with which he discharged the duties of this office made him widely known and universally respected. In 1817 he was elected by the Legislature President Judge of the Court of Common Pleas for the term of seven years, and at the close of his term was re-elected. He continued on the Common Pleas bench until 1829, when he was elected by the Legislature a Judge of the Supreme Court of Ohio. His duties as Supreme Judge were onerous; he was compelled to attend courts in distant parts of the State, and to ride on horseback from county to county. At the end of his term, in 1836, he retired to his farm near Lebanon, where he resided until his death. After his retirement from the bench he permitted his name to be placed on the Whig electoral ticket, in 1836, and again in 1849, and having been elected both times, he twice cast an electoral vote for his friend, General Harrison.



JOHN H. DOYLE.

He was a benevolent and kind-hearted man, and, though an able lawyer and judge, the crowning glory of his life was his spotless purity, his scrupulous honesty and his unsullied integrity. He died on his farm, near Lebanon, May 23, 1855.

EBENEZER LANE was a native of Massachusetts. In 1830 he was appointed judge of the Supreme Court, and re-appointed by Governor Bartley in December, 1837. He resigned as Chief Justice in February, 1845. He had held other official positions previously, — prosecuting attorney of Huron County, judge of Common Pleas Court of the second circuit. For ten years after leaving the Supreme bench he was closely allied with railroad interests as counsel. In 1859 he went abroad, as he himself expressed it, "to see new forms of life, manners, natural objects, and works of antiquity." He visited many foreign countries, returning in 1860. Judge Lane was a great reader and scholar, as his opinions appearing in the reports will bear witness, being noted for their clearness and brevity. He possessed one of the finest private libraries in the State. He died June 12, 1866, at Sandusky, Ohio.

FREDERICK GRIMKE was born September 1, 1791, in South Carolina. Graduated at Yale College, in 1810. He came to Ohio very young, settling in Chillicothe in 1820, and commenced the practice of law. For

several years he was President Judge of the Court of Common Pleas. In 1836 he was elected judge of the Supreme Court, serving seven years. He was a man of considerable ability, possessing especial literary attainments. He was the author of a work entitled: "Considerations upon the Nature and Tendency of Free Institutions," published in 1848, and of "An Essay on Ancient and Modern Literature." He died at Chillicothe, Ohio, March 8, 1863.

Judge Grimke was a very reserved man, lived and died a bachelor, being known as a "woman hater."

MATTHEW BIRCHARD was born at Becket, Massachusetts, in 1803, and expired at Warren, Ohio, in 1876, at the age of seventy-three.

He was the son of Nathan and Mary Birchard, and his ancestors and those of ex-President Hayes were the same. He came to Ohio, at about the age of eight, with his parents, and settled near Warren, Ohio, where he continued to reside until his death.

His education was obtained in the common schools of his adopted home.

Judge Birchard read law with Colonel Roswell Stone, and was admitted to the bar in August, 1827, and opened an office at Warren, Ohio, and soon became a leading member of the Bar in that part of Ohio. In 1833 he was elected common pleas judge of the old third circuit, which office he held until appointed by President Jackson, Commissioner of the Land Office, and afterwards Solicitor of the Treasury at Washington, which place he held "until the days of log cabins and hard cider made the place altogether too uncomfortable for so pronounced and active a Democrat." On his return to Warren he formed a partnership with Governor David Tod and Judge B. F. Hoffman under the firm name of Birchard, Tod & Hoffman, which partnership lasted until 1842, when Judge Birchard was elected to the Supreme Bench of Ohio. He served as a member of the Supreme Court until 1849, the last two years of that time as Chief Justice. His opinions appear in the Ohio Reports from volumes twelve to seventeen inclusive. The opinions written by Judge Birchard are said to be among the clearest of any of those which appear in the Ohio Reports.

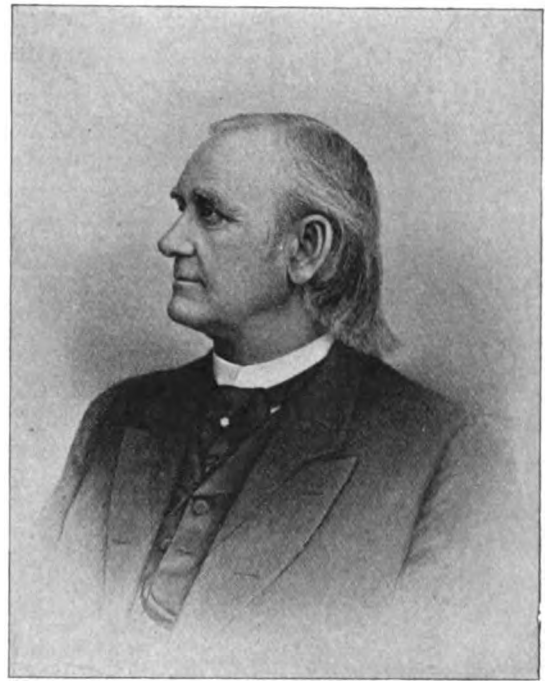
He had the faculty of making correct applications of proper principles to the case or cases before him, in which respect he was the equal of any and the superior of many. He was not what is known as a case lawyer, and in his decisions he seldom refers to cases, relying on general principles; and reasoning from good sense and innate justice, he always presumed that to be equity which ought to be equity, and holding to that idea he nearly always reached a just and equitable conclusion. It was said of Birchard that although, in the main, of an even temper, still there was a large degree of stubbornness in his make-up. To illustrate this side of his character a very good story is told of him: "On one occasion he was in a boat above the dam in the Mahoning River near Warren; the river was high and he was unable to manage the boat, which was rapidly drifting over the dam upon the dangerous rocks below; friends on the bank shouted to him to jump out and swim ashore, but the more they shouted for him to jump the more he wouldn't; when his partner, Mr. Tod, remembering his peculiarities, yelled out, 'Stick to the boat, Birchard, stick to the boat; don't jump out!' Whereupon out he jumped, swam ashore and was saved."

But when on the bench Judge Birchard was kind and considerate of the feelings of those around him; but relentless to wrong-doers who persisted in their evil ways. Of him we may truly say: —

> "Feared, but alone as freemen fear;
> Loved, but as freemen love alone;
> He waved the sceptre o'er his kind,
> By Nature's first great title — mind."

NATHANIEL C. READ was elected judge of the Supreme Court from Hamilton County

in 1849, and stands out as one of the shining lights. He was a lawyer who was extensively known for his ability. He served as prosecuting attorney, presiding judge of the Court of Common Pleas, prior to taking a seat upon the Supreme Bench, and in all which capacities he was, perhaps, in his day and generation, unsurpassed. His living reputation is continued by his luminous opinions found in the early volumes of the Ohio Reports, each one being a model for brevity and clearness, which make the ability of a judge of the court of last resort. Law may thus be simplified and made easy. He frequently dissented from the majority and more good sound law may be found in his dissenting opinions than in the majority opinion. Judge Read resigned his position as judge of the Supreme Court, going back to Cincinnati to practice.



SELWYN N. OWEN.

EDWARD AVERY was a native of Connecticut. He was elected to the Supreme Court bench from Wayne County, being one of the pioneer lawyers of the Wooster Bar. He was prosecuting attorney of that county in 1819 to 1825, member of Ohio Senate from 1824 to 1826. He died June 27, 1866.

RUFUS PAIN SPAULDING first saw the light of day on the third day of May, 1798, at West Tisbury, Mass. His father, Dr. Rufus Spaulding, was eminent in his profession. When young Rufus was but fourteen years of age his father took him with the family and removed from Martha's Vineyard to Norwich, Connecticut, and there settled. He became a student at Yale College, graduating in 1817. He then entered the law office of Chief Justice Swift of Connecticut. After being admitted to the bar, he went to the then far west, Little Rock, Arkansas, and began practice in partnership with Samuel Dinsmore, who afterwards became Governor of New Hampshire. He remained only about three and one-half years in Little Rock, when he removed to Warren, Trumbull County, Ohio, where he remained sixteen years. From Warren he removed to Ravenna, in Portage County. While a resident of Ravenna, he was elected a member of the lower house of the General Assembly. Summit County was formed while he was a member of the Legislature, and at the expiration of his term he removed to that county, settling at Akron. In 1841 he was elected to the General Assembly from Summit County, and was elected Speaker of the House. In 1848–9 he was elected, by the General Assembly, a judge of the Supreme Court of the State, to serve for seven years. The new Constitution went into effect at the end of the third year of his term, and the office of judge became an elective one. He refused to become a candidate before the people for the place and his services were thus lost to the State and people. On leaving the bench he went to Cleveland, Ohio, and engaged in

the practice of his profession. But he kept up with the political movements of the day. Having been born during the administration of the elder Adams, he had reached the age of early manhood when the Jeffersonian school of politics was almost universal, and being an adherent of that school, he soon found himself a member of the Democratic party. He remained with that party until 1850, when he joined the Free Soil party, which was pledged to resist the extension of slavery. On the organization of the Republican party, he became an active member of it. In 1862 the Republicans elected him to represent the eighteenth Ohio district in Congress. He at once became one of the leaders in that body. He was elected to Congress three successive times; with the close of the fortieth Congress his legislative career ended, declining a further nomination, declaring it his intention to retire from public life.

Judge Spaulding was not an ordinary man, but was of such marked personality that it would have given him prominence anywhere. Long in public life, it has well been said that "The history of the Ohio bar, of the judiciary, legislature, and politics, of this State, could not be faithfully written without assigning to his name a conspicuous place." "As a lawyer he was master of the general principles to so great a degree, that he was able to successfully grapple with the most varied questions."

A sincere man, no act of his life was performed but from a sense of duty, and the right once understood, no power could move him therefrom.

JUDGES UNDER THE CONSTITUTION OF 1851.

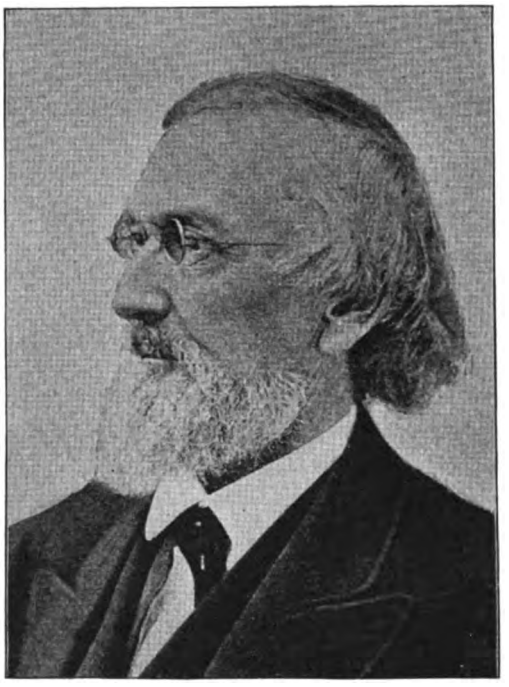
THERE have been thirty-nine judges of the Supreme Court under the present Constitution, two of whom were also judges under the old Constitution. Sketches of their lives will here follow. The good qualities of many jurists are seldom extolled until they have been called to plead their own case before the High Court of Chancery presided over by the Judge on high. In singing the praise of the living the innuendo should be adopted, not to show the slanderous quality of the words, but to extirpate the fulsomeness of seeming flattery. The polished editor who rocks the "Easy Chair" of THE GREEN BAG voices the proper sentiment when he pokes fun at the propensity of lawyers for spreading the color thick when writing legal biography. It is to be hoped that the living judges and ex-judges of the Buckeye State have not been patted on the back, in this article, to such an extent that any of them will become "humped up," and that the "laudatory adjectives" are not too profuse. But the good humored editor of the aforesaid "Easy Chair" should remember that the maxim, that "He who does not blow his own horn, for him no horn shall be blown," has especial application to this class of literature. In undertaking to "write up" the Supreme Court of your dearly beloved State, it is your solemn duty to blow its legal horn as loud as the lungs of the pen may permit. If you don't, who will? So it is with legal biography generally.

THOMAS WELLES BARTLEY, the son of Mordecai and Elizabeth (Welles) Bartley, was born February 11th, 1812, in Jefferson County, Ohio. He received a liberal education, graduating from Jefferson College, Pennsylvania, with the degree of Bachelor of Arts. He read law in Washington City, and was admitted to the Bar at Mansfield, Ohio, in 1834. He soon became a leading member of the Bar. Was elected Attorney-General of the State, performing the duties of that position for four years; was United States District Attorney four years; served six years as a member of the General Assembly of Ohio, and in 1844, on the resignation of Governor Shannon, he became Governor and performed the duties of that office until his father, Governor Mordecai

Bartley, became the chief executive, in December, 1844.

In 1851, he was elected a judge of the Supreme Court of Ohio, serving two terms. On retiring from the Bench he went to Cincinnati, Ohio, and began the practice of law, but soon removed to Washington city.

JOHN A. CORWIN was elected judge of the Supreme Court from Champaign County in 1853, but was not on the bench long until he resigned. He was a very eccentric man, and not possessed of good habits. When he died in 1863 the papers contained about a four-line notice of his death.



JACOB BRINKERHOFF.

ALLEN G. THURMAN was born in Finchburg, Virginia, November 13, 1813. His father was the Reverend P. Thurman; his mother was the daughter of Colonel Nathaniel Allen of North Carolina, the adopted son and nephew of Joseph Hews, who was one of the signers of the Declaration of Independence. He came, with his parents, to Chillicothe, Ohio, in 1819, residing there until 1853, at which period he removed to Columbus, where he still resides. His education was obtained from private instruction given by his mother and in attendance at the Chillicothe Academy. He read law under his uncle, the late Governor Allen, who was at that time United States Senator of Ohio, and with Noah H. Swayne, who afterward became a justice of the Supreme Court of the United States.

He was admitted to the bar in 1835, and began the practice at once, and continued so to do until 1851, when he was elected a judge of the Supreme Court of Ohio. He was married to Mary Dun, daughter of Walter Dun of Kentucky, in November, 1844. In that same year he was nominated and elected to Congress from his district. He declined a re-nomination and re-election, as he wished to give his attention to his law business. Being elected to a place on the Supreme Court bench in 1851, he drew the term of four years, the last two of which he was Chief Justice. He refused a re-nomination to a place on the bench, and again turned his attention to the practice of his profession. He was retained in leading cases all over the State and his time was fully taken up with cases in the higher State courts and in the Federal courts. His opinions are contained in the first five volumes of the "Ohio State Reports," and are notable for clearness and the forcible manner in which the law is set out. His opinions have always been considered, by members of the Bar, as among the best. He has always been an ardent Democrat, and his voice has done more for the Democrats of Ohio than that of any other one man. In its darkest days, when hope had apparently fled, Judge Thurman was always found standing firmly by that party, the principles of which he so much loved. When the young men were anxious to

abandon the party, Judge Thurman said no! stand by the ship, she will yet ride the storms. And even yet, in his eighty-first year, we hear that voice speaking the words of hope to the followers of Jackson and of Jefferson, saying: "We will again beat the Republicans, I know not whether it will be soon or late, yet beat them we will, because the principles of the Democratic party are correct."

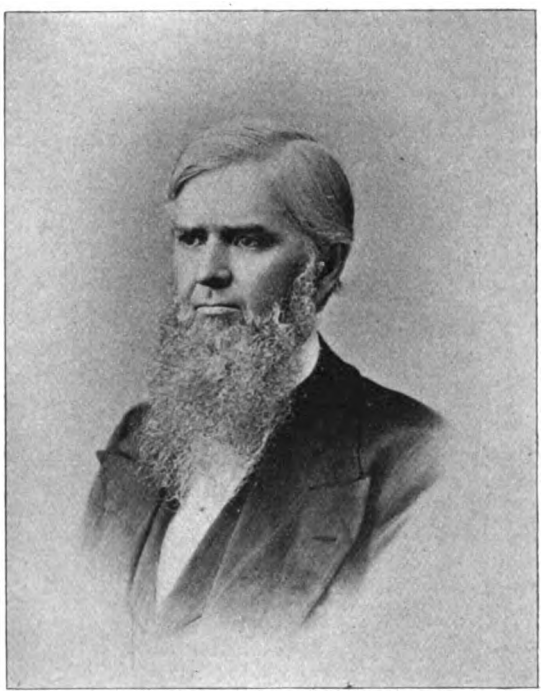
In 1866, he was elected to a seat in the United States Senate, and was re-elected at the end of that term to serve for another six years. He distinguished himself during his service in that body, becoming noted all over the entire country for his fearless independence and as a champion of the people's rights. It is supposed that in the operation of what is known as the "Thurman Bill," relating to Pacific railroads, he saved to the people not less than one hundred millions of dollars. Many times Judge Thurman's name has been mentioned as a candidate for the highest office within the gift of the people, but through some cause he never received that well deserved honor; but that did not lessen his greatness. President Garfield appointed Judge Thurman, together with ex-Senator Howe of Wisconsin, and ex-Secretary of State Evarts of New York, to represent this country in the International Congress which met in Paris in the spring of 1881. This gave him the long-wished-for opportunity to visit Europe in a representative capacity. While performing this mission he visited many foreign countries. He subsequently acted on an advisory committee to settle the differential rate between the great railroads of the country. In 1888 he was nominated for the office of Vice-President of the United States, but was defeated at the polls. No man in this country enjoys to so high a degree the confidence of the whole people as does Judge Thurman In all his long public career no breath of shame has ever touched his garments. Honest and thoroughly conscientious in all his dealing with his fellowmen, his name is but another name for truth and public virtue. No State in this broad land can boast of one more noble in all that goes to make up true nobility than can Ohio, when she points to her honored citizen, Allen G. Thurman; and none was more brilliant than his judicial service. Never was a greater honor conferred upon a citizen than the banquet given in honor of his seventy-seventh birthday, at which one thousand plates were spread, which was the largest banquet ever given a private citizen in the world. At this gathering were distinguished citizens from all over the country.

Judge Thurman is now quietly passing his declining years in Columbus.

RUFUS P. RANNEY for many years was regarded by the Bar of Ohio as their ideal lawyer and judge. His life is a model for study and emulation. He was born in Massachusetts, October 30, 1813. His father came to Ohio when Judge Ranney was but eleven years old, locating in Portage County, their home then being the log hut of the early settler, and their neighbors consisting chiefly of sturdy forest trees, wolves and bears. Inspired with a desire for education, Rufus, after having chopped enough wood for a neighboring merchant to purchase a Virgil and a razor, started for an education. He was a student at Western Reserve College. Leaving college in 1834, he commenced the study of law with Joshua R. Giddings and Benjamin F. Wade, and after two and a half years was admitted to the bar in 1836, commencing practice at Warren, Ohio. He soon formed a partnership with Wade as Wade & Ranney, which continued ten years. He was a member of the Constitutional Convention of 1851, and in March, 1851, was elected by the Legislature judge of the Supreme Court, to succeed Judge Avery, resigned. In October, 1851, after the adoption of the new Constitution, Judge Ranney was chosen by the people as one of the judges of the new Supreme Court. He served in this capacity until 1856, when he resigned

and removed to Cleveland to resume the practice as a member of the firm of Ranney, Backus & Noble. He became the United States District Attorney, but resigned within a few months. Was a candidate for Governor in 1859, but was defeated. In 1862 he was again selected Judge of the Supreme Court, but again resigned after two years' service.

His service in the Constitutional Convention of 1851 as a member of the committee on the judicial department was one of the most important of his life's labors. Space will hardly permit detailing the numerous important questions in which he took an active interest. He favored biennial legislative sessions, opposed giving the Governor a qualified veto power; was the author of the clause in the Bill of Rights providing that when private property is condemned the compensation therefor shall be assessed by a jury. He was the first one to propose the provision to secure the rights of creditors of corporations by individual liability of stockholders.



W. W. BOYNTON.

Judge Ranney strenuously opposed the idea of removing the court of last resort so far from the people. Ranney was very much in favor of the "stirrup judges," considering the circuit system indispensable. He thought "mere paper courts would become little better than mere paper themselves, and might as well be filed away in some secure place in the Capitol." He thought it best that the court see the people, hear the arguments, and not be confined to dry printed records and briefs. And distinguished lawyers at present consider it a serious question whether the best results are reached by a court shut up in a room, confined to printed arguments, absorbed in the science of the law. A review of the many important opinions written by Judge Ranney would be interesting, but space will not permit. One of the greatest services rendered by him, was in placing construction upon important provisions of the Constitution, which he had done so much to form.

WILLIAM B. CALDWELL, the first Chief Justice under the present Constitution, was born in Butler County, Ohio, on the twenty-third day of June, 1808. His parents emigrated from South Carolina in 1805, and settled upon a farm in Old Butler County, on which farm the subject of this sketch labored until reaching his twenty-first birthday. He entered Miami University in 1830, and graduated from that institution in 1835. He read law under Hon. John Woods of Hamilton, being admitted to practice by the Supreme Court in 1837. He began the practice of his profession in Xenia, Ohio, in 1837. In 1838 he removed to Cincinnati, Ohio, where he formed a partnership with General Samuel F. Cary. He was elected Prosecuting Attorney of Hamilton County in 1841, and in 1842

as President Judge of the Common Pleas Court of that county, which position he held until the year 1849, at which time he was elected by the Legislature a judge of Supreme Court, and was re-elected by the people under the new Constitution. In 1854, he resigned from the Supreme Court Bench and returned to his practice in Cincinnati. The strongest points about the make-up of Judge Caldwell were his good nature and his unerring judgment of human nature; he seemed to read men as most men do books, with perfect ease. All his life long he was a close student. He was straightforward and manly in all his dealing and intercourse with others. The opinions written by Judge Caldwell are found in the eighteenth, nineteenth and twentieth Ohio Reports, and in the three first Ohio State Reports. He was much lamented, after death, by those who had had the good fortune to know him in life.

ROBERT B. WARDEN was one of the early reporters of the Supreme Court, coming from Cincinnati. Upon the resignation of Judge Corwin, he was, while acting as reporter, appointed judge of the Supreme Court, serving only about a year. He was only twenty-eight years of age when appointed, and hence the youngest man to occupy a position upon the Supreme bench. He was a man of exceptional ability, but did not possess the power to use it to the best advantage. He was the author of a book entitled "Forensic View of Man and Law." He practiced law in various places in Ohio, finally removing to Washington, D.C., where he died several years ago.

WILLIAM KENNON was born May 13, 1798, in Fayette County, Pennsylvania. His father, with his family, removed to Belmont County, Ohio, in 1804, where the Judge continued to reside until his death, November 2, 1881, at his residence in St. Clairsville, Ohio. He attended Franklin College for a short time, then studied law, and was admitted to the bar in 1824, and began practice at St. Clairsville. He was elected a member of Congress in 1828; in 1840 he was appointed, by the Legislature, President Judge of the Court of Common Pleas of the 13th District; was a member of the Constitutional Convention of 1850; in 1851 he was appointed a member of the Codifying Commission, which framed the Civil Code of Procedure; in 1854 he was appointed judge of the Supreme Court. His opinions are found in volumes 3, 4, and 5, Ohio State Reports. As a public man his every act was marked with ability and honesty. He stood for many years at the head of the profession in Ohio; was eloquent, and as a leader had few equals, perhaps none who surpassed him in the power to convince the mind of either judge or jury of the correctness of his position. He retained his mental strength up to a late day in life, beginning the study of the Hebrew language at the age of seventy-five, and in a very short time was able to read the Old Testament in the original.

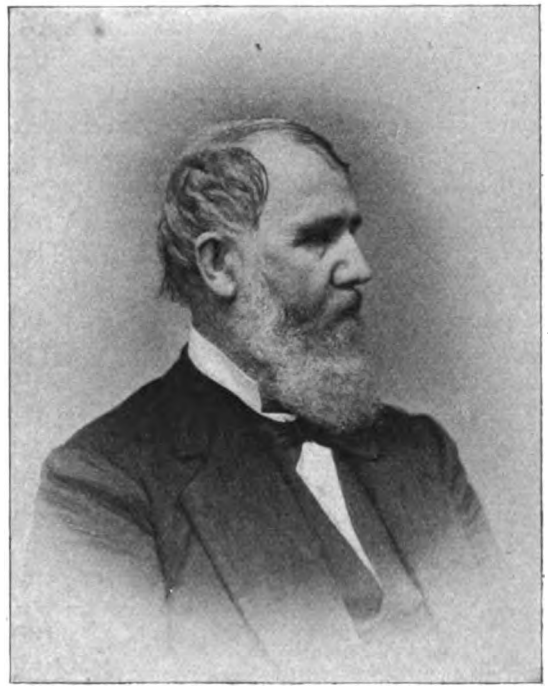
JOSEPH R. SWAN was born December 28, 1802, in Oneida County, New York. He received an academical education at Aurora in that State, where he began the study of law; he came to Columbus, Ohio, in 1824, and entered the office of his uncle, Judge Gustavus Swan (who was looked upon as one of Ohio's ablest lawyers), and shortly thereafter was admitted to the bar. He immediately entered into the practice of law in Franklin County, and soon obtained a high position as a lawyer. The Common Pleas Court of Franklin County, recognizing his worth and ability, and having full confidence in his integrity, appointed him to the office of Prosecuting Attorney in the year 1830.

In 1833 the General Assembly passed an act providing for the election of prosecutor by a vote of the people, and in October of that year Judge Swan was Prosecuting Attorney. He performed the duties of that office until 1834, when the General Assembly

elected him judge of the Court of Common Pleas of a judicial circuit then consisting of the counties of Franklin, Madison, Clark, Champaign, Logan, Union, and Delaware. He was again elected by the Legislature in 1841.

In 1845 Judge Swan resigned his position of judge of the Common Pleas, and formed a partnership with Mr. John W. Andrews of Columbus, Ohio, which partnership continued with profit to both until 1854.

In October, 1854, Judge Swan was the candidate of the Republican party for the position of judge of the Supreme Court, and was elected by a large majority.



W. J. GILMORE.

On the Supreme Court Bench Judge Swan fully sustained he high reputation already won by him, and it is safe to say that he held the esteem and confidence of the Bar, Bench, and the public in general to as great a degree as that which had ever been attained by any of the illustrious citizens who had preceded him on that bench. Some of the most exciting incidents of our country's history were enacted during the period when Judge Swan sat on the bench of the Supreme Court of Ohio, and truly may it be said of him that he never forgot the dignity of the high office which he held. At all times courteous, patient, impartial, firm, and wise. Always striving to rightly construe the law as it existed, never attempting to create law to suit existing conditions, as is too often the case with some courts. Indeed, it was his fearlessness in discharging his duty, as he saw it, and as all have since been made to see, that he was repudiated by his party friends, and refused a renomination to a place on the Supreme Court Bench. We refer to his decision on the "fugitive slave law," when he held "that the State could not interfere with the action of the courts of the United States within their well-established constitutional limits." Judge Swan himself regarded this as the greatest act of his life and the complete vindication afterwards accorded him proves that he was not alone a strong man, but that he was a far-seeing one as well.

But his failure to be renominated and reelected to a seat on the Supreme Court bench did not discourage him, as the work performed by him afterwards plainly shows: it was following this period that he wrote and published a treatise entitled, "A Treatise on the Law relating to the Powers and Duties of Justices of the Peace, etc." This work has gone through many editions, and is considered one of the most useful books ever published in Ohio. One of the last acts of his life was the preparation of a new edition of this work, working at it when hardly able to sit up. His publishers hastened the book through as rapidly as possible that he might see a copy before he died.

Judge Swan was a member of the Constitutional Convention of 1850, and served on some of the most important committees of that body.

Four general revisions of the Statutes of Ohio were made by Judge Swan. He published several well-known text-books. "A Guide for Executors and Administrators" was published in 1843; Swan's "Pleadings and Precedents under the Code," dedicated "To the Young Gentlemen of the Bar," in 1860. This book is without doubt one of the best books ever published upon this most important branch of the law. When we recall only a portion of the work performed by Judge Swan, we are lost in wonder and amazement. Where he could find the time to accomplish so much in so short a time is incomprehensible. It has been well said by one who knew him, that, "In every station, and always, he was the same quiet, upright, conscientious, patriotic, Christian man, loving home, friends, neighbors, country, and finding in them, and the duties claimed by them, a means of preparation for, and foretaste of that life to come which Christianity reveals, and which these earthly relationships symbolize and foreshadow." The life and character of this eminent jurist was recently made the subject of a sermon by that distinguished divine, Rev. Washington Gladden.

Judge Swan was married twice, and left three sons and two daughters surviving him.

JACOB BRINKERHOFF was born August 31, 1810, in New York, and died at Mansfield, Ohio, July 19, 1880. His father, Henry I. Brinkerhoff, was a native of Pennsylvania; his grandfather was from Hackensack, New Jersey, and belonged to the old Dutch family of New York, the progenitor of which, Hendrick Brinkerhoff, came to the New Netherlands from Dreutland, Holland, in 1638. Louis Bevier, the progenitor of the family in this country, was one of a band of French refugees, who, after the revocation of the Edict of Nantes, fled from religious persecution, and sought toleration in the New World. Judge Brinkerhoff was taken by his father to Groton, Tompkins County, New York, where he lived until 1825, attending the district school for five or six years. In 1825 they removed to Steuben County, New York, where he remained until he had reached the age of twenty, working on a farm, a life with which he was much in love. But seeing no way by which he could become the owner of a farm, he decided to study for a profession, and so took up the law. At first, however, he thought of medicine, but changed to the law after having attended the Academy at Plattsburgh. He became a student in the law office of Howell & Howell in Bath, the county seat of Steuben County, in May, 1834. Subsequently he went to the office of Rodgers & Neaston, and still later to the office of Henry Wells (who afterwards became one of the Supreme Court judges of the State), in Penn Yan, Yates County, where he remained until 1835. He came to Ohio in 1836, where his father owned a farm in Richland County, Ohio. He was admitted to the bar in May, 1837. Locating in Mansfield, and forming a partnership with Thomas W. Bartley, who was then Prosecuting Attorney, in 1839 he was elected Prosecuting Attorney, which place he filled for four years. In 1843 he was elected to Congress on the Democratic ticket. While in Congress, he became a free-soiler, and drew up the famous resolutions introduced by David Wilmot, since known as the "Wilmot Proviso"; the original draft of this resolution, in his handwriting, is still in the possession of his family. He served two terms in Congress, and then resumed the practice of law in Mansfield. In 1856 he took his seat on the Supreme Court bench, serving three successive terms, in all fifteen years. On retiring, he returned to Mansfield, where he spent the remainder of his life. He was held in high esteem by the other members of the Court and by all the members of the Bar who came in contact with him.

OLD WORLD TRIALS.

X.

MADAME JONIAUX'S CASE.

FROM the spring of 1894 up to the commencement of February in the present year, Belgian, and indeed one might say continental, society had been filled with all sorts of reports and rumors as to a sensational criminal cause, which was about to come before the courts of Antwerp. The actual facts in the possession of the public were somewhat scanty. But they were numerous and cogent enough to form a foundation for a goodly edifice of conjectures, *on dits* and suspicions. It was known that in the early spring of 1894 M. Alfred Ablay, a Belgian officer of good family, had died suddenly in Antwerp at the house of his sister, Madame Joniaux, a lady of over fifty years of age, the widow of M. Faber, a well-known bibliophile, and the wife of an equally well-known and distinguished Belgian engineer; that the English "Gresham" insurance office with which the deceased had been insured for one hundred thousand francs refused to pay the policy money; that the authorities ordered an examination of M. Ablay's body, and that the result of the inquiries of the investigating judge was the arrest of Madame Joniaux on a charge of having poisoned, not only her brother, in February, 1894, but also her sister, Léonie Ablay, in March, 1892, and her uncle, M. Van Kerchone, in March, 1893. Madame Joniaux has now been convicted of all three crimes, and sentenced to death — a sentence which in Belgium is merely penal servitude "writ large," as it is invariably commuted, and it may be interesting to analyze the evidence adduced against her, and draw the appropriate morals from her case. The first thing that the Belgian "Crown" — we use the term "State" or "People" — had to establish was that the three deaths laid to Madame Joniaux's charge were due to poison. In the two earlier cases — those of Léonie Ablay and M. Van Kerchone — the evidence on this point was of a negative character; and if they had stood alone, she could not have been convicted. Two years elapsed between Mlle. Ablay's death and the postmortem on her body, and of course in that interval all traces probably even of mineral and certainly of vegetable poison must have disappeared; nor were there any reliable circumstances to show that the symptoms which preceded her death were due to morphine, which the prosecution alleged to have caused it. All that the Crown experts could have said was that they found in her corpse no evidences that she had died from natural disease. M. Van Kerchone's case was still more mysterious, although his body was examined one year after his death. Here, again, there were no traces of poison; it was admitted that the deceased had died after a dinner at his niece's house at which he had drunk champagne and burgundy to excess, and the medical experts conceded that the death might have been due to alcoholism. In M. Alfred Ablay's case, however, where the postmortem examination took place nine days after death, morphine was found, and the efforts of the defense to rebut this fact were rather unhappy. First, the presence of the poison was disputed. Then it was contended that enough had not been discovered to account for death. This line of argument clearly involved the fallacy of at once attacking the Crown experts for having said that there was morphine in M. Ablay's body, and at the same time upholding them as sufficiently skillful to have detected enough morphine to take away life if it was there.

The jury probably saw this, concluded that the case was one of morphine poisoning, and reflected their judgment on this point back to the earlier cases. Then if the three cases were cases of morphine poisoning, were they felonious? and was Madame Joniaux the felon? The first branch of this question admits of an immediate affirmative answer. There was really no serious suggestion of accident or suicide. The latter part of the question is not so easily answered. But assuming the original inference as to the cause of death to have been justifiable — a point on which we are by no means clear, we think that Madame Joniaux was rightly convicted. We start with the fact that all three victims died in her house, and that she was interested in the death of all three, and was in serious pecuniary embarrassment at the time of their deaths. Then there was evidence to show that she was in possession of morphine, and nothing to prove that she used it for any innocent purpose. Opportunities of administration she of course possessed abundantly in each case. Highly circumstantial all this evidence of course was, but we regard it as sufficient. Madame Joniaux's examination by the presiding judge excelled in point of unfairness the average of continental criminal inquisitions. The blinds of the court are said to have been adjusted, so that the play of her features could be watched, and every scrap of ignorant and irrelevant prejudice on which the prosecution could lay its hand was pressed into the case against her. But once convicted, she deserved execution. It is ludicrous to keep up the form of capital punishment, if criminals of such deep dye are not to suffer it. LEX.

THE JUDGES' COLLARS OF S S.

THE Collar of S S, worn by the Chief Justice and Chief Baron of Her Majesty's Courts, has been the subject of conjecture and suggestion. The collar is a very ancient ornament, for it is recorded that Titus Manlius, having slain a Gaul in combat, put the *torque* or twisted chain or collar of his opponent on his own neck, and that he thence derived the sobriquet of *Torquatus* (B. C. 361). John of Gaunt, Duke of Lancaster, the uncle of Richard the Second, is said to have been the first person who used the Collar of S S as a badge, that king giving to his retainers symbols of this kind as party emblems, and such being worn by those who supported the pretensions of the Lancaster family to the throne. Hence, one suggested origin of the S S collar is that it means Seneschallar or Steward, an office which John of Gaunt inherited in right of his wife, the daughter of Henry of Lancaster. It continued the symbol of the Lancastrian adherents through the reign of Henry the Fourth, Henry the Seventh, and Henry the Eighth, when in that king's reign an act passed limiting its use to certain persons. The Yorkist Collar was that of the Roses and Suns. The collar of S S is part of the Order of the Garter, and hence some trace it to the institution of that Order, the letters S S being the initials of the Countess of Salisbury, whose name is identified with the Order. It was certainly added to the insignia of that Order after the reign of Edward the Fourth, and so another suggestion of the origin of the letters is Souverayne, the motto of Henry the Fourth, in reference to his claim to the Crown. Again, it is said the letters mean nothing but the Gnostic Sigil or symbol. Another writer argues that they stand for Soissons, and that they were adopted by Henry the Fifth in honor of St. Crispin and St. Crispinian, martyrs of Soissons, on whose

anniversary the Battle of Agincourt was fought. A later writer concludes they signify nothing more than *Souvenez vous de moi.* This view is adopted by Mr. Foss in his "Lives of the Judges." Another theory is that the collar itself was nothing more than a chain on which were hung the pendant decoration, and the chain with its links looking like a series of S S, it hence acquired the name.

When it came to be first worn by the Chief Judges does not appear with any certainty, but in 1649–1685 it was resumed by these learned persons, of whom it had been a distinguishing ornament for upwards of a century. Dugdale, in his "Origines Juridiciales," says the origin of the collar is from *Simplicius and Faustinus*, brothers and Roman Senators, who suffered martyrdom under Diocletian, by having a stone with a chain tied round their necks and being thus thrown into the Tiber. Lord Campbell, in his lives of the Chief Justices, refers to the passage from Dugdale, but offers no comment on it. If the collar were worn in honor of St. Simplicius, it was not so worn till about the year 1407, whereas the Order of the Garter goes back to 1349. One of the S S Collars was bestowed by Charles the Second on the then Lord Mayor of Dublin (1660), but this having been lost, another was presented to a subsequent Lord Mayor, in 1697. Originally these collars were gold enameled chains with cyphers having the badge of some order suspended, and the Order of the Garter consists of S S with roses enameled red within a garter of enameled blue. In 1360 an Order of the Collar or Necklace or Annonciada was instituted by Amadeus the Sixth of Savoy.

The oldest of the S S collars worn by the Judges was that of the Chief Justice of the now abolished English Court of Common Pleas, it having been used by Sir E. Coke, and transmitted down to Tyndal, C. J., from whom it came to Lord Truro, and by him was left to his successors. Lord Ellenborough, in the English Court of Queen's Bench, retained his collar; and on his accession to the Chief Justiceship, Lord Tenterden purchased a new one, which, coming to Lord Denman, was by him transferred to the Corporation of Derby, of which county he was a native. Lord Campbell also retained his collar, so Sir Alexander Cockburn had to purchase a new one. The chief Barons of the late English Court of Exchequer were likewise the purchasers of their own S S collars. In Ireland the collar is worn by the Lord Chief Justice of the Queen's Bench, and the Lord Chief Baron of the Exchequer, but the use of the collar as an ornament in this country must date back from a very early period. In an encounter with the Danes, in the 10th century, Malachi, the monarch of Ireland, defeated two of the Danish chiefs, and he took a collar of gold from the neck of one, and the sword of the other. It is to this feat that Moore alludes in the lines:—

"When Malachi wore the collar of gold,
Which he won from the proud invader."

— *Irish Law Times.*

WILLIAM ATWOOD,

CHIEF-JUSTICE OF THE COLONY OF NEW YORK, 1701–1703.

III.

By Charles P. Daly, LL.D.,

Ex-Chief-Justice of the New York Court of Common Pleas.

UPON Atwood and Weaver's arrival in London they applied to the government for a hearing and to be restored to their offices, which was deferred until authentic documentary evidence of what had occurred could be obtained from New York. It came in the shape of a formal statement by Lord Cornbury of the reasons for what he had done, with letters giving more full details, and many papers and documents.

Atwood filed an answer to the governor's reasons for suspending him, which was characteristic of the man. He did not deny any one of the facts stated in the documents, beyond referring to them as "pretended" or "supposed" reasons, but took the objection that "nothing appeared under the Governor's own hands, but only copies of originals, if there were any, which copies were certified by Honan, an abetter of pirates, so that all the supposed proof rested upon papers depending solely upon his certificate, which was without the seal of the province." The answer further set up that Lord Cornbury acted without authority, as by the terms of his office he, the Chief Justice, could not be suspended, until the Queen's pleasure was known, and "that the Governor acted equally without authority in imprisoning the sheriff, and 'releasing' a condemned traitor, who had fully and freely confessed his crime," and finally that he "should not be obliged to make any further or particular answer, until he had leave to present articles against Lord Cornbury and one of his instruments, the Attorney-General Broughton, for maladministration," to which objections it would appear the Privy Council attached no weight, for they disposed of the whole matter within ten days thereafter.

The publication of the report of Bayard's trial in London was so damaging to Atwood, and especially the account of what took place from the sentence to the granting of the reprieve, that Atwood felt the necessity of doing something to counteract it. Accordingly, in the same year in which the trial was reprinted, 1703, and apparently before the parties were heard before the Privy Council, a pamphlet, "The case of William Atwood, Esq.," etc., appeared in London with a very long title.[1]

The name of the author is not given in the title page, but it was evidently written by Atwood, his peculiarly involved style, confused way of stating facts and pointless attempts at wit being unmistakable.

It was a lengthy production, beginning with a rambling and inaccurate account of events in the colony before and after his arrival, to convey the impression that what he had done was indispensable to preserve the rights of the Crown against the efforts of what he called "the faction." The published report of the trial was denounced as "spurious," with the declaration that it was "not within the intent of his *short* narrative" (it was two hundred closely printed

[1] The case of William Atwood, Esq. By the late King William of Glorious Memory Constituted Chief Justice of The Province of New York in America and Judge of the Admiralty there and in Neighbouring Colonies, with a true account of the Government and People of the Province; particularly of *Bayard's* Faction and the Treason for which he and *Hutchins'* stand Attained; but Reprieved before the Lord Cornbury's Arrival, upon Acknowledging their offences and begging Pardon. London Printed in the Year MDCCIII.

pages) "to show all the falsehoods, contradictions, and absurdities" in the report. As this report of the trial was prepared by Bayard and his counsel, it is not entitled to the same weight that would be given to a publication by a disinterested person, who had taken full notes, and I have, therefore, in my statement of what occurred, inserted no fact that is positively denied in Atwood's pamphlet, or otherwise questioned. It was, however, a printed report of the trial purporting to be substantially correct, and could not be impeached merely by assailing it with such general words as those I have quoted. If there were errors or omissions, they would have to be pointed out. If any statement was untrue, it would have to be denied, and what is denied in the pamphlet is of little or no importance, whilst what is material is admitted by not being contradicted. Some omissions are specified, but they were not material.

Atwood and Weaver were fully heard by counsel in respect to their removal, with the three others, from the Council; the suspension of the two former from their offices; the actions brought against Atwood and the others for damages and upon Bayard and Hutchins' appeals, and the Privy Council confirmed the removal of the five counselors, and appointed the five persons recommended by Cornbury, in their place. It set aside the suit brought by Bayard for damages, upon the ground that no action would lie against the judges for what they did in their judicial capacity, nor against the jurors for what was done by them as jurors. An order was made declaring that "the Queen being sensible of the undue and illegal proceedings against" Bayard and Hutchins, the Governor of the Province was instructed to direct the Attorney-General to consent to "the reversing of the sentences against them, and all issues and proceedings thereupon, and to do whatever was necessary to reinstate them in their honor and property," which was done. Weaver was not restored to his offices, and Dr. John Bridges was appointed Chief Justice in place of Atwood.[1]

Notwithstanding this decision of the Privy Council and the appointment of another as Chief Justice, Atwood determined to continue his efforts to be restored to the office from which he had been removed. With that end in view he maintained a correspondence with the leading Leislerians in New York, with whom he had been associated, and who had kept up the hope of their followers by the assurance that "it would be their turn next," that "Atwood and Weaver would be approved in all they had done."[2] Through this correspondence he kept himself fully informed of what was taking place in New York under the rule of Lord Cornbury, and that rule was certainly of a character to give him every encouragement; for Cornbury was more arbitrary, bigoted, dishonest, and rapacious than any of his predecessors. "We never had," says Smith, the historian, writing in 1765, "a governor so universally detested; nor any one who so richly deserved the public abhorrence"; and though he was a cousin of Queen Anne's, she revoked his commission, declaring, according to the same historian, that she would not countenance her nearest relatives in oppressing her people.[3]

It may be assumed that Atwood would use to his advantage what was revealed of the character of the man that had displaced him, and that he did so is indicated by the attention which the government afterwards gave to his requests. Before renewing his application, however, he resorted to his former method of ingratiating himself with the ministry by writing political tracts that would bring him again into notice, and be acceptable to the government, and hit upon a subject that had that effect. As far

[1] 4 Col. Doc. 972, 974, 975, 1011, 1012, 1014, 1015, 1022, 1023, 1024, 1025, 1044, 1071, 1142, 1150. The act of 1691 under which Bayard and Hutchins were indicted and convicted, was repealed by the General Assembly in 1704.

[2] 4 Col. Doc. 1071, 1017.

[3] 1 Smith, 193 and 194.

back as the reign of Edward I, it was claimed that Scotland was a dependency of England; that as such it was bound to do homage, and that Edward had the right to dispose of the Scottish crown as the liege lord of that kingdom. This claim, which the English never absolutely relinquished, and the Scotch, as a people, never admitted, came under consideration in the reign of Elizabeth, when it was apparent that upon her death, James VI of Scotland, if then living, would become the next in succession to the crown of England, as he did, under the title of James I, through his mother, Mary, Queen of Scots, who was the granddaughter of the sister of Henry VIII. Sir James Craig, a Scotch lawyer, then of great eminence, whose work on the feudal law was then an authority in every country in Europe, and is pronounced by Nicholson "a lasting monument of the extraordinary learning of its great author," wrote an elaborate treatise entitled "Scotland's Sovereignty Asserted, being a dispute concerning homage," proving that the kings of Scotland never paid, nor owed, any homage to the kings of England. And as Sir James was not only a great lawyer, but equally distinguished as an antiquarian, this treatise was supposed to have settled the question.

It appears, however, to have been revived after the accession of William and Mary, and when their joint sovereignty ended by the death of Mary in 1694, William's title to the sole sovereignty of England rested, not upon descent, but solely upon an English statute, the Act of Settlement, and his right to the sovereignty of Scotland upon a convention of Scottish nobles, who, by a large vote, declared that as James II had, through his abuse of power, forfeited all right to the crown, they tendered it to William and Mary, who accepted it; which convention, however, the Jacobites maintained was illegal and without authority. The revival of the claim of Edward I, that Scotland was a mere dependency of England, would, therefore, if it were true, have afforded some answer to the objection raised by the Jacobites, and to show that it was not, Sir James Craig's treatise, which had been written in Latin, was translated into English, and published in London in 1694, and was received with so much favor that another edition of it was published but a few years before Atwood's return to London.

He seized upon this subject as one in which the public and the government were interested, knowing that if he could concoct even a plausible answer to Sir Thomas Craig's treatise, it would attract general attention. It was a kind of investigation, moreover, that he had previously been engaged in, having, as has been stated, before his departure for America, published a quarto entitled "History and Resources of the Dependency of Ireland upon the Imperial Crown of England." Accordingly in 1704 he published a work entitled "The Superiority and Rightful Dominion of the Imperial Crown of England over the Kingdom of Scotland, asserted in answer to Sir Thomas Craig's Treatise on 'Homage and Succession and the Divine Right of Succession to both, inseparable from the civil'" (right).

The work abounds with references to matters alleged to have occurred at a very remote period in English and Scotch history; authors referred to by Sir Thomas Craig are disposed of by such epithets as "ignorant," "lying," and the like, and statements are made of what was said by very early writers, which I should be unwilling to accept without examination, from Atwood's characteristic audacity of assertion in other matters, and especially as so competent an authority as Erskine says that "no light can be received from ancient histories or writings at what period the feudal law was first introduced into Scotland," and that "perhaps no Scottish charter is now extant dated before the year

1095."[1] Whilst Atwood's references, to prove that Scotland stood in a feudal relation to England, are carried up far beyond the eleventh century; one of his statements being that England exercised dominion over it in the time of King Arthur, the hero of a popular poetical romance of the middle ages, one of the theories respecting whom is that he was king of the North Britons of Southern Scotland and Cambria, but whose existence, as an historical personage, has long been questioned, and of which there is no very satisfactory evidence.[2]

To determine whether this work was, or to what extent, if any, an answer to that of the learned Scotch antiquary and lawyer, it would be necessary to read Sir Thomas Craig's treatise, which I have never seen, and in the cursory examination I have given to Atwood's reply, which is a volume of nearly six hundred pages, what I collect from it is that he claims to have established that Scotland, from a very remote period, was a feud of England, and bound to do homage. That when, in due course of succession, the crown of both countries centered in James I, the feud, or feu, as the Scotch term it, was merged in him; that Scotland then became annexed to, and a part of England, and that whoever thereafter became king or queen of England, became also the sovereign of Scotland, "unless the crown of England duly made some other provision"; claiming that he had Scotch blood in his veins,[3] and was "the first among the moderns in asserting to his countrymen of both kingdoms, the honor of being under one imperial crown, not only by consanguinity, but by law."

Atwood's book created the greatest indignation in Scotland. The Scottish Parliament ordered it to be burnt by the hands of the common hangman, directed that the thanks of the Parliament should be publicly delivered by the Lord Chancellor to James Anderson, an eminent Scottish antiquarian, for his reply to it,[1] and bestowed upon him a reward which Atwood, in a rejoinder, says was four thousand eight hundred and eighty Scottish pounds.

The rejoinder of Atwood is entitled "The Superiority of the Crown of England over the Crown and Kingdom of Scotland reasserted against Mr. James Anderson and others by William Atwood, Esq., in animadversion upon a scurrilous pretended answer by him," etc., garnishing the title-page of his rejoinder with a quotation from Horace, which, from what we have seen of the character of the man, is worth quoting: —

"Vir bonus est quis?
"Qui consulta patrum qui leges jura que servat."
(Who is the good man?
He who respects the decrees of the senate, the laws and right.)[2]

Whilst Atwood was engaged in these publications, by which he acquired consider-

[1] Erskine's Institute of Scotland, pp. 206, 207. Edin. 1812, 5th ed.

[2] "S'il y a du vrai dans l'histoire d'Arthur il est difficile de le demêler. . . . Il n'existe aucun monument qui prouve qu'Arthur soit un personnage historique." (Nouvelle Biographie Universelle, vol. 3, p. 390.) (If there is any truth in the history of Arthur, it is difficult to unravel it. . . . There does not exist any monument which proves that he was an historical personage.) And see Turner's History of the Anglo-Saxons, 5 vol. 1, Book III, chap. iii, and the National Biographical Dictionary, vol. 2, for a very full examination of the subject.

[3] His maternal grandfather was Patrick Young, a native of East Lothian in Scotland, the descendant of an ancient Scottish family, and a very distinguished writer. He was the librarian of James I, some of whose works he translated into Latin, and was the author of several learned publications. He died in 1652, the year after Atwood was born. 2 Watt's Bibliotheca Britannica, 991 m. 3 Allibone, 2900. 1 Morant's History of Essex, 155.

[1] An Historical Essay showing that the Crown of Scotland is Imperial and Independent, in answer to Mr. Atwood's. Edin. 1705.

[2] James Anderson, to whom this rejoinder was made, afterwards compiled what has been called a great work, Diplomata et Numismata Scotiæ, which Cosmo Innes, in his lectures on Scottish Legal Antiquities, says he did to prove the antiquity and independent royalty of Scotland, because "there were some men found in England unworthy enough to propose dealing with Scotland as an old feudal dependent, instead of an ancient and always independent neighbor." (Scotch Legal Antiquities, pp. 288, 289, Edin. 1872.)

able notoriety, Dr. Bridges, who had been appointed Chief Justice in his stead, died, and Atwood applied to the ministry for the place. But Lord Cornbury, upon the death of Dr. Bridges, for the reason, as he said, that there might be no failure of justice, there being a great many causes in the court to be dispatched, immediately appointed Roger Mompesson Chief Justice, until the Queen's pleasure should be known, and in the same letter in which he informed the ministry of the death of Bridges and of the appointment he had made, urged that Mompesson might be confirmed, as he was a man of resolution, who would serve the Queen with the utmost fidelity; to which the Lords of Trade replied that they had no doubt that Mompesson would answer from the character given of him; that it was not necessary to apply to the Queen, as by the commission given to him by Cornbury, he was actually Chief Justice, and entitled to the emoluments of that office, which disposed of Atwood's application.[1]

But he was not discouraged. He kept up the Scotch controversy by another publication, entitled "The Scotch Patriot Unmasked," and appears to have indulged in the writing of verses. Mrs. Elizabeth Thomas, a lady poetaster of that day, whom Pope has perpetuated in the Dunciad, under the name given to her by Dryden of Corrina, published a volume of poems, one of which is addressed "To William Atwood, Esq., Chief Justice of New York on some verses he gave me."[2] By the publications that have been mentioned, he appears to have acquired some influence with the ministry, but his efforts to get back to his former place were now more difficult; for Mompesson was an able man, who in England had been for two terms a member of Parliament, and had filled in the mother-country the office of Recorder of Southampton. He was of an old English family, and came to America with a letter of introduction from William Penn, declaring him to be "well-grounded in the law, and an honest, good-tempered, and sober gentleman." All the contemporary authorities agree in representing him to have been a man of learning in his profession, and O'Callaghan says that he "probably did more than any other man to mould the judicial systems, both of New York and New Jersey."[1] In his political relations, however, with Lord Cornbury, he is said to have played a somewhat conspicuous and not very creditable part, and for signing, with some other members of the Council, an address to the Queen, justifying the whole of Lord Cornbury's conduct, he has received from an historical writer "a sentence of stern and unqualified condemnation."[2]

Atwood knew that in the case of such a man it would be idle to expect the ministry, after they had confirmed his appointment as Chief Justice, to remove him merely for the purpose of putting Atwood in his place, and he determined, therefore, to wait, as a more fitting opportunity for renewing his application, until the course of Cornbury should become such — of which he felt assured — as to confirm all that he said against him, and compel the government to remove him. When this event occurred in 1708, and Lord Lovelace was appointed Governor, Atwood's former associates, the two judges, Walter and De Peyster, together with Dr. Staats, petitioned the new Governor to be restored to the Council, setting forth in their petition the injustice of the suspension that had caused their removal; and Atwood, on his part, petitioned the Queen to be reinstated in the office of Chief Justice, upon the ground that Lord Cornbury suspended him upon charges made against

[1] 4 Col. Doc. 1119, 1120. V. id. 69.

[2] Elizabeth Thomas's Miscellanies and Poems on several subjects, London, 1722. It contains also another poem entitled To same on the death of that excellent young man, Leigh Atwood, Esq., his only son, who died under Cyprienos Hands, after he had endured the operation.

[1] 5 Col. Doc. 423.

[2] Field's Provincial Courts of New Jersey, pp. 61, 69.

him without giving him an opportunity of being heard, and that that Governor's appointment of Mompesson, on the death of Dr. Bridges, was merely until the Queen's pleasure should be known, which had never been signified. "It was," he says in a subsequent communication, "beyond dispute that, if Lord Lovelace had lived, De Peyster, Walter, and Dr. Staats would have been restored,[1] and Atwood evidently felt a like assurance in respect to himself, for Mompesson having been the confidential adviser of Lord Cornbury, and having misled the government by signing an address justifying Cornbury's conduct, there was some reason for Atwood's anticipation that the removal of Mompesson would follow that of the Governor. There was an indication, also, that in that event, he would be restored to his former position, for the Queen sent his petition to the Attorney-General for that officer's opinion upon the application, who reported that Cornbury suspended Atwood upon charges "without hearing what he had to say"; that Mompesson, by his appointment, was to enjoy the office only until Her Majesty's pleasure should be known, and what was of more importance, coming from the legal adviser of the Crown, that he conceived it fit, in the case of an officer holding like Atwood, so considerable a post under the government, that Her Majesty should make known her royal intention respecting him. But the newly appointed Governor, Lord Lovelace, died within six months after coming to the colony, and possibly, through that cause, no action was taken either upon Atwood's petition, or that of his former associates.

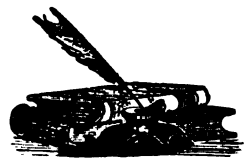
It was more than a year before another governor was appointed, and Atwood, after waiting some time, prepared what he called a memorial to the Lords of Trade, calling their attention to a petition that had been sent to them some time before by De Peyster, Walter, Dr. Staats, Gouverneur, the speaker of the Assembly, and Provost, a member of the Council, asking them, if it were only out of regard for the injured memory of Lord Bellamont and for the welfare and peace of the province, "to procure Atwood's restoration to the station to which King William had appointed him, and to give credit to the account which they felt assured he would faithfully give"; who, they declared, "whilst he was permitted to exercise the office of Chief Justice among them, showed such impartiality, knowledge of the law, and unwearied diligence, as made them earnest petitioners for his restitution." After which Atwood, in this memorial, gave a long and misleading recital of facts, put together in such a way as to leave the impression that he had been greatly wronged, followed by a statement of all that had been done up to that time to have him restored, as an act of justice on the part of the government.

This memorial, from an indorsement upon it, was received and read on the 26th of October, 1709, but it does not appear that any action was taken upon it by the Lords of Trade, or that Atwood made any further efforts. It is said in Phillips's Biographical Index that he died in 1705, but this is a mistake, as he was living four years afterwards, when he presented this memorial.

When or where he died, I do not know. "In the National Biographical Dictionary," now being published in London, the fullest work of the kind that has appeared in the English language, it is said that the year of his death is uncertain, and after the presentation of this memorial, I have been unable to find anything further respecting him. The Leislerians afterwards, as a party, may be said to have ceased to exist; but many individuals among them continued thereafter antagonistic to those in power, a feeling transmitted to their descendants, who agreed in the views, and supported the measures that brought about the American Revolution.

[1] 5 Col. Doc. 168.

The Lawyer's Easy Chair.



. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

GESTURE. — A very pretty and gentlemanly quarrel has sprung up in "The Century" magazine, between Edward L. Pierce and Noah Brooks, on the important question whether Charles Sumner practiced his gestures before a mirror. This charge was made by Senator Douglas, in a public speech, in which he further ridiculed the great abolitionist by alleging that he went through this drill "with a nigger holding a lamp on each side of him." This very vulgar, unbecoming and absurd charge was treated by Sumner with silent contempt. Mr. Brooks now revives it, minus the "nigger" accompaniment, on the authority of the "young daughters" of a Mr. Gardner, in whose house in Washington Sumner lived. Mr. Brooks's language is as follows: —

"Mr. Gardner, among other things told us of Mr. Sumner, said that the family knew, when the senator made a requisition for additional lamp-light, that he was preparing an important speech; and that his young daughters, 'with a curiosity natural to youth,' were accustomed to watch, from the rear windows of the apartment, the senator rehearsing before the pier-glass fixed between the windows in front, with a lamp on either side of him."

Mr. Pierce, as a former biographer of Sumner, indignantly resents this charge, and has been at the pains to obtain the certificates of a number of Sumner's most intimate friends and associates, including several well known lawyers, that they do not credit it. The matter was not worth reproducing by Mr. Brooks, and probably would not have been reproduced but for a very evident dislike which he entertains for the Massachusetts statesman. He accuses him of much worse things than this, in the same article, and in a later one he speaks of Sumner's "studied pose" in the chamber of the Supreme Court on the occasion of Chase's taking his seat as Chief Justice. Mr. Sumner was a proud man, but hardly a weakly vain man. His gestures bore no indication of forethought or practice. In fact they were not at all noticeable nor profuse. It is a pity that Washington gossip, founded on the reported spying of some giddy young girls, should be revived to subject a great philanthropist and statesman to ridicule after his death. If it is worth while to explain his extra demand for candles and his apparent gestures, they may easily be explained by reference to the operation of his toilette, brushing his hair with two brushes, as the manner of some is, or something of that kind. It would never have occurred to anybody who heard Sumner that his gestures were studied, while on the other hand Everett's had every appearance of it. On one occasion, the latter, having been engaged to deliver an oration in New York, demanded to be taken to the hall in the afternoon, and there paced the stage from about the middle to the front, throwing up his arms at the footlights in accompaniment to a subdued utterance, and the precise repetition of this in the evening produced great admiration among all of the audience, except the committee-man who had attended the private rehearsal. Even Erskine liked to visit his court-rooms before the trial-day, to "get the hang of them," as the Yankees phrase it. But artificiality in elocution is a good deal like the same in flowers, it lacks perfume. Everett's glow was that of the iceberg under the polar sun. As George William Curtis once said, "he froze early in life and never thawed out." Sumner undoubtedly did not wear his heart on his sleeve, and he loved not to shake hands with Tom, Dick and Harry, but he devoted himself, and went prematurely to his grave, in the championship of an inferior and despised race. It is well to think of this, and not to rake up improbable and belittling gossip about a good and elevated statesman.

THAT CODFISH. — It is sad to see that the Massachusetts lawmakers are becoming ashamed of their honest but humble origins. For many years a huge codfish has hung over the interior of the door of the lower house of the legislature under the gilded Hub, emblem of one the chief sources of the Commonwealth's prosperity. Now when the legislature is moving into grander quarters there is a disposition to suppress or tuck away that fish. This is very unbecoming. The emblem is far more pleasing than would be a cask of New England rum, or a pair of slave manacles, which would be the natural emblems of the two other chief articles of the Bay State's early traffic. Next we shall hear of a proposal to change the name of Cape Cod. For many

years the writer of these lines sat in a meeting-house at Albany built by early immigrants from Massachusetts and Connecticut, who put the emblems of their respective States on the building in the form of a gilded codfish vane supported by a rod planted in a gilded pumpkin. These things have been sacredly preserved and renovated. Boston is much too careless of her historical landmarks. What has become of the Indian with bow and arrow that pointed out the way of the wind for so many years on the old Province House? The Hancock House was sacrificed. The Old South Church had a narrow escape, and the Old State House is trembling on its foundations. Nothing remains to complete the sacrilege but to take down the grasshopper vane from Faneuil Hall, that insect manufactured by Deacon Browne, who is immortalized by Hawthorne in "Browne's Wooden Image." The aforesaid Indian was also the work of his hands. Will not a second Oliver Wendell Holmes arise to imitate the savior of "Old Ironsides?" He will. Behold him rise: —

Ay! tear the battered emblem down!
Long has it swung on high,
And many a visitor has asked
To know the reason why.
Beneath it rang the buncombe shout
Of patriots making laws,
And silently that goodly fish
Has urged the State's good cause.

Oh! better that its tarnished bulk
Should bob upon the wave;
Its birth was off the fishy Cape,
And that should be its grave.
Fix to its side each wobbling fin,
Attach each loosened scale,
And give it to the fisher's hook,
Or fool the greedy whale.

THE INCOME TAX CASE. — The United States Supreme Court have been polled on the Income Tax law, and the result is a surprise to everybody. It was probably generally supposed that it would be upheld as a whole by a majority of the Court, but the absence of one justice through illness has brought about a singular result in one particular, namely, that the Court stand equally divided on the constitutionality of the law in respect to all incomes except those derived from rents of lands and from state, municipal and county bonds. So on that point the law is upheld through affirmance by equal division. (If the decision below had been the other way, the result would have different, of course — which is an amusing reflection.) As to income from bonds, eight justices declare the law unconstitutional, and as to rents, six agree that it is invalid. The result is undoubtedly a great disappointment to the government, for it must cripple the bill at least one-half — a case of statutory hemiplegia. The bill was designed to reach two very tangible classes of property, and was aimed at aristocratic land-owners and "bloated bondholders," and these are just the people who get off, while the people who earn their incomes by the sweat of their brow or brains, — tradesmen, professional persons, and those on moderate salaries, will have to bear the burden. The law is a failure in another respect: it is valid only in respect to incomes about which there may be difficulty in fixing liability. Rents and bonds are easily tangible; other incomes are considerably vague, and much is left to the individual conscience. The worst result is that the matter is not yet decided beyond question, for if the invalid justice should recover, another case would be made and his deciding opinion taken thereon, if the Court should see fit. In that event we should have the singular spectacle of one judge having at his mercy the upholding or the breaking down of the national finances.

BIG BOOKS. — The biggest book of the year, and the biggest book ever published (excepting that collection of the catalogues of Quarritch, the great London bookseller, which is a foot thick) is the General Digest for 1894, published by the Lawyers' Co-operative Publishing Company, of Rochester. This is a volume of some 3200 pages, on thin but very fine paper, in very small but clear type, in double columns. The type is of two sizes, only the more important cases and those of the highest courts being put in the larger. This is called the "General Digest." The St. Paul West Company have also put out one which looks nearly as large, called the "American Digest." We have put the former to a good deal of practical use lately, and have found it very admirable. The book however rouses painful emotions in the lawyer's mind. All this enormous labor is bestowed on a mere synopsis of the judicial decisions of a single year, and which in a few years will have outlived its usefulness, for the law, with the exception of a limited number of new applications of the old principles, can but go on repeating itself, year after year, and the lawyer simply wants the "last case," because if he fails to cite that, it cannot be certain that the law has not changed. So these huge volumes have their day, in which they are indispensable, and then they become "back numbers." It is saddening to observe how much of these big books is taken up with the mere machinery of the law — with telling how to obtain a record of the judicial expression of the law — mere matters of practice. So under Appeal and Error, Pleading, and Practice, we find 735 pages devoted to this part of the law! We owe gratitude to the patient men

who pass their lives in expressing the juice out of all these adjudications for the information of the profession, and we have especial sympathy with those whose duty it is to classify and arrange the infinite number of paragraphs, and we gladly bestow the heartiest commendation for the expert manner in which this essential part of the herculean task is performed. Ten years hence what will these formidable tomes be good for? Possibly, like Doctor Johnson's big book, to hurl at a polecat if we meet one of those unsavory animals late at night and happen to have the book under our arm. The wife may use it to press flowers or ferns in; the young mother may put it in the baby's chair at table to bring him to the requisite height; or the little girl may utilize it to compress the mucilage with which she puts together her paper dolls. For all these domestic purposes it may supplant the current dictionary, which has hitherto been the favorite resource. We undertook to lug it to our law lecture the other day, to exhibit to our students as an argument for codification, but we had not the strength to carry it.

A LAWYER'S WILL. — It seems that the trustees of Columbia College have offered the trustees of the Tilden Library fund to give them a site on the new grounds of the college for the library building, and to start the library off with the 200,000 volumes of the college library. Mr. Bigelow, one of the Tilden fund trustees, answers that it is doubtful that the proposal should be accepted, because Mr. Tilden meant to endow a public library and not a college library. To this a clever correspondent of "The Critic" answers: —

"Is not Mr. Bigelow in error in thinking that if Mr. Tilden had meant to endow a college library he would have done it? Could it not be said as well that if Mr. Tilden had meant to endow a public library he would have done it? The fact is that either Mr. Tilden did not know his own mind or he did not know how to draw a will. In his will he mentions a library, and he also suggests a desire to further education."

It must be conceded that Mr. Tilden did not know his own will.

NOTES OF CASES.

BURIAL — WIDOW'S RIGHT OF. — In Thompson *v.* Deeds, Iowa Supreme Court, 61 Northw. Rep. 842, a widow tried to remove her husband's body from his daughter's lot, because the latter would not allow her to erect a monument at the grave and a coping around the lot. It was held that the widow should be restrained from the removal, and that she might erect the monument but not the coping. The Court said: —

"When plaintiff consented to the burial of her father in her lot, she knew, or ought to have known, that that consent involved the right on the part of his widow to manifest her appreciation of and affection for the deceased in the usual way, followed from time immemorial by those who respect and revere their dead. This daughter and this widow should exercise a little Christian charity; should remember that whatever their differences may be, they should be lost sight of in the presence of the dead, and obliterated in a common desire and effort to suitably testify to their respect for one who was, as to one of them, a father, and as to the other, a husband. What matters it that the law has said that after burial of a husband the wife shall have no control over his remains; that his next of kin have the exclusive right of disposition thereof? . . . It always has been, and will ever continue to be, the duty of courts to see to it that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out. In one view, it is true it may not matter much where we rest after we are dead; and yet there has always existed, in every person, a feeling that leads him to wish that after his death his body shall repose beside those he loved in life. Call it sentiment, yet it is a sentiment and belief which the living should know will be respected after they are gone."

The milk in the cocoa-nut was accounted for by the following further ruling of the Court: —

"We think that no inscription should be permitted to be placed upon the monument in any way referring to the plaintiff or her first husband, whose remains lie in said lot."

LIBEL — STANDING OF PLAINTIFF. — In Press Pub. Co. *v.* McDonald, 63 Fed. Rep. 239; 26 L. R. A. 531 (U. S. Circ. Ct. App.), it was held that in an action of libel it is competent for the plaintiff to prove his station in society and condition in life to enhance damages. The Court says: —

"The authorities bearing upon this point are conflicting. The text-writers are not in accord. In Massachusetts it was held, as far back as 1807, that the plaintiff in actions for defamation of character may give in evidence, to aggravate the damages, his own rank and condition of life, because the degree of injury the plaintiff may sustain by the defamation may very much depend on his rank and condition in society. Larned *v.* Buffinton, 3 Mass. 546, 3 Am. Dec. 185. In Harding *v.* Brooks, 5 Pick. 247, Chief Justice Parker says: 'The rank and condition of the plaintiff are proper to be made known to a jury by evidence, because the damages may be lawfully affected thereby; but general character has not been the subject of inquiry, unless made necessary by the defense to the action, or to the claim of damages.'

"In Pennsylvania it was held by Judge Sharswood in Klumph *v.* Dunn, 66 Pa. 147, 5 Am. Rep. 355, that: 'The position in life, and the family of the plaintiff, are always important circumstances bearing upon the question of damages, and have always been held admissible for that purpose.'

"See also McAlmont *v.* McClelland, 14 Serg. & R. 359,

where it is said that juries in libel suits always take into view the condition in life of the parties. The point is discussed at considerable length, and the Court expressly lays down the proposition that the plaintiff in such actions may give evidence of his own condition in life to aggravate the damages. A similar rule is applied in Connecticut (Bennett *v.* Hyde, 6 Conn. 24), in Illinois (Peltier *v.* Mict, 50 Ill. 511), in Virginia (Adams *v.* Lawson, 17 Gratt. 250, 94 Am. Dec. 455), and Kentucky (Eastland *v.* Caldwell, 2 Bibb, 21, 4 Am. Dec. 668). See also Shroyer *v.* Miller, 3 W. Va. 161; Fowler *v.* Chichester, 26 Ohio St. 9. A decision in Indiana, where the question raised was as to the admissibility of a question calling for the defendant's position in society, seems to indicate that a similar rule would control there touching such testimony when offered on behalf of the plaintiff. The contrary rule prevails in Alabama. Gandy *v.* Humphries, 35 Ala. 617. The point does not seem to have been presented either to the Supreme Court of the United States or to any of the circuit courts of appeal."

The Court disapprove a *dictum* to the contrary by Folger, C. J., in Hatfield *v.* Lasher, 81 N.Y. 246, and cite the following authoritative expression by Kent, C. J., in Foot *v.* Tracy, 1 Johns, 52: —

"In assessing damages the jury must take into consideration the general character, the standing, and estimation of plaintiff in society; for it will not be pretended that every plaintiff is entitled to an equal sum for the worth of character. The jury have, and must inevitably have, a very large and liberal discretion in apportioning damages to the rank, condition, and character of the plaintiff; and they must have evidence touching that condition and character, so as to have some guide to their discretion."

INFANTS' LIFE INSURANCE CONTRACT — RESCISSION. — In Johnson *v.* Northwestern M. L. Ins. Co., Minnesota Supreme Court, 26 L. R. A. 187, it was held that where an infant, seventeen years old, obtains a policy of insurance, upon which he pays the premium, and makes several semiannual payments during his minority, but disaffirms the contract immediately upon his becoming of full age, and offers to surrender the policy to the insurance company, and demands the return of the money so paid, he can, in case of refusal, maintain an action for its recovery. The Court said: —

"But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of Holmes *v.* Blogg, 8 Taunt. 508, approved as late as 1890 in Valentini *v.* Canali, L. R. 24 Q. B. Div. 166. Some *obiter* remarks of the chief justice in Holmes *v.* Blogg, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved, — a fact which has sometimes led to the erroneous impression that the case itself has been overruled. Corpe *v.* Overton, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits. In Chitty on Contracts (vol. 1, p. 222), the law is stated in accordance with the decision in Holmes *v.* Blogg. Leake, a most accurate writer, in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent Com. 240), and Reeve in his work on Domestic Relations (chapters 2 and 3, title, 'Parent and Child'), state the law in exact accordance with what we may term the 'English rule.' Parsons, in his work on Contracts (vol. 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, 'and enjoys the benefit of it.' At least a respectable minority of the American decisions are in full accord with what we have termed the 'English rule.' See, among others, Riley *v.* Mallory, 33 Conn. 206; Adams *v.* Beall, 67 Md. 53; Breed *v.* Judd, 1 Gray, 455. But many — perhaps a majority — of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities — at least the latter ones — have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule. The dissatisfaction with what we have termed the 'English rule' seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant." . . . "But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as Medbury *v.* Watrous, 7 Hill, 110; Sparman *v.* Keim, 83 N. Y. 245; and Heath *v.* Stevens, 48 N. H. 251, — really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice."

To this last line of cases may be added Spicer *v.* Earl, 41 Mich. 191; 32 Am. Rep. 152.

INFANT'S CHARGEABILITY WITH GUARDIAN'S NEGLIGENCE. — The "legend" of Hartfield *v.* Roper, 21 Wend. 615; 34 Am. Dec. 273, is subjected to severe criticism in Atlanta etc. R. Co. *v.* Gravitt, Georgia Supreme Court, 26 L. R. A. 553, holding that the negligence of the custodian of a child of tender years is not imputable to the child so as to prevent his recovery for an injury by the negligence of a third person. The opinion of Lumpkin, J., gives the most exhaustive array of the authorities on both sides of this vexed question that we have seen. The Court says that the New York doctrine has been approved in Massachusetts, California, Minnesota, Indiana, Maryland, Maine, Kansas and Delaware, and disapproved in Vermont, Alabama, New Jersey, Ohio, Pennsylvania, Virginia, Michigan, Nebraska, Tennessee, Connecticut, Iowa, Texas, Missouri, and Illinois. The Court also calls attention to the modification of the New York rule, first made in that State itself, in Lannen *v.* Albany Gas-light Co. 46 Barb. 264, and uniformly followed there (McGany *v.* Loomis, 63 N. Y. 104; 20 Ann. Rep. 510), allowing a recovery by the child where the child exercised due care, although the parent or custodian may have been negligent. The text-writers (Wharton and Bishop) also disapprove the legend. Mr. Beach, in his excellent treatise on Contributory Negligence, sec. 116 etc., after citing the Donkey and Oyster cases, observes: "It appears therefore that the child, were he an ass or an oyster, would secure him a protection which is denied him as a human being of tender years, in such jurisdictions as enforce the English or the New York rule in this respect." It is singular that the New York Courts should have clung to this ridiculous legend while they rejected the English doctrine of Thorogood *v.* Bryan, imputing to a passenger the negligence of the carrier's servant. More singular still is the fact that the legendary doctrine of Hartfield *v.* Roper was *obiter!* Cowen, J., said that "the defendants exercised all the care which in the nature of this case the law required," and that "it is a case of unavoidable accident," and then he puts forth the legend. Judge Cowen having been dead a good many years, it is safe, and it will not hurt his family's feelings, for us to say that his celebrated opinion is an illogical array of *non sequiturs* and false analogies. There is little left of the legend in the State of its birth, and it will wholly wane away in another generation. Meantime let us crow over the flexibility and certainty of the common law!

SALE — OF LIQUORS BY CLUB. — In State *v.* St. Louis Club (Missouri Supreme Court), 26 L. R. A., 573, it was held that distribution of wine or other liquors among its members by a social club which is a bona fide organization with limited membership, admission to which is only on a vote of the governing board, and with common ownership of property, is not a sale of liquor by retail or in original packages within the meaning of the Missouri dram-shop act, under which license can be obtained only by a tax-paying male citizen above twenty-one years of age, although technically the act does amount to a sale for some purposes.

The authorities on this vexed question are well reviewed in the opinion. The cases which hold that a dealing out of intoxicating liquors by a club to its members is not a sale are Graff *v.* Evans, L. R. 8 Q. B. 373; Com. *v.* Pomphret, 137 Mass. 564; 50 Am. Rep. 340; Seim *v.* State, 55 Md. 566; 39 Am. Rep. 419; Tennessee Club *v.* Dwyer, 11 Lea, 452; 47 Am. Rep. 298; Piedmont Club *v.* Commonwealth, 87 Va. 541; State *v.* McMaster, 35 S. C. 1; Burden *v.* Montana Club, 10 Mont. 330; Koenig *v.* State, 26 S. W. Rep. 835. The following are the the other way: State *v.* Lockyear, 95 N. C. 633; 59 Am. Rep. 287; Rickart *v.* People, 79 Ill. 85; State *v.* Mercer, 32 Iowa, 405; State *v.* Horacek, 41 Kans. 87; Martin *v.* State, 59 Ala. 34; State *v.* Essex Club, 53 N. J. L., 99; People *v.* Soule, 74 Mich. 250; People *v.* Andrews, 115 N. Y. 427. In a number of these last cases the purpose to evade the excise law was evident, and they do not necessarily adjudge that a supplying of the liquors to members of a social club in good faith as refreshments is a violation of the law.

TENANCY BY ENTIRETY — RIGHT TO RENTS DURING JOINT LIVES. — The doctrine of Butler *v.* Nunan, 92 N. Y. 152; 44 Am. Rep. 361, that the modern Married Women's Acts have not superseded the doctrine of tenancy by entirety, and that under a grant of lands to husband and wife the survivor takes the whole estate, is supported by the great weight of authority in this country, but the question of the right to the rents and profits during the joint lives has just now, for the first time, been authoritatively settled in New York, in Hills *v.* Fisher, 144 N. Y. 306, where it is held that the husband does not take them exclusively, but that the husband and wife are entitled to them in equal shares. This approves Buttlar *v.* Rosenblath, 42 N. J. Eq. 615, and disapproves McCurdy *v.* Canning, 64 Pa. St. 39, and so it was held that the husband's mortgage of the lands covered his right to half the rents and profits during the joint lives, and the entire fee if he survived the wife.

The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

The Editor of the "Green Bag."

DEAR SIR, — The February number of the GREEN BAG contained an interesting article on Samuel J. Tilden as a lawyer. I became acquainted with Mr. Tilden during the summer of 1864, at Marquette, Lake Superior, where we were at the same hotel. His name had been very familiar to me from his prominence at Democratic conventions, though he had never held an important public office. He came to Marquette from the Democratic national convention at Chicago, that nominated Gen. McClellan for President, with several other members of the convention. His business was to examine some iron mines in which he held a large interest. One of the mines figured largely in the presidential campaign a dozen years later, on the charge that he had not paid the income tax due from it, but the suit was withdrawn after the election, and it had served its purpose as a campaign argument. I had much talk with Mr. Tilden, partly on account of this mine, which a Boston gentleman had requested me to attempt to purchase. The difference, however, in the estimated value of the mine between the parties was too great for any result.

I asked him for his opinion of the prospect for Gen. McClellan, but, lawyer-like, he asked me for my opinion, without giving his own. He made a political speech while at Marquette, by request, and I was interested in it. He had a good voice, was remarkably clear and emphatic in his statement, concise in his language, and was certainly an impressive if not an eloquent speaker. He spoke readily, though he had evidently made no preparation for the effort.

In company with him was his warm friend, the distinguished William B. Ogden, the first mayor of Chicago, and known as the "Railroad King" from his great railroad interests, and his prominence in building the early railroads that centered in Chicago. He was an unusually fine looking man, of large views, great business sagacity, and interesting in conversation. He was full of information about his travels in this country and Europe, and of reminiscences of the famous men with whom he had been brought in contact. I remember he spoke of having business with Stephen Girard, whom he described. He was enthusiastic in his allusions to Mr. Tilden, whom he regarded as the ablest railroad lawyer in the United States, and no one could have been a better judge, speaking especially of that power of concentration and calculation, on which Mr. Hall has dwelt in his article. He alluded, too, to his fine library and large general reading.

Mr. Tilden's special reason for visiting Lake Superior was to see an iron mine he had purchased, and in which Mr. Ogden and other friends had become parties. He spoke to me with some pride of having taken the responsibility of the original purchase, involving several hundred thousand dollars. He and his friends went out to inspect it with a mining engineer brought with them as an expert, and I was invited to join the party. The mine was located in a forest, at a distance from the railroad and from any village, and tents, provisions, and everything necessary for camping some days in the woods were taken, not neglecting Kentucky's favorite beverage. As we prospected, ore seemed to be abundant everywhere, and the engineer and others would knock off from the rocks piece after piece, and hold up for inspection. Mr. Tilden seemed specially pleased, and would show pieces to Mr. Ogden, and ask with much satisfaction, "Is there any iron there?"

The engineer pronounced the ore of good quality, and of its abundance there could be no question. Satisfied as they were of the value of the mine, the site for the mining village was selected, the location of the branch railroad was fixed, and all other needed preparations for working a great mine agreed upon.

Before their labors were finished I took my departure with another gentleman, an experienced practical iron man, whose whole life had been spent in iron mining.

As soon as we were out of hearing, he turned to me and said, to quote his own language, "That ore is not worth a damn." On inquiry, several years after, I learned that after spending several hundred thousand dollars, the mine had been abandoned, as the ore had proved refractory.

I little thought at the time what a space this small, smooth-faced, plain-looking man was destined to occupy in American history. Of his remarkable

abilities there is now no question, and it is a curious subject of speculation, what a change it might have made in American politics, if he had been inaugurated as President.

Yours very truly,

WM. C. TODD.

LEGAL ANTIQUITIES.

PHILIP of Macedon was king, judge, and lawgiver; and a poor woman had often tried in vain to get him to listen to the story of her wrongs. The King at last abruptly told her "he was not at leisure to hear her." "No!" she exclaimed, "then you are not at leisure to be king!" Philip was confounded at this way of putting it, and seeing no answer to it, he called on her to proceed with her case. He ever after made it a rule to listen attentively to all applications addressed to him.

FACETIÆ.

LORD HERMAND, a Scotch judge, was very apt to say, "My laards, I feel my law — *here*, my laards," striking his heart. Hence he made little ceremony in disdaining the authority of an act of Parliament, when he and it happened to differ. He once got rid of one by saying, in his snorting contemptuous way, and with an emphasis on every syllable, "But then we're told, that there's a statut' against all this. A statut'! What's a statut'? Words! mere words! And am I to be tied down by words? No, my laards; I go by the law of *right reason*."

IN a trial in Georgia in which Tom Carnes was engaged, the opposing counsel had spoken of a syllogism, the major and minor proposition, and the consequence, etc. Carnes, in reply, to convince the jury that the gentleman had lugged in immaterial matter, because he had nothing material to offer, complained of the indelicacy of mentioning in court the names of a very respectable, peaceable family residing over in Lincoln, who had never had anything to do with courts; that old Major Syllogism would be exceedingly alarmed did he know that his name had been mentioned in a court house; that they must know the minor Syllogism could never have been in court, being a minor; and the cruelest cut of all was to name the blushing Miss Consequence, who hardly knew there was such a thing as a court-house. He spoke of the Syllogisms as being a large and respectable family in Georgia.

"WHAT time of night was it when you saw the prisoner in your room?" asked the defendant's attorney in a recent suit.

"About three o'clock."

"Was there any light in the room at the time?"

"No sir, it was quite dark."

"Could you see your husband at your side?"

"No, sir."

"Then, madam," said the attorney triumphantly, "please explain how you could see the prisoner, and could not see your husband."

"My husband was out of town, sir."

A CASE was before Judge Verplanck of Buffalo, N.Y., in which the reputation of one of the parties was involved. "What is the general character of the defendant?" asked the prosecuting officer.

"Character for what?"

"Why, his morals?"

This particular point was just what the witness was not over-desirous of answering, and knowing the Judge quite well, he cast toward him an appealing look. The Judge took in the situation, and, with a face of stony gravity, suggested that the answer desired might perhaps be attained by a slight variation of the question. "Suppose you ask him, "How are his *im*morals? The witness with a relieved expression replied, "Well, Judge, I should say his *im*morals *stand very high!*"

DOWN in North Carolina lately a case was tried before a magistrate, in which the defendant's character having been impeached, it was sought to bolster it up by showing he had reformed and joined the church. The witness, who belonged to the same church, insisted that as the defendant was now a Christian man, *of course* his character was better. Counsel asked him, "Don't he drink just as much as he ever did?" The witness, who was colored and evidently embarrassed by the inquiry, slowly raised his eyes and said with much deliberation, "I think he do, *but he carries it more better*."

SERJEANT SAYER went the circuit for some judge who was prevented by indisposition going in his turn. He was afterwards imprudent enough to move, as counsel, for a new trial in one of the causes heard by himself, on the ground of his misdirecting the jury as judge. Lord Mansfield said: "Brother Sayer, there is an Act of Parliament which, in such a matter as was before you, gave you discretion to act as you thought right." "No, my lord," said the Serjeant, "that is just it; I have no discretion in the matter." "Very true, you may be quite right as to that," said Lord Mansfield, "for I am afraid even an Act of Parliament could not give *you* discretion!"

NOTES.

JUSTICE BULLER used to say that his idea of heaven was to sit at Nisi Prius all day, and play whist all night.

IN "Anderson's Dictionary of Law" (p. 947), under the title, "Shelley's Case," we are told that that celebrated case was decided by "Lord *Francis* Coke." And now comes the Supreme Court of Nebraska, and, in a recent case (Omaha, etc. Ry. Co. *v.* Brady, 39 Neb. 27, 48), quotes a definition from the Commentaries of "Mr. Blackstone."

When Sir Edward and Sir William are thus treated, we need not be surprised that Bacon has a few books attributed to him besides the Shakespeare plays. As the world is inclined to be so liberal with him in the matter of authorship, perhaps he will not begrudge the loan of his Christian name to Coke. But the latter, who hated Bacon and his court, and all things pertaining to them, would not, if alive, be likely to accept the loan in a Christian spirit.

THE following story is told of Chief Justice Parsons. An old lawyer who practiced before him, falling ill, handed over his cases to a young lawyer, Mr. M——, advising the latter to engage senior counsel, and also giving him a letter of introduction to the Chief Justice. The Judge being asked by Mr. M—— as to the merits of the different seniors, with a view to retain one, said: "I think, upon the whole, that you had better not employ anyone. You and I can do the business as well as any of them." This hint being acted on, Mr. M—— turned out to be very successful, and at the close of the sittings called on the Judge to pay his respects. A senior lawyer then leaving the Judge, on recognizing the caller, and suspecting the bond of union between him and the Judge, delivered this Parthian shot on retiring: "I'm not sure, Judge, of attending court at all next term. I think of sending my office boy with my papers. You and he together will do the business fully as well as I can."

LORD CHANCELLOR WESTBURY took upon the woolsack the lofty disdain that had characterized him as Sir Richard Bethell at the bar. In arguing a celebrated appeal, one of the judges pinched him with an awkward question, to which he responded, "Before I answer, may I ask your lordship to reconsider your question, for I am sure, upon so doing, you will perceive that it involves a self-evident absurdity." To a barrister arguing before himself, he said, "You are in error, and, inasmuch as its ways are devious and many, perhaps you can present me with a few more absurdities."

"IT was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it a two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence."—*Lord Brougham.*

LITERARY NOTES.

THE first chapters of the "Personal Recollections of Joan of Arc" appear in the April HARPER'S, with illustrations by Frank V. Du Mond. The authorship is attributed to the historic Sieur Louis de Conte, but the real name of the writer is still a secret. The romance opens with unusual attractiveness, and shows Joan in her girlhood, marked among her peasant playmates by her nobility of mind, her courage, and her acute sympathies.

THE CENTURY for April has almost as much variety in topic as in the number of its articles. Military warfare is represented by Prof. Sloane's Napoleon Life, naval warfare by Molly Elliot Seawell's article

on Paul Jones, invention by T. C. Martin's paper on Tesla's recent work, the drama by a note on Mme. Réjane, with portrait, music by Henry T. Finck's biographical sketch of Stavenhagen, also with a portrait, statesmanship by Noah Brooks's article on Lincoln's re-election, art by a beautiful example of Cole's engraving in his Old Dutch Master Series, religious and educational interests by an article by Lyman Abbott on "Religious Teaching in the Public Schools," travel by a paper by Miss Preston on a new field of travel, "Beyond the Adriatic," fiction by Mr. Crawford's and Mrs. Harrison's serials, and by three short stories.

"Some Curiosities of Thinking" are described by Dr. M. Allen Starr, of the College of Physicians and Surgeons, New York, in The Popular Science Monthly for April. His cases include those of persons with various strange hallucinations, with a defect in one part of the brain only, and some with powers beyond the normal for calculation or music.

The complete novel in the April issue of Lippincott's is "Alain of Halfdene," by Anna Robeson Brown. It is a stirring tale of the sea, pirates, rescuers, and Mt. Desert (then by no means so well known as now), in the days when Washington was President.

The April number of Scribner's Magazine contains "Some Unpublished Letters of President Andrew Jackson," written in his most vigorous and assertive style, calling a man to account who questioned his claim for the full credit of planning and executing the great victory at New Orleans. There were never more characteristic Jackson letters published than these.

Another story from the archives of the Pinkerton Detective Bureau, an account of one of the boldest assaults for robbery on record and of the stealing of $15,000 worth of diamonds off a man's person, appears in McClure's Magazine for April.

The March number of the Political Science Quarterly opens with an exposition of the legal question involved in the matter of "Municipal Home Rule," by Prof. E. J. Goodnow; Mr. Edward Porritt presents another phase of the municipal question in explaining "The Housing of Workingmen in London"; Prof. Simon N. Patten offers "A New Statement of the Law of Population"; Mr. H. C. Emery, of Bowdoin College, discusses at length "Legislation Against Futures"; Prof. W. J. Meyers investigates the cost of "Municipal Electric Lighting in Chicago"; Prof. J. B. Moore presents the first installment of a sketch of "Kossuth the Revolutionist"; and Dr. Frank Zinkeisen, of Cambridge, criticises the views of Stubbs and other historians on "Anglo-Saxon Courts of Law." The number contains, moreover, the usual Reviews and Book Notes.

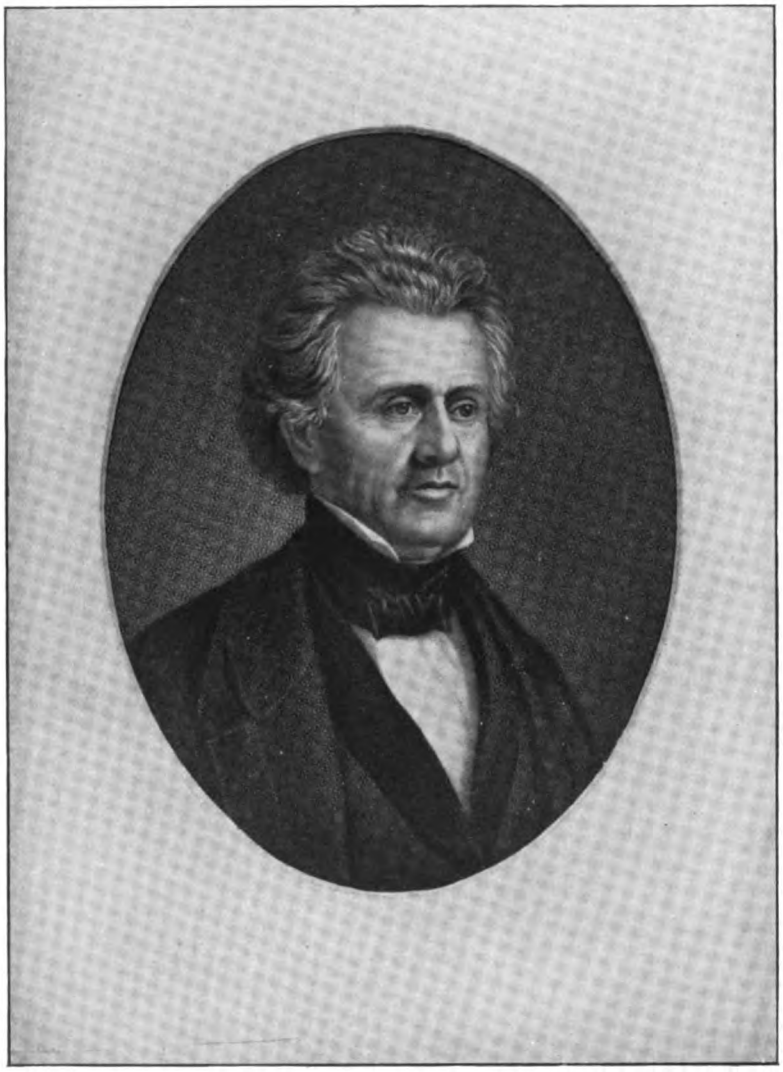
BOOK NOTICES.

The Story of Christina Rochefort. By Helen Choate Prince. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

The fact that this novel is written by a granddaughter of Rufus Choate will bring it prominently to public attention, but the gifted author has no need of any family reputation to establish her position as one of our foremost writers. The book is a truly remarkable one in every way. From a literary point of view it is equal to any novel published in late years, and viewed from the treatment of the subject it is a most powerful work. Anarchy is the theme, and a vivid and truthful picture is given of a community stirred, not to say maddened by discussions and appeals to passions. The scene is laid in Blois, a provincial town in France, and the principal characters are a manufacturer, who is hated by his operatives, because he has money and they have not, and his wife, Christine, who has become imbued with Anarchistic ideas. A parish priest, a sagacious, conservative man and a peacemaker, also plays a prominent part in the exciting drama. The book is one of absorbing interest, and one which cannot fail to do a world of good.

Daughters of the Revolution and their Times, 1769–1776: A Historical Romance. By Charles Carleton Coffin. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.50.

Mr. Coffin has made the stirring scenes which ushered in the Revolutionary War the basis of a delightful story setting forth the patriotism and devotion of the mothers and daughters of the Republic. Boston is the scene of the narrative and the "Tea Party," "Lexington and Concord," "Bunker Hill" and other stirring events are vividly and graphically depicted. Of course a love story is interwoven, and a very charming love story it is. The manners and customs of our Revolutionary forefathers are faithfully set forth, and the book is illustrated with many rare portraits and prints of famous buildings. Historically the romance is of much value, while as a story it is of great interest.



REUBEN H. WALWORTH.

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REUBEN HYDE WALWORTH.

BY IRVING BROWNE.

REUBEN HYDE WALWORTH, the last of the New York chancellors, was born in Bozrah, Connecticut, in 1788. His father, Benjamin, a descendent of William Walworth, of London (who emigrated to this country in 1671, and settled on Fisher's Island and afterwards at New London, Connecticut), was a patriot of the Revolution, who fought at White Plains, and who removed to Hoosick, Rensselaer County, N. Y., when the subject of this memoir was five years old, and resided there until his death. The future chancellor narrowly escaped becoming a great landed proprietor, for the entire site of the city of Troy was once offered to his father and the latter's partner in business, Philip Hart, for $2,000, which they did not deem it prudent to give. The Chancellor's career was determined by an accident. He worked on his father's farm until he was seventeen years old, and would probably have continued to be a farmer, had not the upsetting of a haycart broken his ankle and disabled him from pursuing that course of life. He passed one winter as a clerk in a country store, and then entered on the study of the law in the office of John Russell in Troy. His early education was narrow, but he learned some Latin from his half-brother, a graduate of Williams College. During his legal clerkship he taught school in the fall and winter, and in that pursuit probably got the most of his general education. Among his fellow students in Russell's office were William L. Marcy, and George Morrell, afterwards Chief Justice of Michigan. He was admitted to the bar in 1809. In 1810 he removed to Plattsburgh, New York, and entered on practice. In 1811 he was appointed a master in chancery and a judge of the Common Pleas. In 1814, being adjutant-general of the State militia, and aid on the staff of Major-General Mooers of the United States Army, he distinguished himself in the land battles of September 6th and 11th at Plattsburgh, and witnessed from the shore McDonough's victory over the British naval forces on Lake Champlain. By appointment of General Wilkinson, he acted as judge advocate on the trial of Lieut. Baker, the British spy, who was captured and executed by the Americans. The house in which he resided in Plattsburgh for many years was temporarily occupied by the British as a hospital, and if still standing bears the marks of bullets. Walworth continued to grow in honor and prosperity and professional success. He represented his district in Congress as a Democrat from 1821 to 1823. He took a prominent part in the congressional debates. He defended Calhoun's reduction of the army, Jackson's conduct as governor of Florida in the Callara incident, and Cass's administration of the Indian agency in Michigan; he opposed a bankrupt law; he advocated recognition of the independence of the Spanish American States; he asserted the right of this country to the navigation of the St. Lawrence. In the latter year he was appointed circuit judge of the Supreme Court for the Fourth Judicial District, and executed the duties of that office with credit. His sentence of Thayer

was published in one of the contemporary school readers as a model of judicial eloquence. In that year he removed to Saratoga Springs. He held that office until 1828, when he was appointed chancellor, succeeding Kent, who was retired at the age of sixty by force of the absurd constitutional provision. In the latter year the Chancellor removed to Albany, where he remained until 1833, and then returned to Saratoga Springs and continued there until his death. In 1832, with President Nott of Union College, and Benjamin F. Butler, he was instrumental in composing the difference between the Federal Supreme Court and the State of Georgia, growing out of the Indian titles in that State, and which had led to the imprisonment of certain missionaries there, and persuaded Governor Lumpkin to release them. He was chancellor until 1848, when the court was abolished by virtue of the provisions of the Constitution of 1846. Thus he also was retired from judicial office at the age of sixty, but by a more radical and more reasonable process. In 1847 he was appointed by the Legislature to the chairmanship of the commission to codify the laws of the State, but he declined the office on the ground that sufficient time was not allowed the commission to accomplish that work, and when the same post was tendered to him by Governor Fish, two years later, he again refused, and for the same reason. From 1848 until his death he acted as chamber-counsel and as referee in important litigations. In 1848 he was the unsuccessful candidate, for Governor, of the "National Democracy," the "Hard Shell" or "Hunker" wing, opposed to the "Free Soil" wing, of the Democratic Party. He died in 1867.

Such is the outline of a life not marked by any great events or startling achievement, but honorable, useful, and laborious in a remarkable degree. One who with such little prestige and education was deemed worthy to be Kent's successor, at the age of forty, must have been a man of mark and power and reputed to be deeply learned in the law. Yet the office does not seem to have been much in demand, and he appears to have been the last resort, for all the judges of the Supreme Court declined it. The accessible sources of information about Walworth's career are very scant, and although he was so prominent and influential an actor in his prime, and has been dead so short a time, and held more judicial power than any other man in the history of his State, his fame has already become somewhat traditional.

Upon his assumption of the chancellorship, April 28, 1828, Walworth delivered an address to the bar, which is a singular compound of modesty and pride. It is printed in the first volume of Paige's Chancery Reports, and is as follows: —

"GENTLEMEN OF THE BAR:

"In assuming the duties of this highly responsible station, which at some future day would have been the highest object of my ambition, permit me to say, that the solicitations of my too partial friends, rather than my own inclination or my own judgment, have induced me to consent to occupy it at this time.

"Brought up a farmer until the age of seventeen, deprived of all the advantages of a classical education, and with a very limited knowledge of Chancery law, I find myself, at the age of thirty-eight, suddenly and unexpectedly placed at the head of the judiciary of the State; a situation which heretofore has been filled by the most able and experienced members of the profession.

"Under such circumstances, and when those able and intelligent judges, who for the last five years have done honor to the bench of the Supreme Court, all declined the arduous and responsible duties of this station, it would be an excess of vanity in me, or anyone in my situation, to suppose he could discharge those duties to the satisfaction even of the most indulgent friends. But the uniform kindness and civility with which I have been treated by every member of the profession, and in fact by all classes of citizens, while I occupied a seat on the bench of the Circuit Court, afford the strongest assurance that your best wishes for my success will follow me here. And in return,

I can only assure you that I will spare no exertions in endeavoring to deserve the approbation of an enlightened Bar, and an intelligent community."

Mr. Edwards in his Reminiscences tells us that Aaron Burr advised the Chancellor not to publish the address, "because if the people read this they will exclaim, 'Then if you knew you were not qualified, why the devil did you take the office?'" According to Mr. O'Conor, Burr believed that Walworth decided all his causes against him from personal pique on account of this advice. Such a belief would have been characteristic of Burr, but no one else would have entertained it.

In one point of the address the Chancellor certainly was too modest, and that was in regard to his age, for unless the best records which have come down to us are all wrong, he was forty instead of thirty-eight when "placed at the head of the judiciary of the state."[1] The published record of his administration of this office is found in the three volumes of Barbour's Chancery Reports and the eleven of Paige's Chancery Reports, which are wholly taken up with his decisions, and in his opinions in the Court of Errors, reported by Wendell, Hill and Denio. He also left thirty-nine folio volumes of unpublished opinions. In the latter court he delivered an opinion in every important case on appeal from the Supreme Court, but none on appeals from his own court. He was reputed in his day to be a prodigy of legal learning, and this it is easy to believe on glancing at the exhaustiveness and variety of these opinions. There were a great many appeals from his decisions to the Court of Errors, which was composed of the Senate, the judges of the Supreme Court and the Chancellor. He was reversed in thirty instances, which seems to be nearly one-third of the whole number of the appeals from his decisions — a large proportion, certainly; but it must be borne in mind that the Court of Errors was but little better than a town-meeting, and that it comparatively seldom pronounced a unanimous decision. The reversals, however, included several cases of vast importance, such as Costar *v.* Lorillard, Stewart's Executors *v.* Lispenard, Miller *v.* Gable, and Hawley *v.* James. In some instances the reversal was unanimous, and in several others there were but one or two dissentients. In spite of these facts, and in spite of Mr. O'Conor's exalted opinion of that court, it is quite probable that Chancellor Walworth is to-day a greater legal authority than the Court of Errors, containing so many members untrained in legal modes of thought, unaccustomed to intricate statements of law and fact, and unacquainted with the history of jurisprudence. William Kent said of his judicial career: "Never, perhaps, were so many decisions made where so few were inaccurate as to facts or erroneous in law."

Soon after Walworth came into the Court of Errors, by virtue of being Chancellor (in 1830), he raised the question whether he could take part in appeals in cases heard before him as Circuit Judge of the Supreme Court. The statutes seemed to prohibit him, but he pointed out that they seemed to be in conflict with the constitution. It was decided that he could take part, fifteen senators so voting, one voting to the contrary, and seven declining to vote. Senator Benton observed: "We cannot presume that the feelings and wishes of an individual, holding a high judicial station, will influence his judgment in the re-examination of a

[1] There is great confusion as to the date of Walworth's birth, and even as to his death. Appleton's Dictionary of American Biography puts his birth Oct. 26, 1788, and his death Nov. 27, 1867; Lippincott's Biograpical Dictionary puts his birth in 1789 and his death in 1867; the Encylopædia Britannica puts his birth Oct. 26, 1789; and his death Nov. 21, 1857; Stone in his Reminiscences of Saratoga puts his birth Oct. 26, 1788, and his death Nov. 28, 1866; at the meeting of the Saratoga Bar on his death, his birth was put Oct. 26, 1789, and his death Nov. 28, 1867, "in his eightieth year"; Livingston's "Portraits of Eminent Americans" puts his birth Oct. 26, 1789. The question may be deemed settled by the Chancellor's statement in the Hyde Genealogy, that he was born in 1788.

cause which he has before decided, while sitting in a subordinate judicial tribunal." See 6 Wend. 158. The judiciary article of 1870 put an end to this practice. The Chancellor seemed to have no sensitiveness about appeals from his decrees. In Tripp *v.* Cook, 26 Wend. 155, he said "appeals should be allowed in every case not manifestly frivolous," and that this "was the only mode in which the Court of Chancery could be preserved." In Beach *v.* Fulton Bank, 2 Wend. 238, he gave his opinion that appeals should even be allowed from his discretionary orders.

The article on Walworth in Appleton's Cyclopedia of American Biography, evidently written by William L. Stone, or copied from his "Reminiscences of Saratoga," declares that he "may justly be regarded as the great artisan of our equity laws"; calls him "the Bentham of America"; states that "before his day the Court of Chancery in this State was a tribunal of ill-defined power, of uncertain jurisdiction, in a measure subservient to the English Court of Chancery in its procedure"; and claims that "he abolished much of that subtlety, many of those prolix and bewildering formalities," and made rules which greatly improved the practice. This eulogy, by one who was not a lawyer, appears to me to be a great exaggeration, and to have been written without reflection on the fact that James Kent sat in that chair for fourteen years previously. What is there claimed for Walworth as a reformer of the machinery of the court may be granted: he made excellent rules, and with the increase of business he undoubtedly extended the jurisdiction and developed the authority of the court. But it is grossly unjust to bestow on Walworth the praise which is due to Kent as "the great artisan of our equity laws." Kent formed our equity system, and Walworth built upon his foundations to a large extent. It cannot be denied that Walworth had a creative and constructive mind, and that he might have done what Kent did if it had been necessary and the opportunity had offered; but to speak of him as the originator of our equity system is too much praise. What he contributed to this office were an indomitable industry, an alert intelligence, profound learning, irreproachable integrity, and an ardent desire to do justice. To attain justice he had certain unconventional ways of his own, and a disposition to see and hear for himself rather than trust to the affidavits and schedules. So he insisted on having "the widow Van Bummell" in court, although counsel agreed that she "had nothing to do with the case." So he would "take a view" of a person alleged to be of feeble mind. Access to him was easy, and he was not inclined to entangle himself in red tape, like a judicial Lady of Shalott. He was especially solicitous about the rights of widows and orphans, and his guardianship of them was no formality. In their case he was quite apt to do equity after the easy and direct fashion of an absolute eastern monarch sitting in his palace gate in the olden time. His exaltation of this paternal attribute of his office was a characteristic which should render his name ever honored. William Kent said of him: "No court was ever under the guidance of a judge purer in character or more gifted in talent than the last chancellor of New York." In the last argument made before him by Murray Hoffman, in the last days of the court, that eminent man said: "Apart from the prevalence of pure religion, the patriot can breathe no more useful prayer for his native State than that the future administration of justice may be distinguished for intelligence, learning and integrity such as has illustrated the Court of Chancery from the days of Robert R. Livingston to the present hour. It must be a source of consolation to yourself, as it is of gratification to your friends, that the robe of justice, transmitted from the illustrious men who have gone before you, has

not since it fell upon you been soiled or rent."

At a meeting of the Bar, in the city of New York, on the 18th of May, 1848, resolutions highly complimentary to the outgoing Supreme Court were passed, and also the following: "*Resolved*, That we deem the close of our former judiciary system a fitting occasion for the expression of our own respect and regard for the eminent jurist who for so many years past has discharged the laborious and responsible duties of Chancellor of this State, and whose last term for hearing arguments has also recently ended. That the published volumes of his reports evince a degree of acuteness and discrimination, love of truth, sound morality, and thorough legal research, unsurpassed by any others, and honorable alike to himself and the jurisprudence of our State."

Although Walworth declined the office of a commissioner of codification, it was not because he believed the scheme impolitic or impracticable. In his letter to the Legislature he said: "I am not one of those who believe it is wholly impracticable to carry out the provisions of the Constitution on this subject. On the contrary, I think it not only practicable but highly expedient to collect the general principles of the unwritten commercial and other civil laws, and of our equity system, as well as of the criminal law of the State, now scattered through some thousands of volumes of treatises, commentaries, digests, and reports of judicial decisions, and to arrange them under appropriate heads, divisions and titles, in connection with the statute law on the same subjects. Such modifications of the law should also be suggested and incorporated into the code as are necessary to adapt the laws of the State to the present advanced condition of society, and to the principles of our free institutions." It is plain to see that the Chancellor was in favor of codification, and he would have had time to do much toward the great work before its submission in 1865.

From what I have heard and read I should infer that the Chancellor was by no means a formal man upon the bench, and that indeed he may have been somewhat lacking in dignity. He would drink water by the quart, eat apples by the peck, and ask questions by the score. As Major Bagstock would have said, there was "no bigod nonsense" about him. In hearing cases he loved to get to the core of the controversy, as well as of his apple, in the shortest order, and so he would interrogate counsel, and cross-examine them, and anticipate them, and make suppositions to a very unusual and disagreeable extent, but after he had found out what he wanted to know, he would suffer them to drone away after the fashion of their old-fashioned tribe to their heart's content. This colloquial habit seems always to have been more prevalent among the English judges than among our own, and to use a Briticism, it does not seem "half a bad sort." At the end of the case, counsel could always depend on two things, — that he understood the case and that he understood his own mind. He was not in the habit of saying, "I doubt," and I believe there never was any serious complaint of procrastination in his mental processes nor of delay in decision. But it is undoubtedly true that his judicial manners made him many enemies.

One of the oldest surviving lawyers of New York, writing to me, while he concedes that Walworth "was the most extensively legally-learned man he ever saw," and that his decisions were honest, continues as follows: "The change in the Constitution wrought in 1846 was desired more as a means of getting rid of the Court of Chancery than for any other object. The court was unpopular to the last degree, and the personality of Walworth was the most unpopular element under consideration. He was sure to follow a lawyer with comments

from his opening sentence to the close of his argument, ordinarily sarcastic, and frequently so unkind as to cover the counsel with a feeling of shame and disgust. If a motion was opposed, Walworth not unfrequently abused the counsel on both sides with impartial severity, and as a result both sides left the court angry and bent on revenge should a door ever open by which revenge could be reached. The Convention of 1846 opened this door, and men struck at the Court of Chancery, hoping thus to hit their old tormentor in court. In private association he was courteous and refined, but the moment he ascended the seat of justice his manners became intolerably offensive. Walworth never favored the amelioration of legal practice. Nobody who desired the improvement of legal or equitable practice ever could have thought of intrusting Walworth with power to forward or retard that object." But I once heard the same eminent gentleman address a most eloquent apostrophe to Walworth's portrait in the court room of the Court of Appeals, while praising his invariable protection of the rights of the widow and the orphan.

Walworth's judgments are invariably well written, and his power of stating facts clearly and comprehensibly was quite remarkable. They bear all the marks of vast research, patient reflection, acute discrimination, and liberal learning. Occasionally an opinion appears which is apparently the result of long and wide reading of history, travels, and even poetry, like that, for example, in Nevin *v.* Ladue, on the question whether ale is "strong drink" — a question on which the Chancellor was compelled to resort to the testimony of others, for he himself never drank ale nor anything else stronger than water or tea or coffee. This opinion is one of the most delightful in the books, and forms a worthy and appropriate companion to Chief Justice Daly's celebrated opinion in Cromwell *v.* Hewitt, as to what constitutes an inn. It is noteworthy that three of the senators in Nevin *v.* Ladue thought that the question which was so learnedly and so charmingly discussed by the Chancellor was not necessarily in the case! But one is glad that the Chancellor brought it in, as he did the widow Van Bummell. There is a vein of sly humor discoverable in several passages of this famous opinion. For example, he speaks of the Armenians, who according to Xenophon, used a fermented liquor, prepared from grain, which, "like the more refined tippler of the present day, they sucked through a reed or hollow tube." He also speaks of the monkey-catcher who sets vessels filled with *bouza* "at the foot of the tree on which the animals are gamboling, and then watches at a distance until they come down and regale themselves to intoxication. And we, who have seen the effect of similar proceedings elsewhere, can readily imagine what is the inevitable result of this stratagem to the *bouzy* monkeys."

In Cutter *v.* Doughty, 7 Hill, 305, the first clause of a will, after giving the testator's wife a life estate in his farm, proceeded thus: "After her death I give to my grandchildren, and to their heirs forever my said farm as follows; to wit: to the children of my stepdaughter M., lot number 1, to the children of my daughter S., lot number 3," and then providing for the children of three other daughters and one son in the same way, concluded by providing that in case of the death of any of his children or of his stepdaughter, without lawful issue, the share which would have gone to such issue should be equally divided among "the survivors of my children or grandchildren," in the same proportions. It was held that the term "grandchildren embraced the stepdaughter's children, and the judgment of the Supreme Court was reversed, by a vote of 13 to 11. The Chancellor was in the minority (and manifestly wrong), but he dropped into architecture as follows:—

"To adopt the figure used by one of the plaintiffs' counsel, therefore, this temple must in any

event contain a less number of columns in rear than it originally did in front. For as there were six original takers, if one of them died without issue, there could only be five to take that portion of the estate, even if the stepdaughter, or her children, was included in the class which was to take that share of the property. Correct architectural taste would undoubtedly require that materials of the column which had fallen by the ravages of time should be used to strengthen the five remaining columns equally, instead of being added to four only, and leaving the fifth to its original dimensions. It must be recollected, however, that this testator did not construct the other parts of his temple according to strict architectural taste. For the columns of his first rows were of different diameters. And though they were all of the same height, from the bottom of the base to the top of the abacus, their proportions were different; the contingent remainders in fee to some of the grandchildren having the life estate of one parent for a base with an exterior support by a buttress of trustees, while the remainder to the children of John was based upon the lives of both of their parents, supported by the same buttress as the others. The columns of his second row, constructed from the proceeds of his residuary real and personal estate, are, it is true, not only of the same height, but also of the same diameters. But here again we find the same amount of architectural symmetry. For the columns of Susannah and of the stepdaughter are Grecian Doric, having no bases whatever; while the columns of the children of the testator's other three daughters are of the Tuscan order, resting upon the life estate of one parent for a base as on a single torus. And the column of John's children is Roman Doric, based upon the lives of both parents; the life estates of the father and mother forming the torus and the astragal upon which the column of their children's interest in that part of the testator's property stands. Again, by a codicil, both of the columns of John's children were turned into modern Gothic by the binding up of the father and mother and children together in the lower section of the trunk of the column, supported as before by the buttress of trustees, and making the column to assume a form implying flexure and ramification; which is a distinguishing characteristic of that order of architecture. With these strong evidences of the testator's want of architectural taste and of the slight development of the bump of order which the cranium of that honest German burger must have exhibited, it would, I think, be unsafe to place our decision in this case upon the hypothesis that he undoubtedly intended to construct the temple of his bounty upon correct architectural principles; or to distribute his estate between his children and his stepdaughter, and their children, in strict mathematical proportions."

The Chancellor evidently was not fond of the Italian opera, for in De Rivafinoli *v.* Corsetti, 4 Paige, 264, he refused a writ of *ne exeat* on a bill filed *quia timet* that the defendant was about to leave the country and break his engagement as *primo basso*. He indulged in the following remarks: —

"Upon the merits of the case, I suppose it must be conceded that the plaintiff is entitled to a specific performance of this contract; as the law appears to have been long since settled that a bird than can sing, and will not sing, must be made to sing (old adage)." [Counsel should have retorted "You can lead a horse to the water, but you can't make him drink" (old adage).] "In this case, it is charged in the bill, not only that the defendant can sing, but also that he has expressly agreed to sing, and to accompany that singing with such appropriate gestures as may be necessary and proper to give an interest to his performance. And from the facts disclosed, I think it is very evident also that he does not intend to gratify the citizens of New York, who may resort to the Italian opera, either by his singing or by his gesticulations. Although the authority before cited shows the law to be in favor of the complainant, so far at least as to entitle him to a decree for the singing, I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve, which is necessary to understand and to enjoy, with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult for the master to determine what effect coercion might produce upon the defendant's

singing, especially in the livelier airs: although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama. But one thing at least is certain; his songs will be neither comic nor semi-serious while he remains confined in the dismal cage, the debtor's prison at New York. I will therefore proceed to inquire whether the complainant had any legal right thus to change that character of his native warblings, by such a confinement, before the appointed season for the dramatic season had arrived."

If the Chancellor could have read "Bleak House," he would have learned that caging did not affect the vocal spirits of Miss Flite's canaries.

In personal appearance the Chancellor was not imposing. He was small and lean, and in his last years he wore his iron gray hair and beard long and rather unkempt. His face was seamed and furrowed with thought and mental toil, and his eyes were keen. His face was somewhat Jacksonian. He was one whose spirit "o'er informed the tenement of clay." He was however always physically active and energetic. In the younger days he had been a great jumper, and so late as 1835 he astonished some of his grave and famous guests by leaping over the backs of the parlor chairs. (He must have recovered from the haycart accident.) He was fond of horseback riding, and Mr. Stone tells us he once owned a favorite horse, and rode him dressed in a homespun suit which he wore so many years that horse and rider became of the same color, and he had the appearance of a farmer on a plough-horse. He was also fond of "running with the machine" to fires, and was a sort of self-constituted chief of the fire department. This consorted well with his habit of "total abstinence." When the old United States Hotel at Saratoga was burned, he was on the roof actively directing matters, at the age of nearly eighty. It was his habit early in the evening to play cards, chess or backgammon with his family and his guests, and then to study and work all night, often until three or four o'clock in the morning. He was one of the most genial, kind-hearted and sociable of men, a good story-teller and a hearty laugher. He was president of the American Temperance Union, and widely celebrated for his devotion to the cause of "temperance." Mr. Seward consequently caused a great sensation once by declaring that the Chancellor and a certain well-known statesman of New York drank more brandy and water than any two other men in the State. When this statement was challenged he justified it by explaining that the statesman drank the brandy and the Chancellor the water.

As the traveler from the south approaches Saratoga Springs on the railroad he will hardly fail to see on the right at the southern outskirt a large but unpretending house of gray stone, situated in a grove of tall pine trees. This is "Pine Grove," the Chancellor's residence from 1833 until his death — a third of a century. The grove extended on both sides of the street or road, and the southern part was a public pleasure ground, including a bowling-alley, a form of amusement which does not seem to have aroused the Chancellor's hostility as it did that of his famous fellow-townsman and contemporary, Judge Esek Cowen, who judicially pronounced a bowling-alley a nuisance. In this mansion Walworth exercised a simple and patriarchal hospitality, gathering around the great men of the country who visited Saratoga. He, like Abou Ben Adhem, was one who loved his fellowmen, and he delighted in cultivating a familiar intercourse with them. Of his life at Pine Grove, Mr. Stone gives the following graphic account: —

"Few residences in the land have seen more of the great celebrities of the country, especially of her distinguished jurists and statesmen. It has known Daniel D. Tompkins, De Witt Clinton, Martin Van Buren, Enos T. Throop, Silas Wright, Churchill C. Cambreling, William L. Marcy, Albert H. Tracy, Francis Granger, William H. Seward, Stephen A. Douglas, Millard Fillmore, James Buchanan, Chancellor Kent, Judge Story, Judge Grier, Washington Irving, James Fenimore

Cooper, William L. Stone, Catherine Sedgwick, Mrs. Sigourney, Edward C. Delavan, Gerrit Smith, Generals Scott, Wool, Worth; Gottschalk, the pianist, and a host of others, governors, senators and congressmen, celebrated authors and soldiers, who have chatted in its parlors, dined at its table, and walked about under the shade of its pines. The Chancellor never forgot an acquaintance, and was fond of bringing everyone to his house. Every morning during the summer season he looked carefully over the lists of arrivals at the hotels, and hastened to call upon everyone he knew. The Grove has known the portly form of Joseph Bonaparte in tights, and the quaint figure of Mar Yohannan in multitudinous folds of cloth. Clergymen always found a welcome there, whatever their type of faith or form of worship. Its traditions array such names as Eliphalet Nott, Lyman Beecher, William B. Sprague, George W. Bethune, Samuel H. Cox, Francis Wayland, James Milner, Archbishops Hughes, McCloskey, Purcell, Kenrick, and Spalding, Cardinal Bedini, and Bishop Alonzo Potter. Methodist bishops have visited there whose names I do not know, and at a very early date a Catholic bishop from Canada, in quaint knee-breeches and large buckled shoes, whose zeal in the cause of temperance brought him in connection with the Chancellor. Thither also came, at various times, innumerable missionaries from foreign parts, and now and then a russet-coated elder from the Shaker settlements.

"Lewis J. Papineau, Dr. E. B. O'Callaghan, and Marshall S. Bidwell, exiled from Canada by the unsuccessful rebellion of 1837, found here a hearty welcome, and always remained on terms of the most intimate friendship with the Chancellor.

"The front room in the north wing was the Chancellor's office for forty-three years. Any one passing the house, on entering by the north piazza, might see him hard at work throughout the day, and his lamp was burning there still until two, three and often four o'clock in the morning. His constitution was of iron, and his capacity for labor was enormous, and yet he loved recreation, and no man could enjoy society better. He loved to spend the hours of his evening with his family at games of chess, backgammon or whist, or in lively conversation, until all the rest had retired to bed, when he returned to his office, and to his solitary labors of the night. From these habits it may easily be inferred that he was not an early riser. And yet he often rose early in the summer time, when the Congress Spring was crowded with visitors, and the desire to meet his friends would bring him there among the rest.

"He was a great talker and a lively one, and when a good story was told by himself or others, would throw his head forward, rub his hands together and laugh until the walls rang again. He never stood upon his dignity, but was always ready for any fun, even to the latest years of his life.

"In the same 'office' aforesaid the Chancellor held his 'motion courts.' This was not only a convenience for himself, but generally agreeable to the members of the Bar. By going there, instead of to Albany, they were able to combine a little business with a trip to the Springs. A wood-box being covered with a carpet, an armchair was placed upon it, and a high, light, long-legged desk before it, and the little office was thus converted into a court-room. Here, during a long course of years, distinguished counsel came to make, defend and argue motions in chancery. Hither came Ambrose Spencer, Chief Justice of New York; John C. Spencer, Joshua Spencer, Charles O'Conor, Samuel Stevens, Mark Reynolds, Benj. F. Butler of New York; Daniel Lord, Wm. H. Seward, David Graham, and many other men of equal mark, though of a later generation. Here once William Kent and George Griffin were pitted against Daniel Webster, in some case involving the Illinois State bonds, which crowded the room, piazza, and sidewalk with anxious listeners, until out of consideration for these the Chancellor adjourned to the Universalist Church.

"To this same office came the new aspirants to chancery practice, and signed their names to the roll of counselors. This was a veritable roll made of strong parchment, piece added to piece as the list increased. It holds the names of almost all the distinguished lawyers of New York now living. It is at present in the possession of William A. Beach, a resident of New York City, but a native of Saratoga, and one of the honored names on the roll."

It seems that not all the lawyers liked to go to Saratoga to attend the Chancellor's court. Among these was Ambrose L. Jordan, once attorney-general of the State — but then he rarely liked anything. In the debates in the Constitutional Convention of

1846, Mr. O'Conor opposed the proposal that the Court of Appeals should sit at Albany, on the ground of the inconvenience to the profession in traveling long distances. To which Mr. Jordan replied that it would be more convenient than to have the court held "first in New York, then at Saratoga, then at Rochester, then at Buffalo, and then perhaps at the Pine Orchard, or on the top of Mount Holyoke or the White Mountains. It was hard to conjecture from their late perigrinations where they would be found next."

Much of the Chancellor's later life was passed, disregardful of St. Paul's injunction to "avoid vain genealogies," in constructing a genealogical history of his mother's family, the Hydes. When finished, this volume extended to nearly 1500 pages. So keen was he on this scent, or rather this descent, that one of his family advised him to put out a sign, "Cash paid for Hydes." In this undertaking he visited many New England grave yards, and like "Old Mortality," deciphered many almost illegible inscriptions. He traced himself on his father's side from Lord Mayor Walworth, who struck down the great rebel, Wat Tyler. President Tyler traced his own descent from the latter, it is said. Mr. Edwards relates a story of the Chancellor and the President — *ben trovato e non vero* — how the latter had nominated the former for a seat in the Federal Supreme Court, when William Paxton Hallett, clerk of the Supreme Court in the city of New York, an active politician and a warm friend of Samuel Nelson, called the President's attention to the fact of Walworth's claim of descent, and that he had the Walworth arms framed and conspicuously hung in his house, and at the same time he spoke a good word for Nelson. The result was that Walworth's name was withdrawn and Nelson's substituted. It would be interesting to trace the history of this affair, but it is not easily ascertainable.

Much of the Chancellor's life after his retirement was taken up with the celebrated "Spike case." This was an action by Henry Burden, of Troy, against Erastus Corning and John F. Winslow, for infringement of his patent for making railroad spikes. It was decided that there had been an infringment, and it was referred to Walworth to ascertain the damages. This inquiry lasted many years, cost a great amount of money, and gave rise to bitter animosities. The Chancellor was accustomed, quite properly, I think, to draw for his fees, from time to time, first on one party and then on the other. Mr. Burden told me, some years before his death, that the litigation had cost him $60,000, and that he had no doubt it had cost the other side as much, and the inquiry was still proceeding. I am now informed by the most trustworthy authority that Mr. Burden paid out in this litigation $90,000, and that the defendants paid him as much and probably more! The award of damages was a mere trifle — a few thousand dollars. For a long time one witness in the case was engaged in computing the cubic contents of the spikes manufactured. Another witness went on the stand an unmarried man, and when he finally came off from it, he was the father of a legitimate child. Mr. Burden died before he could bring the report before the court. Mr. Corning also died, and the sons of the parties came together and settled the case. The "spike suit" preserved the odor of chancery after chancery had gone. The Chancellor's connection with this case gave rise to reflections nearly approaching a scandal, but how much of the prolongation and expense was due to him, and how much to the bitterness and determination of the defence it is impossible to determine. As all the parties and all the counsel are dead, it is impossible to tell how much the Chancellor had for fees in this case, but it was currently reported to be an unprecedented amount. It is safe to say that although the Chancellor got a vast amount of money out of the lawsuit, it

brought him no fame nor credit. It must also be conceded that his administration of the case was the only serious charge ever made against his fairness and integrity.

It seems a pity that the last twenty years of this life should have been so much engrossed in such trifles as recording a family history and settling a dispute between rival manufacturers. In a similar period Kent gave mankind his Commentaries. Both had previously performed enormous labors, and perhaps Walworth should not be blamed for seeking rest and amusement. He had fairly earned it by his vast and imperishable achievement, but his published reminiscences would be of large value and interest. One feels constrained to say that he gave up to family what was meant for mankind.

The Chancellor was a religious man, and a firm believer of the Christian faith after the old-school Presbyterian fashion. He was active in all ecclesiastical matters — one of the incorporators of the American Board of Foreign Missions, and vice-president of the American Bible Society and the American Tract Society. His gifts to religion and charity were frequent and generous. In 1838 he sustained the Rev. Robert J. Breckenridge in cutting off the new school churches of the Presbyterian denominations from the fellowship of the General Assembly, on account of the slavery question. He received the degree of LL.D. from Princeton, Harvard and Yale.

It is rather surprising to note how small a ripple upon the ocean of life was caused by the going down of this celebrated lawyer. Although he had held more judicial power than any other man of his time, and had exercised an influence upon the jurisprudence of the state and the pecuniary interests of its citizens quite unparalleled — a power and an influence which are marvelous when one carefully considers them, and which society will never again consent to enable one man to acquire — and although he had been blameless in his great office, yet he had apparently outlived the recollection of the community. Very small notice was taken of his death. His legal friends and neighbors at Saratoga held a Bar meeting, at which the conventional things were said, but at which there was no approach to a just estimate of his remarkable public services. These proceedings are reported in 49th Barbour's Reports, and the reporter states that there had been a similar meeting in the city of New York, addressed by Daniel Lord, James W. Gerard and Charles O'Conor, but that its proceedings had never been published, and he had been unable to obtain a copy. So far as I can discover the Court of Appeals took no official notice of his death, although at about the same period it wept officially over two or three deceased judges of that court (the names escape my recollection), and Walworth's portrait was hanging on the wall of its court-room.

Such is professional fame! But Walworth has left an imperishable mark upon our laws which change and reform can never obscure, and the praise of men is of small account to one who, like him, can enter Heaven's chancery with clean hands.

A GHOST OF NISI PRIUS.

I.

By A. Oakey Hall.

WHILE seated recently, awaiting a call of the calendar in a branch of the city court held in the New York City Hall, wherein formerly every court had local habitation and name, my attention, from some inexplicable reason, became magnetically fixed upon the figure and face of an apparently absorbed spectator, much in appearance like the actor Jefferson when made up as Rip Van Winkle. And I turned to my neighbor whispering "is not yonder man Mr. Jefferson himself in character?" and at the same time I designated his position. My friend looked, and then with a curious glance at me declared that he did not see the person I had pointed out. After several attempts of mine to designate the spectator to him, I had to desist, and was about to make an impatient remark when the Rip Van Winkle figure rose to go. Curiosity impelled me to follow, but I was puzzled to see him apparently walking though group after group as if they saw him not and he touched them not. In the corridor I took his arm and politely said, "Pardon me, but your appearance interests me. I am Mr. — and —." He paused, and looking intently into my eyes, while a magnetic shiver seemed to pass over me, interrupted with, "Oh I know you very well. But how is it you see me? It is a singular circumstance, for although I died in mortal shape many, many years ago, and am now permitted at will to leave my consociation in the spirit world and revisit earthly scenes, I was never before made visible to mortal eye."

I ventured with no little trepidation to stammer out, "Pray whom have I the honor to address?" In a firm and melodious voice he answered, "The mortal name I once bore is graven on a mural tablet in the old Second St. cemetery, but now I am known as a ghost of Nisi Prius. When alive I was an official attendant of the court held in the room we have just quitted, and there passed forty years of my life. But — how is it that your mortal eye sees a spirit, and your mortal ear hears my language? We of the other world are allowed to see and hear mortals. But no matter, now that we do see and hear each other, let us have a talk." We had reached what is known in the City Hall as the Governor's room, and the door happening to be open, we entered. It was vacant, and we took chairs before what is known as the Washington table — it having once been used by the General and stands immediately under the portrait of De Witt Clinton. The ghost raised his eyes to the picture and said, "Grand old gentleman, he was. I last saw him in this very room, but never met him in the spirit world, for he must belong to a different consociation from the one I there mix with." Just at this moment an acquaintance passing by the door looked in and said to me, "Hello — mooning all alone over some case, eh?" and strode on. Then I knew that my ghost was indeed invisible to all except myself. I seized the opportunity and began conversation with, "Then, if you lived in Clinton's time and spent so many years in the City Hall, I presume you must have encountered many of the great lawyers of the past."

"The whole procession from Alexander Hamilton down to these nisi prius times of Carter, Choate, and Coudert, the three C's of the Bar."

"Then, my dear ghost of nisi prius, you are the very Rip Van Winkle to give me reminiscences for my beloved Green Bag. Pray, as Hamlet said to his father on Elsinore platform, 'lead on, and I will follow thee. I shall remember thee so long as memory

holds a seat in this distracted globe,'" at the same time touching my own head theatrically in the manner approved by Macready, Wallack, Fechter and Davenport when reciting the lines as Hamlet.

"I was a very youngster when Hamilton was at the bar," began the ghost. "This City Hall was not then built, and the courts were held in Wall Street; but my sire was a lawyer, and from boyhood I had a penchant for court trials. The court-room was ever to me what the theatre is to many boys and men. I died in 1860, ninety years old, and of course had a long siege of nisi prius. Hamilton, after he ceased official life at Washington, tried several cases upon the hearing of which I attended. What a noble Roman he was in looks and bearing. He was at once the handsomest and most distinguished looking American I ever saw, either when I was in the flesh or since I have been permitted ghostly flittings. But his portraits abound, and this generation can also view him. He attracted attention even when he uttered monosyllables. His voice possessed an innate charm of command. At the very first words of, 'Mr. Foreman, and gentlemen of the jury' he seemed to have won their confidence. I recall that he always pursued the plan of rhetorician Quintilian, 'aim first to win the individual sympathies of your audience.' He made statements without haste of enunciation, and conversationally, as if seated in his library. These were as simple as the sentences a parent would address to a child; then he would grow more animated and indulge in many rhetorical ornaments. His gestures were eminently graceful, and in every case, after the most approved elocutionary rules in all ages, the gesture applicable to the coming sentence would precede it quickly as the lightning flash precedes the burst of thunder. He was therefore, insensibly to himself, a master of pantomime. He never lost command of his temper, and was ever as courteous in the court-room as if he were in the drawing-room. These peculiarities descended to his posterity. As late as 1850 his grandson and namesake used to plead in the New York courts with like rhetorical treatment, power and suavity. But soon after he ceased to be Secretary of the Treasury, and practiced his profession again in New York City, he comparatively neglected nisi prius, and was mainly the recipient of briefs on appeals from attorneys, especially in insurance contentions and commercial complications incident to a new government. I am sure that the first law reports of Coleman and Caine would show him on some particular side in every controversy arising from the law of insurance He became the legal idol of the young Chamber of Commerce. Of all the great lawyers seen and heard in my youthful days, commend me to Alexander Hamilton as the most distinguished looking of all, and the most graceful in his poses and gestures. I can best describe him as an oratorical machine put together and working with the care and nicety displayed in a Geneva watch.

"Dwelling upon Hamilton of course brings up appropriately the name of Burr, who will be found to figure also often in those reports."

"But tell me also about all the great lawyers of that early generation whom you remember. Did you, in attending court with your father, hear Attorney-General Egbert Benson, or Aaron Burr, or Attorney-General Lewis, or the Livingstons, or the first Samuel Jones, or the first Ogden Hoffman, or James Kent?"

"I heard every one, although not until later years did impressions turn into memories and opinion into judgment. I should say that Burr was the greatest nisi prius lawyer of them all. He was so magnetic in eye, look, voice and manner with jurors, small wonder that he was so successful with women. But he lacked the graceful Addisonian language of Hamilton, and his logical powers. Burr was not successful in arguments before judges. They seemed to distrust him. I soon learned to know whether the

Bench trusted or distrusted any counsel. When judges would say, for instance, to counsel, 'Allow me to look at that case,' and have the cited book handed to them, I knew that they wanted to be assured that the addressing lawyer had quoted rightfully, and did not slur paragraphs to his own advantage. Burr was a great sinner in that latter respect, and took all chances of subtlety for victory. Being this species of an unscrupulous lawyer, it became of advantage to the public that in the *fin de siecle* (Eighteenth) when nominated for puisne judge of the Supreme Court of New York State he declined that post, for, fancy a man of his private and political character holding on the bench the scales of justice, and with perhaps both eyes morally bandaged.

"Aaron Burr at the bar, until his pliant, cooing voice was heard, and his eyes either gave at one time soft glances and at other times blazed, was far from impressive in personal appearance. He had a replica in a natural son who was a famous attorney in this city until he died, at an advanced age, as late as civil war time, and whom doubtless you have often seen and met during your own time. Burr was undersized, and like nearly all men who are short in stature, put on at all time in public a pompous and self-conscious bearing. But a hearer lost sight of his personal deficiencies when listening to his torrent of words set to those dulcet tones which made him so dangerous to the fair sex, as many social traditions avouch that he was.

"James Kent even in youth had that Romanesque cast of features which marked his latest years. He then much resembled the face and head of Cicero as shown in the busts which libraries furnish."

I as listener here interrupted the ghost by observing interlocutorily, "Yes, I have noticed that, when standing before the marble bust of Cicero — that which confronts every visitor in the corridor beyond the entrance to the Astor library — and there recalling the portrait which used to hang in the house of the son, William Kent, on East Union Square."

"Firmness was outlined in James Kent's folded lips and massive jaws, and at times his look was awe-inspiring. In his later days, when I saw him in Chancery chambers," continued the ghost, increasing his volubility, "he did not seem to belong to the day and generation surrounding him, but to some classic age of days long gone by. His was a head and face to hang in portraiture in some national gallery of paintings, along side of a portrait of Joseph Story.

"Thomas Addis Emmet also had a Romanesque face, and he always impressed me as belonging to a departed classic age. I abominate," added the ghost with energy, "a judge who wears a mustache. Fancy one on Hamilton, or Kent or Story, if you can, with due respect to their greatness of appearance. Although, of those three unbearded magnates the Commentator on the Constitution which Hamilton aided in fashioning held the most benignant face, and lacked the severity that sometimes flecked the countenances of the other two. John Jay, New York's Chief Justice, impressed me with its benignity. That was a Jay trait in his sons also, whom I have heard at the bar: William, and John the third, whose young grandson, a Virginian Robinson, is growing up to continue the Jay legal prestige.

"Samuel Jones the first was a great master of principles; so was his namesake son, whom I have heard deliver opinions as Chancellor; so is the grandson and third Samuel Jones, whom I occasionally find still in the courts as I flit about in them. These I have mentioned were all judges in time.

"The Livingstons depended more upon precedents than principles. I have learned, during my long siege as auditor in courts, to distinguish the philosophic lawyer from the case lawyer.

"The three Hoffmans were the most oratorical and eloquent of their contemporaries.

But bless you," added the ghost, stroking his Rip Van Winkle beard, "eloquence don't count for much now-a-days before jurors and judges; but in earlier juridical times in this city, jurors expected the graces of oratory, and looked disappointed if these became absent. They had not been vaccinated with the modern virus of sheer utilitarianism.

"James Kent was not long a practitioner before he became a judge: but from what I heard of his appearances in court he was better fitted for a chamber than a nisi prius counselor. He was a very dry speaker, with a monotonous voice. But," added the ghost with a chuckle, "trip hammers don't make music when they strike metal, but the blow is strong and decisive.

"Ah, those early times of national nisi prius were so different from the times of the present. D'ye know, I've come to think that legal practice has almost ceased to be a profession and is fast becoming only a trade. The courts were then imbued with greater surroundings of dignity and formality, and were as mysterious and awe-inspiring to laymen as are the behind-scenes of a theater to pitites and gallery gods. Jurors served from sense of duty, and did not hasten to make excuses for shunning service. Ah me, what changes have I not seen and lamented!" sighed the ghost.

At this point of ghostly interview I saw that my narrator was becoming digressive — as doubtless ghosts in general feel — wherefore I recalled him to the standpoint of my curiosity with this interlocutory remark: "But were there not other lawyers worthy of mention of those Hamiltonian, Burr and Kentish times?"

"Are they not catalogued in this memorial brain of my spirit world? I have met all of them there when visiting the consociation of spirit lawyers. Let me see. Who first to name? They were all great in some particular branch, although in early republican times lawyers, nor doctors, had not then, as now, branched into specialties. Yes, there was Robert Troup, and Elisha Pendleton, and Ambrose Spencer, and David Cadwallader Colden, and David B. Ogden the first, and David Graham the first, and James Emott the first, and Abram Van Vechten,— every one of whom had descendants, some now in practice, to tread in their legal footsteps. Each one of these was especially given to the lore of procedures: for life at the bar was then tentative. Jurisprudence was getting rid of old British Colonial barnacles, and accommodating itself to novel Republican government, and was teaching State and Federal jurisdictions and procedures to ward off collisions. Technicality and the claim of *in cortice* were then the genii of the bar. It was a rare delight for me to listen then to their 'keen encounter of wits.' Should you ask me *qui meruit palmam* of that grand legal group, perhaps it would distract my supernatural judgment. But in the first few years of the century at the New York bar, there did come one towering lawyer — John Wells, to whom belongs the fame of being the means of settling the law of libel, in what is known as the case of Cheetham, whom Wells defended and was successful enough to win a verdict of only six cents, when everybody expected a verdict mounting into the thousands. But I must not omit in this reminiscent connection to recall that, in the year previous, Hamilton had as successfully defended an editor named Harry Croswell for a libel (denominated seditious) upon Thomas Jefferson, or to add that the defense was an agreeable task to Hamilton, who had come to dislike Jefferson and his new fangled Democracy as much as Hamilton detested Burr. Did I attend the trial? Well, as is the modern slang I hear often at nisi prius from impudent young lawyers, 'I should smile.'" And the ghost did smile until every hair of his beard joined in it. "Have I not told you there has scarcely been a *cause célèbre* in New York City from which I was absent? I attended both libel trials, and shared the

joy of laymen at finding them to have shattered the old King's Bench iniquitous maxim, 'the greater the truth the greater the libel,' which, however, afterwards became substantially qualified into, only when the truth is unnecessarily uttered and damage has resulted. About the same time there was another great libel case brought by no less a person than DeWitt Clinton against another Crosswell editor, who owned a newspaper in Schoharie County, adjoining Albany. I recall that Richard Riker, a famous jurist of his day, had made a motion to remove the action from New York, where Clinton was popular, to the county where the paper was published."

At this juncture I listened attentively to the ghost, for at this time of ghostly interview, was being mooted in an adjacent court the jurisdictional question whether Charles A. Dana, the Nestor of the New York press, should be extradited to Washington to answer for a libel disseminated there against one of its citizens, although the libel was printed and published in New York City.

The ghost continued: "Justice James Kent heard the motion and denied it, saying in comment[1]: 'It is more important for an individual to protect his character against libels disseminated in the place of his residence than in a remote place where he might not be known.'

"Meanwhile another generation of great lawyers, the second for New York City, was coming to the fore of the bar," continued the ghost; "such as William P. Van Ness, Elisha Williams, Peter B. Munro, William Slosson — his fame to be continued by two sons, — James Tallmadge, Philo Ruggles the first, Robert S. Sedgwick, Elijah Paine, John Anthon the elder, Reuben H. Walworth (afterwards chancellor), Samuel A. Foot, Samuel A. Talcott, and Thomas J. Oakley (the *facile princeps*). Elisha Williams might be called the nisi prius Henry Erskine of that grand group who, during the administration of Madison and Monroe, dominated New York litigation, Kent illustrating the bench, while Walworth, Foot and Anthon divided honors as the most deeply read in legal science. Anthon was more of a banco lawyer, yet his volume on nisi prius deservedly retains to this day a place in legal libraries. Elisha Williams was regarded as the shrewdest of his legal generation in what I may call stage management of his cases. He was an adroit inductive cross-examiner, and he well knew when to stop, after punctuating some one strong point for a client.

"How many nisi prius cases," said the ghost again digressively, "I have in my time observed lost through over cross-examination. How many even shrewd lawyers I have noticed, some from desire of display and others through 'invoking keen encounter of wits,' draw answers by cross-examination that had better for their side been left alone. How often, too, I have seen a not very well read advocate get, by means of tact, an advantage over the lawyer of great learning and deep thought who was tactless. How often, too, I have encountered lawyers who, although the judge was manifestly favoring them, insisted upon continuing argument, and not knowing when to stop. Also lawyers who hammered at comparatively immaterial points instead of resting contented with clinching the one controlling point."

[1] Coleman and Caine's reports, 398. ED.

A SKETCH OF THE SUPREME COURT OF OHIO.

IV.

By Edgar B. Kinkead, of the Columbus Bar.

Charles Cleveland Converse was born at Zanesville, July 26, 1810. His parents were members of the Ohio Company. He graduated at Ohio University and attended Law School at Harvard. He attended lectures by Story and Greenleaf, and enjoyed the friendship of such men as Benj. R. Curtis and Charles Sumner. In 1849 he was elected to the State Senate and chosen presiding officer of that body. In 1854 he was elected judge of Court of Common Pleas and in 1855 judge of Supreme Court. On account of his health he could not take his seat, and shortly after resigned. He died Sept. 20, 1860.

Ozias Bowen was born in New York, July 21, 1805, and died at Marion, Ohio, Sept. 26, 1871. He came to Ohio when young; was admitted to the bar in 1828, commencing his practice at Marion, Ohio. Feb. 7, 1838, he was elected by the legislature president judge of the second circuit, was re-elected and served until the adoption of the Constitution of 1851. In June, 1856, Governor Chase appointed him to the vacancy created by the resignation of Judge Converse, and he was subsequently elected to fill out the unexpired term. He was a dignified judge, especially noted for his assiduity and thorough preparation of cases as a practicing lawyer. He was one of the Ohio electors who elected President Lincoln.

Josiah Scott was born December 1, 1803, in Washington County, Pennsylvania, on a farm a few miles from Cannonsburg, where Jefferson College is located, and where Judge Scott received his education. He graduated with the highest honors of his class in the year 1823. Thrown at once upon his own resources, he entered with courage upon the life-work ahead of him. Going to eastern Pennsylvania, he there taught in a classical academy in Newton, Bucks County, where he prepared a number of students for the freshman class at college. Next he went south and taught in one of the schools of Richmond, Virginia, for two years. His leisure time during these two years was spent in the study of law. He, at the end of his two years in Richmond, returned to his native home, and was there chosen as a tutor in Jefferson, where only four years before he had graduated with such high honors. He taught but one year in Jefferson, and having kept up his legal studies he decided at the end of that time to come to Ohio, and go into the practice of law. On the back of a horse he started westward, and reached Mansfield in the spring of 1829, visiting the Hon. Thomas W. Bartley, who had been a pupil of Scott's at college, and they were afterwards associated in the practice of law. In June, 1829, he located at Bucyrus, which was then but a hamlet in the wilderness; nearly one-half of the county remained an Indian Reservation for fifteen years afterwards and was occupied by the Wyandots. He soon made a reputation for himself, and came to be looked upon as a strong advocate both with judge and jury. In 1840 he was elected to the General Assembly for the counties of Crawford, Marion and Delaware. In 1851 he went to Hamilton, Butler County, where he distinguished himself as a sound lawyer in competition with such able advocates as John Woods, Lewis D. Campbell, Thomas Milliken and William Bebb.

In 1856 he was elected judge of the Supreme Court, his term beginning the 9th of February, 1857. Soon after his election he was appointed by Governor Chase to fill a

vacancy caused by the resignation of Judge Ranney, and held under that appointment until the term for which he had been elected began. Twice re-elected, he continued on the bench until the 9th of February, 1872, when he declined a re-election. Before leaving the bench he returned to Bucyrus and again took up his home there, and resumed practice until 1876, when Governor Hayes appointed him a member of the Supreme Court Commission; on the expiration of the Commission in February, 1879, he again went back to his practice, but died on the 15th of June, 1879, after having reached the age of seventy-six years.

Judge Scott did not neglect the pursuit of learning outside of his profession, being a student of English literature, a fine Latin and Greek scholar, Horace and Demosthenes being his favorite authors. He was a very skillful cross-examiner; he would lead a witness on until he had gotten the truth from the most stubborn of them. In argument to the court Judge Scott was full of logic, and could nearly always convince. His opinions will be found in the Ohio State Reports, from volume five to volume twenty-one inclusive, and in the series containing the decisions of the Commission, and rank with the very best. He left an impression upon the jurisprudence of Ohio which will never be erased, and his opinions are both instructive and sound.

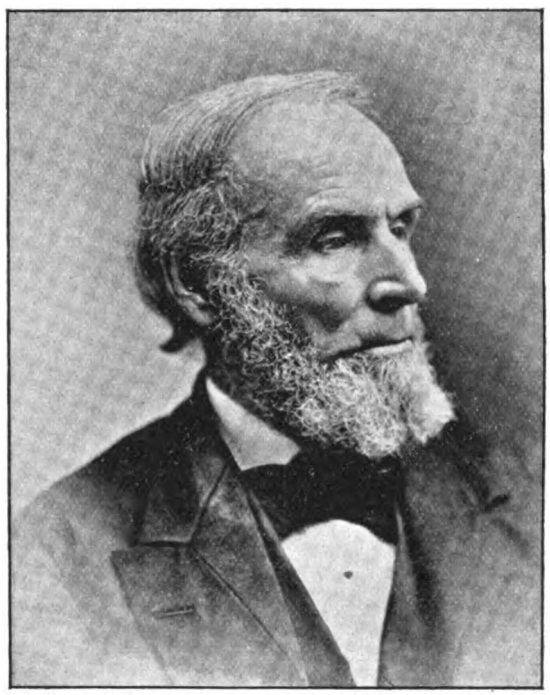
MILTON SUTLIFF was born in Trumbull County, Ohio, October 6, 1806; was the son of Samuel Sutliff, a farmer, and a soldier in the Revolutionary War. Of a family of six sons, four of them became lawyers of note. Milton graduated from the Western Reserve College in the class of 1834. He was an Abolitionist, and very active in behalf of his party. Was a member of the National Anti-Slavery Society, formed in Philadelphia in 1833, and took a prominent part in its deliberations. He was admitted to the bar in 1834, and began practice at Warren, Ohio. Was elected to the Legislature by the free-soil party in 1849, and voted for Salmon P. Chase for United States senator. He also voted for Benjamin F. Wade for senator later on. He supported Horace Greeley for President in 1872. He was elected a judge of the Supreme Court in 1858, serving five years, the last year of his term as Chief Justice. His record as a judge is a good one. Coming to the bar at an early day in the history of the country, he advanced with firm and steady progress to the front.

WILLIAM V. PECK was one of the judges of the Supreme Court of Ohio from February 9, 1859, to February 9, 1864. According to the rule of that Court he was Chief Justice during the year ending February 9, 1864. His decisions are contained in Volumes 8 to 14 inclusive of the Ohio State Reports, during which period many questions of great importance were considered and determined by the Court. It was the period which covered the momentous events just preceding the outbreak of the war, and during the first three years of its progress. He declined a renomination on account of ill health. He was for many years severely afflicted with bronchitis, which prevented him from again engaging in active practice after leaving the bench.

Judge Peck was a bright scholar, and had the advantage of a splendid legal education, which he received at a law school maintained at Litchfield, Connecticut, when he was a young man residing there. Judge Gould, who is the author of Gould's Pleading, was in charge of the law school, and from him Judge Peck derived his legal instruction. His family have now in their possession Gould's law lectures, as delivered by him to the students of the law school, and which have never been printed, the lectures composing six volumes transcribed by Judge Peck in his own handwriting, and are remarkably elegant specimens of his penmanship. The handwriting is as easily read as print, and is in marked contrast with the or-

dinary run of lawyers' handwriting. He prized these volumes highly, and up to the later years of his life he was in the habit of going through them and making marginal notes and references to later decisions which caused any change in the law as made in the text.

When he left his home at Litchfield, Connecticut, after having been admitted to the practice of the law, he went to Cincinnati about 1828, and was employed in a lawyer's office there, but as the work to which he was assigned was purely clerical and consisted in drawing deeds and contracts, and copying pleadings, it was very distasteful to him, and after remaining there a few months he went to Portsmouth, Ohio, where he opened an office, in which place he resided until the time of his death. He built up in Portsmouth a large practice, and rapidly attained the reputation of being a careful, able and well trained lawyer. He was elected Common Pleas judge in 1848, which office he continued to fill until he resigned to take his place upon the Supreme Bench, to which he was elected in 1858. He was a model Common Pleas judge, his decisions being singularly clear and displaying wonderful insight and ability, and he possessed the happy faculty of being able to make his decisons so plain and clear that litigants themselves were satisfied with what he decided, even when the result was unfavorable to them. One great feature in his character as a lawyer was his wonderfully clear statement of the question at issue, and the happy faculty he had of eliminating everything not strictly pertinent. He served as Common Pleas judge during the time when the Supreme Court, which existed prior to 1852, as lawyers expressed it, traveled the circuits and heard cases and rendered their decisions, and afterwards, when the system was maintained, although in a modified form, after the adoption of the Constitution of 1851, when one of the Supreme judges was required to be present at the sitting of what was then called the District Court in each circuit, — the District Court being composed of two of the Common Pleas judges and one of the Supreme judges. And it was a fact much commented on, that term after term of the Supreme Court and afterwards the District Court would be held in Judge Peck's circuit, and there would not be a case for hearing taken up from the court over which he presided.



JOHN WELCH.

Judge Peck was born in Canandaigua, New York, on April 17, 1804 and died on December 30, 1877. His best monument is his decisions, contained in the volumes of the State Reports referred to. These decisions display great industry, research and reasoning power. In his private life he was a quiet, unassuming man, of great simplicity of manners, the best evidence of real ability and force of character.

WILLIAM Y. GHOLSON was born Dec. 25,

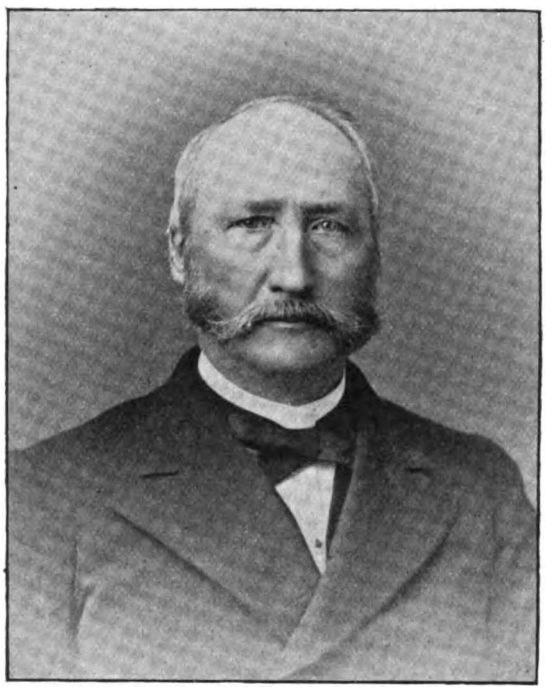
1807, in Virginia; graduated at Nassau Hall, Princeton, New Jersey, and died near Cincinnati, on the twenty-first day of September, 1870. On November 8, 1859, he was appointed judge of the Supreme Court for the unexpired term of Judge Swan, and was thereafter elected for a full term of five years, but failing health compelled him to resign. He had previously served on the bench of the Superior Court of Cincinnati from 1854 to 1859. Judge Gholson was one of the most able jurists that ever occupied a seat upon the Supreme Bench. A biographer says of him: "As a man of great intellectual power, cultivated to a high degree by incessant activity, and furnished with all that laborious study could impart; of a well-balanced temperament, uniting in just proportion the qualities of a sound judgment with an active and subtle perception; cautious in conclusions; ingenious in reasoning; he was remarkable, not more for the depth and reach of his abilities, than for his intellectual integrity and the courage of his convictions. At the bar, his superiority was never felt as an oppression. On the bench, he was kind, patient, free from prejudice and partiality, respecting not persons, regarding only law, justice and reason. His diligent and well directed industry was unexcelled. He amused his hours of leisure with the labors of authorship. His judicial opinions rank high for learning and accuracy. He lived a life of useful activity, admired and loved by all who knew him; but by those who knew him best, his memory is not only a fragrance, but a treasure."

HORACE WILDER was born in West Hartland, Connecticut, on August 20, 1802, and died at Red Wing, Ohio, Dec. 26, 1889, aged eighty-seven years. He graduated from Yale College in 1823. He was admitted to the bar in Virginia in 1826, coming to Ohio in 1827, taking up his home in Geauga County. After a year's residence in Ohio, he was admitted to the Ohio bar in 1828, commencing his practice at East Ashtabula, Ashtabula County. He was elected prosecuting attorney in 1833, and in 1834 a member of the Legislature of the State. In 1855 he was elected judge of the Court of Common Pleas in the third subdivision of the ninth judicial district, to fill a vacancy, and re-elected for a full term in 1856.

December 12, 1863, Governor Tod appointed him to fill the vacancy in the Supreme Court caused by the resignation of Judge Gholson, being elected in 1864 for the balance of the term. It was said of Judge Wilder that "he was the friend, counsellor and hope of the younger members of the bar, and was loved and almost idolized by them."

HOCKING H. HUNTER was born on the spot where now stands the city of Lancaster, Ohio, August 23, 1801, and departed this life at his home in that city February 4, 1872. He was a son of Captain Joseph and Dorothea Hunter; his father was a native of Virginia, his mother of Maryland. Captain Hunter served in the Revolutionary War, and at its close went to Kentucky; in 1798 he moved to Fairfield County, Ohio, being the first settler of that county. Judge Hocking H. Hunter grew up on the farm, working at times on a saw-mill. He married Miss Ann Matlock, November 30, 1823. He attended the country schools in the neighborhood, where he acquired some of the rudiments of an education. Afterward he spent some time at the Lancaster academy, his first tutor being Professor Stephen Whittlesey, a graduate of Yale; later Professor John Whittlesey, another graduate of Yale, had charge of young Hunter's education. Reading law under the Hon. Wm. W. Irvin, at one time a judge of the Supreme Court of Ohio, proving himself a good student, he was admitted to the bar in the spring of 1824, and at once entered into the practice of law, and continued so to practice while he lived. In 1825, he was made prosecuting attorney for Fairfield

County, which place he held for six years, or up to 1831. In the early part of 1831, he became the partner of Hon. Thos. Ewing, and had the entire control of the extensive business of that firm, during Mr. Ewing's term in the United States Senate. In 1863 he was elected a judge of the Supreme Court of Ohio, and received his commission and qualified to sit as a Judge thereof, but decided not to do so and so resigned his commission and continued in practice. In those days the Bar at Lancaster was considered one of the strongest, if not the strongest in the State, and it was among the strong men of that Bar that he attained a reputation equal to any, and here he was determined to remain and did so. He made no pretense to being an orator, but his sound judgment and large fund of information made an impression on those who knew him and left an impress on the sands of time which will last throughout all eternity. He had what, in all times and in all countries, is deemed the noblest quality, that of *honesty* in every action of his active and useful career.



MARTIN D. FOLLETT.

He seemed to have made that maxim his own which says: —

"Know then this truth (enough for man to know),
Virtue alone is happiness below."

WILLIAM WHITE was born in England, January 28, 1822. Died in Springfield, Ohio, March 12, 1883. Judge White's parents died while he was still young, and he was brought to this country when about the age of nine. His uncle settled in Springfield, Ohio, where William was apprenticed to a cabinet-maker, to serve for nine years, but at the end of the sixth year he purchased the remainder of his time from his master. He continued to work at his trade until he had paid the purchase price for the three year's time due his master. He devoted all his spare time to his trade and to other pursuits in order to get the necessary money to pay for his education, which he was determined to gain. His principal education was secured in the High School of Springfield, Ohio. On the completion of his education he began the study of law in the office of William A. Rodgers, of Springfield. He earned money to pay his expenses during the time which he must devote to the study of law by teaching school. He was admitted to the bar in 1846, when he became the partner of Mr. Rodgers, with whom he had read. He had been three times elected prosecuting attorney of Clark County prior to his election to the judgeship of the Court of Common Pleas, which occurred in 1856. He was again elected in 1861. When Judge Hunter resigned his seat on the Supreme Court bench in 1864, he was appointed, by Governor Brough, to fill the vacancy thus created. In October of that same year he was elected to fill out the unexpired term of Judge Hunter, and was elected to the same position three

times thereafter, namely in 1868, 1873 and in 1878. Nearly every branch of the law is touched upon in the reported decisions during the time that Judge White sat on the bench. He was nominated by the President, and the nomination was confirmed by the Senate, to a place on the bench of the District Court of the United States, but illness prevented his acceptance of the office

After his death, which occurred at his home in Springfield, March 12, 1882, the State Bar Association passed the following Resolution, which was ordered printed in the Supreme Court Report, by the Court:

"William White, Chief Justice of the Supreme Court of Ohio, having departed this life on the 12th instant, after thirty-three years of unabated and conscientious devotion to arduous public services, the members of the Bar of the State deem it to be their bounden duty to express, in a public and solemn manner, their profound sorrow at his death; and to testify their high esteem for his long, faithful, and eminent services, as well as for the unsullied purity and uprightness of his personal character, and his excellent endearing qualities of heart; and to record their affection for his memory, and their appreciation of the inestimable value of his long, useful, and inspiring career, and his unremitting toil, to the detriment of his pecuniary interests, in the service of the State he loved so well. The loss of such a man from the judicial forum is irreparable to the public, as well as to the Bar.

"In his hands, as a magistrate, life, liberty, and property were safe. To commemorate, as we now do, the character, and virtues, and usefulness of such a man, is not a mere outward, unmeaning rite, for nothing is truer than that 'the character and virtues, the just sentiments and useful actions of distinguished men, preserved in the annals and cherished in the recollections of a grateful people, constitute their richest treasure.'"

LUTHER DAY was born in Granville, Washington County, New York, July 15, 1813. Judge Day attended the common schools until about the age of twelve, at which age he began an academic preparation for college and continued for a year, when his father took him back to the farm, where he labored for a year, after which time he returned to school, but had been there but a few days when word reached him that his father had been killed in a saw-mill which he owned. The untimely death of his father compelled him to abandon the idea of securing an education. His father's affairs were not in good condition, and it was thought that after a settlement had been made there would be nothing left for the family; but young Luther decided to save them from such a fate, and so went to work on the farm and in the mill, where he continued to labor until reaching the age of twenty. At the end of that time he found that the labors of himself and a younger brother had been the means of saving the home to his mother and the younger children. He now decided to go on with the work of securing an education, so abruptly broken off six years before, and again resumed his preparatory studies, and in 1835 entered Middlebury College, Vermont; and by teaching and other labors he managed to stay in that institution of learning for two years, but at the end of that time, his mother having removed to Ravenna, Portage County, Ohio, he came on to see her, expecting to return and finish his course in college; but his means being limited he gave up the idea, and entered the office of Hon. Rufus P. Spalding, as a student of law. He read for two years, and supported himself in the mean time by doing clerical work for the County Clerk.

He was admitted to the bar in October, 1840. Hon. Darius Lyman tendered him a place in his office as a partner, of which kind offer he at once availed himself, and by that means at once stepped into a business, as Mr. Lyman was an old practitioner at the time. He remained with Mr. Lyman

for three years. Was elected prosecuting attorney of the county in 1843. In 1845 he was married to Miss Emily Swift Spalding, daughter of Judge R. P. Spalding.

Judge Spalding having moved to Akron in 1840, Judge Day went there and formed a partnership with him, remaining about a year, when he returned to Ravenna, becaused of his wife's ill health at Akron. He was again elected prosecuting attorney of Portage County in 1849. He was the Democratic candidate in his district for member of Congress in 1850, but the district having a large Whig majority, he was beaten. In 1851 he was elected judge of the Common Pleas Court.

WILLIAM T. SPEAR.

In 1862 Governor Tod appointed him Judge Advocate General on his staff, with the rank of Colonel, but he soon resigned on account of his professional business. In 1863 he was elected, as a Republican, to a seat in the Senate of the State, and in 1864 he was elected judge of the Supreme Court of Ohio, and thereupon resigned his seat in the Senate. In 1869 he was elected a second time to a place on the Supreme Court bench, but in 1874 the State went Democratic, and he with his party was beaten. In 1875 the Legislature created a commission to revise the statutes of the State, and Governor Allen appointed Judge Day a member of that commission. In 1876 Governer Hayes appointed him a member of the Supreme Court Commission. He was four years Chief Justice of the Supreme Court, and Chief Justice of the Commission one year. His opinions, written while on the bench of the Supreme Court, are found in fifteen volumes of the Ohio State Reports.

JOHN WELCH was born in Harrison County, Ohio, Oct. 28, 1805. He was admitted to the bar in 1833, and started in practice at Athens, acquiring an extensive clientele from the beginning, and was successful and active throughout his professional career. Judge Welch was favored in his younger days of practice by being thrown in contact with men eminent in the law, which necessarily gave him rare opportunities. Libraries were not of any magnitude in the localities where he practiced, and he was compelled to depend very largely upon his own mental resources and reasoning. The training which his mind received in this manner eminently qualified him for the duties which he was called upon to perform later in life. The legal mind must of necessity be the stronger when trained by self-reasoning rather than when solely dependent upon case law. He was called upon to fill a number of honorable positions, namely State senator, member of Congress, judge of the Court of Common Pleas, and last, judge of the Supreme Court, the latter of which he held for thirteen years. His opinions while on the bench of the Supreme Court are models

for brevity and clearness. His habits in the consultation room were peculiar, being modest but extremely firm in his views, which when once formed were never changed.

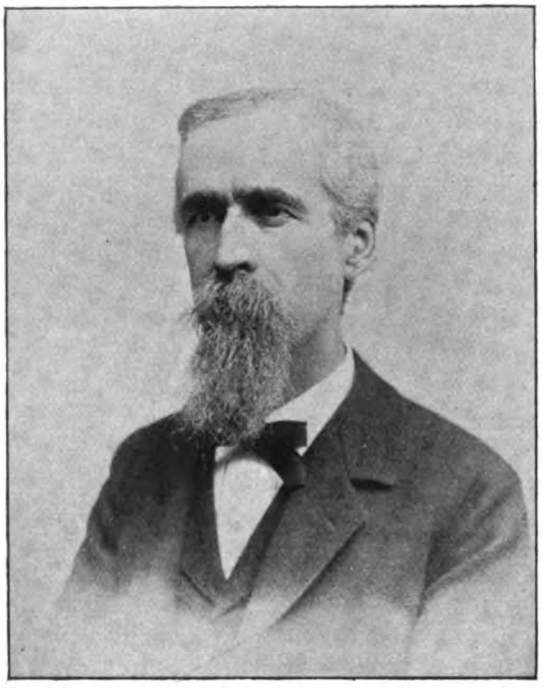
Judge Welch was the author of a two-volume Index Digest of the Ohio Decisions, which has been extensively used throughout the State.

GEORGE W. MCILVAINE took his seat as a member of the Supreme Court February 9, 1871, serving until 1885, and was renominated for a fourth term, which he was compelled by reason of his health to decline. The Bar of Ohio will remember Judge McIlvaine and his associates, Judges White, Okey, Johnson and Longworth, as one of the strongest Courts. The appreciation of Judge McIlvaine's ability was shown by his continuous service. And why should not this rule be followed when able and competent judges are elected to the bench? Judge McIlvaine had previously served upon the bench of the Court of Common Pleas, where his popularity was shown by his re-election without opposition. His service upon the bench covered a period of twenty-five years, ten upon the Common Pleas and fifteen upon the Supreme Court. As a judge it is said of him that "He was, withal, a patient and attentive listener, and quite observant of Lord Bacon's direction to a judge, not to indulge in 'too much speaking.' He relied more upon principle than upon cases, cited few cases in his opinions, and the troublesome and objectionable '*obiter dicta*' seldom found a place. He was quick in his perceptive powers, and fallacious arguments were quickly brushed away."

Judge McIlvaine was very kind to the younger members of the Bar, and especially to those who applied to the Supreme Court for admission. He was a broad, liberal minded man, had no use for trifling technicalities in the law, nor catch-questions in law examinations. A very good story is told of him which, by way of illustrating these qualities, we shall give. There may be those living who were concerned, but not knowing them we may be permitted to relate the anecdote. It is not quite as bad as the story of Governer John Brough's admission to the bar, but there is something of the same liberality in the two examiners. When Ben Fessenden, one of the examiners, asked John Brough, "What is law, anyhow, Mister Brough?" old Governor John replied, "Well, d— if I know, but I do know where we can all get a good glass of old Bourbon," and the committee and John adjourned to get the Bourbon, after which John was duly certified to as a lawyer. But keeping our eye on the squirrel, Judge McIlvaine officiated as examiner, when the first class under the new law requiring students to be examined by a committee appointed by the Supreme Court was examined. This committee being new in the business, probably fully realizing their grave responsibilities, asked questions which neither lawyers, judges or students could answer. It became noised about that almost the entire class was going to fail, when the Supreme Court held a caucus and decided to call the committee in and hold a court of inquiry into the cause of such a wholesale slaughter of would-be lawyers, and Judge M. was designated to conduct the examination of the committee, who were accordingly invited into the presence of the court. Judge McIlvaine thereupon began a perusal of the questions, when he came across a question in criminal law asking what crimes were indictable under the reign of some king of England a century or more ago, and asked who prepared that question. The committeeman answered, when Judge M. asked him to give the answer, which was duly given. Judge M. then said, "Let me ask you a question. How many crimes are indictable under the statutes of Ohio?" The member of the committee became embarrassed; the Judge spoke up, saying, "You need not be worried; I couldn't answer it myself." And after conducting the in-

quiry for a while in this manner, it was decided that Judge M. should go in and conduct an oral examination of the class, which was accordingly done, and a very nice examination in elementary law followed, and the class was duly admitted to the bar.

The qualities that enter into and form the character of an able and upright judge, Judge McIlvaine possessed in an eminent degree.



THADDEUS A. MINSHALL.

THOMAS Q. ASHBURN was born February 9, 1820, in Hamilton County, Ohio. He received his education at Miami University, and Jefferson College, Penn., teaching school in his younger days. He was admitted to the bar in 1876, settling at Batavia, Ohio, for the practice of his profession. He was appointed a member of the first Supreme Court Commission in 1876 by Governor Hayes, serving in that capacity for a period of three years.

Judge Ashburn also occupied the position of Judge of the Court of Common Pleas, being selected first in 1861, again in 1866 and 1871. He was also elected a member of the State Senate, dying during his term, January 17, 1890. He was an unpretentious man, his principal fault being to underrate his own ability. About twenty years of his life were spent in judicial position.

WILLIAM H. WEST was born February 9, 1824, in Millsborough, Washington County, Pennsylvania. His paternal ancestors settled with Penn's colony on the Delaware, in 1682, and their descendants are now scattered to all parts of the country. Judge West's father Samuel West was born near Brownsville, Pennsylvania, in 1785. About the close of the century, his family removed to Jefferson County, Ohio, and in the churchyard of Island Creek, above Stubenville, the paternal and maternal grandparents both sleep. Judge West's father afterwards returned to his native village Millsborough, Penn. In 1830 he moved with his family to Knox County, Ohio, where he settled on a farm, southeast of Mt. Vernon. Here it was that Judge West spent the years of his early childhood. In 1840 he became a pupil in the primary department of the Martinsburg Academy, a newly established institution of learning. In 1844 he entered Jefferson College, Pennsylvania, and graduated in 1846. Immediately after graduating he went, with Dr. Breckinridge, to Kentucky, and taught school near Lexington, that State, for one year. He then became associated with the Rev. G. W. Zahnizer, his friend and classmate, and together they assumed control of the High School for boys in the city of Lexington. He was invited to accept a tutorship in Jefferson College, and returned there in 1849, remaining until the fall of 1849, when he was made adjunct professor in Hampden-Sydney College, Virginia. He became weary of teaching, however, and resigned

in 1850, and returned to Ohio. In that same year he entered the office of Judge William Lawrence at Bellefontaine, Ohio, and was admitted to the bar in 1857, and entered into a partnership with his preceptor. Was elected prosecuting attorney of Logan County in 1852. He took an active part in the organization of the Republican party in 1854, and he and Hon. James Walker started the first Republican newspaper published in Logan County. He was elected a representative to the General Assembly in 1857, but declined a re-election. In 1860, he took part as a delegate to the convention which nominated Abraham Lincoln for President of the United States, which he claims to be the proudest service of his life. He was again sent to the Legislature in 1861, and in 1863 was elected State senator. In 1865, and again in 1867, he was elected Attorney-General of the State. President Grant appointed him consul to Rio Janeiro, in 1869, and his nomination was confirmed by the Senate, but he declined the honor. He was elected a judge of the Supreme Court of Ohio, in 1871, but by reason of failing sight he was compelled to resign his place there, at the end of the first year of his term. He was a delegate to the Constitutional Convention of 1873. In 1877 he was the Republican candidate for Governor of the State, but was defeated. He then left public life, and has ever since devoted his time to his profession. Judge West is a great lawyer, and by those who believe in his school of politics is considered a statesman of no small dimensions. By everybody, however, he is known to be honest in his every act and fearless in the discharge of anything which he considers it his duty to do. Through all his long career he has retained the love and veneration of his neighbors, which fact speaks louder than any words can of the real worth of the man.

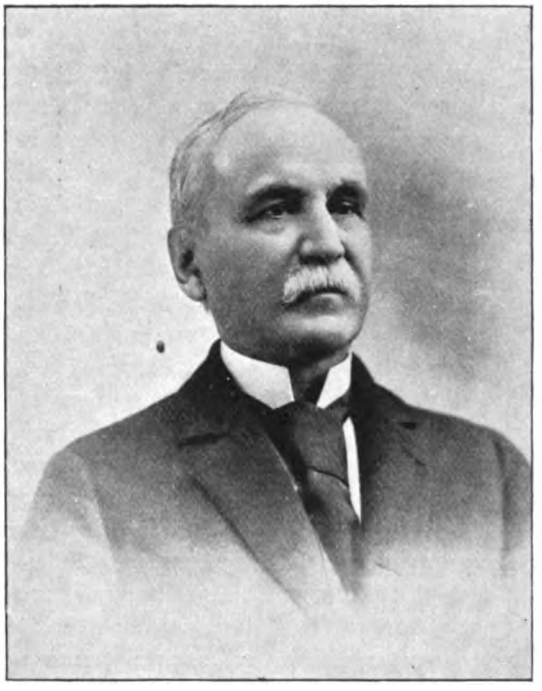
WALTER F. STONE was born at Wooster, Wayne County, Ohio, November 18, 1822. His parents came from Vermont to Ohio, and shortly after the birth of their son removed, from Wooster, to Strongsville, in Cuyahoga County. The boyhood of Walter was spent attending school at Pittsburg, Penn., and in that city he began the study of law, under Walter R. Lowery, who afterwards became Chief Justice of the Supreme Court of Pennsylvania. After reaching his majority he entered a law office at Cleveland, O., and it was there he completed his studies and was admitted to practice.

He permanently located at Sandusky City, and began active practice, in connection with Judge A. W. Rendry, in 1846. Later he was associated, as partner, with Judge Ebenezer Lane, who at one time served on the Supreme Court of Ohio. He continued in the practice until the fall of 1865, at which time he was elected judge of the Court of Common Pleas, in the first sub-division of the fourth judicial district of this State. He was re-elected to the same office in 1870, and served in that capacity until 1873, when Governor Noyes appointed him to fill a vacancy of the Supreme Court, occasioned by the resignation of Judge West. In the fall of 1873 he was elected to fill the unexpired term of that judgeship. His health failing him, he was compelled to resign his place on the bench in the fall of 1874. He afterwards, accompanied by his wife, made a visit to the Pacific coast, in search of health; but the experiment proved of no avail, as he continued to grow worse, and died at Oakland, California, on the twenty-third day of December, 1874. His remains were buried at Sandusky City, O., January 5, 1875.

The private life of Judge Stone was of the purest kind, and his judicial learning and ability was of a high order.

GEORGE REX was born in Canton, Stark County, Ohio, July 25, 1817. He was educated in the common schools of his native county, and at the Capital University, at Columbus, Ohio. For a while he taught

school at Canton; read law with John Harris of Canton, was admitted to the bar on the 10th of October, 1842. Removed to Wooster in 1843, and began the practice of law. He continued to make Wooster his home until his death, which event took place on the twenty-ninth day of March, 1879. He served as prosecuting attorney of Wayne County for four years. Was elected to the State Senate from the Wayne Holmes District, in October, 1851. Was made president *pro tem.* of that body. Was again elected to the office of prosecutor of Wayne County, in 1859, and re-elected in 1861. In August, 1864, he was appointed prosecuting attorney, to fill a vacancy. Again elected to the State Senate in 1867, when the district was composed of the Counties of Wayne, Holmes, Knox, and Morrow. He was a great friend of the common school system, and rendered much valuable aid in its establishment. Governor Allen appointed him a judge of the Supreme Court of the State, to fill the vacancy occasioned by the resignation of Judge Stone, in September, 1874; at the October election of the same year he was elected for the unexpired term of Judge Stone, serving until the 9th of February, 1877. He declined to be a candidate for re-election in 1876. The labors of the bench had seriously affected his health; and although he re-entered the active practice of law, he never recovered his usual health. He was a public spirited man, and was possessed of strong convictions, and was ever fearless in the discharge of his duties both private and public.



FRANKLIN J. DICKMAN.

WILLIAM J. GILMORE was born in Liberty, Bedford County, Virginia, April 24, 1821, and came to Ohio with his parents in 1825, settling in Preble County. His education was obtained from such sources as were afforded in that early day in the log schoolhouse; and in Westfield and Hopewell Academies, the latter being then in charge of Rev. Samuel W. Mc Cracken, who previously had been professor of mathematics in Miami University. Judge Gilmore began his study of the law under Thomas Milliken of Hamilton, and was admitted to the bar in Columbus in 1847. He first began the practice of his profession in Hamilton, in partnership with Col. Thomas Moore, but a year later removed to Eaton and opened an office. In 1852 he was elected prosecuting attorney of Preble County, which office he held two terms, notwithstanding the fact that the political majority of the county was largely against him. In 1857 he began his judicial career, being elected to fill the vacancy made by the resignation of Judge James Clark upon the Common Pleas bench, which position he resigned in 1874, when he was elected a judge of the Supreme Court. After leaving the bench in 1880 he opened an office in the City of Columbus, where he continues to reside and is actively engaged in the

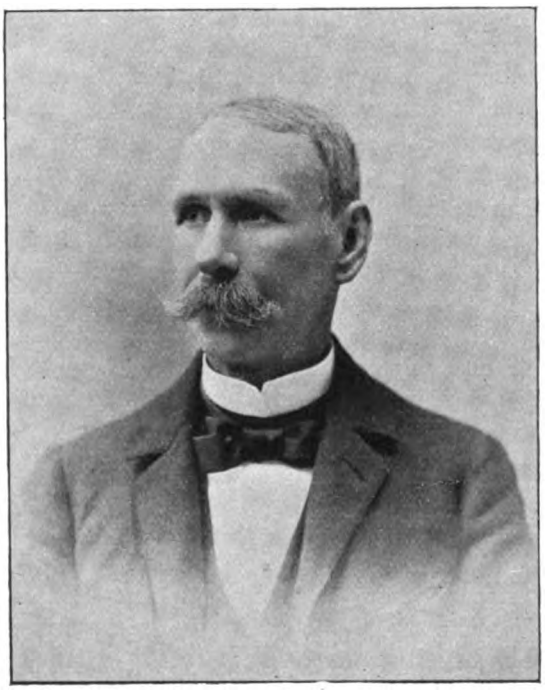
practice of his profession, with his son Clement R., who was admitted in 1888.

Judge Gilmore has been a Trustee of Miami University since 1871, and is one of the trustees for the State of the Ohio Archeological and Historical Society. Was president of Ohio State Bar Association 1885-86, and delegate to American Bar Association in 1894.

WASHINGTON WALLACE BOYNTON was born Jan. 27, 1833, in Lorain County, Ohio. In his younger days, from the age of sixteen years until 1858, he employed his time in teaching. He was admitted to the bar in 1856, commencing practice in 1858. He was appointed prosecuting attorney of Lorain County to fill a vacancy. In 1865 he was elected to the lower house of the State Legislature. In 1869 he was appointed, by Governor Hayes, judge of the Court of Common Pleas, to fill a vacancy, and in 1871 was elected to the same position. He was elected judge of the Supreme Court in 1876, and retired in 1881. After leaving the bench he located in Cleveland, where he is still extensively engaged in practice.

JOHN WATERMAN OKEY was born in Monroe County, Ohio, January 3, 1827, and was of English and Scotch-Irish parentage. His grandfather, Leven Okey, came to Ohio before it was a State, and when Monroe County was organized he was elected one of the judges. His father, Colonel Cornelius Okey, at one time represented Monroe County in the lower house of the General Assembly, Ohio; he was a man of ability and stood well with his people. He died in 1859, at the age of seventy-seven. Judge Okey's great-grandmother reached the extreme age of one hundred and three. Judge Okey attended the Monroe Academy; he also had private instruction from some able scholars; on the completion of his studies he became a deputy in the office of the county clerk of his county. He read law under Nathan Hollister, at Woodsfield, and was admitted to the bar October 22, 1849. In 1853, while a clerk in the office of Secretary of State, he was appointed probate judge of his native county, and was afterwards elected to the same office. In 1856 he was elected judge of the Court of Common Pleas, and was elected a second time to that office. He removed to Cincinnati, Ohio, in 1865, where he became associated with Hon. W. Y. Gholson, and for nearly two years they labored together in the preparation of the "Ohio Digest," which was one of the best digests ever made in Ohio. Afterwards Judge Okey and S. A. Miller prepared and had published what is known as "Okey and Miller's Municipal Law," which work was published in 1869. In 1875 he was, by Governor William Allen, appointed, together with M. A. Daugherty and Judge Day, a member of what is known as the codifying commission to revise and codify the general laws of the State. In 1877 he was elected a judge of the Supreme Court of Ohio. On the resignation of Judge Boynton in 1881, Judge Okey became Chief Justice. Nearly the whole of Judge Okey's life was given to judicial labors. While in the active practice of his profession he was considered a strong and ready trial lawyer. If a long term on the Common Pleas bench and a laborious course of study of general principles are the things needed to fit a person to perform well the duties of a judge of the highest court in the State, then few men have come better prepared to perform those delicate and laborious duties than did Judge Okey. He was familiar to an unprecedented degree not only with the Constitution of the state, the legislation of the state, and the judicial decisions of the state, but with the English, Irish and Scotch reports and authors and with the multudinous reports of our Federal and State courts and elementary writers as well. His mind was eminently judicial and logical in character, ready to take in all of a case, analyze it, eliminate the immaterial and irrelevant, and

capable on the real point and difficulty of the question involved to throw a flood of light that rendered the difficulty transparent, and discovered the principle of the solution, whether that principle were authenticated by one or many precedents or by none. With all the reverence possible for so strong and vigorous a mind to give to precedents, still when it came to adjudging cases where the law was not clear, he gave more heed to the dictates of his own conscience as to what was the right course to be pursued than he did to any or all of the opinions which might ever have been written on the subject. Never stopping to ask what a certain course might do for himself, his sole object seemed to be to find out what was the right, and when he had decided what that consisted in, then would he do that thing though the heavens should fall.



MARSHALL J. WILLIAMS.

Ever mindful of the opinions of others, yet he never allowed such to stand in the way of what he deemed his duty. Once his mind settled as to the right, no power could move except absolute proof were presented to show him wrong. Pure as the snow in all he did, his life was one well worthy the emulation of those who are to follow him.

WILLIAM W. JOHNSON, born in Muskingum County, Ohio, August 17, 1826, was a son of Solomon and Elizabeth (Wartenbe) Johnson, the former a native of Connecticut, the latter of Virginia. The paternal grandfather was a Revolutionary soldier, and in 1805 came to Ohio. The family were a race of farmers, and William was reared on a farm in Muskingum County, Ohio. But little chance had he to attend the common schools, but on the contrary he was compelled to secure what education he had in early life by reading at home such works as were within his reach. He was a hard student, however, devoting all his spare time to the study of books on science and history. Afterwards he attended one term at the Muskingum College, and then taught school in his native county. He read law in the office of Charles C. Converse at Zanesville, Ohio, and was admitted to the bar in 1852. In 1858 he was elected judge of the Common Pleas Court of his district, and held that office for fifteen years; he was elected the two last times as judge without opposition, which in itself proves the esteem in which he must have been held by the people of his district. His health failing him in 1873, he resigned from the bench, and for a time took no active part in public affairs. In 1879 he was elected, on the Republican ticket, a judge of the Supreme Court of Ohio. Judge Johnson was a hard worker, and gave much thought to the opinions written by him. Of sound judgment, and reasoning faculties above the average man, and a love of justice which caused him to weigh well each case which came before him.

NICHOLAS LONGWORTH was born June 16, 1844, at Center, Ohio. He graduated with honors from Harvard University; his legal education was received under the tuition of a distinguished lawyer of the State, Rufus King; he was admitted to the bar in 1869. He continued actively in practice in Center, Ohio, until the year 1877, when he was elected to the bench of the Court of Common Pleas of Hamilton County, which position he filled with ability and distinction until 1881, when he was elected to the bench of the Supreme Court. Owing to the condition of his health, and because of attention to his father's large estate required of him, he resigned his position of judge of the Supreme Court, March 9, 1883, forming a partnership with Thomas McDougall, Esq., in Center, Ohio, but discontinuing his practice in 1883.

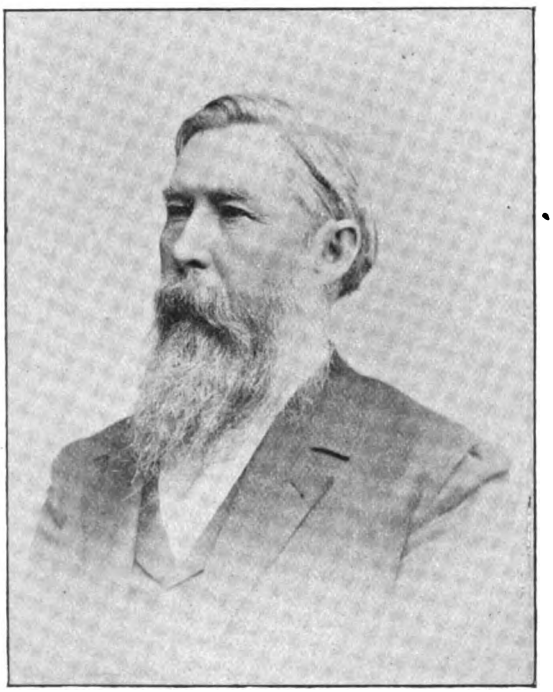
Though Judge Longworth entered the bench of the Supreme Court comparatively a young man, he carried with him a mind matured by an extensive experience.

JOHN HARDY DOYLE was born the twenty-third day of April, 1844, at Monday Creek, Perry County, Ohio. His parents were among the first settlers of the Maumee Valley. The family moved to Perry County, in 1841, but returned to Lucas County in 1846. Judge Doyle attended the public schools of Toledo, completing the high school course. He afterwards took a regular course of study under a private tutor, and then attended the Granville University at Granville, Ohio. In 1859, he entered the office of his uncle, who was then Recorder of Lucas County, where he remained two years. He began the study of law under General H. S. Commager, of Toledo, afterwards with Edward Bissell, of the same city; was admitted to the bar in 1864, and at once formed a partnership with Mr. Bissell. At this time he had just reached his twenty-first year. He was elected judge of the Common Pleas Court in 1879. He was the nominee of the Republican party for judge of the Supreme Court of Ohio, in 1882 and 1883, but went down with his party that year.

In 1883, Governor Foster appointed him a judge of the Supreme Court to fill the vacancy caused by the resignation of Judge Nicholas Longworth. In June, 1883, he was the unanimous choice of his party to fill both the short and long terms, but he was defeated. Since leaving the bench he has been engaged in practice in Toledo. He was president of the National Bar Association, and delivered the annual addresses at White Sulphur Springs, West Virginia, in 1889, and at Indianapolis in 1890. Was also president of the Ohio State Bar Association, and delivered the annual address in 1893.

MOSES MOORHEAD GRANGER was born October 22, 1831, in Zanesville, Ohio; was educated at Kenyon College, from which institution he graduated as valedictorian of his class, in 1850. He was admitted to the bar of Ohio, January 4, 1853; went into practice at Zanesville; was married at Lancaster, Ohio, December 29, 1858, to Mary Hoyt Beese. He took an active part in the War of the Rebellion, on the Northern side, and distinguished himself for devotion to the cause of the Union and for bravery. He has held many positions of a civil nature, beginning with that of city solicitor of Zanesville, serving from April, 1865, to August, 1866; member of Council for the village of Putnam from April to August, 1866; prosecuting attorney of Muskingum County from January to December, 1866; judge of Court of Common Pleas, First Subdivision, Eighth Judicial District of Ohio, from December 10, 1866, to October 9, 1871; reporter to the Supreme Court of Ohio, October, 1872, to March, 1874; judge of the Second Supreme Court Commission of Ohio, April 17, 1883, to April 17, 1885. He was, by the unanimous votes of his associates on the Commission, chosen to serve as Chief Judge during both years. He resigned from all the offices held by him except that of

member of the Supreme Court Commission. His name was placed before the President of the United States by friends all over Ohio, for the place on the Supreme Court of the United States, made vacant by reason of the death of Associate Justice Stanley Mathews. He has held many places of trust, both public and private, to all of which he has been faithful. Held in the highest esteem by all who know him, and loved by his neighbors for the many excellent qualities of mind and heart, he still continues in the practice of his profession in his native city of Zanesville, Ohio.



JOSEPH P. BRADBURY.

GEORGE K. NASH was born in Medina County, Ohio, August 14, 1842. He is a son of Asa and Electa (Branch) Nash, natives of Massachusetts. At an early day Mr. Nash's father came to Ohio and settled on a farm in the county where George K. was born and reared. He attended the public schools of his native county, and later entered college at Oberlin, Ohio, where he took the regular course up to sophomore year, when he retired from college on account of his health, and began the study of law, reading with R. B. Warden. Judge Nash was admitted to the bar in April, 1867, and at once began the practice of his chosen profession. He was at one time chief clerk or Secretary of State Sherwood; in 1870 he was elected prosecuting attorney of Franklin County, being re-elected to the same office in 1872. He won the respect of all while performing the duties of this, the first elective office ever held by him. In 1876 he ran for Congress against Thos. Ewing, but was defeated; in 1877 he was a candidate on his party ticket (Republican) for Attorney-General, but went down with the ticket; in 1879 he was again nominated for the same place and elected; and re-elected in 1881. Judge Nash made many new friends while acting as Attorney-General, and had many a grave question to pass upon; so well and faithfully did he attend to them that when the time came to make up the list of names of men who were to serve on the Supreme Court Commission, Judge Nash's name was quite naturally suggested, and he was made one of that important commission, and on the seventeenth day of April, 1883, he took his seat with the other gentlemen who were to aid in the work of bringing up the docket of the highest court in the State. Judge Nash's public service has been so eminently satisfactory that there seems little reason to doubt that he has not yet seen the last of the public service which the people of this State are to ask of him. Since his retirement from the bench he has been engaged in a practice of a very general nature, not having made any special branch of the law a specialty. He has frequently been associated with other counsel in the Supreme Court in cases involving the construction of statutes or the constitutionality of laws. He is still a young

man, just in the prime of life and is without doubt on the road to still higher honors. He is chiefly noted for his good nature, conscientiousness, good sense and good judgment.

RICHARD A. HARRISON. This sketch would not be complete without reference to the name of this profound and learned lawyer, who was named as one of the judges of the first Supreme Court Commission, and who has been solicited to take a seat upon the Supreme bench; and who has for many years been more intimately and closely associated with the Supreme Court than most any member of the Bar in Ohio now living. His devotion to his profession has constrained him to steadily decline this honor. No other man in Ohio is more qualified to fill this important judicial position than him.

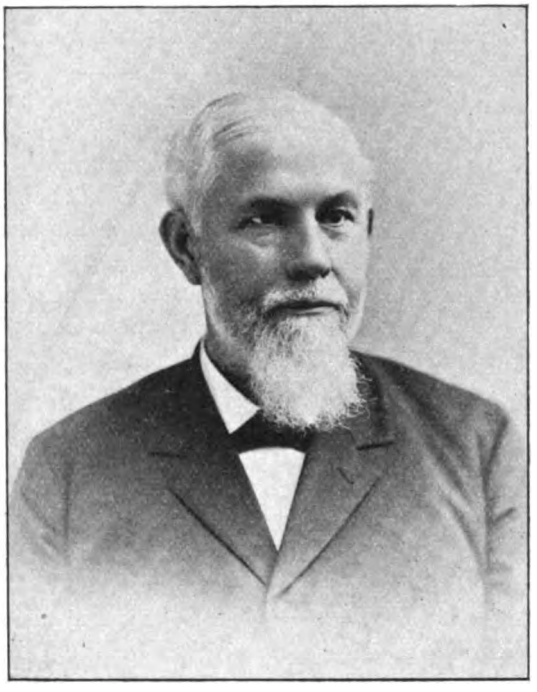
JUDGE HENRY C. WHITMAN was born in Billerica, Mass, Jan. 5, 1817. He was descended from good New England stock. His father, Nathaniel Whitman, was the Unitarian minister of that town, and his two uncles, Jason Whitman and Bernard Whitman, were eminent Unitarian ministers in New England in the early part of the century. His mother's name was Sarah Holman, of Bolton, Mass.

Though his father was a minister, he carried on a small farm in Billerica, and the first fifteen years of the son's life was spent like that of most New England country boys, in working on the farm and going to the country schools. At the age of fifteen he went to the Phillips Academy in Exeter, N. H., then, as now, one of the leading educational institutions in New England. After being at Exeter four years, in 1836 he entered Bowdoin College in the State of Maine, one year in advance. He left college in 1838, without waiting for a degree, and commenced studying law with Hon. Nathaniel Woods of Fitchburg, Mass. Mr. Woods at that time was one of the leading lawyers of central Massachusetts. Judge Whitman studied with Mr. Woods two years, and was admitted to practice law at Worcester, Mass., in 1840. Soon after his admission to the bar he went to Washington, D. C., where for a few months he obtained employment in the Treasury Department, and then for some months he became the private secretary of the Hon. Franklin Pierce, then a senator in Congress from New Hampshire, and afterwards President of the United States. While residing in Washington, Mr. Whitman became intimately acquainted with Governor William Medill, then a representative in Congress from Ohio. Gov. Medill resided in Lancaster, Ohio, and agreed to form a law partnership with young Whitman, who accordingly, in 1842, came to Lancaster, Ohio, and continued in partnership with Gov. Medill till he was appointed judge of the Court of Common Pleas in 1848.

At the time Mr. Whitman settled in Lancaster the Bar of that county was justly considered one of the ablest in the State. Among the lawyers there in full practice were Thos. Ewing, Sr., Henry Stanbury, Hocking H. Hunter, William Medill, Judge Van Trump.

Young Whitman soon made himself felt among them. Always ready and able to meet them at the bar, he had also the rare faculty of ingratiating himself with the people. He was also an ardent Democratic politician, entering into all political campaigns with zeal, and in a very few years was a leader of his party. He was elected to the Ohio Senate for Fairfield County in 1847, where he served two years. At the close of his senatorial term he was appointed by the General Assembly a judge of the Court of Common Pleas. That was under the Constitution of 1802. He continued in office until the New Constitution was adopted in 1851. Under the new Constitution he was elected one of the judges of the Court of Common Pleas for the Seventh Common Pleas District for three successive terms of five years each. He served two full terms, but resigned in the year 1862, the second

year of the third term, and moved to Cincinnati, where he formed a partnership with John Kebler and Judge M. F. Force, under the name of Kebler, Whitman & Force. He brought with him a distinguished reputation for integrity and ability. He ranked soon with the leading lawyers of the Hamilton County Bar, and was engaged in the trial of many important cases. His long career on the bench, holding court in the several counties of his district, where lawyers of eminent ability were from time to time before him, was a fit training for his new field of activity. Judge Whitman sustained the reputation he brought from the interior of the State. Mr. Force left that firm in 1866. He had been a distinguished officer in the Civil War, and was elected judge of the Common Pleas in 1866. Judge Whitman continued his connection with Mr. Kebler till January, 1876, when he was appointed by the Governor a member of the Supreme Court Commission. He soon resigned from the Commission and resumed practicing law in Cincinnati. In 1886 he quit practice altogether. He died in August, 1889.



JACOB F. BURKET.

In 1844 he married Elizabeth King, daughter of Samuel King of Wilton, N. H., who is still living in Cincinnati. She is a woman of rare intelligence and culture, naturally much sought for in social circles, and leading in many social and benevolent organizations. They have had two sons, Henry Medill Whitman, and Channing Wood Whitman, both graduates of Harvard College. The eldest son died in Cincinnati in 1869. The youngest died in Huddersfield, England, where he was the American Consul, in February, 1890, leaving one son, who has been through Cambridge College, England, and is now a student in Harvard Law School.

Judge Whitman was a great reader, always kept himself well informed about public affairs, in which he took a great interest, and was always well up in the current literature of the day. He was naturally a leader of men wherever he happened to be.

His outward manner was at times somewhat forbidding, but he had a warm heart and was full of sympathy for others. On the bench he was always anxious to see justice done. Sometimes for the sake of justice he would disregard the nicer technicalities of the law. He was a good lawyer and an upright judge.

D. THEW WRIGHT was born November 25, 1825; graduated at Yale College in 1847, at Harvard Law School in 1852, and commenced practice in 1852; was a member of the first Supreme Court Commission, being appointed from Hamilton County. He is now engaged in the practice of his profession at Cincinnati.

JOHN MCCAULEY was a member of the Supreme Court Commission of 1883, appointed from Seneca County. He was born in Columbiana County, Ohio, December 10,

1834, was educated at Delaware, was admitted to the bar in 1860, locating at Tiffin. He was prosecuting attorney of Seneca County from 1865 to 1869. Was a member of the Constitutional Convention of 1851. In October, 1879, he was elected judge of the Court of Common Pleas of his district.

WILLIAM H. UPSON of Akron, Ohio, was appointed by Governor Foster to fill the vacancy upon the Supreme bench caused by the death of Judge White in December, 1883. He served as prosecuting attorney of Summitt County, from 1848 to 1850; was State senator from 1853 to 1855; member of Congress from 1869 to 1873; delegate to the National Conventions which nominated Presidents Lincoln and Hayes. He became one of the judges of the Circuit Court of Ohio upon the establishment of that court in 1885, and was re-elected in 1886.

MARTIN D. FOLLETT was born October 8, 1826, in Vermont. In his younger days he taught school, and in 1859 he began the practice of law at Marietta, where he has continued ever since. He was once the nominee of his party for Congress, but was defeated. He was elected judge of the Supreme Court in 1883, and served out the unexpired term of Judge Longworth.

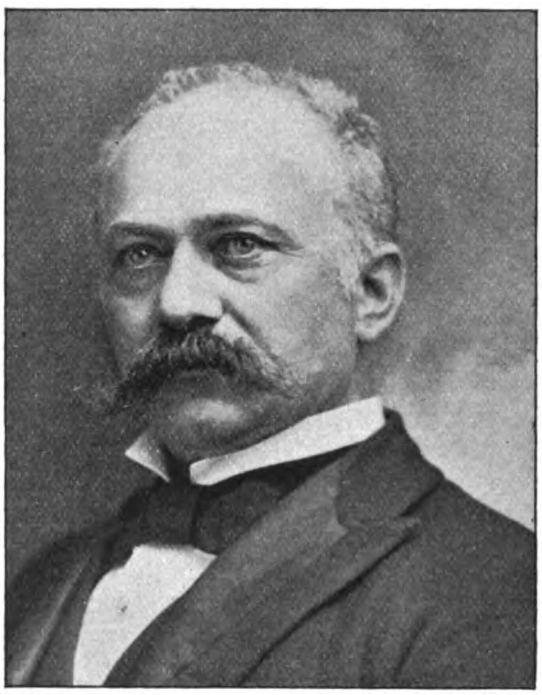
SELWYN N. OWEN was born in New York, July 5, 1836. His parents came to Ohio when he was a child. He was educated at Antioch College. He was a law student of Kennon & Stewart at Norwalk, Ohio, attending Cincinnati Law School one year, graduating therefrom in 1862. He commenced practice at Fremont, but within a year thereafter he removed to Bryan, Ohio, where he continuously engaged in practice until 1877, when he went on the Common Pleas bench. Judge Owen was so popular that in 1881 the opposition party did not place any one against him, and he was a second time elected judge of that court. He was elected to the Supreme bench before the completion of his term on the Common Pleas, and became Chief Justice of the latter court in 1885, which place he held for three and a half years. It has been said of Judge Owen by his political opponents that he was "an ornament to the Supreme Bench," that "if all the judges on the Supreme Bench held the scales of justice with such equal poise as Judge Owen, the charge of a partisan Bench would never be known." Judge Owen displayed great ability in his written opinions, and few judges have been closer students, and no one relishes fine propositions of law, or can solve them more easily than he. As an after-dinner speaker and a good all around practical joker he has no equal, and stands very high among his associates at the bar. Judge Owen is now engaged in the practice of law at Columbus.

WILLIAM T. SPEAR, a present member of the Supreme Court, was born June 3, 1834, in Warren, Ohio, from whence came several of Ohio's distinguished judges. His father, Edward Spear, also a judge, was a native of Pennsylvania, of Scotch descent; his mother, whose lineage is traced back to colonial times, came from Norwich, Connecticut. His parents came to Ohio, settling at Warren in the year 1819.

Mr. Spear received a common school education in the excellent union schools of Ohio, supplemented by a most valuable experience at the printer's trade. After serving an apprenticeship upon the "Trumbull Whig and Transcript," published at Warren, he went to New York City, where he was employed in the office of the New York "Herald," and thereafter became a compositor, and later a proof-reader, in the publishing house of the Appletons.

The value of the practical lessons thus derived, laying as they did a solid foundation for important duties which he was called upon to perform in after life, can hardly be estimated. Perhaps no pursuit quickens the powers of conception more than the craft of the printer, and especially has the

experience herein outlined been of service to the judge in the preparation of judicial opinions. Says one distinguished in the craft: "Herne has uttered a sneer at the husk and shell of learning, but the best bread is made from the whole meal, and includes the 'shorts' and the 'middlings' as well as the fine flour. If every lawyer, physician, and clergyman were to spend six months at the 'case' before entering upon his profession, he would find, even in that short term of labor, a useful and fitting preparation for such literary tasks as may afterwards devolve upon him."



JOHN A. SHAUCK.

The young printer appreciated his calling, but growing tired of the confinement of the printing office, and having imbibed an ambition for the law, he returned to Warren, and at once began to learn something of the practical side of the profession of his choice, by service as deputy clerk of the Probate and Common Pleas Courts of Trumbull County. He served in these capacities for several years, devoting his spare hours, in the mean time, to the study of the law under the direction of Hon. Jacob D. Cox, since Governor of Ohio, but then of the Trumbull County Bar, now Dean of the Cincinnati Law School, and father of many lawyers. This preparation was followed by a course in Harvard Law School, where Mr. Spear was graduated in 1859. Being thus equipped by reason of his practical and theoretical training, and ready to enter the field of legal contest, and having returned to Warren, where he was admitted to the bar of Ohio, he at once became a member of the firm of Cox & Ratliff. Later he was associated in practice with Hon. John C. Hutchins, now of the Court of Common Pleas of Cuyahoga County. In 1871 he was elected prosecuting attorney for Trumbull County, serving two terms, and then solicitor of his native city for two terms; and for several years he was engaged in the practice with C. A. Harrington, Esq., the firm enjoying a lucrative business.

Soon after laying down the duties of those minor positions, Mr. Spear was elected judge of the Court of Common Pleas, the duties of which office he entered upon in 1878. He was re-elected at the expiration of his first term, but did not complete the second term, because of his election to the Supreme Court, which occurred in 1885. He has since been twice elected judge of the latter court.

THADDEUS A. MINSHALL, a present member of the Supreme Court of Ohio, is a native of Ohio, born in Ross County, June 19, 1834. His educational training began in the country schools, and rounded up by attending Mt. Pleasant Academy, in his native county. His legal education was obtained in the office of S. L. Wallace of Chillicothe, being admitted to the bar in 1861. He served in the War of Rebellion with distinction, at the close of which he began the

practice of the law at Chillicothe. He has filled the positions of prosecuting attorney and judge of the Court of Common Pleas, being first elected to the latter in fall of 1876, holding it until elected to fill the vacancy on the Supreme bench caused by the resignation of Judge McIlvaine in 1885. In 1890 he was elected to a full term.

As a *nisi prius* judge he presided over many important trials and displayed rare ability as a trial judge. Some of his charges to the jury have become noted. As a judge of the Supreme Court, his opinions bear evidence of learning, careful thought and study. He regards the law as founded upon principles, and not alone upon cases. His words are susceptible of but one meaning, and are never placed in print without the most careful scrutiny and consideration. He has written some very important opinions which are models for brevity and conciseness. Ford *v.* Osborne, 45 O. S. 1, is perhaps the most frequently cited of any late case. It settles the degree of proof required to set aside an instrument which purports to be sealed and acknowledged, and that the Supreme Court will review the evidence for the purpose of determining if the rule has been violated. State *ex rel. v.* Standard Oil Co. 49 Ohio St. 137, was a case argued by able counsel, in which was involved the question whether or not an agreement by which stockholders of a corporation transfer their stock to trustees in consideration of the agreement of stockholders of other companies and partnerships engaged in the same business doing likewise, all to receive in lieu of their stock trust certificates, and the trustees thereafter to control the affairs of the corporation in the interests of the trust, is against public policy as tending to create a monopoly and control production and prices.

FRANKLIN J. DICKMAN was born in Petersburg, Virginia. He graduated from Brown University, at Providence, Rhode Island, with the salutatory honors. He was a classmate of Hon. Samuel S. Cox, Chief Justice Thomas Durfee of Rhode Island, Hon. Francis Wayland, now at the head of Yale Law School. He took a post-graduate course at the University, pursuing literary and scientific studies. He was admitted to the bar of Rhode Island two years after leaving the University. He followed the practice of his profession in Providence until he removed to Cleveland, Ohio. He was the Democratic candidate for the office of Attorney-General of Rhode Island, running on the same ticket with General A. E. Burnside, who was a candidate for Congress. He left Providence in 1858, settling in Cleveland, where he has since resided. In 1861 he was elected a member of the Ohio Legislature. Upon leaving the Legislature, he formed a partnership with Judge R. P. Spalding, which continued until 1875. In March, 1867, President Johnson appointed him United States District Attorney for the Northern District of Ohio, which office he resigned in March, 1869. He was appointed as one of the judges of the Supreme Court Commission of 1883, by Governor Foster. In November, 1886, he was appointed by Governor Foraker a judge of the Supreme Court, and in 1887 he was elected to fill the unexpired term of Judge Johnson. In 1889 he was elected judge of the Supreme Court for a full term, and became Chief Justice in February, 1894, which position he held until February 9, 1895. Judge Dickman has always had a taste for literary work, of which proclivity his written opinions bear evidence.

He contributed to the pages of the "Knickerbocker Magazine" a series of articles on "Butler's Horae Juridicae," and was the author of contributions to other periodicals, among which was an article on the English Revolution of 1688. Among the important opinions written by Judge Dickman are the following: In Railway Company *v.* Telegraph Association, 48 O. S. 390, the rights of telephone companies and street railways are fully discussed, in which the

doctrine that the dominant purpose of streets is to facilitate public travel, and that the rights of a telephone company in the streets is subordinate to the rights of the public in the streets for the purpose of travel.

MARSHALL J. WILLIAMS, a present member of the Supreme Court, was born on a farm in Fayette County, Ohio, February 22, 1837. He had the educational advantages afforded by the excellent common schools at Washington C. H., to which was added a course of two years at the Ohio Wesleyan University; after which he commenced the study of law in the office of Hon. Nelson Rush, then one of the prominent lawyers in that part of the State. He was admitted to the bar in November, 1857, and immediately entered upon the active practice of his profession at Washington C. H., taking a prominent position at the bar. In 1859 he was elected prosecuting attorney, and re-elected to a second term; after the completion of his term in that office he rapidly grew into an extensive and lucrative practice, being retained on one side or the other of the most important cases in the courts of his county, his practice extending to the surrounding counties. He pursued successfully the business of his profession uninterruptedly until 1869, when he was elected representative in the General Assembly, serving two terms therein. He was a recognized leader of that body, a clear and forcible debater, and no one possessed in a greater degree the respect and confidence of his fellow members. His counsel was much sought by members in the preparation of legislative measures. Upon the close of his legislative term of office, he resumed the practice of his profession until 1884, when he was elected judge of the Second Circuit Court. He was chosen as the first Chief Justice of the Circuit Court of the State. While occupying a position upon the bench of the Circuit Court, he was nominated by the Republican State Convention of 1886, for judge of the Supreme Court, and was elected at the ensuing election, taking his position upon the bench of that court on the ninth day of February, 1887; was its Chief Justice Feb. 9, 1891, until Feb. 9, 1892, when he entered upon his second term as judge of that court. Judge Williams possesses a high order of legal and judicial mind, and his opinions speak well for his ability. Judge Williams was elected as the first Dean of the Faculty of the Law Department of the Ohio State University, and was active in the promotion of the school. He is in the full possession of physical health and intellectual vigor, which, with his industrious habits, enable him to accomplish a vast amount of work.

JOSEPH P. BRADBURY has been a member of the Supreme Court since 1888. He began the practice of the law in 1866, at Union City, Indiana, removing to Pomeroy in the fall of the same year, where he has since continued to reside. In 1869 he was elected prosecuting attorney of Meigs County, and re-elected in 1871. In 1878 he was elected Common Pleas judge for a short term, and re-elected in 1876 and 1881. Judge Bradbury was especially qualified for a trial judge, because of his keen perceptive powers, quickness of action, and sound judgment. There was no unnecessary delay in his court as a *nisi prius* judge. This course at first may not have been altogether satisfactory to some members of the Bar with whom he came in contact, but became so later.

Every one realizes that an accurate, thorough knowledge of the facts of any case is a necessary preliminary to an ascertainment of the law, and that the sooner the trier masters the facts the sooner will his mind find occupation upon the important question of what rule of law applies to them. If he be slow in comprehending with exactness the controlling facts he will likewise be slow in reaching the real work; if quick, that work will soon be before him. In the quick grasp of facts, in the process

of sifting, winnowing out the unimportant facts from those which are material, and reaching a full understanding of the real question in controversy, Judge Bradbury is especially strong. And, having almost equal facility in determining the principle of law which governs the case, he is necessarily a rapid and easy worker. Not that his work is inconsiderately done; the contrary is the fact. Nor is he a blind stickler for ancient precedents. One reading his opinions, while conscious that he is familiar with the precepts and discussions of the text-writers as well as the decisions of courts bearing upon the question, yet is impressed that where the question is not controlled by the previous decision of our Supreme Court, Judge Bradbury is governed more by a high sense of justice and a strong common sense in reaching his conclusions, than by what some worthy may have said about it a half dozen centuries ago.

JACOB F. BURKET, a present member of the Supreme Court, was born in Perry County, Ohio, March 25, 1837. He was elected to the additional judgeship created by the legislative enactment of 1892. In his younger days he taught school and also followed the carpenter's trade. He commenced the study of law in June, 1859, at the same sime teaching school during winter months. He was admitted to the bar, July 1, 1861, and commenced the practice of his profession at Ottawa, Ohio, removing to Findlay, Ohio, in April, 1862, forming a partnership with Henry Brown, Esq., which firm was dissolved May 1, 1869, after which he practiced alone until January 1, 1888, when he formed a partnership with his son, Harlan F., which firm continued until taking his seat upon the Supreme bench, in February, 1893. As a lawyer he was noted for the clear manner in which he presented the principles upon which his cases were founded, his practice in more recent years being in the line of railroad and corporation law. He devoted some time also to business interests as president and director of the American National Bank of Findlay, Ohio. Judge Burket has also taken great interest in fraternal societies, being elected Grand Master of the Odd Fellows of Ohio in 1881. He is a member of the American Bar Association and of the Ohio State Bar Association, seldom failing to attend their meetings.

JOHN A. SHAUCK became a judge of the Supreme Court since the preparation of this article, on the 9th day of February, 1895. He was born in Richland County, Ohio, March 26, 1841; graduated from Otterbein University and received his legal education at the law school of the University of Michigan, being admitted to the bar of Ohio in 1867. He engaged in the general practice at Dayton until February, 1884, when he became a member of the Circuit Court, serving upon that court until elected to his present position.

DIVORCE, FROM A LAYMAN'S POINT OF VIEW.

By Frank Chaffee.

"WHOM God hath joined together let no man put asunder." If this prayer-book sentiment be true, then one of two conditions must exist: either God has nothing to do with a large proportion of the marriages of these end-of-the-century days, or else the thriving business of the divorce mill must be conducted by other than men.

I have lately been mixed up in a divorce case. I was neither plaintiff nor defendant, nor yet that very objectionable party of the third part, the cause of the trouble. I had no desire to be involved in the complication at all. It was simply an instance of having greatness thrust upon me. I had the misfortune to be the intimate friend of the plaintiff, — a fine fellow indeed. This fine fellow had followed injunctions said to occur in Scripture, and had taken unto himself a wife. After the taking, he had discovered that the lady was not the angel he had taken her for; in fact, that she was an extremely unsuitable and altogether objectionable person. He felt annoyed at the discovery, and confided his woes to me.

Now, I had always been a rather old-fashioned person. I had regarded marriage as an entirely serious matter, and had spent many years regarding its approaches and results without ever having gathered sufficient confidence to attempt a personal experience. I was sure that I had heard something, somewhere, about the parties of the marital combination cleaving unto each other until death doth them part.

With these observations and views in my mind, I met my friend's recital of his troubles with ready sympathy. I said: —

"Old chap, this is terrible; you must reason with her."

"Reason be blowed," he responded, with emphasis. "She is a bad lot. I shall get rid of her."

"Heavens!" I exclaimed, "you don't mean *murder?*"

"Murder!" he said, as he laughed with some bitterness. "Oh, dear, no; we do these things very simply, nowadays. I shall just divorce her."

"But, old man," I said, "she is your wife; and you promised to love and cherish, and all that sort of thing."

"Yes," he replied, scornfully, "and I promised to honor, too; but do you expect me to keep such a promise under existing circumstances? Not much; I've instructed my lawyer to commence proceedings at once."

I thought the matter over, and I made up my mind that my views must be all wrong. I knew there were divorces, of course, but I had never been intimately connected with one before, so I had never made a study of the subject, with its causes and effects. Now, as I pondered, from my friend's point of view, I decided that divorce was a very wise dispensation; that, if the orderings of Providence resulted disastrously, it was a very good thing that legal wisdom was comprehensive enough to remedy, readjust, reorganize; in short, *correct* the doings of said Providence.

I therefore set about formulating new views, and studied the subject in its various bearings. I promised to help my friend in his case, and joined him in his consultations with lawyers, detectives, and others who attend to marital dissolution. It did strike me that a couple of lawyers, a brace of detectives, a consulting ex-judge, an irate plaintiff, and his fidus Achates, formed rather inadequate odds against one small woman. Then I reasoned that I had heard that one clever woman is usually a match for a dozen men. Justice to her sex compels me to state that, in the case of the sharer of my friend's

joys and the cause of his sorrows, this saying was amply verified. It took many days to collect evidence against the lady sufficient to justify the Court in declaring the match off.

It was finally accomplished, however, and now my friend revels in his restored state of single blessedness, although he asserts that he can feel himself but semi-detached.

Incidentally to my association with this case I learned many interesting facts connected with the disconnection of the marriage bond. Divorce appears to be a habit that grows on one. I heard of one charming woman who, after a brief season of married life, divorced her husband for just and adequate cause. She returned to her native town, met an early lover who meanwhile had married, was the cause of his divorcing his wife, after which she married him and settled down to apparent contentment. Habit, however, was strong upon her, and, after a short time, she again appealed to the courts, which, anxious to oblige a lady, once more severed her bonds. Her ex-husband returned and re-married his first wife, while my heroine, after a short season of retirement, formed a marriage combination with a gentleman who, knowing her record, and being of a ready wit, died before she had time to divorce him.

This lady must have believed implicitly that, in the possible hereafter, there shall be no marrying nor giving in marriage, neither any recognition of earthly marriage contracts, else she would never have dared arrange for herself a last condition which should be so much worse than her first.

There seems, to the lay mind, to be a great many complex and wonderful things connected with the laws governing marriage and divorce. For instance, I am told that persons divorced in New York may not again marry in that State, but they may take a ferry across a river to a little State lying just opposite New York, and which I believe is called New Jersey, and there they may wed with the sanction of church and law. Then they may come back and live in New York without attention being called to their somewhat anomalous position.

If a married couple take a dislike to one another, and the laws of their resident State offer no opportunity for release, one of them removes to another State, where the laws are more obliging, establishes a residence by spending a few months there, and then returns free. I am told of a place in the West where the thing is so easily and simply done that it has become the very Mecca of the dissatisfied pilgrims on the matrimonial road. There was a time when a Western city named Chicago was jeered at because of the simplicity with which it settled marital difficulties; but that city has, I believe, mended its ways in this respect, and now one must journey even farther toward the setting sun to have a divorce granted "while you wait."

One amusing point I have discovered is, that most of the divorced ones rush almost immediately from the alleged frying-pan into the probable fire; that is, no sooner is one marriage bond dissolved than another is contracted, and the questionable part of it is, that evidence in many cases suggests the active consideration of the forming of the second bond before the dissipation of the first. I should think it would all be very confusing.

A simple fisherman, in the pretty play "Alabama," objects to a railroad running through his country because it "tends to discourage the frogs."

My objection to this divorce railroading is that it "tends to discourage" matrimony, and, being a single man, with a possible yearning for matrimonial bliss, I feel that I have a right to file my objection. Why would it not be a good plan to have national divorce laws, so that if you were divorced in one State your position would be the same in all, and you wouldn't have to cross a State line to be respectable. Make the requirements as simple as seemeth good in the eyes

of the law, only make the same conditions hold good over the entire country. Don't divorce a person for impoliteness in one State, and make murder, arson and forgery necessities for a similar result three miles away in the next State. In any case, why do we pretend that marriage is for time and eternity, when we know it is of possible speedy dissolution? Isn't the Law poaching on the preserves of the Church, anyway, when it dissolves a bond created by the latter? Of course, all this is only a layman's point of view, and, more than that, a layman who has been neither divorced nor yet wed. It is, however, sometimes the blind man who best theorizes on painting, and the deaf man who knows a thing or two about the soul of harmony; and, really, I *would* cut out of the marriage service that phrase "whom God hath joined together let no man put asunder."

A RUSSIAN COURT.

THE assizes of Russia are held at least twice a year, and, if needful, three or four times, in the chief towns of the department, and three councilors are commissioned to hold them. The senior councilor takes the title of President of the Assize, and on him devolves all of the chief duties. As soon as the three arrive in a town, they pay their official calls in a carriage and pair, calling on the prefect and the diocesan. These functionaries pay the return visit immediately, and the mayor, assessor, police commissioner, and other officials follow. On either side, the ceremonial is punctilious to a degree, and the etiquette is in all cases strictly defined. As the arrival of the judges is generally timed for the afternoon, the social ceremonies occur in the evening.

One entire day must elapse between the arrival of the judges and their sitting, in order that there may be full time to examine the calendars on which are spread the indictments, the depositions of witnesses, and all of the facts and rumors which the police have been able to collect concerning the accused. There are three categories for trial: The political offenders, the press offenders, and those whose crimes involve sentences of death or exile. These may be in strict confinement, in the houses of detention, or at large. The public prosecutor, and not the Bench, decides as to what enlargement shall be allowed prisoners before and during trial. He is supposed to be very fair in all that is done, and sees to it that the accused are present when the juries are drawn.

The drawing is the first business of the assizes. A panel consists of forty men, and for each trial fourteen are drawn, twelve to form the jury, and two supernumeraries or *suppléants* to act in case of sickness of the jurors. These two men sit in the box with the others, and hear the trial, but take no part in finding the verdict, unless in filling vacancies. Every prisoner is attended at the drawing by counsel, although he may be of little use to the prisoner.

At mid-day of the second day after their arrival, the judges open court. The hall of justice is a large room, at one end a dais, on which are the judges, clad in scarlet and ermine, in large arm-chairs. Behind them hangs a life-size painting of Christ on the cross, and on the table in front of the judges' chair is a gilded crucifix. Of the picture and crucifix the judges seem almost entirely oblivious. Mounting the dais, the prosecutor follows, and takes a seat in a rostrum at their right. The gendarmes then enter with the prisoners, escorting them to a dock opposite the prosecutor. The proceedings commence with the reading of the first indictment on the list, by the clerk of court. This may occupy an hour, as the indictment

is apt to be a portentous document. The prisoner remains sitting during the reading, but at its close he is ordered to stand, and the president proceeds to interrogate him.

This examination is fearful and wonderful. The judge speaks as if guilt had already been proved, and is exasperating and bullying. It is a common thing for him to use such expressions as, "You wretched liar! Infernal scoundrel! No equivocation! What a falsehood that was! No more such devilry!" When the prisoner has been questioned and harried to the president's content, he is allowed to sit down, and the witnesses are called. They are not sworn on a Bible, but lift their right hands, and swear to "tell the truth." There is no examination or cross-examination by counsel. It is the president who does all of the interrogating, and he examines the witnesses for the prosecution first. Then those for the defense come forward without any interposition in shape of a speech for the prisoner by his counsel. The speeches follow the taking of evidence, the prosecutor speaking first, and the defendant's counsel following, each urging points and advancing theories and arguments. The president does not sum up, and his associates are silent. After the counsel for the defense concludes his speech, the prosecutor is privileged to reply. These speeches are nothing less than harangues, gushing, sentimental, and full of clap-trap. They are addressed to both bench and jury-box, and may occupy hours. During the trial the jury is not detained, and the jurymen go where they please without any restrictions: but once they have retired to consider the verdict, they are locked up until they arrive at a decision. The only person with whom they may communicate is the president, and he is summoned to their room if they desire to see him. On returning with the verdict, the president states a number of questions for the jury to answer, and these may number as many as a hundred, the answers being simply "Yes" or "No." Unanimity is not required in the finding of the verdict, but in order to carry conviction there must be a majority of eight to four. Six to six acquit. If five pronounce for acquittal and seven for conviction, the prisoner gets the benefit of the *minorité de faveur*; and yet the Bench may add its three votes to the five and reverse the verdict. There is a proverbial uncertainty about verdicts. The jury is prone to find out *circonstances attenuantes*, in a grave case, and these the judges must respect. Having answered all of the questions, the foreman lays his hand upon his heart and says, "Before God, and before men, and on my honor and conscience, the verdict is for acquittal" (or conviction, as the case may be).

The prisoner is not in court either when the verdict is given or sentence pronounced. When he is brought in, the clerk reads him the decree, and if guilty he has three days to appeal to the court of cassation. Every prisoner appeals as a matter of course, and the higher court merely determines whether the trial was conducted with the due legal formalities. It does not enter into any question of right or wrong, but considers the merest trifles. A clerical error, or the least misstatement, is sufficient to secure a new trial. The upper court may not call up a case for months, and meantime the condemned prisoner is kept anxious.

For that matter, there is nothing but anxiety for the unhappy man's lot. When he has been led from the clerk's desk, that is the end of it. The Bench and Bar have a dinner. The local authorities dine the judges. The jury has a feast. The prisoner languishes in jail. In his sentence there was not the slightest intimation as to when its provisions were to be carried out. He hears absolutely nothing of what is being done for or against him outside the jail walls. His counsel gives him no information as to his chances. It may be a month, or six, or a year, when the first

certain information of his fate reaches him.

The intelligence comes at break of day, and fifteen minutes before the moment of sunrise, which is generally appointed for the execution, the knout, or the start for Siberia. The governor enters the cell, and makes the announcement, and from the instant everything is done with the greatest celerity. If it is death, the chaplain presses the wine on the unhappy man, and three minutes are allowed for the shrift. Then the *ispravnik* takes him in hand, and he is half conducted, half pushed into the open court, where at once the execution follows. Is it the knout? With the same expedition the man is led forth, and the gendarmes bare his back. The instrument of torture is a whip of seven strands, and each strand loaded with sharp nails and pieces of jagged metal. While two gendarmes pinion the prisoner to rings fixed in the prison wall, a third brings out the knout, and at a signal from his fellows proceeds to the infliction. It is a horrible punishment, but there is not a man but prefers it to exile, knowing full well that in Siberia it will be the incident of every day. He may faint at execution, and shriek when led to the chains of the far Northeast, but at sight of the knout he smiles. Men have been known to suffer it time and again, and there is nothing more inhuman.

But, actually, from the Christian point of view, the entire procedure of trial, interregnum, and sentence is inhumanity intense. Nothing can be more deplorable than for a convict to be given no opportunity to prepare for punishment. Even the chaplain lies to the prisoner systematically, by holding out hopes of a pardon that he knows impossible. The convict finishes his jail career in a fool's paradise. He is given all the food and tobacco he wants, and a quart of wine a day. His warders play cards with him as much as he likes, and he lives a silly existence. Suddenly, death, — and that is all.

Are the sentences just? We cannot answer at our distance. At the least, let us be glad that the czar decrees the abolition of the use of the knout. It may mean something worse in punishment, perhaps, but it is good news that it is to go. After this there are other reforms to come, — the lightening of the chains for Siberia, the lessening of the horrors of the mines, and a change of capital punishment. They may ensue.

As for the court, it is generally held that it cannot be improved, and in many of the proceedings it is to be preferred to the courts of other European countries. It is admirably adapted to Russia, and shows advantageously when compared with other courts.

GIFFORD KNOX.

OLD WORLD TRIALS.

XI.

THE STORY OF GABRIEL MALAGRIDA.

GABRIEL MALAGRIDA was one of the strangest products of Jesuitism. Born at Mercajo near Milan in 1689, he was admitted into the Society of Jesus at the age of twenty-two, and some years afterwards set out as a missionary to Brazil, where he devoted himself to the task of converting the Indian tribes. At this period of his career he gave evidence of a spirit of fanaticism closely bordering on insanity. But he also did excellent religious and social work among the savage races with which he was brought into contact.

In 1754, he crossed to Lisbon to become

the spiritual adviser of Marianne of Austria, the Queen of Portugal. In Lisbon he acquired a great reputation for austerity and piety. He lived on bread and beans, starving himself through his frequent fasts, applied the scourge to his bare shoulders, and only allowed himself a few hours' sleep on a plank on the ground.

In 1750 the reigning king died (in Malagrida's arms), and Dom Joseph ascended the throne. The Jesuits had then far too commanding an influence in the state, and the Marquis de Pombal, the able and long-sighted politician whom the new king called to his counsels, made a resolute endeavor to curtail it by measures which had the misfortune to excite the hostility of the nobles as well. The Jesuits denounced him from their pulpits. He got them expelled from the palace, induced the king to take a Franciscan for a confessor, and persuaded the Pope to prohibit them by "bull" from making slaves of the American Indians. While this controversy was raging and waxing hotter, the famous earthquake of Lisbon occurred (1st November, 1755). It was at once claimed by the Jesuits as a portent on their side, and the king himself in fear and trembling asked Pombal what was to be done? "Bury the dead and feed the living," was the Portuguese statesman's reply; and the success in attaining the latter object completely re-established his position in the confidence of the king. The Jesuits endeavored to produce a diversion in their favor by predicting a second earthquake and even venturing to fix the date of its occurrence. But the event did not come off, and the ridicule in which this ill-omened prophecy involved the Holy Fathers drove them and the nobles into rebellion.

On the night of 3rd September, 1758, as the king was returning from the house of his mistress in a carriage, an attempt was made upon his life. He was merely wounded, and the Marquis of Pombal slowly but surely arrested the conspirators. Malagrida was among the number. The evidence against him consisted principally of letters which he had written predicting that the king would not survive September, 1758. There was some difficulty in bringing him to trial before a secular tribunal, and accordingly he was handed over to the Inquisition on a charge of heresy. The writings on which this charge was based savored strongly of insanity. They were contained in two works: "The heroic and wonderful life of St. Anne, mother of the Holy Virgin Mary," and "The life and empire of Antichrist." In the latter Malagrida announced that there were to be three antichrists — a father, son, and nephew; the last of these personages was to be born at Milan in 1920, the child of a nun and a monk, and was to take as his wife, Proserpine, one of the infernal furies.

The Inquisitors found Malagrida guilty of heresy, deposed and degraded him from his order, and delivered him up, with a gag, the cap of infamy and the label of arch-heretic, to secular justice, "praying earnestly" (with the hypocritical prayer common to such tribunals) "that the said criminal may be treated with kindness and indulgence, without pronouncing against him sentence of death or effusion of blood." Malagrida was sentenced to be strangled and burned, and he suffered this cruel death in the seventy-third year of his age at an *auto-da-fe* in the Plaça da Rocio at Lisbon, on the 21st of September, 1761. Dressed in a tiara and a long robe decorated with devils, the old priest was led forth, in the midst of a procession of recreant Jews, sailors convicted of bigamy, and two pietist nuns, to meet his fate. A crier preceded him and announced his iniquities. Before his death he is said to have made the following declaration: "I confess that I am a sinner, and as to my revelations, it is not expedient to say what I think of them." There is little doubt that this unfortunate man suffered from delusional insanity, and whether we do or do not hold it to have been of a character which ought

to have exculpated him from punishment, most of us will be disposed to agree with Voltaire that on his trial "the excess of the ridiculous and the absurd was joined to the excess of the horrible. The culprit was brought to judgment as a prophet, and was burned, not for having been a regicide, but for having been mad." LEX.

LONDON LEGAL LETTER.

LONDON, May 6, 1895.

THE Society of Comparative Legislation, which has recently been organized in London, promises to be of very great advantage to all English-speaking communities. It had its origin in a paper read last November by Sir Courtenay Ilbert before a distinguished audience in the Imperial Institute. The Lord Chancellor presided; Mr. James Bryce, the president of the Board of Trade, could not be present, but he contributed a valuable letter; Lord Justice Davey, Mr. Justice Wright, Sir Henry Jenkyns and Sir Raymond West, formerly Chief Justice of one of the Indian courts, participated in the discussion which the paper elicited, and finally, "The Times" published the paper itself, and gave Sir Courtenay Ilbert's views the endorsement of a leader — compliments which are by no means lightly to be regarded. As stated by its author, the object of the paper was to "direct attention to the expediency of collecting, arranging and making more accessible information about the course of legislation in the different parts of the British Empire and in the United States of America, and to make some practical suggestions toward the attainment of this end." The interest English lawyers and legislators had in uniting the United States in the movement was several times eloquently referred to, but in no way more pleasantly than by a classical anecdote which Sir Courtenay told with great effect. "Let me," he said, "remind you of some memorable words which were spoken on a famous occasion some 2,400 or 2,500 years ago, and which have been recorded for us by the father of history. After the Persian host had laid waste the soil of Attica with fire and sword, two rival embassies came to Athens. One was from the great King, urging the Athenians to recognize the inevitable, to yield to the overwhelming force of the Persian monarch, and to accept Persian supremacy on favorable terms. The other was from Sparta, imploring Athens not to desert the cause of Greece. The Athenian reply was prompt and decisive. 'There are two reasons,' they said, 'which make it impossible for us to go over to the Mede. The first is the sight of our temples in ashes, of our homes in ruins. These things we can neither forget nor forgive. The other is that we Greeks are bound together by common blood, a common tongue, common religion, and common institutions. These things it were not well that Athens should betray.' I have not translated quite literally, but nearly enough for the purpose of the illustration. Now there is just the same kind of identity or difference in the laws, customs, and institutions of the English-speaking race, not only throughout the British Empire, but also in those United States of America which, if we used the word colony in the Greek sense, constitute the greatest of British colonies — throughout what Sir Charles Dilke calls the Greater Britain."

The need in all communities of information as to what attempts and successes had been made by any one of the communities in the field of legislation was illustrated by the fact that the constitutional and administrative experiments which are being tried in England are those which are on trial in the Colonies and the United States, and that there is hardly a Colonial or American debate which does not find echo within the walls of Westminster. The questions of state federation and state union; of the constitution and composition of legislative bodies; of female and popular suffrage; of the incidence of taxation; of the relief of the poor; of the control of the liquor-traffic; of the relation between the working and the capitalist classes — these and other questions, all of supreme moment, have been practically settled in some communities, while in others they have, as yet, reached only the state of agitation. If laws to regulate these subjects are practically successful in one country, then other countries are deeply interested in the form which they have taken. In the very matter of the making of laws themselves, considered as a legislative act, there is a great deal to be learned by the majority of legislative bodies. In the United States, the Supreme Courts of the various states act as a corrective body, and, at least, ensure that a given act shall be in accordance with the Constitution, although in other respects the work of the legislature may be most slovenly and even contradictory. In some of the Australian Colonies, bills are sent to an expert, for final revision, after they have obtained the approval of the legislature. In other countries, and in England, accomplished and experienced draughtsmen carefully prepare the bills before they are proposed for consideration. The best of these methods should, upon inquiry, be easy to ascertain, but the difficulty at present is to ascertain how to make the inquiry.

Then there is another branch of this subject which may, perhaps, be less interesting to the legislator and the sociologist, but it is of greater importance to the active practicing lawyer and the careful judge, and that is the way to get at the laws of the English-speaking people, once these laws have been enacted. Lord Justice Davey, in his interesting speech which followed Sir Courtenay's paper, drew attention to the fact that the British Empire was peculiarly well-fitted to promote the study of comparative law, because within its jurisdiction lay an immense variety of laws and legal systems. In the remnant of the Duchy of Normandy constituted by the Channel Islands (Guernsey, Jersey, and Sauk) are found the old *coutumes de Normandie;* in India, Hindu and Mohammedan law co-exist; in Demerara and South Africa there is the Roman Dutch law; in Mauritius, old French law; in lower Canada, the French law as it was before the Code Napoléon, and also an improved Code Napoléon. We might have added that, as the Privy Council has supervision of all these diverse laws, so the United

States Supreme Court might, on occasion, be required to construe French and Spanish and Dutch law, as it existed long before certain territories, out of which states have since been made, were acquired from France and Spain and Holland.

In London, there are the three law libraries of the Inns of Court, and a library maintained within the Royal Courts; there is also the library of the Incorporated Law Society, and the British Museum. In none of these is there anything like a complete collection of the statutory law of the English Colonies and of the United States. Most of the Colonies are fairly well represented, but in the statutes of the United States all the libraries are lamentably deficient. This is due, for the most part, to ignorance of the geography and the form of government of the United States, an ignorance which is conspicuous in many of the otherwise best informed members of the English Bar. There should be, somewhere in London, a complete collection of the reports not simply of the United States Supreme Court, but of the courts of last resort of all the states. But as long as the American judges have the absurd and silly custom of writing pages upon pages to express opinions which really great judges, like Kent and Story, would have compressed into as many lines, or which an English judge would have delivered orally in a sentence or two, no one library can afford shelf-room to accommodate the out-put. A plan has been suggested by which the various libraries, particularly of the Inns of Court, might combine to furnish these reports to those who care to consult them, and in the very remote future it may be adopted. But even now all the law libraries ought to contain the federal and the state statutes, and the session acts up to date. The only one of the libraries which makes a pretense of keeping a useful list of American books, is that of the Middle Temple. The benchers of the Inn have recently ordered what is practically a complete set of the statutes of all the States, and these, it is announced, are to be maintained in a workable state.

Sir Courtenay Ilbert's paper not only drew attention to the lack of a complete collection in England of the legislative enactments of the British Colonies and the United States, but suggested that it was improbable that any such collection existed anywhere, and urged the usefulness, first, of amassing this information in some one central and easily accessible place, and, afterwards, of digesting and comparing it in a volume or volumes, after the style adopted by Mr. Stimson in his digest of the United States statutory laws.

As a result of this paper a meeting was called by the Lord Chancellor to consider the best means of furthering the study of comparative legislation. This meeting was held in December last, and was attended by an even more representative body of lawyers, legislators and sociologists than were present to hear Sir Courtenay Ilbert's paper. As a result a Society of Comparative Legislation was formed, with the Lord Chancellor as its permanent president; a council embracing the foremost representatives of the Bench and Bar and the universities, together with the ambassadors of the United States and France, and an executive committee selected not only to represent the various parts of the English-speaking world, but to secure a working organization. The committee has as yet not issued its scheme, but will shortly do so. It hopes to make the society genuinely useful to practicing lawyers, jurists, students of sociology and legislators. Upon a larger and more complete scale, so far at least as the science of jurisprudence is concerned, it will endeavor to do for Great Britain and her colonies, and the United States, what the American Bar Association is trying to do for the states of the Union, in the way of enforcing a uniform and systematic code of laws where there is now diversity and conflict. It will go further, and, by collating, digesting and arranging the laws, set their essential features forth in a volume or series of volumes, so that, for example, an American lawyer desiring to know the law of England, the Australasian Colonies, or India, on a given subject, may at once inform himself without the necessity of consulting the statutes or codes of these communities. When it is remembered that in the British Empire there are some sixty legislatures, and nearly fifty in the United States, and that these are constantly employed in passing acts relating to commercial law, the general administration of justice, capital and labor, marriage and divorce, the regulation of the sale of intoxicating liquors, education, railways, incorporative companies, bankruptcy, and merchant shipping and mercantile law, it will readily be seen how extensive the scope of the society may legitimately become. Even if the practicing lawyer has no need to use in the trial of a case or the preparing an opinion, the information which may thus be furnished, he may still employ it to illustrate an argument, to inquire into the reasons that lie at the foundation of a system, or to suggest a useful modification or a radical change in the law of his own community.

The method of carrying out the proposed work is a subject for careful consideration. It has been suggested that, as a matter of first importance, a standing committee be appointed with a view to obtain information as to the existing statute law of England and her dependencies and the United States, more particularly as to the form of statute and written law, modes of preparing and passing bills, revision and amendments of statutes, form and manner of publication of statutes, and their consolidation and codification and indexing. Communication will be established, so far as the United States is concerned, with the American Bar Association, the judges of the courts, the heads of the law schools, the editors of the law periodicals and the officers of the various local law societies. The co-operation of these authorities will be warmly welcomed, and branch and corresponding societies throughout the States will be encouraged. It is probable that an international conference will be held as frequently as may be convenient for the purpose of discussing questions of interest to the legal profession and the public. In Germany, Italy, Austria, Switzerland such gatherings are annually held, and are productive of great good to the profession. It is remarkable that no meetings, at least upon the line proposed by the Society of Comparative Legislation, have ever been convened in Great Britain or elsewhere in the Empire. Such a convention, with representatives from the leading lawyers of the United States and the Colonies in attendance, would be a notable occasion, and an event to which every lawyer and jurist would look forward with the keenest interest.

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The Lawyer's Easy Chair.

. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

PRISONERS AS WITNESSES FOR THEMSELVES. — "The London Law Journal" brings information of the progress of the "Evidence in Criminal Cases Bill," in the House of Lords, which provides that persons accused of crime may testify on their own behalf. It is our impression that the Lord Chancellor was the originator of this measure, if not of this bill. It is a humane measure, and is also calculated to elucidate the truth. It is regarded with favor in this country, and so far as we know, no state that has adopted a similar law would now dispense with it. The remarks of Lord Halsbury and the Lord Chancellor on the moving of the bill for a second reading are of interest. Lord Halsbury said: —

"He really thought the time was come when people should understand what absurd anomalies existed in the law as it at present stood. If their lordships glanced at the schedule of the Acts that it was intended to repeal by the bill it would be seen that in those different Acts there was a provision which enabled accused persons to give evidence on their own behalf; and matters had now come to this, that it required a special education on the part of those who presided at criminal trials to know whether or not the persons accused before them were capable of giving evidence or not. He might illustrate what he said by referring to an incident that took place before the Recorder of London. Two persons were indicted for an offense, and each of them desired to call his wife to give evidence in his behalf. They were informed that if the women were their wives they could not be called, whereupon one of the men said that he was not married to the woman he wished to call, though they had long lived together. On this the man was judicially informed that this woman could be called to give evidence, and she was called and made a credible witness; but in the other case, as the accused was married, the woman could not be called. That would give some idea of the present state of the law in this respect. Since one of the bills which he had brought forward had passed their lordship's house, a very remarkable case had been tried before the Lord Chief Justice. It was a case in which an old man, eighty years of age, named Barber, had been connected in some way with a prospectus issued in reference to the ship "Great Eastern." He was charged with obtaining money by false pretenses by means of the prospectus, and probably in consideration of his age, he was sentenced to only a comparatively light punishment. But the case arose again subsequently in civil proceedings, and the same point on which he was convicted, whether the allegation in the prospectus was a falsehood, once more came up. In this civil proceeding the man was capable of being called as a witness, and, to the satisfaction of everyone, including the learned judge who tried the case, he was acquitted by the jury of having obtained money by false pretenses, and for the best of reasons — that that which was alleged to be a false pretense was, in fact, true. On that occasion the Lord Chief Justice took the opportunity of pointing out the hardship, the gross injustice, that this old gentleman suffered through the law having prevented him from being called as a witness in the original trial. Whatever was the principle which guided the law originally, he would ask whether it was reasonably possible to maintain the system under which every person indicted under the Acts mentioned in the schedule to the bill could be called as a witness, whereas every person who was excluded from them could not. But the question did not quite rest even on that. He had mentioned before that in this country, unlike many other countries, everybody was entitled to assume to himself the character of the prosecutor, and, assuming that character, unless the Attorney-General intervened, he practically framed the charge which should be made against a person. A learned judge had told him that in his view it was quite possible in such circumstances for a person to take the opportunity of so framing the charge, by varying its legal quality, as to make it incapable for a person proceeded against to be called as a witness. What sense or reason could there be in such a system as that? The present state of the law had been denounced by nearly every person conversant with its administration. A circumstance bearing on this occurred in a case which was tried not long since, and it might a little shock the public conscience — a case in which it was stated that a prisoner about to be sentenced to death for murder declared that he could have proved where he was at the time of the murder, if the law had permitted him to be called to give evidence. Without however relying on such an incident, the mere fact that a prisoner was now able to say that the law prevented him from proving his innocence by reason that he was not allowed to give evidence in his own behalf, could not be ignored."

"The Lord Chancellor said he entirely concurred with what had been said by his noble and learned friend. Personally he entertained the strongest opinion on the matter. Having introduced a similar bill, he should certainly exercise all the influence he possessed to insure its passing into law, and he was quite satisfied that there was no indisposition whatever on the part of his colleagues to see this bill become law. There were still some who retained what, in his opinion, were prejudices against the change;

but he believed those feelings would disappear as soon as the law came into operation. The possible mischief would, in his judgment, be infinitesimal."

The ancient tenderness of the law that denied to persons accused of murder the privilege of testifying on their own behalf, lest they should add perjury to murder, was rather laughable.

CODES. — Sir Henry Maine, in "Early Law and Custom," alludes to the Hindu tradition that when Manu gave to Narada his account of the creation and geography of the world, "it contained one hundred thousand *slokas*, legal text or verses," and that the donee observed, "This book cannot easily be studied by human beings on account of its length." He accordingly abridged it to twelve thousand verses, and his disciple, Sumati, further abridged it to four thousand. It is only the gods, says the introduction, who read the original Code. Men read the second abridgment, since human capacity has been brought to this through the lessening of life." This has been suggested by the information that Mr. J. Newton Fiero of Albany, late president of the New York State Bar Association, has been making an attempt to procure a revision of the Code of Civil Procedure of that State. That famous institution, made by David Dudley Field, and modified by the experience of thirty years, stood almost perfect, in 1880, in about three hundred sections. About that time, Mr. Throop got himself appointed chairman of a commission to revise the statutes. They were expressly enjoined not to meddle with those parts of the law which had been already codified, but Mr. Throop fancied himself a jurist and yearned to get his name on the title-page of that law epoch-making code, and so he wrote it all over, and expanded and bloated it with matters that are no proper part of a Code, but belong solely to rules laid down by the judges; and this monstrous legal dropsy, of three thousand four hundred sections, he persuaded the Legislature to adopt, through the same influence which prevailed on the judge in Scripture in favor of the much speaking woman, and ever since, with some supplementary special inflation, it has stood a reproach to the cause of Codification, and the ridicule of the Old Men of the Sea in States that do not like Codes. Bliss's edition of this Code is in three volumes of nearly three thousand nine hundred pages in fine type! Mr. Fiero's proposal is excellent and deserves the encouragement of every lawyer who has any desire for the improvement of the laws and the benefit of the profession. The only thing in the way is the natural indisposition of lawyers to change rules with which they have become very familiar. We would not rail too hardly at that, for we recollect the contented spirit with which we went out of the practice of the law, just as Throop's code came in. We had grown up under Field's code, and we had no mind to surrender it for a bigger one, and to relearn our practice. But this revision must inevitably be made some time, and the sooner the better, and we know of no more laudable matter on which reform should operate than this, under the lead and supervision of Mr. Fiero.

HATS AGAIN. — This time it is women's hats on which we would discourse. The masculine fraction of the community has been temporarily cheered by the intelligence that bills have been introduced in three State legislatures for the suppression of women's high hats in theatres. Men have hitherto borne with this crowning abuse very tamely, but it has grown to such dimensions of late that we suspect the women themselves are rebelling and demanding that hats shall be lowered or doffed. Men will not submit to an inconvenient fashion or custom for a great length of time. They do not insist on wearing their high hats so as to cheat others of their money's worth. But women are never content unless there is some unnatural and grotesque excrescence in their apparel. If it is not a bustle, it is crinoline, or huge inflated sleeves, or high heels, or a hat eighteen inches high. It must be conceded, however, that when our dear tyrants do consent to a modification, they generally signalize it by going to the opposite extreme, and so in contrast with the high hat, our eyes have been rejoiced of late by many sweet little confections of a mere bit of lace with a bow of ribbon or velvet, which does not interfere with one's view of the stage in the least. But these are the exception, and the tall hat with its hearse-plumes, nodding to right and left, is still largely in the majority, and causes the masculine attendant to wish that he were not a church member, so that he might ejaculate "a big, big D." So when we heard of the introduction of this bill, under a very carefully guarded phraseology, in the New York legislature, we were much elated, and hoped that the high hat was about to be relegated to its proper place at church or funerals. But alas! it turns out that the New York bill was never seriously intended. It was but a cruel and unfeeling joke designed merely to satirize the women. It has met its fate in the assembly. Although fifty-six men voted for it, to fifty-three against it, there was not a constitutional majority. It was simply a scene of horse-play. All very fine, gentlemen! You may jest about tariff or income tax or national currency, but not on the high hat. We can tell you that you will have to account with your enraged constituents when you come home, and that even if

you succeed in getting a re-nomination, you will be "snowed under" so deep that one of these high hats with its funereal feathers on top of a six-footer woman would be invisible in the drift. You have yet to hear from the people. Men will yank their own hats off every minute to women in the streets, and yield their seats to them in the street-cars, but the high hat is, as Marjorie Fleming said of "seven times seven," "what nature herself can't endure." Women may just as well understand that the worm has turned. Hats off, or no vote. *Vox populi nux vomica!* What says the poet?

When lovely woman wears a bonnet
That hides the legs upon the stage,
What charm can hush man's curses on it,
And mitigate his muttered rage?

The only art to calm his passion
And smooth away his looks adverse,
Is to eschew the feathery fashion
And sell her plumage for a hearse.

NOTES OF CASES.

JUDICIAL COMITY. — The late Judge John Erskine, of Atlanta, shortly before his death, wrote us in relation to the recent sketch of Charles O'Conor in this magazine. With particular reference to the matter of cumulative sentences, he said: —

"When in London in 1880, or possibly 1882 (for I was in that city in both those years), I had some business in the Foreign Office, and while there strayed into the Court of Appeal, just as Mr. Benjamin had concluded his argument in the Tichborne Claimant case, against cumulative sentences. There were three judges sitting — James Brett (afterward Master of the Rolls), and the other was, I think, Lord Justice Collin. When Mr. Benjamin sat down, the three 'learned Thebans' conferred for a few minutes, and then Lord Justice James began to talk, and when he came to speak of the New York Court of Appeals case which you refer to, he belabored it with great judicial rigor. I cannot recall what he did say, but it was thunderingly expressed, and I knew he would get 'bringer' when the judgment reached New York. But the next morning I read in 'The Times' a report of the judgment, much softened in language. It *read* very well, and pleased this old gentleman."

When Lord Justice James came to publish his opinion in official form (5 Q. B. Div. 502), he was quite moderate, notwithstanding he was "startled" by the New York decision, in three places, and in another found it "startling if not shocking;" although it is hard to see why he was surprised, for he confesses that he is "unable to understand it."

In the celebrated case of Brook *v.* Brook, 9 H. S. Cas. 219, which decided the momentous proposition that a man's marriage with his deceased wife's sister, made in a country where it was valid, would not be valid in England, the Lord Chancellor Campbell administered a rebuke to Sutton *v.* Warren, 10 Metc. 451, which held that a marriage between nephew and aunt, contracted where it was legal, would be recognized as valid in Massachusetts, although it would have been invalid if celebrated in Massachusetts. Lord Campbell said: "I am sorry to say that it rather detracts from the high respect with which I have been in the habit of regarding American decisions resting upon general jurisprudence"; "proceeded on a total misapprehension of the laws of England"; and "My Lords, may alarm us." Would that his lordship could have lived to read Mr. Bishop on Brook *v.* Brook, and Chief Justice Gray's reply to these animadversions, in Millikin *v.* Pratt, 13 Mass. 458. The former is too long to quote, and the latter observed: —

"The judgment proceeds upon the ground that an act of Parliament is not merely an ordinance of man but a conclusive declaration of the law of God. . . Such a decision, upon such reasons, from any tribunal, however eminent, can have no weight in inducing a court not bound by its authority to overrule or disregard its own decisions . . . The case recalls the saying of Lord Holt, in London *v.* Wood, 12 Mod. 669, 687, 688, that an act of Parliament can do no wrong, though it may do several things that look pretty odd, and illustrates the effect of narrow views of policy, of the doctrine of 'the omnipotence of Parliament,' and of the consequent unfamiliarity with questions of general jurisprudence upon judges of the greatest vigor of mind and of the profoundest learning in the municipal law and in the forms and usages of the judicial system of their own country."

So far it seems that the American courts have made the most "points" in the slugging match. But as Gray's rejoinder came twelve years late, we fear that Campbell did not see it.

DIVORCE — FRAUD. — Several recent New York cases seem to run counter to the well-settled doctrine of annulment of the marriage contract on the ground of fraud. It is familiar that fraud which will avoid a marriage must go to the essence of the contract. Fraudulent representations as to birth, age, social position, fortune, health, manners or character, will not suffice. Kent says, "The law makes no provision for a blind credulity, however it may have been produced." So where a man represented that his former wife was dead, but she was living, they having been divorced (Clarke *v.* Clarke, 11 Abbott Pr. 228); and where a woman concealed the fact that she had given birth to an illegitimate child (Smith *v.* Smith, 8 Oreg. 100), it was held that the marriage should not be set aside. But in the special term of the New York Superior Court (King *v.* Brewer, 8 Misc. 587), it has been held that a wife

might have her marriage annulled because her husband had unlawfully kept a pool-room before marriage, unknown to her. The Court acknowledge that there is little authority for such holding, but rely on a previous case in the same court (Keyes *v.* Keyes, 6 Misc. 355), where a marriage was annulled because the husband had represented himself as honest and industrious, whereas he was a professional thief, and his portrait was in the Rogue's Gallery. Directly the contrary was held in Wier *v.* Still, 31 Iowa, 107, where a man prevailed on a reluctant widow to marry him, and it turned out, contrary to his professions of goodness, that he was just out from a third term in the State prison. The parties had never cohabited; indeed, on the way from the minister's, the wife "felt so badly" that she had consented without more investigation, that she refused to live with the man. But the Court declined to bother their heads about it. A violent example of this recent New York outbreak may be found in the unspeakable case of Meyer *v.* Meyer, 49 How. Pr. 311. A more commendable ruling was made in Moot *v.* Moot, 37 Hun. 288. Here a schoolgirl of fifteen was visited by a man at school, away from her parents, and induced to marry him. She insisted that she should have her parents' consent, and he falsely assured her that they knew of his visit and its purpose, and did not disapprove, and that she need not live with him for three or four years. The marriage was not consummated. The act of the man was a criminal offense. The Court annulled the marriage on the ground that the fraud went to the very essence of the contract. We regard the doctrine of the King and Keyes cases as extremely unsound and impolitic. Of course it is plausible to urge that no harm can be done by setting aside an unconsummated marriage in such circumstances, and that it is hard thus to tie up an innocent woman; but the answer is that such leniency will tend to render people more careless and hasty in forming marriages, and lead them into matrimonial bargains which may ruin their lives, because of the discovery of the fraud only after marital cohabitation. In one of the cases in question, the judge excuses the carelessness on the ground that "love is blind." Very true, but that is no reason why it should be encouraged in imbecility. Let such fools go to South Dakota or Oklahoma, and spare our civilized courts this wild and lawless administration of justice.

Too Much Piano. — The newspapers have had a good deal to say of the embitterment of the last hours of the late Judge Martine of New York, by the excessive piano-playing of a female next-door neighbor, who had a reputation to keep up as an amateur. It was thought that the offense was beyond legal prohibition, because the playing was in private. There may be some doubt of this, for a thing may be a nuisance although it is private, as for example a private stable. As to public playing, in Feeney *v.* Bartoldo, New Jersey Court of Chancery (30 Atl. R., 1101), it was held that where a saloon-keeper causes a piano to be played in his saloon each night from 7 o'clock till 10, and sometimes till 11 o'clock, to the music of which dancing, accompanied by loud noises, is indulged in, the effect of which is to prevent the occupant of an adjoining dwelling from sleeping, a preliminary injunction will, at the suit of such occupant, be granted, restraining the use of the piano after 9 P.M. Piano cases seem to be rare. In the Westminster County Court, in London, in 1877, there was an attempt by a literary man, having chambers in Lincoln's Inn Fields, to restrain the playing of an organ by a tenant of the next floor below. It was played two or three times a week from 7 to 10 P.M. Two neighboring solicitors testified that they did not object to the music, while an artist and a scientific man corroborated the plaintiff. An injunction was denied. But in Inchbold *v.* Barrington, L. R. 4 Ch. App. 388, a circus brass band was shut off. Old Comyn said, "the setting up a school so near my study, who am of the profession of the law, that the noise interrupted my studies," would be a nuisance. But in State *v.* Baldwin, 1 Dev. and Bat. 195, it was held no nuisance to curse and swear so loud at a tavern as to break up a neighboring singing school. Miss Phelps, in "Gates Ajar," conjectured that there will be pianos in heaven. Our own idea of heaven is that it is a place where the noise of piano-practicing will never be heard. It would be too bad to subject poor Judge Martine to any more of it, and it would be a righteous retribution on that unkind woman that she shall be condemned to practice eternally in some other place.

Highway — Use of. — To our note on the use of highways (*ante*, 201), the reader may add the case of Sidlinger *v.* Kansas City, Missouri Supreme Court, 26 L. R. A. 723, where it was held that one who breaks the guard-rail of a viaduct in a street, while running a race in the dark, with full knowledge of the situation, cannot recover for injuries thereby received on his claim that the rail was defective. It appeared "that the plaintiff, with a number of other young men, was drinking beer from a bucket in the rear of the saloon in the immediate vicinity of the viaduct shortly before the accident occurred, and that plaintiff was more or less under the influence of liquor at the time of the happening of the accident." The Court held that the street was not designed for pedestrians to run races in, citing McCarthy *v.* Portland, 67 Me. 167; 24 Am. Rep. 23, which laid down the like doctrine in respect to horse-racing.

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

"THE GREEN BAG."

Editor "Green Bag."

Permit me to call attention to a fact which I have never seen mentioned in connection with the authorship of the expression "created equal," viz.: August 17, 1774, James Wilson, afterwards one of the justices of the United States Supreme Court, published, and distributed throughout the Colonies his celebrated address upon "The Authority of Parliament to Legislate for the Colonies," and used this language: "ALL MEN ARE BY NATURE EQUAL AND FREE. NO ONE HAS A RIGHT TO ANY AUTHORITY OVER ANOTHER WITHOUT HIS CONSENT."

In the Declaration of Independence we find the same idea, both of equality and freedom as a consequence of equality, and consent as the basis of authority to make laws separated; but the ideas are identical, and the language "by nature equal" is very close.

When we bear in mind that Wilson was a signer of the Declaration, and a member of a committee in reference to it, why is it that we ascribe the language to another, and through him trace it to a foreigner?

Wilson was one of the most learned of this great company of statesmen, and certainly the most deeply versed in the classical legal literature pertaining to Natural Law; but he was likewise an exceedingly modest man, — a trait not to be ascribed to Jefferson, — and I see no reason to ascribe the invention of the style or sentiment to anyone not connected with the struggle.

The whole address of Wilson discusses liberty, not in the light of any French notion of the term, but as English liberty, and contains several other ideas, reproduced in the Declaration of Independence, of equal force and equal importance.

We should bear in mind that it was essential that the colonists show themselves to be in the right and the Crown in error, according to the ideas of the British Constitution, not according to the ideas of the French Revolution. Any idea that the document was pervaded with such ideas would have been highly prejudicial to the cause of America in England. The central thought of the Declaration is not the right to revolt, but that the King had abdicated his authority, and is precisely Wilson's argument. His speech is found in Vol. 3 of his works, and also in "American Oratory."

These are suggestions. The question is, why do we say that Jefferson imported the sentiment from France, when it existed at home?

JAMES DEWITT ANDREWS.

LEGAL ANTIQUITIES.

ONE of the articles of the Constitutions of Clarendon, in the time of Henry II (1164), shows that the right of sitting in the House of Lords, now belonging to bishops, and greatly prized by them, was originally forced upon them at a time when they thought it an indignity to sit in any assembly except by themselves, as a separate order.

FACETIÆ.

THE most popular man in a western town had got into a difficulty with a disreputable tough who was the terror of the place, and had done him up in a manner eminently satisfactory to the entire community. It was necessary to vindicate the majesty of the law, however, and the offender was brought up for trial on a charge of assault with intent to kill. The jury took the case, and were out about two minutes, when they returned.

"Well," said the old judge in a familiar, offhand way, "what does the jury have to say?"

"May it please the court," responded the foreman, "we, the jury, find that the prisoner is not guilty of hittin' with intent to kill, but simply to paralyze, and he done it."

AN old woman living some distance from Manchester, Kentucky, was summoned as a witness to tell what she knew about a fight at her house several nights before, in which three or four people were killed. She mounted the stand with evident reluctance and many misgivings, and when

questioned as to what she knew about the matter said, "Well, jedge, the fust I knowed about it was when Bill Sanders called Tom Smith a liar en' Tom with a knife, slicin' a big piece out of him. Sam Jones, who was a friend of Tom's, then shot the other fellow, en' two more shot him, en' three or four got cut right smart by somebody. That naturally caused some excitement, jedge, en' then they commenced fitin."

BOB MCLEAN of Greensboro, N. C., was a lawyer of infinite jest. Once practising before Judge Tourgee, he lost his temper at some ruling and used some petulant expression. Instantly the Judge said, "Mr. McLean, the court does not understand you. Do you mean to express contempt for the court?" Recovering his temper, McLean, balancing himself, said with the greatest good humor, "I hope your Honor will not press that question."

A CLIENT wrote a letter to Theophilus Parsons, stating a case and requesting his opinion upon it, and enclosing twenty dollars. After a lapse of some time, receiving no answer, he wrote a second letter, informing him of his first communication. Parsons replied that he had received both letters, had examined the case, and formed his opinion, but somehow or other "it stuck in his throat." The client understood this hint, sent him one hundred dollars, and received the opinion.

NOTES.

A SHORT time ago, a prisoner managed to escape from the Kirkwall prison. His occupation was that of a fisherman, and it is thought he managed to get on board one of the steam-line fishing boats. At all events, from that day to this, nothing further has been heard of him. The matter seems to have caused his father (also a fisherman) so much annoyance, that the other day he consulted an agent as to whether an action at his instance would lie against the jailer for the loss of his son! The following is an excerpt from one of the letters of the aggrieved man: "Can we come on the jaylor for damages, or what can be done? He was put in jal all right, and it is toe bad to think that we should loss him through their neglect."

A SYNOPSIS of a charge given to the grand jury at the June, 1859, general term of the District Court in and for one of the counties of Minnesota, as understood by an outsider, and appreciated by all the bystanders. Written at the time by an attorney then present in court and who heard the charge.

"Gentlemen of the Grand Jury: In entering upon your duties, you are to consider yourselves a body corporate, having deliberative powers and prerogatives, like unto other men. The well being of the Christian portion of the community is especially committed to your charge: —

"*I* go further, gentlemen, *I* tell you that *I*, though sitting here as I do, as judge of this high and honorable court, am a man of like powers, passions, propensities and prerogatives as other men, save and except such as have by early piety, mature age, and long and tried judicial experience been conquered and brought into due submission.

"Gentlemen of the jury, the duties which you are called upon to perform are peremptorily demanded of you by the government of the country in which you live. Therefore, gentlemen of the jury, you will see that you are in duty bound to give your undivided attention to finding and presenting to the court, indictments and presentments against your fellow citizens who have been unfortunate enough to be detected in the commission or omission of any crime or disdemeanor known to the laws of your commonwealth. You should not allow your thoughts and attentions to be diverted or substructed from the great trust reposed in you, and upon which, and about which, *I*, sitting here on this bench as I do, am charging and instructing you. You should consider, gentlemen, that you are not the only men who are called upon to forego personal interests, and sacrifice secular concerns, in a performance of the duties you owe to yourselves, your neighbors, and the unfortunate fellow citizens aforesaid.

"*I* go further, gentlemen, *I* say to you that *I*, sitting here as judge of this court, have forewent secular concerns many times for the benefit of the human family, in the performance of the great and arduous duties of the station of judge, for which, without egotism, I can safely say that God and nature have amply qualified me, and to which the people by their generous sufferings have called and reduced me. (Here his honor

glanced at the bystanders, and sniffed ominously at the nasal organ.)

"Gentlemen of the jury, you are common men and not supposed to know or understand much of anything, especially about the ponderous and weighty duties of grand jurors, and it therefore becomes my duty, sitting here as the honorable judge of this court, to instruct and inform you.

"There are two ways for you to proceed. In all cases where it is made to appear certain that a crime has been committed, and the name of the offender is known to you, it would be decidedly the most proper and advisable course to proceed by indictment. But should you find, from the evidence, that a crime has not been committed, but that one is about to be, and you do not ascertain the name of the intender, or embryo depredator, then, and in such cases, you will proceed by presentment.

"Gentlemen of the jury, the crimes known to our laws, sometimes spoken of as the code, are three in number, viz.: larceny, perjury, and bigamy.

"There are some other crimes known as common law crimes, but as these are common and ordinary, I shall not refer to them.

"Larceny is often, from its nature, called theftery. These are technical terms, understood by the court only.

"Bigamy is nothing more or less than double mating, double marrying, or bigamating, which terms are also technical, and will be explained later on.

"Perjury is defined by our ancient law writers to be false swearing without cause and with intent to cheat or defraud.

"I shall now proceed to be more specific in defining these code crimes.

"Firstly: The crime of larceny or theftery consists in unlawfully taking property, personal or real, without authority of law, and detaining the same without justification or probable cause, and against the earnest and repeated protestations of the owner. For instance, the taking of another's well, and using it as a miners' shaft, or the unlawful taking possession of town lots, would be real larceny, or larceny in the real estate aspect of the case. So, also, the pulling of the wool from the back of your neighbor's sheep or swine, would be the clearest sort of personal larceny or individual theftery.

"From these copious illustrations, gentlemen of the jury, I think you (although but common men) will be able to know and understand what theftery really is, and I pass on to:

"Secondly: The crime of bigamy means just what the word seems to indicate, and what I told you before it did mean. If any persons in this county have been committing this gross and heinous crime, you will present them to the court.

"This brings me to third and lastly: Perjury, or giving false information. This is the most subservient to the public interests of any crime set forth in the code; and if any persons are guilty of the same, and you so find them, you will hand them over to me, and, by the authority invested in me as judge of this court, they will hear something drop.

"Gentlemen of the jury, in ancient times there was such a crime as sodomy; but no such crime exists now, it having been rendered obsolete by an ancient decree, and the Sodomites have not been known to exist since the 'great disposer of public events' so effectually cleaned them out and soused them in the Dead Sea.

"Gentlemen of the jury, judges, sitting as the court as I now do, are not usually as explicit and definite and certain in their instructions to grand juries as I have been; but this being the first term of court in your county since the people elected me to this august and honorable station, I have deemed it proper to be a little more clear than I otherwise would be.

"The Clerk will swear the attendant, and may the Lord have mercy on this county."

LITERARY NOTES.

THE MID-CONTINENT MAGAZINE (new series of the SOUTHERN) for May shows a distinct advance over any previous issue of this publication, and contains a great variety of good reading matter. Henry Watterson forms the subject of an excellent article by Morton M. Casseday. Mr. Watterson is certainly the most picturesque figure in American journalism, and has exerted an influence on social and political questions second to that of no publicist of the day.

PERHAPS the most beautiful series of pictures ever presented of the Rocky Mountains will be found in a collection of fourteen original paintings, executed by Thomas Moran for the May COSMOPOLITAN. To those who have been in the Rockies, this issue of the COSMOPOLITAN will be a souvenir worthy of

preservation. This number contains fifty-two original drawings, by Thomas Moran, Oliver Herford, Dan Beard, H. M. Eaton, F. G. Attwood, F. O. Small, F. Lix, J. H. Dolph, and Rosina Emmett Sherwood, besides six reproductions of famous recent works of art, and forty other interesting illustrations — ninety-eight in all.

HARPER'S maintains its reputation as "the best collection of short stories." The May number contains three, each treating a phase of American life, and each widely different from the others in scene and manner. Owen Wister's "La Tinaja Bonita" is a love story of Arizona, with a desert and a drought for a background; Robert Grant, in "By Hook or Crook," relates an incident in the social career of a prosperous Boston architect; and Julian Ralph, in "Dutch Kitty's White Slippers," introduces his readers to another set of "People We Pass" in the East-side of New York.

HERBERT SPENCER begins a new series of articles in THE POPULAR SCIENCE MONTHLY for May. His general subject is "Professional Institutions," — one of the divisions of his Synthetic Philosophy, — and he shows how each of the professions has been developed out of the functions of the priest or medicine-man.

A PAPER on "Tammany," in the May number of MCCLURE'S MAGAZINE, describes the high-handed rule of Marshal Rynders and the Bowery "Plug-uglies" in New York City fifty years ago. It is fully illustrated.

In the May SCRIBNER'S MAGAZINE, President Andrews's "History of the Last Quarter-Century in the United States" reaches "The Downfall of the Carpet-bag Régime" — one of the most disgraceful episodes in the history of reconstruction, as well as the most dramatic. This account is absolutely non-partisan, and will revive the memory of a most curious period in the development of our political history. The illustrations are from a great collection of unpublished material, and are as interesting in their field as the text.

MR. A. C. BERNHEIM contributes to THE CENTURY for May a paper entitled "A Chapter of Municipal Folly," dealing with the squandering of New York's public franchises, an article which, while having special reference to New York, is applicable in general significance to other cities of the United States. The general interest in municipal affairs finds further expression in an editorial in the same number entitled "The Public Safety is the Supreme Law," apropos of the recent decision of the New York State Court of Appeals sustaining the New York City Board of Health in the enforcement of sanitary laws in tenement houses.

TWO historical studies of interest which appear in the May ATLANTIC are "The Political Depravity of our Fathers," by John B. McMaster, and "Dr. Rush and Gen. Washington," by Paul Leicester Ford.

THE NORTH AMERICAN REVIEW for May publishes, under the caption of "The Income Tax," two extremely important and valuable contributions on this most timely topic, the Hon. George S. Boutwell, Ex-Secretary of the Treasury furnishing his views on "The Decision of the Supreme Court," while a well-known economist, who desires, in this particular instance, to be known only as "Plain Speaker," takes as his theme "The Spirit of the Tax."

BOOK NOTICES.

LAW.

THE LAW OF NEGLIGENCE IN NEW YORK. Being all the reported cases in negligence and kindred subjects in the court of last resort of the State of New York (to Jan. 1, 1895). Condensed, codified, classified. By John Brooks Leavitt, of the New York Bar. The Diossy Law-Book Co., New York, 1895. Law sheep. $6.50.

Although Mr. Leavitt treats only of the local law of New York, this work is one of more than local interest. It will be of much use to lawyers in other states, inasmuch as that the *facts are given* on which the judgment is based, and if the practitioner can find a case like his own in its facts, evidence that a court of high standing ruled as he would like his own court to rule, cannot fail to help him. The plan of the book is decidedly novel. Part One contains *all the cases in chronological order*, with a concise statement of the *salient facts* and *rulings of law*. Part Two contains a *Code of Negligence* as declared by the Court of Appeals, with the cases bearing upon the various sections so arranged that the governing principles and cases in point may be easily formed. Part Three contains all the cases *classified* according to the *causes* which produced them, and *places* where they occurred. Over two thousand rulings have been

so arranged as to bring together all which bear upon the same point. The work will be invaluable to New York lawyers, and, as we have stated, of great use to the profession generally.

AMERICAN ELECTRICAL CASES. Being a collection of all the important cases (excepting patent cases) decided in the State and Federal Courts of the United States from 1873 on subjects relating to the Telegraph, the Telephone, Electric Light and Power, and other practical uses of electricity, with annotation. Edited by WILLIAM W. MORRILL. VOLUME II (1886–1889). Matthew Bender, Albany, N. Y. Law sheep. $6.00.

Upon the appearance of Volume I of this series, we expressed our appreciation of the great value of the work, and the excellence of Mr. Morrill's annotations. The second volume is in every way acceptable and evidences careful and conscientious work on the part of the editor. Nearly all the cases in the volume were decided between Jan. 1, 1886, and July 1, 1889, and include many very important decisions. Volume III will be ready about July 1, prox.

THE INSURANCE AGENT; HIS RIGHTS, DUTIES AND LIABILITIES. By John A. Finch, of the Indianapolis Bar. The Bowen-Merrill Co., Indianapolis. 1894.

This little volume, within the limit of about forty pages, contains a vast amount of valuable information for insurance agents as to their rights, duties, and responsibilities, written by a well known insurance lawyer. Full reliance can be placed in the accuracy of the statements made. The book is one which no insurance agent should be without.

THE HISTORY OF ENGLISH LAW Before the Time of Edward I. By SIR FREDERICK POLLOCK, Bart., M.A., LL.D., and FREDERIC WILLIAM MAITLAND, LL.D., Downing professor of the laws of England in the University of Cambridge. Little, Brown & Co., Boston, 1895. Two volumes. Cloth. $9.00 *net.*

No work of greater importance has ever been offered to the legal profession than this history of early English law. The names of its distinguished authors command the respect and interest of the legal world, and are a guaranty that the work is the result of the most thorough research and investigation. The labor involved in its preparation must have been stupendous and could have been successfully undertaken only by men of such scholarly and legal attainments as Sir Frederick Pollock and Professor Maitland.

The work covers a period which has not heretofore received full and adequate treatment. Beginning with the Anglo-Saxon legal antiquities, it extends to the reign of Edward I. First is given a chronological sketch of Early English Legal History, and then follow the doctrines and rules of English law which prevailed in the days of Granville and Bracton. Very full notes and references accompany the text. The work opens up a delightful field for the student of the origin of existing law, and the very full table given of the works referred to will enable him to push his researches to the very fountain-heads if he so desire. The value and importance of these volumes, legally and historically, can hardly be overestimated, and both authors and publishers may well feel proud of presenting to the public such a monumental work.

DIGEST OF INSURANCE CASES. Embracing the decisions of the Supreme and Circuit Courts of the United States, of the Supreme and Appellate Courts of the various States and foreign countries, upon disputed points in fire, life, marine, accident, and assessment insurance, and affecting fraternal benefit orders. For the year ending Oct. 31, 1894. By JOHN A. FINCH of the Indianapolis Bar. The Rough Notes Co., Indianapolis, Ind., 1894.

This digest is of great value, not only to the practicing lawyer, but to all insurance officials and agents. The present volume contains about four hundred and fifty cases well digested and admirably indexed.

THE UNITED STATES INTERNAL REVENUE TAX SYSTEM. Embracing all internal revenue laws now in force as amended by the latest enactments, including THE INCOME TAX OF 1894 and 1864, with rulings and regulations. The whole copiously annotated, with references to the decisions of the Courts and the Departments, and Cross-references, with an introductory historical sketch of Internal Revenue Taxation in the United States, and an Appendix containing laws relating to internal revenue practice, with forms. By CHARLES WESLEY ELDRIDGE, of the Massachusetts and California Bars. Houghton, Mifflin & Co., Boston and New York, 1894. Law sheep. $5.00.

With an experience of twenty-five years in the Internal Revenue Service, Mr. Eldridge possesses unusual advantages for the preparation of a work upon this important subject. A clear, concise and reliable statement of the whole law relating to Internal Revenue, as it exists to-day is given, and the matter

is so admirably classified and conveniently arranged for reference, that the book cannot fail to prove of great service and value to all interested in this branch of the law. It will be seen that the Income Tax law of 1894 is included, as well as the old repealed laws of 1861 et seq. The annotations are numerous and to the point, and the index has been prepared with evident care and discrimination.

A PRACTICAL TREATISE UPON THE LAW OF JUDICIAL WRITS AND PROCESS IN CRIMINAL CASES. The sufficiency, validity, amendment and alteration of process; its execution and return, and the powers and liabilities of officers thereunder. By WILLIAM A. ALDERSON, of the New York Bar. Baker, Voorhis & Co., New York, 1895. Law sheep. $6.00, *net.*

In this treatise Mr. Alderson gives the profession a new book upon a new subject. The scope of the work covers every conceivable point likely to arise concerning judicial writs and process. The author has not contented himself with merely giving citations to support the statements advanced, but has carefully and thoroughly discussed the principles which underlie and govern the questions presented. The book is admirably adapted to the practitioner's needs, and is also invaluable as a guide to officers who are entrusted with the service and execution of writs.

FORMS OF PRACTICE; OR, AMERICAN PRECEDENTS IN PERSONAL AND REAL ACTIONS. By BENJAMIN L. OLIVER. Fifth edition, revised and enlarged. By BORDMAN HALL, LL.B. Little, Brown & Co., Boston, 1895. Law sheep. $6.00.

Oliver's Precedents have been so long and so favorably known by the profession that they need no words of commendation from us. They have ever been regarded as the most complete and valuable set of precedents collected, and they have stood the test of long continued use. This new edition has been completely revised and much enlarged by Mr. Hall, and the work is now in such form as to fully meet the requirements of the practitioner of to-day. An admirable index makes the contents of the book easily accessible.

MISCELLANEOUS.

RUSSIAN RAMBLES. By ISABEL F. HAPGOOD. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

In these sketches of travel in Russia, Miss Hapgood gives a better idea of the ordinary conditions of the life and characteristics of the inhabitants than we have been able to obtain from anything heretofore published. Russia is a most interesting country, and, notwithstanding the terrible stories which have been told of police espionage and other drawbacks to which the traveler is subjected, Miss Hapgood's experience shows it to be possible to travel with as much ease and pleasure there as in any European country. The book is filled with charming descriptions and amusing anecdotes.

GOD'S LIGHT AS IT CAME TO ME. Roberts Brothers, Boston, 1895. Cloth. $1.00.

This little volume is the outcome of a desire on the author's part to lead others to some understanding of the reason and necessity of all the suffering and turbulence, both physical and mental, that hold and overpower humanity to-day. She believes that each individual experiences in life that which will sooner or later uplift, no matter how direful the process through which he must pass may be. The book is pleasantly written and will bring comfort to many a doubting soul.

UNDER THE MAN-FIG. By M. E. M. DAVIS. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

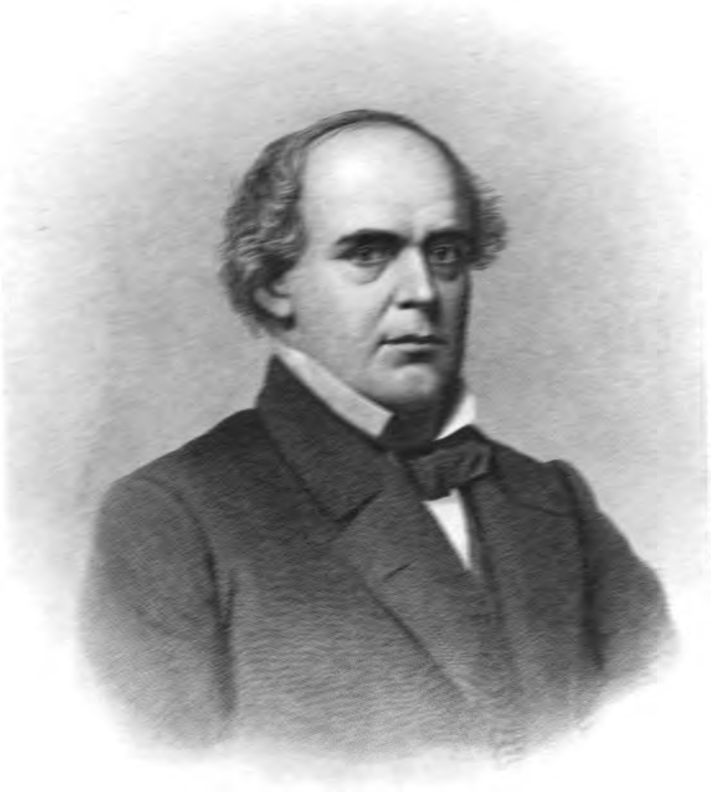
The story of a life overshadowed by an unjust suspicion, is most interestingly told by the author. Not until after the death of the unhappy object of the universal distrust of his neighbors is the mystery satisfactorily cleared up and his noble qualities made manifest. The book is delightfully written and contains some remarkable character delineations.

PRINCE BISMARCK. By CHARLES LOWE, M. A. Roberts Brothers, Boston, 1895. Cloth. $1.25.

The life of Germany's great chancellor is one replete with interest. His career is the most remarkable of any of the prominent figures who have appeared upon the stage of action of the nineteenth century, and Mr. Lowe's biography of Bismarck is an exceedingly valuable and timely work. His political career is vividly portrayed, and some insight given into his domestic life. As a whole this work is the most readable and satisfactory sketch of this great man which we have ever read.

A SOULLESS SINGER. By MARY CATHERINE LEE. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

This is a charmingly told story of a beautiful woman possessing a marvelous voice, but lacking the soul necessary to truly interpret music. The experiences of life, however, develop the required quality, and she becomes a truly great singer. A simple love-story is mingled with the theme. The book is well worth reading.



The Green Bag.

VOL. VII. No. 7. BOSTON. JULY, 1895.

PERSONAL RECOLLECTIONS OF CHIEF-JUSTICE CHASE.

BY EUGENE L. DIDIER.

I SAW Chief-Justice Chase for the first time on the 15th of March, 1869. Quite unexpectedly, on that day, I received a letter from Mr. Chase appointing me his private secretary, and requesting me to come over to Washington at my earliest convenience, as he wished me to take the place immediately. The Chief Justice asked me to meet him in the Conference Room of the Supreme Court at half-past three that afternoon. I found him, at the time and place appointed, deeply engaged upon a case which had been recently argued.

The exquisite address of Lord Chesterfield enchanted even the uncouth Dr. Johnson; the incomparable grace of the great Duke of Marlborough is said to have charmed all who approached him. Chief-Justice Chase possessed neither the exquisite address of Chesterfield, nor the incomparable grace of Marlborough, but there was a personal dignity about him which impressed every person who came into his presence. I felt it the first time I saw him, and never quite overcame it in all my subsequent intimate relations.

The Chief Justice lived at that time with his daughter, Mrs. Sprague, in the fine old house corner of Sixth and E Streets. His library was a small room on the second story, plainly furnished; in fact there was scarcely room for anything except the book-cases, desks and chairs. It was a working-room, and in it the Chief Justice did an immense amount of work. Hawthorne once showed a friend a shabby little room in his house at Salem, where "The Scarlet Letter" was written, and said, "In this dismal room fame was won"; so, in that little library, Chief-Justice Chase prepared those opinions which added a crowning glory to the fame already won as United States senator, Governor of Ohio, and Secretary of the Treasury during the most momentous period of our national existence. Every public position which he occupied was different from the other, yet he distinguished himself in all by his commanding ability, and in an age famous for its illustrious men, he was one of the most illustrious. He did not succeed by mere chance, or luck or favor; he was a tremendous worker all his life. Mr. J. W. Schuckers, the gentleman who preceded me as private secretary, and who was with Mr. Chase when he was Secretary of the Treasury, told me that he often sat down at his desk at nine o'clock in the morning, and worked until six in the afternoon. I know that he never spared himself when duty called, and midnight sometimes found us at work.

Balzac says a great man must live alone. Chief-Justice Chase exemplified this in his life. Certainly, in his latter years, his was a solitary existence, passed in his library or in the Supreme Court, paying few visits, and receiving few visitors. His habits were simple and methodical, rising at six in summer and seven in winter, and breakfasting at eight, or half-past eight, according to the season. After breakfast, during which he glanced at the morning newspaper, he met his secretary in the library, where he read and answered his letters, and worked on his opinions until 10.15, when he walked (on

fair days) to the Capitol, and took his seat as Chief Justice of the Supreme Court, at eleven o'clock. At three the court adjourned, and he walked home, where he partook of a slight lunch, consisting invariably of a cup of tea and three or four cream crackers. The dinner hour was six; the meal was more elegant than substantial, but there were always three courses and dessert; wine was rarely served at his table, nor did he smoke. The conversation at table was of a very quiet character, in which his younger daughter, Miss Janet Ralston Chase, took the lead. The Chief Justice was a great thinker, but not a great talker. Unlike Falstaff, he was neither witty himself, nor the cause of wit in other men; like Poe, he never laughed, and seldom smiled; a joke was foreign to his nature; the nearest approach to one was when I once heard him say to a Catholic gentleman that he "thought a *good* Catholic was better than a *bad* Protestant." He seemed oppressed by the burden of life, or crushed by disappointed ambition. After dinner, he resumed his work in the library, or, when not too busy, played chess, of which he was very fond. He was a good, but not a scientific player. Like Napoleon, he always fought for victory, and did not like to be beaten. I was very much out of practice when I first began to play with him, and he beat me nearly every game, but after I took up my chess manual, and studied the best openings, this was reversed, and he asked me whether I had been studying any work on chess. I told him I had, whereupon he said I played a good enough game, and advised me to let the books alone. His favorite summer game was croquet. These were the only games I ever knew him to play. He knew nothing about cards, and there was not a pack in the house.

Once or twice during the Washington season, the Chief Justice gave a dinner party at his own house. They were very solemn affairs, — too dignified for laughter, and not pathetic enough for tears. The principal guests were the justices of the Supreme Court, and leading members of the Washington Bar. Ancient legal jokes were told with a gravity that eclipsed the gayety of the table. The guests took their cue from the host, who never unbended under any circumstances. He was dignity personified, yet, in our hours of friendly intimacy, he would reproach me for not being more familiar with him. I remember, one evening we were sitting upon the piazza of the Charleston, S. C., hotel, when, after a silence of some moments, he said: "You are either very ambitious, or very much in love: otherwise you would be less reserved with me."

Among the few visitors who called upon him in Washington, during the time I was with him, I remember Gen. Sherman, Charles Sumner, Gen. Rosecrans, Sir Edward Thornton, A. R. Spofford, and Vice-President Wilson. The last called the day after the sudden death of Edwin M. Stanton, to get some information for an article on the deceased statesman which he was asked to write for the "Atlantic Monthly." During the whole of his public life, the Chief Justice kept a journal in which he recorded all the events that came under his notice. He read to Mr. Wilson from his journal an account of Mr. Stanton's connection with the cabinet of Mr. Lincoln, touching upon the circumstance of the retirement of Mr. Cameron from the cabinet, and the appointment of Mr. Stanton as Secretary of War. Mr. Chase, in a letter to Judge Black, dated July 4th, 1870, gives the following account of this affair, which created so much talk at the time: —

"Mr. Cameron had expressed a wish to retire and take the mission to St. Petersburgh some time before he did actually withdraw, and I believe that he was the first to suggest to Mr. Lincoln the name of Mr. Stanton. I held, myself, several conversations upon the subject of Mr. Cameron's

retirement, his appointment to St. Petersburgh, and the appointment of Mr. Stanton as his successor, with President Lincoln and Mr. Cameron, and I called on Mr. Stanton to ascertain whether he would accept the post of Secretary of War if tendered to him. Ultimately, when, as I supposed, the matter was fully understood, Mr. Lincoln addressed a note to Mr. Cameron, tendering the mission to St. Petersburgh, and signifying his willingness to accept his resignation. The note was brief, and seemed curt. But Mr. Lincoln, upon his attention being drawn to its tenor, said he intended to make it everything that it should be, and another note was substituted, expressing what he declared to be his real sentiments. Mr. Cameron was not removed. He resigned because, as he stated at the time, he preferred the mission to the secretaryship, and he did recommend the appointment of Mr. Stanton as his successor."

The Chief Justice has not stated the very friendly part that he took in this matter. Mr. Lincoln's letter to Mr. Cameron, offering him the mission to Russia, was deemed curt and unfriendly by the latter, and he so expressed himself to Mr. Chase, whereupon Mr. Chase called upon the President, and suggested that it was not the sort of note that should be addressed to the retiring Secretary of War.

"Well, then," said the President, "write what you think proper, and I will sign it."

Mr. Chase thereupon wrote a most cordial letter to Mr. Cameron.

Chief Justice Chase was a very domestic man, and, although he married and buried three wives before he was forty-five, he never forgot the one romantic love of his early manhood. When he was a poor and unknown teacher in Washington, he had among his pupils the sons of William Wirt, the Attorney-General of the United States. Mr. Wirt, who had arisen from poverty and obscurity to a splendid position in public and private life, was attracted by the talents of the young New England boy. He invited him to study law under him, and made him a welcome guest at his house. Miss Wirt's particular friend was Elizabeth Cabell of Richmond, Va., who was a frequent visitor at the home of the Wirts in Washington. Mr. Chase met her and lost his heart. Miss Cabell accepted him as an escort to parties, the theatres, receptions, dinners, etc., and the young man wrote sentimental verses to the fair Virginia girl, but when he offered her his heart, she disdained to marry a poor school teacher. So she became the wife of a high-born Virginian, and lived and died in provincial obscurity, while young Chase went to Cincinnati, and started on a career which made him one of the foremost men of his time. Had he been successful in his first love, the career of Salmon P. Chase might have been entirely changed, and the future destiny of this country might have been affected, in a measure, by the result of this unsuccessful love affair of an obscure Yankee school teacher. Had he married Miss Cabell, he would either have remained in Washington, or settled in Richmond, and become a pro-slavery Democrat, but going West at that time, while smarting under a disappointment inflicted by one of the proud patricians of the South, he threw himself heart and mind into the anti-slavery movement, and, becoming one of its most prominent leaders, by his creative genius he paved the way for the formation of the Republican party in 1856.

Although Chief-Justice Chase married early, he did not marry late, for, after the death of his third wife, before he was forty-five, he did not marry again. But, being a man of very strong affection, he became deeply interested in one of the handsomest women of Washington, Miss Constance Kinney. He was more than three-score at this time, but, whenever Miss Kinney attended one of Miss Chase's afternoon receptions, the Chief Justice was sure to be present, throwing aside his books or work

in the library to enjoy the society of this fascinating woman. He was thinking seriously of making a fourth matrimonial venture, but his daughter, Mrs. Sprague, persuaded him to abandon the idea, telling him that it would injure his high political aspirations. Speaking of this last love-affair of Mr. Chase recalls a circumstance connected with his first love. When holding the United States Circuit Court in Richmond, in the spring of 1869, another Elizabeth Cabell, the niece of his first love, called to see the Chief Justice and Miss Chase; in alluding to his former sweetheart, his voice trembled, and he was evidently much moved by the tender recollections of the romantic episode of his youth.

Chief-Justice Chase was received with great cordiality in the South, during this trip. Wherever he went, and in whatever company, he appeared as the advocate of a restored Union. He was invited to dinners, receptions, etc. At Charleston, I counted the cards of forty-eight of the most prominent gentlemen of the city who called to see him in one day. The Chief Justice was very much pleased with the attentions shown to him, and accepted all the invitations that he received. One of the most interesting was a dinner given by Mr. Trenholm, in Charleston, at which Mr. Chase and Mr. Memminger sat side by side. The latter, it will be remembered, was the Confederate Secretary of the Treasury.

Mr. Chase had a very liberal and catholic mind; he respected the honest convictions of every man, whether in religion or politics. Although, when a young man, teaching school in Washington, his patrons were Clay, Wirt, and other leading Whigs, Salmon P. Chase was always a Democrat in politics. He was an abolitionist, and the defender of abolitionists, when it required great moral courage even in the North to be the one and do the other. He began his public life as a member of the first anti-slavery convention that ever met in this country, the Cincinnati Convention of 1845. He called the Free Territory Convention at Columbus, O., in 1848, which resulted in the National Anti-Slavery Convention at Buffalo, of the same year, which nominated Martin Van Buren and Charles Francis Adams for President and Vice-President of the United States. On the 22d of February, 1849, Mr. Chase was elected United States senator from Ohio, as an anti-slavery candidate. When the Republican party absorbed all the anti-slavery elements of the country, and became a great national party, he went with it; but when slavery was finally abolished, and the Civil War was over, he resumed his original place in politics as a Democrat. I once heard him say: "I am a Democrat, by the grace of God, free and independent."

Chief-Justice Chase has been accused of indulging a presidential ambition. This is a noble ambition when a man is worthy of that high honor, and surely Salmon P. Chase would have graced that illustrious position. It would have properly crowned an exalted public life; but he never allowed his personal ambition to interfere with his public duties. When in Charleston, in 1869, he was invited to be present at the decoration of the Federal graves. His duties in court would not permit him to be present, but he sent a letter, in which he expressed the hope that, in the near future, both the North and the South, having forever buried and forgotten the unhappy differences of the past, would decorate, alike, the graves of both Federal and Confederate dead. The sentiment expressed in this letter attracted wide attention, and was attributed by some persons to a bid for the presidency. A prominent New York banker was so much shocked by the words of the Chief Justice that he wrote to him, accusing him of being actuated by an ambition for the presidency in expressing such views. In reply, Mr. Chase said: "I never was so ambitious as some un-

ambitious men have thought me. My only ambition now is to see this country united and peaceful and happy." In the summer of 1869, I sent him some newspaper clippings on the subject of what was called the "Chase movement." In reply he said: "The gentlemen who have shown such anxiety to relieve themselves of all complicity in 'Chase movements' might at least have had the grace to say that Mr. Chase never indicated (and might have added, with perfect truth, never felt) any wish that they should engage in any such."

In religion, Chief Justice Chase was an Episcopalian of a very mild type; and Miss Chase, who was extremely high in her views, regarded him as almost a Methodist. He was a man of deep religious convictions, and he tried to live up to his belief. He read morning prayers for his family and servants; he went to church every Sunday, and refrained from all official work on that day; two or three times, when compelled to finish an opinion on Sunday, in order to have it ready for court the next day, he expressed regret that he had to work on Sunday.

When I first saw Chief-Justice Chase he was, seemingly, in the prime of a splendid manhood: tall, straight, and vigorous, he was, to all appearance, good for twenty years of usefulness; yet, within two years, he was struck down by a mortal disease, which carried him off in the sixty-fifth year of his age.

THE OBJECT OF LAW.

LAW was designed to keep a state in peace;
To punish robbery, that wrong might cease;
To be impregnable, a constant fort,
To which the weak and injur'd might resort;
But these perverted minds its force employ,
Not to protect mankind, but to annoy;
And long as ammunition can be found,
Its lightning flashes, and its thunders sound.

CRABBE.

A FEW REASONS WHY IT IS NOT WISE TO GIVE THE BALLOT TO WOMEN.

By Mary Wick Saxe.

THE thought that suggests itself to most men and women is, Will the enfranchisement of women be of benefit to the entire community? not Will it be of benefit to women as a class, but Will it be expedient for all, that women should vote? Many articles and essays have been published in favor of suffrage, but one looks in vain for any single well defined exposition of a benefit which is to result to either women or the state. "Glittering generalities, fantastic speculations, socialistic theories," one finds in plenty, but nowhere the statement of a wrong to woman that man has refused to redress, of a provision for her benefit that he has refused to make. One of the most prominent suffrage speakers acknowledges that, in the last fifty years, through the legislation of men, women have obtained in the eye of the law a more favorable position than men themselves hold.

Many arguments are advanced for woman's suffrage, one being that the ballot is an inherent right. But there is no such thing as an inherent natural right of an individual to vote. The right to say who may or may not vote has and must always remain with the state, and must be exercised with reference to the interest, not of an individual, but of the state. In no proper or exact sense is the suffrage a right at all, or even a privilege. It is a duty imposed upon the male citizen, because it is believed that its exercise by him will be for the best interest of the whole community. Suffrage, if a right, is a political and not a natural one. As our Constitution has it, it is the right of every person to elect or be elected according as the same is established "by the frame of government."

Consider the probable effect of admitting to the ballot all women; not alone the brilliant and intellectual women, but the densely ignorant, who have neither the education, the mental capacity nor the desire for political knowledge; not alone the "semi-civilized foreigner," but his wife and daughters. In the lowest class of laboring women we find the really dangerous element, too ignorant to understand political questions, too weak to resist the voice which would influence their votes by persuasion or bribery, they would, like the same class of men, form a mass of unreasoning voters, the ready prey of unscrupulous politicians. To say that the women are no worse than the men does not help the matter, for it is this class of men from whom we have little to hope and much to fear; it is their vote that now threatens the honor of our country. Shall we double this threatening element? Educated women already influence men in a great measure by public opinion. They voice public opinion, which is much more influential and powerful than the ballot itself.

It is claimed that women will purify and elevate politics because they are purer and more conscientious than men; but this is exceedingly doubtful when applied to politics. It seems reasonable to expect, were women admitted to vote and hold office, that all the corruption and intrigue displayed by men would be found in women. The fact that women have no political prizes to gain, no offices in view, no constituency to please, has made them of great value in works of philanthropy and reform. The influence of woman when standing apart from the ballot is immeasurable; she can be broad, liberal and wise, free from the prejudices of partisanship, with all men ready and willing to help her, whereas; if she were

a voter she could depend only on her own party, the woman's vote often being divided against itself. Let us move slowly, and not consider the vote as the only infallible means to all wished-for ends, the only panacea for all evils.

It is urged that to refuse women the ballot is to render her liable to taxation without representation, and this is proclaimed as a gross injustice. The term "taxation without representation" has been misunderstood. Taxes are the involuntary contributions levied and collected by the government for the protection, benefit and advancement of the entire community. They are levied alike on voter and non-voter, citizen and alien, children and adults, men and women; in short, there is no relation, in fact or theory, between taxation and the voting power. As the bill of rights has it, "Each individual has a right to be protected in the enjoyment of his life, liberty and property. He is obliged consequently to contribute his share to the expense of this protection." Now that is the reason why every property owner, man, woman, infant or alien is obliged to pay taxes, because he or she is protected in his or her life, liberty and property. Every woman, every minor gets this protection, and the enjoyment of taxes when put out in roads, sewers, libraries and schools, in just as full a measure as men. The comparison that Mr. Edwards made, in the GREEN BAG of May, 1895, of dumping the tea into Boston Harbor with giving the suffrage to women, is a little far-fetched. American interests were different from those of England and were not represented in her legislature, but the interests of American men and women are essentially the same, the family is represented.

In the United States it is impossible to compare suffrage in the western and eastern states, the difference being so great. In Wyoming there are only one-half as many women as men, and not one man or woman to the square mile, while in Massachusetts there are fifty thousand more women than men, and many men and women to each square mile. Also there are in the far west no large cities such as we have in the east. Mr. Gardiner, a prominent scientific and business man of Kansas, spoke of an election in Leavenworth in the following manner: "One party put up a man of questionable reputation as mayor, the other party nominated a man of spotless character. Soon the latter's friends found that the other party were enlisting all the negro women of the city to their cause by sympathy and bribes. We then saw that all would be lost if we could not arouse our wives and sisters to their duty as enfranchised women to vote for the pure election. Soon they became interested and began canvassing around amongst their neighbors. Constantly they increased in numbers and enthusiasm, until finally people who had been friends and neighbors for years would not speak, and the whole history of each candidate, with that of their ancestors and followers, was discussed in every household, even before its youngest members. Women had caught the fever of politics, and it raged high and furiously. And, as a climax, on election day we saw our wives and daughters driving through the city, picking up women of the lowest possible class and morality, and then walking with their arms around them to the polls to see that they voted rightly. Every means of intimidation, bribery and cajolery which had been used by men was employed unhesitatingly by women on election day, and yet when the votes were counted the result was no different than if they had remained quietly at home without the ballot." In England, for some time past, the franchise has in a small way been given to single women who pay rates and taxes, and in '94 it was extended to married women who pay rates and taxes in their own names, and the franchise was enlarged; but no conclusions can as yet be drawn from so recent a grant of the voting power. The

property qualification was done away with in America in 1820, on the ground of expediency, and if women are given the suffrage it should be given them on the same basis that men have it. Many of the suffragists do not desire an educational qualification, claiming that the ballot will educate women, but how women can get a lift and learning out of a right that has not made men better or wiser is an anomaly not explained.

The higher education of women is a thing entirely apart from the ballot, for women without it have obtained entrance into most men's colleges, as well as into all professions. They can be lawyers, doctors, ministers; in fact, one finds no business or profession closed to her, no barrier interposed to her development and advancement in any direction in which her sex permits her to direct her footsteps.

But these advantages of higher education, and the professions are open only to the exceptional woman, while the ballot is to be opened to all women; not little by little so that they might learn to appreciate its dangers and disadvantages and avoid the rocks and reefs, but all at once the floodgates are to be opened, and the franchise given to women. She is to learn, through bitter experience, and the country is to suffer the consequences. Some of the late articles written by suffragists prove conclusively by their tone that it is better for women to move slowly; that they need time in which to learn that a wisely-adjusted bit is an excellent thing.

The mind of woman is essentially religious, and there is little doubt that her politics have been and would be influenced by religion. The election in Bridgeport, Conn., is a proof of this, the Protestants and Catholics both working assiduously for their own candidates, the Catholics coming off victorious. In Brookline, Mass., the only disturbance at the polls since the Australian ballot system came into use, was when the A. P. A. women thronged around the polls, begging men and women to vote for Protestants. This mingling of religion and politics can be of no good to either, as it is usually conceded that religion and politics are better in different channels.

Women's wages, we are told, will be raised as soon as they have the ballot. This statement can be best answered by the question: If the ballot will raise women's wages, why has it not raised the wages of men? Men have been voting a long enough time, and as yet have not been able through legislation to come to any satisfactory basis about wages. The constant strikes all over the country prove this. Women as a rule seek temporary work, hoping soon to leave it. The average age of working women is twenty-two, as determined by government investigation. You see what this means, that women who have obtained some degree of skill are constantly dropping out, and their places are being filled with untrained girls. The wisest and best of our women are studying what can be done for the working-girl. They hope that organization among workers and the cooperation of all intelligent men and women may do much to raise the position of the working-girl.

The suffragists urge the necessity of reform in legislation, which will never be reached through men, since they do not suffer from the injuries brought about by the want of them, and here they have in mind the social evil. No legislation will ever wipe that out. Men must be refined and women strengthened before vice will disappear. Legislation may hasten it, but in this case as in that of intemperance, when you array women against men you are antagonizing the very people you are trying to win, and adding an evil to the one you are seeking to remove. We can only work surely by stemming the tide of evil through early education, before it has grown too strong and overpowering.

The main reason, however, why suffrage

should not be given to women at present, is that a majority of women do not want it, some through indifference it is true; but a large number of intelligent women do not wish to assume a new duty when they have now before them problems unsolved. These women realize that the interests of men and women are the same, and that no legislation which is unjust to women can be good for men; it is only an unenlightened public opinion which can think otherwise. Why should the ballot be thrust upon the unwilling majority of women? The suffrage is no universal solvent, it performs no miracles, it creates nothing new. The ballot is only one form of influence, one means of obtaining an end. It has its dangers and disadvantages, and must we not pause before we increase its problems? Mr. Edwards, in his article before referred to, says, "You SHALL have this disability removed which is an everlasting reproach to a dominant sex, and be placed on an equal footing with husband and brother." The position of women is not inferior to man, she does not need to be placed, for she is already on the same footing with him. Is it necessary for woman to follow in the very same footsteps as man in her march towards a better condition and a higher life?

Our educated women are our leisure class, and from them we have a right to demand the wisdom that comes from the highest ideals lived out in the noblest lives. Let these women become the leaders of Public Opinion, now the strongest force that governs the world. But above all let them hold sacred the calmness, the retirement and dignity of their lives, and keep undimmed the high ideals which shall give guidance and light to those less favored than themselves.

THE POLICE OF PARIS.

THE organization of the French police has for a long time inspired the admiration, not to say the envy, of Europe. Although, like every other earthly institution, it frequently shows imperfections, its successful action throughout a long century, from the time of Fouché and Vidocq down to the present day, must be admitted as a proof of the clear-sightedness of the successive Police Ministers and the cleverness of their agents. The fact that Eyraud's arrest was not owing to the acumen of the French police is no blot on the system, and should merely be considered as the exception that proves the rule.

There are actually three categories of police in Paris — the secret police (political and inquiry making), the criminal police, composed of detectives whose mission it is to track criminals and to watch suspected persons, and the ordinary city police, numbering at the present time about 6,000 policemen of all grades, which it is proposed to increase by the addition of 300 extra "sergents-de-ville," at an annual cost of 144,375 francs. Till within a recent date there was another distinct body of police in Paris, the "police des mœurs," whose duties are of a delicate nature, as the appellation implies. As it came to be considered that too much importance was given to the last-named body, it was incorporated with the "police secrète," so that, although they continue to fulfil their peculiar functions, the "police des mœurs" are not exclusively employed in the surveillance of improper conduct and the arrest of compromised persons. These three categories of police are official, and act under the responsibility of the authorities appointed by the Government.

But, as in England and America, an out-

side extra-judicial police has gradually grown up in Paris, with agencies established in many quarters, who offer their services for any purpose without scruple as to the justice, morality, or possible consequences of their inquisitorial action. Such agencies have never inspired much respect or confidence on the part of the public; their intrigues have frequently led to serious, and sometimes to comical results, as was cleverly delineated in the well-known farce of "Tricoche et Cacolet"; and the surveillance they propose to employ with respect to others is often employed against themselves by the authorities of the Prefecture, so that the lookers after others are from time to time well looked after in their turn.

The abuses resulting from the tolerated but totally unauthorized existence of such establishments have led to the creation of a new sort of agency calling itself the Police Officieuse, in reality an inquiry office, but which discards every idea of espionage for political or other purposes. This inquiry office, which professes to undertake any admissible sort of investigation, is of quite recent foundation, and although young in months only, is organized on a footing which places a large staff of old retired police employees at the disposal of its director. Its avowed object is to assist justice by extra-judicial inquiries, without being in any way authorized by the official police to act on its behalf. Each of the employees above referred to possesses some special aptitude, to be made use of, when any particular occasion arises.

So far, but few relations have been established between these inquiry offices in Paris and similar establishments existing in England and America, where a great amount of extra-judicial business is transacted quite independently of the legally appointed authorities. Overtures have been made for that purpose, and when a proper basis of operations can be submitted to the English and American private detective establishments in London and New York, a suitable and useful understanding with their French colleagues will not be likely to meet with any obstruction. It stands to reason that all the investigations undertaken by the Police Officieuse will be made (professedly) in a thoroughly judicial, official, and confidential manner. In making these observations it is necessary to state, from information received by the representative of the "Galignani Messenger" at the Prefecture of Police, that all the agencies alluded to in this article act entirely at their own risk and peril. No private agency can possess the powerful machinery at the disposal of the Prefecture. When a case has been abandoned by the official police, there is little hope for success by any other means; yet people who have been robbed of either purse or honor, and have applied to headquarters in vain, often take to these agencies, that resemble men who go to work in an abandoned mine, with the hope of finding a forgotten or hitherto undiscovered treasure.

The system of inquiry employed by the inquiry office is the same as that followed out by the Paris Prefecture of Police, to which all its former servitors are, of course, well accustomed. The tariff is also the same as that charged by the Prefecture — ten francs per day's surveillance or inquiry in Paris; fifteen francs per day in the provinces, and twenty-five francs per day in foreign countries, besides travelling and hotel expenses to be paid by the client. The extras are often more considerable in amount than the simple tariff charges; and when the inquiries fail to succeed, the disappointed client finds that he has been uselessly mulcted in the vain hope of discovering something undiscoverable. — *Galignani.*

LEGAL ENTOMOLOGY.

By R. Vashon Rogers.

EARLY in the eighteenth century, the monks of the monastery of St. Anthony, in Brazil, brought an action of ejectment against some ants accused of interfering with convent property. Father Manoel Bernardes, in his "Nova Floresta," gives a full account of this law-suit. It arose in this wise. The ants in that part of the country were numerous, very large, and destructive; they were miners, and excavated extensive subterranean corridors and store-houses, and in the exercise of their own sweet will so undermined the cellars of the friars and so worked upon the foundations, that the whole convent became shaky and liable to collapse. Besides this, these insects actually stole the grain that the worthy brethren had carefully stored away for the use of the convent. The ants came in multitudes, and worked indefatigably by day and night. Starvation threatened the monks, who tried to repel the inroads of their liliputian enemies without success. All physical means being unavailing, recourse was had to the strong arm of the law; process duly issued in the name of the Minorite Friars of the Province of Pietade, in Maranhao, against the ants of the said territory, and the latter were duly summoned before the bishop of the diocese, sitting as judge of the tribunal of Divine Providence. Counsel were employed on either side. The advocate for the friars deemed it necessary, in opening the argument, after evidence had been taken, to state that his clients, being mendicants, in obedience to the rules of their order lived on the contributions which they collected, and with great difficulty, from the pious inhabitants of the district; yet the ants, who were considered unholy, and for that reason were abhorred by St. Francis, not only persistently robbed the monks, but also endeavored to turn them out of their convent and destroy it. Waxing eloquent, the pleader claimed that the ants should satisfactorily explain their conduct, or else death should come upon them, either by pestilence or by flood, or at the very least, they should be banished from the country forever.

Counsel for the ants alleged that, having received from the Creator the gift of life, they had a perfect right to preserve it by all the means in their power; that in the practice and execution of these measures they gave to men the example of virtues with which they had been endowed: for example, prudence, in thinking of the future and storing their food for a time of want; diligence, in gathering in this life treasures for the future, as St. Jerome says, "*Formica dicitur strenuus quisque et providus operarius, qui presenti vita, velut in aestate, fructus justiciae quos in aetenum recipiet sibi recondit*"; the virtue of charity in helping one another when the burden was too heavy for one; and religion and piety, in ever burying their dead. He pointed out that it was hard for the plaintiffs to appreciate the gigantean labors of his puny clients, that they often carried burdens greater than their bodies, and sometimes their courage was greater than their strength. He admitted that the friars were more noble and more worthy, but yet before God they were only like ants, and the gift of reason scarcely outweighed their sin in having offended the Creator by not observing the laws of reason as well as they did those of nature. It was thus the friars rendered themselves unworthy of the service and assistance of other creatures; and they had committed many greater crimes against the glory of God than the ants had in carrying off their flour and wheat. Then he claimed title in his clients, alleging that they were in posses-

sion of the ground before the monks had established themselves in the place, and so they ought not to be troubled; and so he appealed for them against the violence done them to the tribunal of the Divine Creator, who made the smallest as well as the greatest, and had assigned to every one a guardian angel. He admitted that it was difficult for the defendants to contend against the human means employed by the plaintiffs; but, notwithstanding all, the ants were resolved to continue their own style of living, as the earth and all it contained belonged to God, and not to the plaintiffs. *Domini est terra et plenitudo ejus.* (Apparently even in those days counsel threw in a little Latinity wherever possible.)

This argument for the defense was so strong that even the advocate for the friars had to admit that the ants had some right on their side. Then the judge carefully considered the evidence, and weighing the matter with an unbiased mind, that justice might be done in the premises, decreed that the friars should select a field in the neighborhood of which the ants might have peaceable possession, and that the ants should remove at once, under pain of excommunication. The judge thought that neither party would be prejudiced by this decision: the friars had come to the country to sow the grain of the evangel, and their maintenance was agreeable to God, and the ants could easily obtain their food in the new place by their industry, and the cost would be less.

When this judgment was pronounced, the judge sent a friar to proclaim it to the ants, and this he did by reading it, *ore rotundo*, near by the ant-hills. Then, *mirabile dictu*, evidently the Supreme Being was satisfied with the decision, *et nigrum campis agmen:* millions of ants came out of their homes, formed themselves into long and dense columns, and proceeded straight to the field assigned them, forsaking their old abodes forever. And the Minorites, released from the fear of their enemies, sang *Te Deums* of praise and thanksgiving.

Bernardes saw these pleadings and proceedings, and carefully read them in the monastery of St. Anthony, where they had been placed. Where they are now we would not like to say, as we find that in the same century a number of ants — and white ones at that — had taken possession of a library in Peru and devoured a great number of books. These termites had actually to be excommunicated before they would cease from carrying out the wise saw of Bacon, that some books are to be tasted, others to be swallowed, and some few to be chewed and digested.

Apropos of ant-hills, among the black Khonds of Orissa, in India, an intending witness is sometimes placed over an ant-hill and made to utter an imprecation that if he swears falsely he may be reduced to powder by the dwellers therein. Then he tells his tale. By the way, some of the jungle tribes have to hold on to the tail of a cow before they will tell theirs. (Lea's "Superstition and Force," p. 258.)

The vicinity of Lausanne, in Switzerland, was in the year 1479 badly infested by cockchafers (*Anglice*, May-beetles). They were so numerous and destructive as to be a thorough pest. M. Richardt, who was then chancellor of the city of Berne, advised that legal proceedings should be taken against them. His advice, judging from the experience of the preceding three or four hundred years, seemed reasonable, and so was followed. In the first place there were some processions — why, where, and of whom we are not certain; next, the beetles were summoned to appear in the Bishop's court. The citation did not seem to warrant a fair trial, or even a safe conduct; it was in this style: "Ye hideous and degraded creatures: ye grubs! There was nothing like ye in the ark of Noah. By orders of my august superior, the Archbishop of Lausanne, and in obedience to the Holy Church, I command

ye all and every one to disappear, during the next six days, from every place where food grows for man or beast. If ye are not obedient, I enjoin ye to appear on the sixth day, at one o'clock in the afternoon, at Willisburg, before the Archbishop of Lausanne." This was such a case of hanging first and trying after, that we are not surprised the beetles did not appear. If the Archbishop had really wanted them to come, he should have made his summons returnable after dark and then have lighted his candles and opened his windows: then they would have come buzzing and droning in fast enough, we trow. The poor things sleep in the day-time. Counsel had been graciously assigned to them — the advocate Perrodet. True, *he had been dead six months*, but that was not considered a drawback. (Perhaps it was considered that while lying quietly in his grave he might the more readily consult with clients who spend some three years of their lives beneath the sod. At all events, we Anglo-Saxons should not sneer at the retaining of M. Perrodet for the defense after his funeral, for in the Dooms of Ine (cap. 53) provision is made for the taking of the evidence of important witnesses after they had dropped the obolus into the hands of the Stygian ferryman.) Unfortunately, neither the counsel nor the accused attended at court, so judgment was given against the chafers by default. We regret greatly Perrodet's neglect. A speech by him, delivered in sepulchral tones, while clad in a winding-sheet instead of a gown, would have been effective upon the court. The sentence was, of course, excommunication in the name of the Holy Trinity and the Blessed Virgin; and the hideous and degraded creatures, the grubs, "were ordered to quit forever the diocese of Lausanne." ("History of Swiss Reformation," by Ab. Ruchat.)

The first recorded trial of insects took place in Laon, A.D. 1120. These were caterpillars; and some sixteen other cases are known, ending with the ants above-mentioned. In the "Mémoires de la Société Royale Académique de Savoie" is an account of proceedings instituted in 1587 against some beetles that were playing havoc in the vineyards of St. Julien, near St. Julien de Maurienne. It appears that in 1545, these, or similar creatures, had made an attack upon this territory, and legal proceedings had been commenced against them; the inhabitants had chosen a lawyer to look after their interests, and one had been appointed to defend the insects, when suddenly the beetles all disappeared, so the law-suit had to be abandoned. However, the action was resumed in 1587, the beetles having returned in great numbers, and the devastation being greater than ever. The court addressed a complaint to the vicar-general of the bishop of Maurienne, who named a judge to hear the case, and counsel to plead for the accused. The vicar also published an order of proceedings, which included processions, prayers, etc. After argument it was decided that the inhabitants of St. Julien must provide a tract of land away from the vineyards, where the beetles could live without interfering with the vines. The court particularized the size of the land, and that it must contain trees, herbage, and grass in sufficient quantity and of good quality. The inhabitants deemed it best to accept this judgment without further appeal, and promised on certain conditions to cede certain land in favor of the coleoptera "en bonne forme et vallable a perpétuyté," on condition that in case of war they might take refuge there, and reserving a right of way through it, "sans causer touttefoys aulcung prejudice à la pasteure des dictz animaulx: et parce que ce lieu est une seure restraite en temps de guerre, vu qu'il est garni de fontaynes qui serviront aux animaulx susdictz." The decree was amended to cover these points, and on June 29, 1587, the conveyance was executed. Apparently these hard-shells were slow in moving into their appointed home, for we find that on the celebrated fourth of

July the counsel for the St. Julienites presented a petition to the court, praying that, in default of the insects accepting the land and removing thereto, they might be ordered not to interfere with the vineyards, under heavy penalties. The advocate for the beetles, of course, asked for an enlargement; vacation probably came on, and so the matter was not taken up again until September. Then the defendants' counsel declined to accept the land offered, as it was barren, and produced nothing. Counsel for the people denied this, so the court appointed arbitrators to view the place and decide the question. And ——. Here, most unfortunately, the report ceases.

The means taken by the people of St. Julien de Maurienne were, according to the writers of those days, frequently and successfully employed against various families of the insect hosts. Barthelemi de Chasseueux or Chassenee, in his work "Concilia" (Lugduni, 1588), gives indictments against May-bugs and snails. He contends that such animals are amenable to trial, and gravely discusses whether they should appear in the courts *personally*, or by *proxy*, and inclines towards the necessity of a personal appearance. He thinks, however, that the advocate appointed to defend these small fry might urge their incompetency as an excuse for their non-appearance. We must confess, however, that the facts of this learned lawyer are not always reliable. The Beaunois had been suffering from the attacks of locusts. In his book he tries to console them by saying that the creatures of which they complained were as nothing in comparison with those that infested India. These latter, he affirms, were three feet long, and their legs — of which they had six — were armed with teeth so strong that saws were made of them. In his opinion, the best way to obtain deliverance from these and similar pests, was to pay promptly and truly the tithes due to the Church, and then to cause a woman to walk round the infected place barefooted.

We find, in a case against grasshoppers, that when the ecclesiastical judges intended to issue an excommunication, the accused had to be summoned before the court in the prescribed manner a first, second, third, and fourth time; and then they, or some of them, had to be brought in, *nolentes volentes*. They were allowed to answer the charge against them. The prosecutor had to state clearly the point in question, so that it might be seen whether there was any controversy as to the law or facts. The court then decided whether witnesses were needed, and on whom the burden of proof fell. Other parties interested were allowed to intervene and be heard. For instance, in the grasshopper case it was held that wild and tame birds might show cause against the prosecution, for they were in danger of being deprived of their favorite food if the hoppers were banished. The acridophagi were also to be heard, for they might be seriously injured by a judgment hostile to the insects. The court in this matter was rather in a quandary, considering that it would be unjust to others to compel the grasshoppers to go elsewhere, so it thought the best plan was to let those who liked to eat them do so.

The actions of ejectment against these insects seem in this nineteenth century almost as extraordinary as the ejectment of spectres referred to in the Eyrbiggia Saga. The mansion of a respectable land-owner in Ireland was haunted by the ghosts of those who had died therein — they actually crowded round the fire, to the great annoyance of the living, who wished to warm themselves. Snorro, a priest of the god Thor, advised, and a jury of the neighbors was summoned in the usual way as in ordinary civil matters; the phantoms were cited to appear and show by what warrant they disputed with the owner the quiet possession of the house, and why they interfered with and incommoded the living. The spectres appeared on being called, and, muttering vain regrets at being compelled to leave, vanished, to the great

astonishment of the inquest. Judgment then went against them by default. (Sir Walter Scott's Demonology, p. 106.)

Killing flies by the heavy artillery of the Church and of the Law reminds one of Longfellow's story of a fellow lodging in the house of a Jew, who bought of his landlord all the *flies* in the house, with permission to kill them as he pleased, for his amusement. He then coolly took out his pistol and began to shoot at them wherever they alighted — on windows, looking-glasses — no matter where, bang! bang! until finally the Jew was glad to buy him off. ("Longfellow's Life," by Sam. Longfellow, vol. i, p. 336.)

In the Middle Ages domestic animals were tried in the ordinary criminal courts, and their punishment, on conviction, was death. Wild animals, such as rats, locusts, and such like, were tried in the ecclesiastical courts. It was argued that as God cursed the serpent, David the mountains of Gilboa, and the Man of Nazareth the barren fig-tree, so the Church had full power and authority to exorcise, anathematize, and excommunicate all things animate or inanimate. Yet as the lower animals were created before man, and the first occupiers of the earth; as God blessed them, and gave them every green herb for meat; as they were saved in the ark, and entitled to the privileges of the Sabbatic rest, they therefore were ever to be treated with the greatest clemency consistent with justice. Of course some learned canonists disputed all these propositions, and regarded these trials as improper and unjust.

Bees have been considered by the courts even in these latter days. In the Province of Ontario, not very many years ago, one McIntosh asked for an injunction restraining his neighbor Harrison from keeping bees. The latter had some eighty hives, and his bees flew around, not only gathering honey, but also humming about the plaintiff's blacksmith shop, and stinging his customers' horses. McIntosh complained that he could not shoe the horses, because he had to shoo the bees. These busy-bodies also frequented his kitchen at preserving times. The jury found the bees a nuisance. In the Delaware Circuit Court (New York), the following year, a similar action was tried, with a similar result. To right matters the jury awarded six cents damages, while the court granted a permanent injunction commanding the removal of the bees, and forbidding the further keeping of them. (24 Alb. L. J. 382; 36 Alb. L. J. 364.) But it was held that a keeper of bees was not liable for injuries done by them to a passing team. He had kept bees in the same place for eight or nine years, and never before had they attacked a horse. (Earl *v.* Van Alstyne, 8 Barb. [N.Y.], 630.)

Bees are *ferœ naturæ*, and until they are hived and reclaimed no property can be acquired in them. Wild bees in a bee-tree belong to the owner of the tree. Finding the tree, and marking it with his name, does not vest in one who is not the owner of the land any exclusive right in the swarm, nor is it a reclaiming. The finder cannot bring an action successfully against another for cutting down the tree and carrying away the bees. Even if the owner of the land gives the finder permission to take them away, still the finder has no property in them, and the owner of the tree might safely give them to a third party. But if the finder has actually begun to cut the tree down, then he can successfully maintain an action against one who interferes with him. (Gillet *v.* Mason, 7 Johns. 16; Ferguson *v.* Miller, 1 Cow. 243; Adams *v.* Burton, 43 Vt. 30.) The owner of reclaimed bees may bring an action of trespass against one who cuts down a tree into which they have entered, thus destroying the bees and taking the honey, even though the tree be on another's land. If my tame bees swarm on to my neighbor's land, so long as I can identify them they are mine, even though I cannot get them without trespassing. (Goff *v.* Kills, 15 Wend. 550; Watts *v.* Mease, 3 Benn. [Pa.] 566.)

Howel the Good says that bees originated in Paradise; that, being banished thence on account of Adam's transgression, God blessed them, and so no mass can be solemnized without their wax. (Gwen. Code B. II, ch. xxvii.)

Other busy B's have been the subject of litigation. Mr. Shirley, after quoting the following note, makes the subsequent remarks: "5 Brunswick Place, September 19, 1842. Lady Marrable informs Mrs. Smith that it is her determination to leave the house in Brunswick Place as soon as she can take another, paying a week's rent, as all the bedrooms occupied, but one, are so infested with bugs that it is impossible to remain." And in pursuance of this determination the Marrables moved out, and Smith went to law with them, alleging that as they had taken the house for five weeks they had no right to leave it in this summary fashion, bugs or no bugs. The Marrables, on the other hand, successfully contended that it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation, and that if it is not fit the tenant may quit without notice. (Shirley's Com. Law Cases, 67; 11 M. & W. 5.) This famous case, after being disrespectfully spoken of for many years, was in 1877 expressly affirmed in Wilson *v.* Finch-Hatton (2 Ex. Div. 336).

In a late case in England it was decided that the presence of six of these *cimices lectularii* in an attic on the third floor of a furnished house was not such a taking possession of the house by them as to oust the tenant, and to render justifiable a refusal to carry out the contract and pay the rent. To make this paper a little more scientific these facts are added: It takes a bed-bug eleven weeks to attain its full size; they have been known to live a year without food without becoming emaciated; and cockroaches are as fond of preying upon them as they of attacking the genus homo. (34 Alb. L. J. 82.)

In India, at one time, it was a costly luxury to demolish a mosquito. The Gentoo law said, "If a man kill an insect, the magistrate shall fine him ten puns of couries." For who could tell whose great-grandfather's spirit might, perchance, be lurking in that very dipteron that was fattening on one's nose.

THE ENGLISH LAW COURTS.

II.

THE HOUSE OF LORDS.

AS a court of law the House of Lords exercises four distinct classes of functions. It determines (*a*) disputed claims of peerages on reference by the Crown, and (*b*) the validity of new peerages intended by the Crown to confer a right to sit and vote in the House. We have had several instances of the former in past years. The Wensleydale case (of which more hereafter) is the palmary instance of the latter. This jurisdiction is analogous to that enjoyed by the Commons of declaring a seat vacant where disqualifications exist, and (prior to the establishment of election courts) of determining disputed returns. In the second place, the House of Lords has the right to try state offenders upon impeachment by the Commons. Students of constitutional history do not need to be reminded of the impeachments of the Earl of Strafford, in the reign of Charles I, and of Warren Hastings, in the reign of George III. In the third place, the House of Lords has jurisdiction to try members of its own body in criminal cases where a peer is charged with treason or felony. This is simply an application of the provision in Magna Charta that a man should be tried by his peers. The case of Earl Ferrers, in 1760, for the murder of his steward, will at once recur, in this connection, to all who are acquainted with the history of English law as to criminal responsibility in mental disease. Lastly, the House of Lords is the supreme court of appeal for England, Scotland and Ireland.

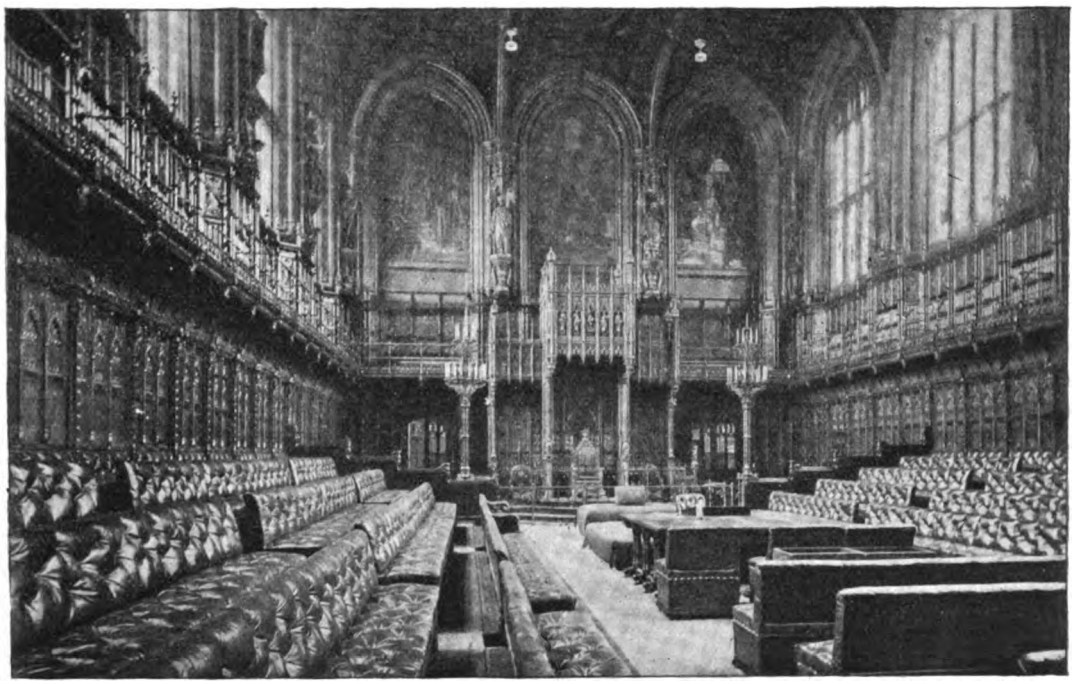
THE HOUSE OF LORDS. EXTERIOR.

The origin of this jurisdiction is practically as follows: the *Curia Regis* of the old feudal kings gradually was broken up into separate courts. One, the King's Bench, dealt with cases concerning the King's interest; a second, the Exchequer, had jurisdiction in revenue cases. Disputes between subject and subject were referred to a third, the Court of Common Pleas. There remained, however, in the sovereign, what Sir William Anson calls "a residuary power," which "was called into play where the courts were not strong enough to do justice, or were deficient in rules applicable to the case at issue, or were alleged to have decided wrongly." After some intermediate changes of little importance for our present purpose, the king in council (at first the Star Chamber and latterly the Privy Council) became the tribunal for the determination of cases where, from the greatness of the offender or the magnitude of the issue, the ordinary courts could not be trusted to do "adequate justice." The king in chancery (by "the keeper of his conscience," the Lord Chancellor) acquired exclusive jurisdiction in all cases where the rigor of the common law had to be relaxed by supplemental rules, and the appellate jurisdiction in cases of error in the common law courts passed into the hands of the House of Lords. In the reign of Henry IV the House of Commons prayed to be relieved from the judicial business of Parliament, and the Lords became sole judges in cases of "error." In the reign of Charles II it established a right to review the decrees of courts of equity; "error" was abolished by the judicature rules under the act of 1875; but provision was made for appeals by way of rehearing. In 1876 the jurisdiction of the House of Lords was based upon statute. In that year the Appellate Jurisdiction Act provided that an appeal shall lie to the House of Lords (subject to certain provisions) from any order or judgment of any of the courts following: (1) of Her Majesty's Court of Appeal in England; and (2) of any courts in Scotland from which error or an appeal at or immediately before this act lay to the House of Lords by common law or statute; and (3) of any courts in Ireland for which error or an appeal at or immediately before the commencement of this act lay to the House of Lords by common law or statute. It is also provided that no appeal shall be heard unless there are at least three members present who fall within the definition given in the Act of Lords of Appeal. A lord of appeal may be (1) the chancellor of Great Britain for the time being, (2) a lord of appeal in ordinary, or (3) a peer of Parliament who is appointed by letters patent, receives a writ of summons to attend the House of Lords in its legislative capacity, is a baron *for life*, enjoys a salary of £6,000 a year, and holds office during good behavior,

THE RT. HON. EARL OF ROSEBERY.

subject to removal on an address by both Houses of Parliament. The number of these judicial officers is limited to four. The qualification is fifteen years' practice at the bar, or two years' tenure of "high judicial office," a term which means "the office of Lord Chancellor of Great Britain or Ireland," of a paid judge of the judicial committee, or of judge of Her Majesty's Superior Court for Great Britain and Ireland. In spite of the statutory basis given to the jurisdiction of the House of Lords by this act, the sittings of the House in its judicial, resemble those of the House in its legislative capacity. Provided that the necessary quorum of lawyers is present, other peers may in theory (although they do not now in general practice) take part in the deliberations and the judgment of the House. In 1783 peers not being law lords voted without question in the case of the Bishop of London *v.* Fytche (1 East. 487).

In Greville's Journal (1838, Vol. 1, p. 81, n.) it is stated that in the case of Small *v.* Altwood the fifth vote on the hearing in the House of Lords was given to Lord Orvan, who had never held judicial office. The last occasion on which a non-legal peer voted on an appeal was Bradlaugh *v.* Clarke (8 App. Cas. 354), where Lord Denman took part in a hearing and voted with the minority. More-



THE HOUSE OF LORDS. INTERIOR.

over the form of judgments delivered in the House of Lords is that of a motion, as in ordinary debates; and the result is recorded in the journals of the House. It is probably the legislative character of judicial proceedings in the House of Lords, as opposed to the advisory character of legal proceedings in the Privy Council, that accounts for the fact that dissentient judges deliver separate judgments in the former case, but not in the latter. In addition to this point of difference between the two tribunals, Sir William Anson notes (1) that, whereas the

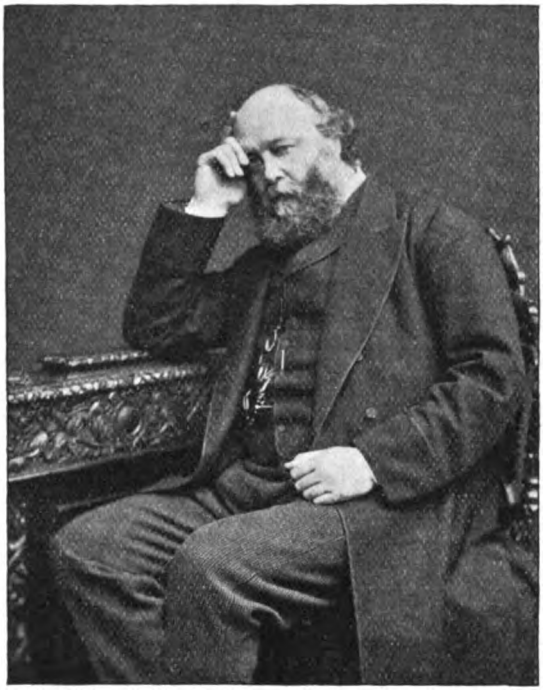
House of Lords holds itself bound by its decision, the Privy Council, like the Supreme Court of the United States, though a court of final appeal does not consider itself precluded from advising the Queen to reverse a judgment previously given (Cushing *v.* Dupuy, 5 App. Cas. 409, reversing and practically overruling Cuvillier *v.* Aylwyn, 2 Knapp, 72); and (2) that, while the House of Lords is entitled to the assistance of the judges of the High Court (MacNaughton's case, 10 Clark and Finnelly, 200), no one can attend the Judicial Committee unless he be a Privy Councillor, and summoned.

After this general sketch of the constitutional character of the House of Lords as a judicial tribunal, we may now proceed to trace the careers of some of the leading lawyers who have sat in it. With the great Chancellors we can deal more appropriately when we come, in a subsequent paper, to treat of that hoary and much abused institution, the Court of Chancery. Other points with reference to the practice, procedure, etc., of the House of Lords, will be noticed incidentally as they arise in the course of the following silhouettes.

LORD WENSLEYDALE.

James Parke, afterwards Lord Wensleydale, was the youngest son of Thomas Parke, a Liverpool merchant, and was born in 1782. He was educated at the Macklesfield Grammar School and at Trinity College, Cambridge, where he took his degree of B. A. in 1803, and graduated as M. A. in 1806. In addition to these customary honors, Parke, during his university career, was elected university scholar in 1799, a scholar of his college in 1800, and also gained the positions of Fifth Wrangler and Senior Chancellor's Medalist. Having for some time practiced as a special pleader (he was perhaps the greatest master in the mysteries of the science of pleading since it began), he was called to the bar of Lincoln's Inn, whither he had migrated from the Inner Temple, in 1813, and joined the Northern Circuit. In 1820 he was taken in to assist the law officers of the Crown in conducting the case against Queen Caroline in the House of Lords, and in 1828, after he had been only fifteen years at the bar, he was raised to the court of King's Bench in succession to Mr. Justice Holroyd, and received the usual honors of knighthood. Six years later (1834) he and Mr. Justice Alderson were made Barons of the Court of Exchequer. Baron Parke retired from the bench in 1855, but was raised to the House of Lords with the life title of Lord Wensleydale in January, 1856. This appointment gave rise to the Wensleydale peerage case, some accounts of which cannot be omitted from a sketch of the House of Lords. Lord Wensleydale was raised to the peerage by letters patent, which at once limited the grant to his life and provided that he should be entitled to a writ of summons as a Lord of Parliament. It was admitted by Lord Campbell that if the Queen had addressed a writ of summons to Baron Parke as Lord Wensleydale, and there had been no patent limiting the grant, the House could not have questioned his lordship's right to take his seat; and it also followed from the decision in the Clifton case, in the latter part of the 17th century, that the Crown could not refuse a writ of summons to his heir after his death. But the question whether the Crown can at once limit the grant of a peerage to the term of the grantee's life and provide that he should be entitled to a writ of summons, was a different one. It was referred to a committee of privileges and answered in the negative, after elaborate arguments and discussions. That the Crown could create a life peerage by patent was practically undisputed. It was also admitted that for four hundred years there had been no instance of a commoner being sent under a peerage for life to sit and vote in the House of Lords. But it was contended that there were instances prior to that date, and a list

prepared by Prynne was relied on. Dr. Stubbs, however (Const. Hist. III, 439), says that, on careful examination, Prynne's list shrinks to very small proportions: some of the names are those of judges whose writs have been confusedly mixed with those of the barons; some occur only in lists of summons to councils which were not proper parliaments. In most of the other cases the cessation of the summons is explained by the particular family history; for example, the son is a minor at the time of his father's death, and dies or is forgotten before he comes of age. In others, nothing is known of the later family history, and it must be supposed to have become extinct. Dr. Stubbs concludes that no baron was ever created for life only without a provision as to the remainder, or right of succession after his death. However this may be, the Committee of Privileges decided that Lord Wensleydale's original patent was invalid, and a new patent was accordingly issued in the usual form. It should be pointed out that the change was necessitated by legal difficulties alone, since Lord Wensleydale's only surviving child was a daughter, and he had thus no legal heir to his title.



THE MARQUIS OF SALISBURY.

The Wensleydale peerage case established the principle that a lord of Parliament must be an hereditary peer; and this principle still holds good, although modified in the special cases of the bishops and the lords of appeal in ordinary. It is perhaps worth observing that one of the favorite suggestions for the present day reform of the House of Lords is that the Crown should be enabled to reinforce the hereditary peerage by a reinforcement of life-peers. Many men, whose talents would prove a source of strength to our second chamber, are pecuniarily unable to bear the burden of an hereditary title, and might yet be both able and willing to accept a life peerage. Lord Wensleydale lived till the age of eighty-five, and served in the House of Lords till his death, which occurred in February, 1868. Parke was one of the very greatest lawyers that ever sat upon the English bench. He knew, as we have said, the science of special pleading as it never has been known before or since; and his almost passionate adherence to legal forms, which has lately been the butt of Lord Coleridge's misplaced wit, and of which his reply to a proposed amendment of the pleadings in a case, "Think of the state of the record," is perhaps the capital instance, was due, not to any narrowness of intellectual vision, but to a firm belief that the ends of justice are best served by sticking closely to technical rules. The stories told of him are practically endless; and the gossips of the Temple still love to recount his apology to a lady for being late for dinner, that he could not tear himself away from a beautiful demurrer, and to dwell upon his passion for cold air, his

pride in being thought like King George the Third, his restoration from a fainting fit by the application to his nose (after hartshorn and alcohol had failed) of a dusty volume of the statutes, of his old-world courtesy, and so on.

It may be interesting to refer to a few of Parke's leading judgments. One of the best known is Langridge *v.* Levy. There the defendant knowingly sold to the father of the plaintiff, and for use by the plaintiff, a gun with a warranty as to its safety; the gun burst and injured the plaintiff, who sued in "case." The question arose whether the action was maintainable. Parke delivered the judgment of the Court of Exchequer. He pointed out that the action could not be supported upon the warranty as a *contract*, since there was no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and could alone sue upon that contract for the breach of it. But the action was in his lordship's opinion maintainable in "case" or tort. "The defendant," he said, "has knowingly sold the gun to the father for the purpose of being used by the plaintiff by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true, used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract: it is no more than a representation, but it is no less. We think therefore that, as there is fraud and damage, the result of that fraud not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." The court did not decide, however, that the defendant would have been responsible to a person not within this contemplation at the time of the sale, to whom the gun might have been sold or handed over. This judgment was affirmed by the Court of Exchequer Chamber in "error."

Another of Parke's leading decisions, this time given in the House of Lords, is Chasemore *v.* Richards. The plaintiff, a landowner and millowner, had for above sixty years enjoyed the use of a stream, which was chiefly supplied by subterranean water, percolating through the substrata. Water, which would otherwise have been thus supplied to the stream, was diverted from it by the defendant, an adjoining landowner, who dug on his own ground a well for the purpose of supplying water to the inhabitants of the district. The plaintiff, having lost the use of the stream, was held to have no right of action against the defendant for thus abstracting the water, which was of "sensible value in and towards the working" of the mill.

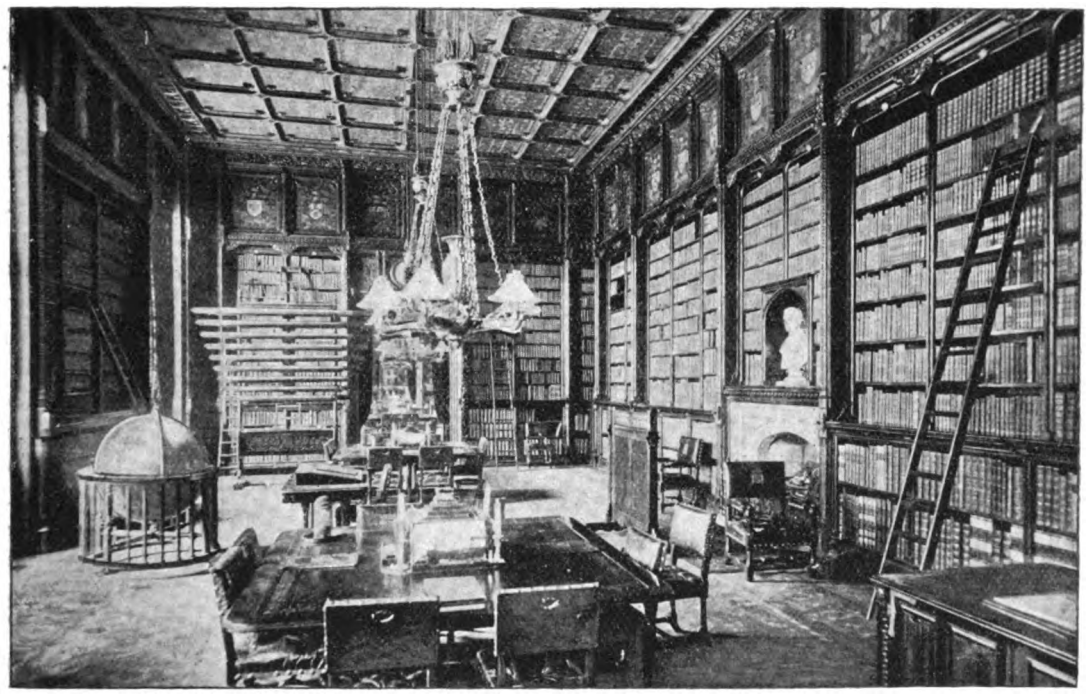
This case, taken in conjunction with Acton *v.* Blundell (12 Meeson & Welsby, 324), has affirmed conclusively this proposition, that the disturbance or removal of the soil in a man's own land, though it is the means (by process of natural percolation) of drying up his neighbor's spring or well, does not constitute the invasion of a legal right, and will not sustain an action; and further, it makes no difference whether the damage arise by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well, or whether, having found its way to the spring or well, it ceases to be retained there.

The last of Parke's judgments to which we shall refer was delivered in Buron *v.* Denman. The plaintiff, who was a Spaniard and not a subject of the Queen, was lawfully possessed of slaves on the west coast of Africa. The defendant was captain of a man-of-war, which had proceeded to the Gallinas to release two British subjects there detained as slaves. He concluded a treaty with the native king for the abolition of the slave trade in his country, and in execution of the treaty fired the plaintiff's premises and carried away and released his slaves. Denman's

proceedings were afterwards approved by his government. The case was tried at bar before Parke, Alderson, Rolfe and Platt. Parke gave the charge, and held that the ratification of the defendant's act by his government made it an act of state, for which no action could be maintained.

LORD BLACKBURN.

Colin (Lord) Blackburn was born in 1813 in Sterlingshire, and was educated at Eton and Trinity College, Cambridge, where he graduated as B.A. and Eighth Wrangler in 1835, and M.A. in 1838. In the same year he was called to the bar of the Inner Temple, and practiced till 1859, when Lord Campbell made him a judge of the Court of Queen's Bench. The appointment was pretty strongly criticised at the time, for Blackburn had never had any practice on a considerable, not to say a large, scale, and adverse critics did not hesitate to attribute his promotion to the fact that, as joint editor of Ellis and Blackburn's reports, he had recorded Campbell's decisions. The event however amply justified Campbell's choice, for both in the Court of Queen's Bench (1859–75) and Queen's Bench Division (1875–76), and in the House of Lords (Nov. 1876–Dec. 1886), Blackburn made innumerable contributions of permanent value to the development of English law. Before referring to some of his decisions it may be as well to notice a curious case in which he was defendant. One Rosanna Dupin Fray had brought an action against a person named Voules. She claimed that certain costs of an adjournment were due, and obtained a rule *nisi* for their payment. Mr. Justice Blackburn discharged the rule. Thereupon she sued him for damages. The learned Judge demurred on the grounds (1) that no action lies against a judge of one of the superior courts for anything done in his judicial capacity; (2)



LIBRARY, HOUSE OF LORDS.

that the declaration was bad for not alleging malice; (3) that it was defective for not alleging want of reasonable and probable cause. The court (Cockburn, C. J., Wightman, Crompton and Mellor, J. J.) gave judgment for Mr. Justice Blackburn. Crompton, J., said in argument, "It is a principle of our law that no action will lie against a judge of any of the superior courts for anything done in his judicial capacity, although it be alleged to have been done maliciously and corruptly. The public are deeply interested in this rule, which indeed exists for their benefit and was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions." In a previous case (Thomas *v.* Churton) Cockburn, C. J., had said, "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office by using slanderous words maliciously and without reasonable and probable cause, he is not liable to an action." Fray *v.* Blackburn however probably now disposes of this point. Most of the leading mercantile decisions in the Queen's Bench, from 1859 onwards, were delivered by Blackburn. Chief-Justice Cockburn learned not a little of his commercial law from his colleague and for some time after his appointment as Chief Justice was content to let Blackburn give the judgment of the court whenever he was sitting with him. Among Blackburn's chief judgments in the Queen's Bench were: Winsor *v.* Reg., in which the effect of discharge of a jury in criminal cases was fully considered; Strauss *v.* Francis, affirming the right of counsel to compromise an action; Newby *v.* Van Oppen, the liability of a foreign corporation to be sued in England; and Armstrong *v.* Stokes, the liability of undisclosed principals. In the House of Lords however the chief judicial work of this great judge was done. In 1877 he delivered one of the judgments in Clarke *v.* Adie, in which the modern patent law as to "subordinate integers" was laid down by the supreme tribunal. In the same year he delivered the leading judgment in McKinnon *v.* Armstrong & Co. as to compensation and retention in bankruptcy. The following list of decisions may be consulted with advantage by those who desire to trace Lord Blackburn's judicial work in greater detail. Garnett *v.* Bradley (3 App. Cas. 962); Dublin etc. Ry. Co. *v.* Slattery (ib. 1199); Orr-Ewing *v.* Registrar of Trade-marks (4 App. Cas. at p. 492); Fairlie *v.* Boosey (ib. 711), piano arrangements of copyright music; Julius *v.* Bishop of Oxford (5 App. Cas. 237), meaning of the words in a statute, "it shall be lawful"; Sturla *v.* Freccia (ib. 639), statements in "public documents"; the Orr-Ewing case (9 App. Cas. 42), which gave rise to a curious conflict of jurisdictions between the Scotch and English courts; Collins *v.* Collins (ib. 228), condonation of adultery; Thomson *v.* Weems (ib. 671), truth of answers to queries by a life-insurance company; and Metropolitan Bank *v.* Pooley (ib. 220), inherent jurisdiction of the courts to dismiss frivolous or vexatious actions. No one who reads these decisions, or a considerable proportion of them, will entertain any doubt as to the propriety of Lord Campbell's selection in 1859. When Lord Blackburn retired from the bench general regret was felt that the Wensleydale peerage case prevented him from continuing to sit and vote in the House of Lords. In addition to his other work, Lord Blackburn is the author of a standard treatise on the law of sale.

LORD BRAMWELL.

George William Wilshere, Baron Bramwell, was born in 1808, and received, at the country house of his father, who was a banker, the early commercial training which he subsequently turned to brilliant account. After having practiced for some time as a special pleader, he became a student of Lincoln's Inn in 1830. Six years later he migrated to the Inner Temple, to whose bar he was duly called in 1838. He soon acquired a large and lucrative practice. In 1849

he was appointed, along with Sir E. Jervis, A. E. Cockburn, Willes and Martin, a member of the famous commission to whose labors we owe the common law procedure acts. In 1851 he became a member of another (the partnership law) committee. It is to him that we owe both the doctrine and the terms "limited liability" in connection with joint stock companies.

In 1856 Bramwell was made a serjeant at law, and in the following year he was raised to the Bench as a Baron of the Court of Exchequer. He was sworn of the Privy Council in 1876. He retired at the end of 1881, receiving the unusual honor of a dinner from the bench of judges on this occasion. In the latter years of his life Baron Bramwell was one of the ornaments of the House of Lords. He died in May, 1892.

THE DUKE OF DEVONSHIRE.

Quite a small volume of Bramwelliana might readily be written. Lord Bramwell himself records how he turned a losing into a winning case at the outset of his career by taking a point which his leader, a man of slower apprehension, had missed. He expected that this signal success would have resulted in an immediate influx of heavy cases into his chambers. But no such inrush of business followed. The attorneys soon found him out, however, and the tide of work, when it once set in, knew no ebb.

On the bench, Bramwell was great in criminal and in commercial cases. As a criminal administrator he was, in the eloquent language of Sir Henry James, "the hope of all that suffered and the dread of all that did wrong." He shared Sir Henry Hawkins' settled antipathy to the doctrine that crime is simply a kind of diseased or abnormal development from social conditions; the very name of moral insanity operated upon him as an irritant, and both on the bench and in periodical literature ("Nineteenth Century," 1885–6) he often "went for" the fraternity of "mad doctors" with considerably more vigor than politeness. To him is attributed the well-known reply to a counsel who urged that his client was suffering from the disease kleptomania, "That is a disease which I am here to cure"; and whether this is so or not, he certainly defined "an irresistible criminal impulse" as a criminal impulse not resisted, and loved to ask expert witnesses whether criminals alleged to be moral lunatics would have perpetrated their offenses "in the presence of a policeman." The most favorable instance of Bramwell's performances in this direction is to be found in the trial (discussed in the late Sir James Stephen's History of the Criminal Law) of Dove, a half-witted farmer in Leeds, for the murder of his wife by strychnia poisoning. In spite of all the disputes to which the subject has given rise, the evidence points to the conclusion that it was the ruthless severity with which Bramwell sentenced the garroters to prison and the lash which stamped out this abominable type of offense.

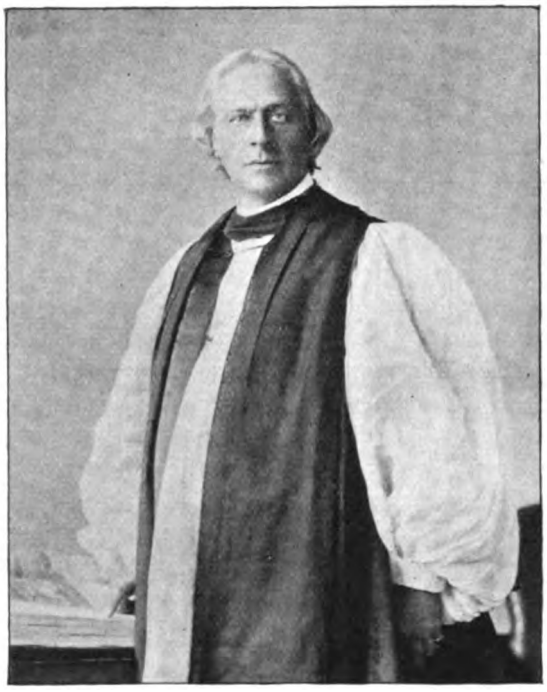
On one occasion, when Bramwell was prefacing his sentence on a prisoner with an admonition, he was promptly interrupted by the criminal man with the words, "'Ow much?" Few modern judges have had a higher sense of the dignity of his office than Lord Bramwell. He usually cast his rebukes in an epigrammatic form, in order that their wit might temper the pain which they inflicted, but he was quite ready to proceed to extremities if necessary. He once threatened to commit Montague Chambers, Q. C., for contempt. "What would you have done, Chambers," he afterwards said, "if I had carried out my threat?" "Moved for my own discharge," was the reply. The Bench as well as the Bar came in for a share of his caustic criticism. Of Chief Justice Denman he said, that his lordship always got uneasy when a point of real law was started, while he commented pretty strongly on Cockburn's habit of selecting the most sensational cases for his own list. Bramwell was an ardent individualist, and believed in the sacredness of contract with no half-hearted belief. During the stormy years of Mr. A. J. Balfour's administration, when the plan of campaign had to be fought, he frequently wrote to the papers on this burning subject, and many a letter from his pen, under the familiar signature "B.," appeared in the "Times." A few quotations from Lord Bramwell's last decision will illustrate his literary and intellectual quality. In Salt *v.* Marquess of Northampton, in which an equity question relating to a fetter on redemption was at stake, Lord Bramwell (who was a common lawyer) commenced his judgment as follows: "The first thing I find it necessary to do in this case is to learn and familiarize myself with the law which governs it and its language." A frank confession; but the task was well done.

THE BISHOP OF LONDON.

The Mogul Steamship Case raised a question of great interest. An associated body of traders endeavored to get the whole of the Chinese tea trade into their hands by offering exceptional and very favorable terms to customers who would deal exclusively with them. The Mogul Steamship Company were excluded from the association, and brought an action for damages against the association, alleging a conspiracy to injure them. The House of Lords held that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action. Lord Bramwell said (after indicating doubts whether the agreement in question was illegal at all): "I will assume that it was, though I am not sure. But that is not enough; for the plaintiffs to maintain their action on this ground they must make out that it was an offense. I am clearly of opinion it was not. It is admitted that there may be fair competition in trade, that I may offer to join and com-

pete against a third. If so, what is the definition of 'fair competition,' what is 'unfair' which is neither forcible nor fraudulent? It does seem strange that, to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection. It is a strong thing for the plaintiffs to complain of the very practices they wished to share in, and once did."

In Derry *v.* Peek, Lord Bramwell delivered a still more notable judgment. A special act incorporated a tramway company, provided that the carriages might be moved by animal power, and with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special act the company had the right to use steam power instead of horses. The plaintiff, Sir Henry Peek, took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power, and the company was wound up. Sir Henry Peek, having brought an action of deceit against the directors, founded upon this false statement, it was held by the House of Lords, reversing the decision of the Court of Appeal, and restoring that of Justice Stirling, that the defendants were not liable, the statement as to steam power having been made by them in the honest belief that it was true. Lord Hannen, in his judgment in the Court of Appeal, had revived the old discredited distinction between "legal" and "moral" fraud. Bramwell pounced upon him at once. "I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase legal fraud, except when actual fraud cannot be established. Legal fraud is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks a claim is somehow made out. With the most sincere respect for Sir James Hannen, I cannot think the expression 'convenient.' I do not think it is an 'explanation which very clearly conveys an idea'—at least I am certain it does not to my mind. I think it a mischievous phrase, and one which has contributed to what I must consider the erroneous decision in this case. The statement" (in the prospectus), Bramwell went on, "was untrue. But it does not follow that the statement was fraudulently made. There are various kinds of untruths. There is an absolute untruth—an untruth in itself, that no addition or qualification can make true, as if a man says a thing he saw was black, when it was white, as he remembers and knows. So as to knowing the truth, a man may know it, and yet it may not be present to his mind at the moment of speaking, or if the fact is



THE ARCHBISHOP OF CANTERBURY.

present to his mind it may not occur to him to be of any use to mention it." After expressing his opinion that the untruth told by the directors fell under this category, Bramwell concluded as follows: "I think it is most undesirable that action should be maintainable in respect of statements made unreasonably, perhaps, but honestly. I think it would be disastrous if there was 'a right to have true statements only made.' It might, perhaps, be well to enact that in prospectuses of public companies there should be a warranty of the truth of all statements, except where it was expressly said there was no warranty." In pursuance of this suggestion, although not in terms adopting it, the Director's Liability Act, 1890, makes every director or promoter of a company liable for untrue statements in a prospectus, unless it is proved (1) that he had reasonable ground to believe, and did believe, such statements true; (2) that so far as engineers', valuers', or other experts' reports are concerned, the statements fairly represented such reports; this defense, however, may be negatived by proof that the persons making such reports were not, and that there was no reasonable ground to believe that they were, competent; and (3) that so far as such untrue statements are extracts from official documents, such extracts were correct and fair representations of the contents of the documents; or (4) that the defendant withdrew his consent to become a director before issue of the prospectus, and gave proper notice of such withdrawal." Bramwell's style was nervous to the point of jerkiness; but he was always clear, robust, and manly in his thinking, even when it would be difficult to say that he was altogether sound. His brother, Sir Frederick Bramwell, is a well known scientific expert and arbitrator.

Among the other notables, though *magno intervallo*, in the House of Lords, have been Lord O'Hagan, whose judgments will repay perusal; Lord Fitzgerald, an importation from the Irish Bench; Lord Gordon, who held the post of Lord Advocate in the early years of the Beaconsfield government, and whose shy, retiring disposition concealed legal gifts of no mean order; and Lord Morris, the *quondam* Chief Justice of Ireland, whose rich native accent once provoked from a young lady, at whose wedding he was taking part, the touching appeal, "Throw your brogue after me." Lord MacNaghten was raised direct from the Chancery Bar to the House of Lords, where he is the solitary representative of equity, of course in the technical sense of the term. Although an eminent lawyer, he has not proved so distinguished a judge as his friends anticipated. Lord MacNaghten has recently, however, done excellent work as arbitrator in the numerous cases to which the collapse of the Portsea Building Society gave rise. And he has delivered one humorous judgment (in Montgomery *v.* Thompson, 1891, App. Cas. 222). Mr. Montgomery, a licensed victualler, erected a brewery at Stone, in Staffordshire, and sold his ales as Stone Ales, in infringement of the trade name of the respondents. The Court of Appeal enjoined him from doing so, and the question was whether the form of the injunction was right. Lord MacNaghten astonished students of his judgments by a decision from which the following passages may be extracted: "Stone, it seems, is a town in Staffordshire, containing some six thousand inhabitants. It has a supply of water admirably suited for brewing, so the appellant says, and his opinion is fortified by scientific analysis. Anyhow, Stone is famous for its ales, which are known in that part of England as 'Stone Ales.' Those ales all come from the plaintiff's brewery. In 1887 the appellant determined to set up as a brewer himself. He had to find a site for his business. Where was he to go? After much consideration, influenced, as he says, by the peculiar virtue of the water, he resolved to go to Stone. One thing leads to another. Having gone to

Stone he could think of no better name for his brewery than 'Stone Brewery,' he could find no more fitting designation for his ales than 'Stone Ales'; then came these proceedings. It is not the first time in these cases that water has got an honest man into trouble and failed him at a pinch." In discussing the question whether the Court of Appeal (whose order was ultimately affirmed) ought not to have restrained Montgomery simply from using the term Stone Ale without clearly distinguishing his ales from those of the Thompsons, Lord MacNaghten said: "Any attempt to distinguish the two, even if honestly made, would have been perfectly idle. Thirsty folk want beer, not explanation." To Lord Watson's unique position we have referred in a previous paper. It only remains to allude to Lord Hannen and Lord Bowen, whose deaths, the former after a long career of judicial and public service, the latter before the promise of his brilliant life had been fulfilled, have perceptibly impoverished the judicature of England. The biographies of both of these great men are familiar to our readers, and we need not reproduce them here. As types, different indeed but equally great and striking, of all that is best in the English legal world, they have rarely been excelled. In strength of character Lord Hannen surpassed Lord Bowen. In scholarship, in culture, in brilliancy, and subtlety of intellect, Lord Bowen surpassed Lord Hannen. In power of exposition, in patience, in true courtesy and kindness, in the modesty of greatness, he would be a bold critic that ventured to differentiate them.

No one in this nineteenth century more truly deserved the seventeenth century title of "admirable" than Lord Bowen. At Rugby and at Oxford he was famous alike in athletics and in learning. The highest honors in classical scholarship fell to his lot. At the bar he succeeded in overthrowing the law laid down by the Queen's Bench Division in Clewer's case. On the bench he delivered judgments which, in point of ingenuity and logical and rhetorical power, are not equaled by anything that appears in the law reports. We have heard the voice of Lord Bramwell in the Mogul Steamship case. Let me close with the wisdom of Lord Bowen in the same great cause. "All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future; and until the present argument at the bar, it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary normal standard of freights or prices, or that law courts had a right to say to them, in respect of their competitive tariffs, *Thus far shalt thou go and no further.* To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fettered unfreedom of trade can, in my opinion, be warranted. The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, or molestation, gives rise to no cause of action at common law. I myself should deem it a misfortune if we were to attempt to present to the business world how honest and peaceable trade was to be carried on, in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial 'reasonableness,' or of 'normal' prices or 'fair freights' to which commercial adventurers otherwise innocent were bound to conform. LEX.

PRESCRIPTION.

TRANSLATED FROM THE GERMAN BY J. H. BEALE, JR.

THAT learned lawyer, Lucius Gay,
Studied his Bracton night and day;
Sometimes in Brooke his mind did soak,
Then broiled his intellect on Coke.
His wife, as lovely as a dream,
Sat all alone and sewed a seam,
Or with her female gossips three
Imbibed at eve the cheerless tea:
While in his study night and day,
Glued to his book sat Lucius Gay.

One day at last on Washburn's page
About Prescription learned the sage,
A right unused for certain years
Is gone forever, it appears.
A sudden thought inspired the man,
Straight to his lovely spouse he ran;
He kissed her on her lips so soft,
And in his arms embraced her oft.
Full sweetly smiled the wife at this;
Five years and more she lacked a kiss.
Consumed with curiosity,
"My darling husband," queried she,
"Why, after long, long years, my own,
Have you at last so loving grown?"

"Why?" answered he, with wit profuse,
"To break the chain of adverse use.
Six years' neglect of osculation
Destroys the right by limitation:
Now time begins to run anew;
Safe for six years my rights in you."

He spoke and to his books returned,
And many another marvel learned.

THE GHOST OF NISI PRIUS.

II

By A. Oakey Hall.

AT my second meeting with the Ghost of Nisi Prius I began to chide him for breaking his engagement to meet me with more reminiscences on the day following our first interview, when he interrupted with an apologetic wave of his hand, and preserving the spirituelle, melodious voice of our first interview, said, "Although I term myself the Ghost of Nisi Prius, I have learned to prize arguments in banco, at which there is no glamour of a jury. Before the twelve comes the 'keen encounter of wits' whereof Shakespeare makes Gloster speak to Lady Anne; but before judges in banco comes in play, comparatively, Shakespeare's succeeding line, 'and fall somewhat into a slower method.' I had in my lifetime attended in New York several arguments before a bench, notably one in which Daniel Webster appeared, during the forties. It was in the famous India-rubber patent controversy between Charles Goodyear and Horace H. Day. No nisi prius hearing was ever so piquantly interesting as that argument. And it was notable as occasioning the substantial debut of Clarence A. Seward at the city bar. My absence on the day we agreed to meet was more or less connected with that then very young man. I was absent because I flitted to Washington in order to hear the second argument on the income tax cases, wherein Seward, alas, no longer youthful save in heart and strength, pulled laboring oar for the private litigants."

My ghost, spiritually like, was beginning to ramble, for as ghosts deal not with time or space, they are — and especially according to Swedenborg — apt to disregard sequences. So I said, "Let the income tax visit wait a bit, and return to Webster and the India-rubber case."

Not at all disconcerted by my episodical intervention, the ghost gave a chuckle and said, "Ha, ha, it was a rare occasion: George Sullivan — the founder of the great law firm, variously known in epochs, as Sullivan & Bowdoin — Sullivan, Barlow & Bowdoin — Bowdoin, Larocque & Barlow — and lastly, Shipman & Larocque — was senior counsel against Webster. The latter oratorical as well as logical, and Sullivan logical without a taint of oratory. And I use the word taint advisedly, for I believe oratory *per se* is wasted in banco. "Have you ever seen a bulldog get a greyhound by the ear?" asked my ghost with another chuckle. "How beautiful the hound, and how graceful are his efforts to get away from the tenacious bulldog who surlily holds on. His best point in the controversy is his teeth, and his second point the tenacity with which that point is held upon. Match the arguing logical lawyer having principle and precedent for his teeth with the graces of an opposing orator, and you have the contest of legal bulldog with legal greyhound. Sullivan was to my mind the bulldog, and Webster the greyhound. And I fancy Judge Samuel Nelson then, as he heard their contention, may have thought of the simile. A bystander asked young Seward how long Goodyear versus Day was likely to last. I remember that it was then years old, and had been heard in various forms in Boston as well as in New York. Seward is now, as president of the Union Club, known to be as witty and poetic as he is learned and logical, and he took pencil and paper and thus wrote impromptu: —

'When will this controversy end, you pray?
I say, not for a "good year and a day."'

The argument was remarkable also for other smartness of rhetoric. The length of the pending litigation was being impressed on the Judge for some temporary interlocutory purpose, when Seward remarked in an aside, 'It is like the century plant.' Webster hearing it, caught at the simile, and with that wealth of language ever at his lingual and picturesque command, paraphrased it thus: 'like the American aloes which imparts its beauty or its fragrance of flower only to one century.'"

My palms struck each other as if in applause, which the ghost noticing, said, "Yes, the beauty of the paraphrase justly excited applause then." Next, striking a reflective attitude, he added, "What a pity the newspapers of that day were not as these are to-day, enterprising, alert, omnivorous of ideas and omnipotent with the interviewing voices. Had they been, what interesting sayings and doings and anecdotes of the great lawyers of half a century ago this posterity would have enjoyed."

"Ah, but my dear ghost, you do yourself injustice. Have you not allowed me to discover a raconteur who can recall some of those lost sayings and doings and anecdotes? May I not paraphrase the words addressed by Webster, on occasion of the Bunker Hill Monument celebration, to the survivors of the battle who were in the audience, and addressing yourself, say, 'Venerable ghost, you have come down to us from a former generation."

The ghost gave another chuckle that I wish I could in words describe, and resumed, "But about my visit to Washington. After all, I was disappointed in one respect, for Seward did not argue. He had previously had his day in court on the first argument, and this time brought his junior partner, Guthrie, to the front, who made a closely logical argument, but without the oratorical graces of his coadjutor, Joseph Choate, nephew of Rufus, now reburnishing the time-faded lustre of the great Massachusetts name. That partner of Seward will yet make as national the name of Guthrie, as it was patriotically made, forty years ago, by James Guthrie, the first Kentucky-made Secretary of the Treasury. I fear that the reargument, as in the case of the great legal-tender case, and the similar fluctuation of decision, will be likely to loosen the regard of laymen for the consistency of legal science, and to revive the old slang first perpetrated by the actor, Charles Macklin, when representing the hero in the last century comedy of "Love à la Mode"; he observed, 'The law is a sort of hocus-pocus science, and the glorious uncertainty of it is of mair use to the professors than the justice of it.'"

"Yes, dear ghost," I groaned, "that phrase, 'glorious uncertainty of the law,' continues to annoy Bench and Bar, and dissenting opinions have intensified the distrust of laymen. But a truce to digressions. Let me pick up your thread of reminiscence of the New York Bar and Bench where at our last meeting we dropped it, at the year 1846."

"Yes, that year of constitution tinkering in New York State," and the ghost here gave a series of chuckles. "Nearly half a century passed with that constitution in force, and reviewed in every possible variety of moot by ingenious lawyers before the courts, and by decision perfected in meaning and stability. But while we talk together, its recent successor constitution is undergoing fresh argumentative manipulation in yonder court-room. That constitution of 1846 revived anew, at nisi prius and in banco, discussion of procedures such as I have told you interested Hamilton, Burr, Kent and the Livingstons at the close of the last, and the beginning of this century. The era of 1846, however, was notable in bringing to the fore a new generation of young lawyers. John Anthon, Ogden Hoffman second,

and the second Samuel Jones, and Marshall Bidwell, and James W. Gerard the first, and George Wood but Thomas J. Oakley and John Duer were yet survivors from the last epoch; then the new and very radical epoch, at which judges became elected, and codification put snaffle-bits into the jaws of common law in New York City, restricting its elasticity much as the snaffle-bit curbs alike the horse marked aged in turf annals and the two-year-olds, — such a radical epoch brought forward, necessarily, younger lawyers, who had no old traditions to bury, nor old forms to remember. Now to the front stepped Charles P. Daly, John E. Burrill, Lorenzo B. Shepard, C. Bainbridge Smith and Stephen J. Field. They who now see the last named on the Federal Bench can hardly believe he was the almost boyish-faced, alert, active young lawyer, whom, prior to his hegira to California, I heard in 1848 in the Court of Common Pleas during a patent medicine controversy, when basting such an old forensic hand as Charles W. Sandford, a veteran of the Chancery Bar. There were also at that era such young nisi prius advocates as William M. Evarts, Frank Marbury, Daniel E. Sickles, then the dandy of the Bar, Richard Busteed, who became during the Civil War in Alabama what the Southerners called a carpet-bag Federal judge; and Ammiel J. Willard, who about that time of war became a South Carolina judge; and his partners, Peter B. Sweeney, now, wearied of political generalship, a veteran municipal lawyer of the existing Bar; and another young lawyer, Henry H. Anderson, who soon forged to the front of the Bar, and, now a veteran, is the referee, whom, according to newspaper reports, Hetty Howland Green is daily combatting in a modern Jarndyce litigation. Then, also, came forward, as young rising lawyers, Abraham R. Lawrence, Luther R. Marsh, John Cochrane and Chauncy Shaffer, each of whom was an impassioned jury orator. Also James T. and John R. Brady, John Mason Knox, Waldo Hutchins, Henry E. Davies, who died Chief Justice of the Court of Appeals, Edwards Pierrepont, who became Federal Attorney-General, N. Bowditch Blunt, who afterwards died while district attorney, and Aaron J. Vanderpoel and J. Smith Bryce, father of the present proprietor of the "North American Review," and Alexander Hamilton, grandson of Alexander the great among royal jurists, and Albert Mathews, now a septuagenarian author of great repute; and Richard B. Kimball, who finally rejected jurisprudence for the fame of a novelist, and William Allan Butler, (a modern Sir William Jones), and Edward Sandford, who was shipwrecked on the ill-fated Arctic; and Andrew Boardman, the chosen junior of Charles O'Conor, and Edwin W. Stoughton, who died minister to Russia. Indeed the decades following 1846 knew a more promising and distinguished Junior Bar than New York City ever afterwards knew.

"Among that galaxy I, of course, had my favorites. John E. Burrill — founder of a great law-firm which graduated the present fearless and popular Judge Ingraham — stood at the head of my favorites then. He was so courteously aggressive and tactfully fearless. He was a very legal David amid Goliaths of the Bar. A scientific cross-examiner and a born persuader of men. In later life he seemed to have lost his early zeal and ambition, and he died a discriminating jurisconsult, after leaving the brunt of court battles to an able younger brother and junior partners, 'chicks whom I gather under my wing,' as I once heard him remark of them. Ned Stoughton, as he was lovingly called, was even in youth distinguished for imposing personal appearance, with a Romanesque countenance, and picturesquely clustering heavy locks of hair, and magnetic eyes formed to command. He was one of the group of lawyers who were of counsel to Rutherford B. Hayes in the legal scuffle of 1877 for the Presidency.

He possessed that fluency of language which veteran Bostonians recall in Rufus Choate. He became, too, the Lucullus among New York lawyers, and his dinners at his Fifth Avenue mansion, assisted by his wife, who had been the widow of an éminent littérateur, were remarkable for tactful selection of clients and brother lawyers, and for gastronomical excellence. Alas, I never enjoyed any of them," sighed the ghost, ruefully, "but they became the talk of the court-rooms."

"Ned Sandford was also my favorite, as he was of the judges, his compeers and jurymen. "Steam-engine in breeches," was a descriptive name once applied to Daniel Webster, and it also belonged to Sandford — a brother, by the way, of Judge Lewis H. Sandford, and best known by his volumes of reports, mainly on commercial conflicts. Sandford's motto to his students was, If you wish a thing to be very well done, don't impose it on others, do it yourself. He was an indefatigable — drafting his own pleadings, constructing his own briefs, and racing from court to court for attendance upon his cases. It was his incessant toil that broke his physique and sent him abroad for recuperation, returning wherefrom he met his shipwreck. He had a happy faculty of putting everybody at ease. One day, crossing the court square, he encountered a rural lawyer wearing a yellow vest and blue coat with brass buttons, which tradition ascribes to Daniel Webster for costume; observing whom, he ran to him with outstretched hand, exclaiming, 'Good morning, Mr. Webster.' The old lawyer — his name was Alanson Nash — was delighted, but of course disavowed identity; yet for years, until his death, summer and winter, he continued to wear the Webster costume and imitate the poses of the 'god-like Daniel.'

"William M. Evarts, about 1850, began to take high rank at the bar — not for oratorical graces, for he possessed few, but as a great condenser of facts and perfection in logic; besides being indoctrinated in legal principles, and arguing from those in preference to citing cases. I always followed Evarts into a court-room, for his keenness of reply, his apt repartee and clinching retorts. But in those days Evarts owed much to his partner, Southmayd, an unambitious attorney, who cared for nothing in life but incessant devotion to law. He would come into court with a far-away look, as if he were communing with the spirit of Bacon. He walked in the street as if wrapped in mental soliloquy. And in his office was never so delighted as when Evarts brought in, or started, some subtle point. He it was who prepared the Evarts briefs, for which he ransacked ancient and modern legal literature with the assiduity of the old 'Prodigious' in 'Guy Mannering.' I mention Southmayd as the type of a lawyer who asks no other reward for himself than what is obtained from research and illustrating legal philosophy through the medium of other brains and tongues, filtering his streams of research. Southmayd was said, in the profession, to have never had miscarry a pleading, a trust deed, or a will. And his admiration for Evarts approached idolatry. Evarts had no attribute of Pecksniff about him, but Southmayd, nevertheless, was his Tom Pinch. You doubtless did not know the Evarts of nisi prius and banco, of fifty years ago, as I did, and you will perhaps be surprised to hear me say that he was then in even better legal trim than he was when defending Andy Johnson, or when, subsequently, Attorney-General. Politics has seemed to me to fetter his logic and lucidity. Many will choose to best remember this Massachusetts man by birth and education, and New Yorker by adoption, as Secretary of State and as senator; but as I flit now often past him, broken in health and almost blind, I best think of Evarts as lawyer of half a century ago. Public life did for him what it did to Webster, it dimmed, but could not injure, his legal fame. His posterity, in estimating

Evarts, will search the New York and Federal reports rather than those of the Congressional Globe or the archives of the State Department."

"You have said little about the judges of the period to which you have referred," I said to the ghost, interruptively. "For during your nisi prius and banco experience you must have acquired a stock of reminiscences about them."

"Ah, they all knew me well," began the ghost with new chuckles. "I was as fully known to them, merely by my constant attendance, as was Miss Flite to the judges who flourished in Jarndyce versus Jarndyce. When the New York judiciary became elective, conservative old lawyers cynically shook heads and said the Bench would now be deteriorated by the ballot-box. Such was not the proven result however. True, the Bench, for instance, lost appointed Judge William Kent, son of the commentator, and an inheritor of the latter's love of law and of his judicial temperament, without any of his father's severity of look or manners. Never was there a more courteous nisi prius judge, or of more equable temper, than Kent the younger. Metaphorically speaking, when he shed the ermine and regained the gown of the advocate, he, with renewed practice in his chambers, retained the love of the profession, and cheerfully set to work to annotate new editions of the famous family commentaries, the copyrights whereof he had inherited.

"Conventions and ballot-boxes soon provided a Bench of grand judges. And the new system of their alternating nisi prius and banco duties acted smoothly and profitably to themselves and the public. Judges who continuously sit at nisi prius, or in banco, are likely to construct grooves in their minds. I dare say Justice Gray, of the Washington Court, often pines for the presence of a jury as means of relaxation. The election of judges in New York, for instance, gave to lawyers and litigants John Duer, of colonial descent, of old-fashioned courtesy, and great research — as witness his treatise on Insurance; also Samuel Jones, retired chancellor, when chancery became euphemistically abolished under the tame style Court of Equitable Jurisdiction, that journeyed *pari passu* with conflicting common law and statutory procedures; also Harry Edwards, the elegant descendant of Connecticut Jonathan, the divine. The ballot-box restored Vice-Chancellors McCoun and Robertson to the bench, and retained Thomas J. Oakley, who owned the face of a satyr but the heart of a St. John. Political bosses at that era felt the pulses and examined the tongues of the people in order to give them excellent judicial medicine. It was only after many succeeding years that another generation of bosses put imbibers of patent legal medicine on the New York Bench." Here the ghost changed chuckle for a groan, and resumed, "Now-a-days, political bosses who choose judges are apt to feel only their own pulses and put out their own tongues. Previous Judge Charles P. Daly was also then retained by election. Cynics in the profession menacingly said, 'This popular election of judges will lead them to time-serving and towards catering to popular applause.' I am proud to say," added the Ghost of Nisi Prius, rising to an oratorical attitude, "that down to the close of the Civil War, which had more or less demoralized trade, commerce, finance, and politics, New York City never knew one judge who could be suspected of demagogism or partiality; nor against whose integrity there was a whisper. After that period you are old enough to form your own judgment as to the class of judges who followed, and so can reminisce for yourself. Edwards Pierrepont, later minister to England, at the early period as a judge of the Superior Court, together with Lewis B. Woodruff, later judge of the Court of Appeals and Federal Circuit Judge, and Henry Hilton, in the Common Pleas, loom up in my experience as especial model judges. To

knowledge of law they each added knowledge of human nature; to case learning they added courtesy and tact, and an impartiality such as Lord Campbell in his Lives of Chief Justices loved to emphasize. I used to fancy that the statue of Justice, over the City Hall, often unbandaged her left eye and exultingly balanced her scales when she knew that one of those judges were on the bench."

Here the Ghost of Nisi Prius seemed inclined to fall into reverie, and I interrupted it with this interrogation: "You still flit from court to court, and have Bench and Bar of the present under observation: how does either compare with that of the past in your mortal existence?"

"We must judge of greatness by the times in which great men lived, and of their surroundings," was the ready answer. "For instance, Draco, or even Solon, might not become historical personages if alive to-day and exercising judicial power. Perhaps Justinian himself might not be to-day, if alive and writing institutes, regarded as great. Perhaps Chief Justices Jay or Marshall would have been out of place when lately listening to income tax arguments. No one would expect Chief Justice Fuller, in these days, to hint that colored men had no rights that the white man was bound to respect. Neither William Wirt nor Hugh S. Legaré stood under the fierce calcium light beneath which Attorney-General Olney has stood. But judging the Bench and Bar of New York City by the times amid which either now exists, and remembering the *tempora mutantur* proverb, I say either will favorably compare with its Bench and Bar all throughout this expiring century. To-day no Alexander Hamilton is at its bar: yet I fear its roll shows several Aaron Burrs; but in place of Hamilton it has a Simon Sterne and a James C. Carter. In place of James Kent it has the retired Judge Daly, who is hard at work himself with legal commentaries. To replace John Jay is there not Noah Davis, the approved jurisconsult of your Bar, after attaining grand judicial honors through a quarter century? It has no Irish Thomas Addis Emmet, but it boasts a French Coudert. In the legal galaxy shine as nisi prius planets, oratorical Joseph H. Choate, persuasive Elihu Root, logical Edward Lauterbach, the astute George Hoadley, the popular Joseph Larocque, the alert cross-examiner, Edward C. James — son of a great deceased judge, — William B. Hornblower and Wheeler H. Peckham (who are still corner-stones, although rejected by senatorial builders), the acute-minded Daniel G. Rollins, the accurate Wager Swayne, my now venerable Clarence Seward an admirable Crichton; the now equally venerable William Allen Butler; James Niemann, a very apostle of the nisi prius creed; the sententious James R. Cuming; Artemas Holmes and John S. Des Passos, great proficients in corporate law.

"On the New York Bench of to-day Judge Pryor, formerly of Virginia, brings mindful recurrence to its greatest judge, Marshall. Sedgwick, who in appearance and judgment much resembles John Duer, once in the same court; Van Brunt, with old-time suggestions of Samuel Nelson, and Andrews, with like suggestions of Blatchford. Ah, me! ah, me!" cried the ghost, spasmodically, "am I to be the veritable wandering Jew of nisi prius under operation of the old familiar legend? I must —"

Interruption came at this juncture by the voice of the court-house janitor, who, thrusting his head through the door and recognizing me, said, "Beg pardon; but have you not been alone by yourself long enough? It is hours since I first observed you in this recess of the building. Besides, by your leave, cleaning time has arrived."

My Ghost of Nisi Prius gave a spiritual wink, as if to say, "Now, are you not satisfied with my spiritship? To the janitor I am invisible. But I must not subject you

to a charge of eccentricity or to the suspicion of being a mere thought-brooder. And so for the present *au revoir*."

Then the N. P. Ghost glided from me like a bit of summer vapor, clean through the stalwart form of the unobservant janitor; while I, as the clocks tolled the knell of parting day, did proceed, like the elegiac ploughman of Thomas Gray, to homeward plod my weary way, leaving the Bench and Bar to blankness and to me; but giving opportunity for noting down for the GREEN BAG, beloved of Bench and Bar, the ghostly interview. And I can never again revisit the place of interview without paraphrasing Poe's Raven, and saying, "And my soul from out that Shadow that lies floating on the floor, shall be lifted never more."

LONDON LEGAL LETTER.

LONDON, June 1, 1895.

THERE are two features of the criminal practice in England which must excite the curiosity and wonder of the American lawyer. One is that an accused person, under indictment for felony, cannot testify in his own behalf; and the other is that there is no appeal from the verdict of a jury or the sentence of a judge. If it is a matter affecting his pocket, merely, a litigant may go into the witness box; but if his honor, his reputation, his personal liberty and even his life are at stake, his lips are sealed. It is true that Mrs. Maybrick, under indictment for the murder of her husband, did attempt to testify, but what she said was received merely as an *ex parte* statement. This statement was made against the advice of her counsel, Sir Charles Russell, now the Lord Chief Justice, and not a word was addressed to her by him, or by counsel for the Crown in cross-examination. After her plaintive and pathetic statement was made, she sat down in the dock in painful silence, and it is generally considered by members of the Bar that her action in attempting to give her version of the circumstances attending her husband's death prejudiced her case. Efforts have been made to remove the bar of silence, but the opposition at present is insurmountable. An innocent man, it is contended, is safe in the hands of his counsel, and a guilty man would abuse the privilege. This is, practically, what was urged against the change in the civil practice forty years ago, and although its falsity has been proved, it will doubtless be years before the advocates of an equally liberal construction of the criminal law are successful. Fortunately, when the Criminal Amendment Act was passed, about ten years age, every person charged with an offense under that act was made a competent, but not a compellable, witness on every hearing at every stage of the charge, except of course at the inquiry before the grand jury. Thus it happened that Oscar Wilde was twice a witness in the recent criminal proceedings against him which have startled and shocked the community. No better test could have been made of the propriety or impropriety of putting the accused into the box. He was an educated, versatile, quick-witted and unprincipled man. His cross-examination abounded in epigrams and aphorisms, and his bright sallies and the skill with which he parried attack and made sharp thrusts in return, brought down a house which otherwise seemed weighted with the melancholy and gravity of the situation. And yet, notwithstanding his absolute and unequivocal denial on direct examination of the crime imputed to him, and the brilliancy of his self-defense on cross-examination, the jury refused to believe him, and had but little hesitation, apparently, in arriving at a verdict of guilty. That the judge who presided at the trial shared their views, is manifest from the fact that he imposed the maximum penalty allowed by the statute. If, therefore, this accomplished scholar and clever and experienced man of the world was not able to impose upon twelve common jurors, it would hardly seem that there is much left in the objection to opening the door of the witness box to persons accused of other crimes on the ground that the privilege of testifying in their own behalf is likely to result in a miscarriage of justice.

The other defect of the English criminal practice, that of denying the right of appeal to an accused and convicted person, is likely to be much sooner remedied. At present the only resource a person who considers himself wrongfully convicted has is, theoretically, an application to Her Majesty the Queen. Practically this means an appeal to the Home Secretary, upon whose advice Her Majesty invariably acts. It is not necessary that the Home Secretary should be a lawyer, and, within a very recent period, a Home Secretary to whom an unusual number of appeals from convictions, which were not approved of by the people and concerning the correctness of which well qualified lawyers had grave doubts, were made, was a layman. He had not the time to examine the voluminous records that were submitted to him in each case, and even if he could have patiently gone through them, he lacked the training necessary to arrive at a correct conclusion. He was therefore compelled to rely upon the advice of his subordinates, to whom the matters were referred. Doubtless his predecessors had acted in the same way, and it is probable that Mr. Asquith, who is technically a Q. C. as well as officially the Queen's Counsel in these matters, must refer them to others for investigation. But the people are beginning to see the impropriety of forcing an overworked political official to become a judge of last resort in criminal matters, and accordingly, for the second time, a bill is before Parliament to provide for the appointment of

a regular Court of Appeal in criminal cases. This bill in capital cases gives an absolute right of appeal, and provides that in certain events a new trial may be ordered by the court, which is to consist of all the judges of the present High Court of Justice, including the Chancery judges and the lord justices. In non-capital cases, a right of appeal is given subject to certain leave being obtained, but such appeal is limited to convictions or indictments. The judges who are to constitute the court, if the bill passes, have had several meetings to consider it and have, it is reported, arrived unanimously at the conclusion that the bill is "objectionable in principle and cumbrous and unworkable in detail." Under these circumstances it is hardly likely to become a law this session of Parliament. It is interesting to know that, so far as principle is concerned, the judges say that the wide rights appeal proposed would, in their opinion, "tend to lessen the sense of responsibility of juries"!

Anent the Oscar Wilde case, to which reference has been made, this much may be said of it which is highly creditable to the English courts and to the English newspapers. The whole proceedings, from the day the warrant was issued until the day the sentence was passed, were comprised within just seven weeks, and this included the trials. It was not until the proceedings against the Marquis of Queensbury, which had been begun at the instance of Wilde, disclosed a startling story of shameful practices, that the outside public had the slightest intimation of the life Wilde had been leading. Up to that time he was regarded as a talented if eccentric author, whose manuscripts any publisher would pay liberally for, and whose plays any manager would gladly accept. In fact, during the days of the first trial, two theatres were filled nightly with audiences of "most" people, who laughed at and applauded the clever things in two clever plays written by the wretched man whose time meanwhile was spent between a prison cell and the dock. It seemed incredible that such a man could be guilty of any moral delinquency, and particularly of the loathsome offense with which he was charged. He was arrested on the 5th of April, and although the preparation of the case against him involved the compilation of the testimony of a large number of witnesses and some documentary proof, he was put upon his trial on the 26th of April. The jury could not agree, and then for the first time he was admitted to bail. At the next term of court, less than three weeks later, he was again tried, and this time convicted. With all this celerity there is no suggestion that there was any "railroading" of the case to a hasty conclusion. Nor, on the other hand, was there any attempt by his counsel to interpose delays. Sir Edward Clarke, who defended him, is not only the acknowledged leader of the English Bar, but he has such a reputation for truth and uprightness that it is extremely likely that a mere request from him would have procured a continuance to a subsequent term. It is probable, however, that such a thought never occurred to him. His brief was marked 250 guineas (or the equivalent of $1250) as a retainer, and it would have been worth quite as much again had the case been continued and the trial protracted.

The newspapers deserve credit for not responding to a certain public demand for the dirty details of the proceedings. One newspaper absolutely refused to publish any report whatever of the case, and the others, at least those most generally read, tucked their reports away on an inside page and under the head of the ordinary police news, cutting out and "boiling down" the matter until it assumed a most condensed form. And yet it was open to them to have given their readers columns full of it, displayed under obtrusive head-lines. As to gossip about the chief actors in the case, or descriptions of the scenes in court, there was hardly a word of it, and absolutely none after the trial was over. We are not informed how the convicted man and his counsel took the sentence, or what they think of it or what they are going to do about it.

Quite in keeping with this was the equally decent conduct of the newspaper reporters in the divorce court last week. A "society" case was on, and the *dramatis personæ* were not only prominently known, but the drama was of an exciting and highly interesting nature. But some of its incidents were of such a nature that counsel agreed in requesting the judge to try the case *in camera*. This he refused to do, but he suggested that he would request the reporters to refrain from publishing any report of the case other than the result. This was done, and the reporters complied with Sir Francis Jeune's request. It is now suggested that a bill be introduced into Parliament to give the judges of the courts authority to act generally as Sir Francis Jeune did in the case mentioned. If a newspaper, after the interdict of the court, publishes a report of the proceedings, both the writer of the report and the responsible editor and publisher of the paper will be dealt with as for contempt of court. It is not improbable that here as in America such a bill would be opposed on the ground of its alleged interference with the liberty of the press, or because its provisions were unduly repressive of "newspaper enterprise," but it is doubtful if such objections will prevail. A large part of the community, and a very decided majority of those necessarily engaged in the class of cases which the bill will cover, would gladly welcome it.

STUFF GOWN.

The Lawyer's Easy Chair.

. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

MIDSUMMER. — The "leafy month of June" has come and gone, and it is one of the accumulating pile of regrets in life that we have one less June to live. Only one thing too much has been said in its favor.

"Oh, what is more rare than a day in June!"
That's pretty, but not quite true,
For in February's chillier moon,
A day is rarer by two.

But now midsummer is at hand, when no wise man worketh, unless obliged, but when he letteth the gray furrows of his brain lie fallow for a few weeks. Our peculiar notions about vacation must be pretty well known by this time, for we have reiterated them often enough. They may be summed up in one expressive word: Loaf. Do not work. Indulge in no violent amusement like hunting or tennis. Fishing is tolerable if the angler will sit on a bank. But even then we would prefer to lie under a tree, and turn over the pictures in the Dove and Lea edition of Watson's "Complete Angler," and hire some fellow to do the fishing. We would not worry ourselves by lying under various trees, but having found one satisfactory, lie under that altogether, taking care to select one so ample in shade that it would not be necessary to move around to keep out of the sun. Lie there from not too early in the morning until sundown, and read Hamerton's "Sylvan Year," in which he describes the round of the months in a forest valley of France. Or even more appropriately, read "Midsummer Night's Dream," in Horace Howard Furness' new variorum edition, notes and all. This last issue of the great commentator's unrivaled edition is in some respects the most interesting of all. The preface is one of the most exquisite and appreciative pieces of Shakespearian criticism ever put forth. Douglas Jerrold said to Mary Cowden Clarke, the Shakespearian concordancer, "When you go to heaven Shakespeare will give you a kiss, even if your husband should happen to be there." So when Dr. Furness goes hence, surely Shakespeare will be on the lookout for him, and will snatch him away to a symposium with his friend Ben and a few other congenial spirits, at which there will be a feast of all toothsome and liquorish things except Bacon. Dr. Furness is one of the very few Shakespearian scholars who has a keen sense of humor, and in this volume he exposes two very choice bits of that heavy, matter-of-fact, unimaginative comment which distinguishes most German criticism in respect to Homer and Shakespeare. He says: "Indeed, so alert was poor Wieland not to offend the purest caste, that he scented, in some incomprehensible way, a flagrant impropriety in 'Hence, you long-legged *spinners*, hence'; a dash in his text replaces a translation of the immodest word 'spinner,' which is paraphrased for us, however, in a foot-note by the more decent word 'spider,' which we can all read without a blush." (Wieland is as modest as an Albany furniture dealer, who never used the word "leg" to women, but always spoke to them of the "limbs" of a table or chair.) Feodor Wehl, who was present at the famous first production of the comedy at Berlin, says: "The actor who personates Theseus must have a joyous, gracious bearing. When he threatens Hermia with death or separation from the society of man, in case of her disobedience to her father, he must speak in a roguish, humorous style, and not in the sober earnestness with which the words are usually spoken." We now expect some German pedant to evolve the theory that Othello was not really black, but that he burnt-corked himself to test Desdemona's sincerity. This volume and those of the before mentioned "Angler" are large and weighty books, but a really luxurious lawyer can have his office boy to hold them for him. After all, the greatest midsummer luxury is to get out of the reach of telegrams. That was a fitting use of electricity when it was turned on to murderers. Let all messenger boys in midsummer be electrocuted. The only kind of a telegram which we can tolerate may be thus described: —

What news from the vibrating wires,
Stretching down the dusty street,
With hum like invisible choirs,
Comes fluttering down to my feet?

Does it tell of a tumble in stocks,
Or visit of cousinly kin,
Or despatch of some well-filled box,
Or that Baby has swallowed a pin?

No message of direful mishap
Appeals to my eager sight,
But only a trivial scrap
From the tail of my grandson's kite.

Because kite-flying is a lazy occupation. Nobody but Franklin, author of that base maxim, "Honesty is the best policy," would ever have degraded it to a scientific purpose. It is sad to contemplate the great and good men who have broken themselves down in taking exercise for the sake of amusement. One feels pity for poor Grotius in prison whipping a huge peg-top, and for stern John Calvin playing at bowls even on the Lord's day. Erskine flew kites for his boy. Kite-flying is "out of sight," and as "Macaire" says in Stephenson's farce, "My body, thanks to immortal Jupiter, is but the boy that holds the kite-string; and my aspirations and designs swim like the kite, sky-high, and overlook an empire."

"Our Greatest Lawyer." — This Chair has received some very disheartening intelligence from its admired friend, Frederic R. Coudert, of New York. It comes in the form of a small cut, purporting to be his likeness, at the head of an article by him, under the title above quoted, in the twelfth anniversary edition of "The World". In the copy sent us, a blue-pencil hand in the margin draws attention to this cut. The color is appropriate; the picture is not handsome. If our good friend has grown to look like this, he should instantly go to St. Louis and put himself under the new treatment for tuberculosis. Such a villainous counterfeit presentment, if made to a grand jury, would induce instant indictment. But the mental picture, shown in the bright and felicitous rhetoric, discloses no sigh of failure or despondency. In answer to the question, "Who is the greatest lawyer whom you have known?" Mr. Coudert finds it necessary to name three — Charles O'Conor, Ogden Hoffman, and James T. Brady — each greatest in a certain sphere. O'Conor was greatest in knowledge of the law, but he always kept a tight rein on his imagination, Mr. Coudert thinks. (We should say his imagination needed no more reining in than a milk-wagon horse.) Hoffman he deems to have been irresistible with the jury. Brady he pronounces "the most richly endowed of them all," but the impression he left was "that he could do anything if he only cared to try." We doubt Mr. Coudert's opinion that "he might have commanded an army or written an epic poem," but we do believe that he was the only one of the three who had what was worthy of the name of imagination. It is probable that Mr. Coudert did not know Rufus Choate. That man had more genius and power and left a deeper impression on law and letters than O'Conor, Hoffman, and Brady all rolled into one. They were simply "not in his class," as "the fancy" phrase it. Mr. Coudert's judgment, however, is corroborated by that of John K. Porter, who pronounced O'Conor and Brady the greatest lawyers he had known, and he was a competent judge. But as to Porter also, if he had ever heard Choate, he never could have talked of anybody else, for he himself possessed many of the qualities of that greatest of American advocates. After all, these things are mere matter of opinion; hardly any two will exactly agree, and we throw out our own opinion, in our usual modest and diffident manner, for what it may be worth. When reading Mr. Coudert's brilliant and generous paper, we feel as one did after hearing George William Curtis on Sir Philip Sidney — doubtful whether he had listened to Curtis on Sidney or to Sidney on Curtis. In the same newspaper is an article on "Slipshod Legislation," by that acute lawyer and high-minded citizen, Simon Sterne. Mr. Sterne appears pictorially to better advantage than Mr. Coudert; in fact to almost too good advantage, for his likeness was evidently derived from a photograph presented by him to the lady of his love in the days of courtship. We involuntarily exclaim, "so wise, so young, do never live long." Mr. Sterne wisely advocates the establishment of some tribunal to scrutinize proposed legislation. He says: "The one single element which was accepted by the Constitutional Convention out of the whole scheme of constitutional reform put before it by me to bring method and order into our legislation and give notice to the locality of its proposed enactment, was that of submitting to the mayors of the cities local laws which affected the cities, and it is admitted that much good has already been accomplished and will hereafter result from the adoption by the people of this State of this tentative and limited reform in the enactment of local measures."

Choate. — "The Critic" reproduces from "The World" a clever little picture of Joseph H. Choate as he appeared in the argument of the Income Tax case. He is represented, however, with one foot on the seat of a chair. We find it difficult to believe that he ever assumed such an inelegant attitude, especially in court. We are only glad that it was not this Chair that he put his foot on.

On the Income Tax Choate set his foot,
He dealt it many deadly whacks;
So glad he pulled it up by the root,
And never trod on other tacks!

THE DECAY OF THE RIFLE VOLUNTEERS. — Sorry news comes to us about the Inns of Court Rifle Volunteers. As their number has fallen below the required limit of 360, they are threatened with being disbanded. The "Law Journal" says: "The origin of the 'Devil's Own' is traced to the band of barristers who organized themselves into an armed force at the time of the Spanish Armada. As now constituted, however, the corps was established thirty-five years ago, and for many years was an unqualified success. Among the distinguished men who joined its ranks were Lord Hannen, Lord Thesiger, Lord Macnaghten, Lord Davey, Lord Bowen, Lord Justice Cotton, Lord Justice Lindley, Lord Justice Lopes, Lord Justice Smith, Mr. Baron Pollock, Mr. Justice Chitty, Mr. Justice North, Mr. Justice Charles, Mr. Justice Grantham, Mr. Justice Kekewich, Sir James Stephen, Sir Edward Clarke, Sir Robert Reid, and Mr. Henry Matthews." This is the corps, probably, in which John Scott exposed his incorrigible inaptitude as a soldier, and the irregular front of which caused the remark, "as this indenture witnesseth." But has not the corps outlived its purpose? The Little Corporal no longer stands on the opposite shore, scaring the island into fits; and it has always been believed that he was driven to abandon his scheme of invasion by fear of the charges of the lawyers. The Crimean War is done, and Tennyson no longer adjures them to "form."

> The Rifle Volunteers have had their day,
> There are no threatening troubles to surmount;
> Each separate hero now can go his way,
> And safely rifle on his own account.

GERRYMANDER. — In Mr. Moore's excellent history of "The American Congress" he adopted the prevalent belief that the famous Massachusetts "Gerrymander" was the invention of Governor Gerry. That undoubtedly was the contemporaneous accusation, and has since received popular credence, but it is now declared to be an error. For example, in the "Century Dictionary" it is said that the governor was personally hostile to the measure. Mr. Moore also interprets the Dred Scott decision in precisely the same way that Mr. Brooks does: "to the effect that the negro had no rights that the white man was bound to respect." Both these labels will probably stick, and Governor Gerry and Chief Justice Taney will go down in history with these undeserved stigmas upon them. If one would get a good idea of the adhesive power of a press label, let him read Bunner's story, "The Man with the Red Pants," in "More Short Sixes."

NOTES OF CASES.

HAPPENING OF LOSS OR INJURY. — The use of these or equivalent words in clauses of limitation in insurance policies has given rise to much divergence of opinion. In a recent case in Wyoming, McFarland *v.* Railway etc. Association, 27 L. R. A. 48, it is held that the words in an insurance policy, "one year from the date of the happening of the alleged injury," mean precisely what they say, and not one year from the time when the money became payable under the policy, which was ninety days after proof of the injury. This would seem to be pretty clear; but some very influential courts have decided the other way in respect to provisions only a little less explicit. The Court say: —

"The most of the cases bearing upon the question of extending the time limited for commencing suit, by holding the limitation to run from a later date than that specified in the policy, are cases of fire insurance, which limit the time to a certain number of months after the loss or after the fire, and further require proofs of loss to be furnished, or other conditions precedent to the right of action to be performed, for which time is allowed, or which necessarily consume time. So far as the question has been before the federal courts, the decisions are conflicting. Judges Thayer, Bunn, Hawley, and Gilbert have held, in favor of the position of plaintiff, that the limitation runs only from the time the cause of action accrues, although the policy reads a certain number of months after the loss or after the fire. Judges Deady and McKenna, and the Court of Appeals of the District of Columbia, hold directly the reverse. See Steel *v.* Phœnix Ins. Co. of Brooklyn, 2 C. C. A. 463, 51 Fed. Rep. 715; Vette *v.* Clinton F. Ins. Co. 30 Fed. Rep. 668; Friezen *v.* Allemania F. Ins. Co. Id. 352; McElhone *v.* Massachusetts Ben. Asso. 22 Wash. L. Rep. 157. Coming to the states, we find five states and one territory holding, by their courts of last resort, that a limitation of a certain time for beginning action after the loss or after the fire shall not run from the date of the loss or of the fire, but from the time the cause of action accrues. We find a considerably larger number where the decisions are directly to the contrary effect, and a number where they are somewhat equivocal, and claimed by both parties; and some make a distinction between the meaning of the phrases 'after the loss' and 'after the fire.' So if we were to decide this case according to the number of the authorities, we should be compelled to decide it in favor of the defendant. But this is not a satisfactory way of determining a question of the construction of the language either of a contract or of a statute."

The cases thus holding are: Barber *v.* F. & M. Ins. Co. 16 W. Va. 658; 37 Am. Rep. 800; Matt. *v.* Iowa M. A. Ass'n, 81 Iowa, 135; German Ins. Co. *v.* Fairbank, 32 Neb. 750; Hong Sling *v.* Royal Ins. Co. 8 Utah, 135; Hay *v.* Star F. Ins. Co. 77 N. Y. 235; 33 Am. Rep. 607; Sun Ins. Co. *v.* Jones, 54 Ark. 376. On the other hand are cited: Johnson *v.* Humboldt Ins. Co. 91 Ill. 92; 33 Am.

Rep. 47; Chambers *v.* Atlas Ins. Co. 51 Conn. 17; 50 Am. Rep. 1; Virginia F. &. M. Ins. Co. *v.* Wells, 83 Va. 736; Travelers' Ins. Co. *v.* Cal. Ins. Co. 1 N. Dak. 151; 8 L. R. A. 769; Blanks *v.* N. O. H. Ins. Co. 36 La Ann. 599; Fullam *v.* N. Y. U. Ins. Co. 7 Gray 61; 66 Am. Dec. 462; State Ins. Co. *v.* Meesman, 2 Wash. 459; McElroy *v.* Continental Ins. Co. 48 Kans. 200; Owen *v.* Howard Insurance Co. 87 Ky. 571; Hocking *v.* Howard Ins. Co. 130 Pa. S. C. 170; Lentz *v.* Teutonia F. Ins. Co. 21 Minn. 85; Chandler *v.* St. Paul F. & M. Ins. Co. 21 Minn. 85; 18 Am. Rep. 385. It seems to us that the principal case and the majority of the decisions are clearly right. It is difficult to appreciate the reasoning by which the time when the loss or injury shall "occur" or "happen" is postponed from the time of the accident or casualty to the time when the amount is definitely and formally claimed by the party. The loss or injury consists in the destruction by fire or the occurrence of the accident, and it is impossible for language to make the intent plainer, unless the contrary is explicitly negatived, which no reasonable human being would think necessary or sensible. One might as well say that the birth of a child does not occur until it is christened.

SURRENDER OF CUSTODY OF INFANT CHILD. — In Enders *v.* Enders, 164 Pa. St. 266, 27 L. R. A. 56, it was held that a contract, by a wife separated from her husband, to surrender the permanent custody of an infant to her father, a man of means, is not against public policy. This is in accord with the general consent of authority, as shown in the notes in 27 L. R. A. 56, and Browne on Dom. Rel. 77. The Court say that they cannot find that such a contract has ever been held void or voidable, and cite cases where such a contract, even with a stranger, has been upheld (Van Dyne *v.* Vreeland, 11 N. J. Eq. 371; Hill *v.* Gomme, 1 Bear. 541), when for the interest of the infant, and observe: —

"We concede the authorities establish that the contract of a parent, by which he bargains away for a consideration the custody of his child to a stranger, he attempting to relieve himself from all paternal obligation and place the burden on another, who is to shoulder it, it, without natural affection or moral obligation to prompt to the performance of parental duty, but only because of a bargain, is void as against public policy. Such a contract would be the mere sale of the child for money. But this was a family compact. The pride of the grandfather centered on the child as his only living male descendant, in whose future there was promise."

In the principal case the grandfather had promised to give the mother $20,000 by will or otherwise, in consideration of the transfer of the child, had died without doing so, and the action was to compel it, and was sustained.

COMPOSITION — FRAUDULENT PREFERENCE. — In Hanover National Bank *v.* Blake, 142 New York, 27 L. R. A. 33, it was held that where a debtor secretly gives to a creditor a preference, by way of additional security on composition notes, the notes are not thereby rendered void. The substance of the decision is that in such cases only the additional inducement or benefit is avoided, and the creditor may recover the proportionate amount of the composition common to all. This is contrary to the English doctrine, which holds that such a preference renders the security totally void. The Court cited the weighty authority of Judge Duer, in Breck *v.* Cole, 4 Sandf. 79, and the cases of Fellows *v.* Stevens, 24 Wend. 294; Bliss *v.* Matthews, 45 N. Y. 22; Harloe *v.* Foster, 53 N. Y. 385; White *v.* Kuntz, 107 N. Y. 581; 1 Am. St. Rep. 886; Meyer *v.* Blair, 109 N.Y. 600; 4 Am. St. Rep. 500; Solinger *v.* Earle, 82 N. Y. 393. Judge Gray observes: —

"If we should say that the fraud of the secret agreement made by the creditor operated to avoid the whole transaction of composition, the result would be to leave him with the original indebtedness unreleased. If the composition agreement, by which the debt was compromised, is to be deemed nullified by the fraudulent transaction, I do not see why the creditor would not be at liberty to pursue the original debt; a view which Littledale, J., regarded as possible in Howden *v.* Haigh. It would certainly seem to be the logical outcome of the proposition asserted below that, if the composition agreement has been avoided, it has become inoperative as an agreement, for any purpose. We assert a wholesome rule, and one which works a just result, if we hold that the secret and fraudulent agreement itself is illegal, and is inoperative to confer any rights or advantages upon the creditor. Perfect equality is to be maintained among the creditors. It was thought below that the secret agreement and composition agreement constituted but a single and indivisible transaction or agreement. I am not prepared to accede to that proposition, though it has support in some of the English cases referred to. It seems to me the case falls easily within the rule which permits a severance of the illegal from the legal part of the covenant . . . We should be careful, in our desire to punish the harsh and unscrupulous creditor, who presses his debtor, and bargains for an advantage over other creditors, by deprivation of legal rights and remedies, that we do not go too far, and lay down a rule which may result unjustly in other ways. It ought not to be possible that, through his fraud, he may be reinstated in his original position as a creditor for the whole sum due."

This seems to be the first time that this doctrine has been necessarily and unequivocally adjudged. The case is well annotated in the L. R. A.

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

"THE GREEN BAG."

WE gladly publish the following communication, from which it appears that unintentional injustice was done the memory of the late Judge Corwin of the Ohio Supreme Court, in the May issue of THE GREEN BAG. We regret that such was the case, and make such amends as possible by this publication.

SPRINGFIELD, ILL., May 23, 1895.

Editor "The Green Bag,"

15½ Beacon Street, Boston, Mass.

MY DEAR SIR. — My attention has been called to an article which appears on page 233 of the issue of THE GREEN BAG for the current month, as follows: —

"*John A. Corwin was elected judge of the Supreme Court from Champaign County in* 1853, *but was not on the bench long until he resigned. He was a very eccentric man, and not possessed of good habits. When he died, in* 1863, *the papers contained about a four-line notice of his death.*"

Judge Corwin was my uncle. I bear his name. I saw him die. I lament his loss. I revere his memory. In all my experience I never knew a more undeserved reflection upon the memory of the dead than this publication. In any newspaper office it would be righted in an instant. I venture to hope that a magazine devoted to lawyers and the bench, supposed to be the protectors of the weak, will do no less, in the way of even-handed justice, than a daily paper. In this firm belief I come to you for a patient hearing and a decent recognition of the merits of John A. Corwin. I should be unworthy of the name I bear if I didn't do this. My uncle's body is buried in the cemetery at Urbana, Ohio, my native place. It is with the remains of my grandfather and my grandmother, by my father and by my brother; by his wife and his little boy. I am the only grandchild left from my grandfather's stock bearing the name of Corwin, and the duty of calling your attention to what I think a lamentable error devolves on me. I do not know Mr. Kinkead who wrote this statement. I cannot conceive his object. Had he used information right at hand, he would have gotten the exact data concerning my uncle. Had he gone to Senator Thurman or visited Urbana, but forty miles west of Columbus, or consulted with Judge John H. Young or John H. James of Urbana, both friends of my uncle, he could have gotten the facts. He mentions all the other judges of the Supreme Court of my uncle's time, telling when they were born and when they died, and giving information concerning them. He does not render my uncle this poor tribute, but dismisses him with a slur.

Permit me, therefore, to call your attention to a few facts, and to give you the names of witnesses, by writing whom you can easily verify what I say.

John A. Corwin in early life was a printer. He maintained himself at college by his own labor, and became an eminent lawyer. For many years he was a partner of his father, Moses B. Corwin, who served two terms in Congress. He was for a long time a partner of my father, Ichabod Corwin, who, for the ten years preceding his death, was judge of the Common Pleas Court of the district composed of the counties of Champaign, Miami and Darke. John A. Corwin was one of the finest lawyers Ohio ever knew. He was of grand personal appearance, a chivalrous, high-minded man. No poor person ever appealed to him for help in vain. He was the defender of the oppressed. He was one of the youngest men ever honored by a seat on the Supreme bench of Ohio. He was for many years a partner in business with Robert B. Warden, Supreme Court Reporter, whose name appears in this same article. He was an associate of George E. Pugh and George Pendleton, of Chase, of Thurman, of Judge William White, of Judge William J. Gilmore, of James and Isaiah Pillars of Lima, Ohio; of Judge William Mungen of Findley, Ohio. If I remember right, Senator Calvin S. Brice of Ohio was a friend and admirer of my uncle. Pendleton or Pugh, I forget which, defeated my uncle for the United States Senate from Ohio, in a Democratic caucus, by a single vote, in a contest where a nomination was equivalent to an election. His fame was so great that he participated in many of the most important trials in Ohio and the south. He was a grand

public speaker, and many people believe he rivaled Thomas Corwin. I could call your attention to a number of famous trials in which my uncle participated, but I will not trespass on your time. His wife was a daughter of Governor Joseph Vance of Ohio, and I will tell you of one incident I saw myself, illustrative of his power of leading men.

A public meeting was called in Urbana on the night of the day Sumter was fired on. My uncle was living on a farm he owned just a mile from town. He came into the court-house while addresses were being made. The room was crowded, but the proceedings seemed to lag. Judge Corwin stood a long time by the door. Some one, seeing him, started the cry, "Corwin, Corwin." He walked to the platform over which hung the American flag. Poor as I am, I would give a hundred dollars for a copy of the speech he made. He awakened the greatest enthusiasm, and at the conclusion of his speech he pointed to the American flag and said: —

"Traitor, spare that flag. Touch not a single star. It protected me while young, and I will defend it now."

Leaving the platform, he walked to the secretary's desk and affixed his name, as I remember, the very first among the list of volunteers. A company of one hundred men was raised on the strength of Corwin's speech. Entitled to the command of it, he gave it to William Baldwin, and the company went out in the Second Ohio Infantry. Judge Corwin then assisted in the formation of two other companies, and went out as the captain of one of them. If I remember correctly, he was the captain of Co. K, 13th Ohio Infantry, in the three months' service. He was largely instrumental in recruiting some of the companies of the 66th Ohio Infantry, one of the most famous regiments in the Union army. His services in this particular were greatly appreciated by the war governors of Ohio, and, at the time of his death, he had recruited almost an entire regiment, of which he was to be the colonel. Some of the troops were in camp near his house.

This is the man whom Mr. Kinkead slurs. He was an open-hearted, charitable man. He never did a mean thing to anybody, other than himself, in all his life. His besetting sin, if he had any in the late years of his life, was intemperance. He drank a little, but seldom to excess, and he died lamented by thousands of friends who loved him. Mr. Kinkead's statement concerning publications at the time of his death is utterly without foundation. A few years ago the "Urbana Citizen Gazette" devoted several columns to Judge Corwin. William A. Taylor of the "Cincinnati Enquirer," a resident of Columbus, Ohio, recently printed an amusing account of a contest for Congress, in the old Champaign County district, between my uncle, on the one hand, and my grandfather on the other.

I cannot permit this untruthful statement to go unrebuked. I do not ask for flattery on the one hand, nor suppression of the truth on the other. I am actuated by a desire for even justice, and I think I ought to have it. Nor do I ask you to accept my statements for anything herein contained. Judge Corwin has been dead for over thirty years, and but few of his old companions are on earth. Judge John H. James and John H. Young, Urbana, Ohio; Hon. William White, Springfield, Ohio; William J. Gilmore, Eaton, Ohio; Judge Pillars of Lima; Senator Brice; Hon. Allen G. Thurman, Columbus, Ohio; Robert G. Corwin, Lebanon, Ohio, are a few names I can give you.

In conclusion, I beg your indulgence for having gone into this matter in detail. The offense to my uncle's memory was so marked that it is a matter of great moment to me, and I trust some reparation can yet be made.

Very truly yours,

JOHN A. CORWIN.

LEGAL ANTIQUITIES.

IN 1717 the following singular commitment to the Bastile was made out by order of the Duke of Orleans, Regent during the minority of Louis XV of France: "Laurence d'Henry, for disrespect to King George I, in not mentioning him in his Almanack, as King of Great Britain." How long this unlucky almanack-maker remained in prison is unknown.

FACETIÆ.

ACCORDING to the judgment of the late Chief Justice Stone of the Alabama Supreme Court, John A. Campbell was the greatest lawyer that State has ever had. He was a member of the Supreme Court of the United States, being appointed from Mobile, and resigned when his State seceded. He then became Assistant Secretary of War for the Confederate States. After the war he resided in New Orleans and Baltimore until his death.

Before the war he had a large practice in Mobile and was of course much before the Supreme Court of Alabama. On one occasion the Court interrupted him by frequent questions, much to his annoyance. After standing it for some time, Campbell stopped, and then, slowly addressing the bench, said, "If the Court will listen, the Court will

learn." The Court listened; and Campbell went on without further interruption.

THE following is one of the many good stories told of Judge Dooly of Georgia. At the close of a court, having settled his tavern bill and ordered his horse, the Judge came from his room with a very small pillow under his arm, a miniature likeness of a more satisfactory article on which to repose the head after the toils of the court during the day. Some person inquired of him what he was going to do with the pillow. "I am going to plant it in some rich soil, that it may grow larger by next court," was the reply of the witty Judge.

THE plaintiff in a suit brought against the city of New York had been injured by a fall, caused by a defect in the sidewalk, and during the trial a well-known physician testified that "the plaintiff was so injured that he could *lie* only on one side." "I suppose, doctor, you mean he would make a very poor lawyer," observed the counsel for the city.

AFTER the passage in Georgia of the severe laws against gambling, Judge Dooly was very rigid in their enforcement. At the close of a session of the Superior Court, the Judge had retired to rest; but the noise of a faro table in the adjoining room disturbed him so much that he got up, dressed, and went in and told them that he had tried all legal methods to break them up, and had failed; and now he was determined to adopt another plan. Before the night had closed he broke the bank, and told the parties to clear out, and be more careful in the future how they interfered with the court.

IN North Carolina the judges of the Superior Courts "rotate," i. e., ride each circuit of the whole state in regular succession. When Judge Shipp, of one of the mountain circuits in regular rotation came to ride a circuit on the sea coast he was much pleased with clams, which were new to him. He had a clam supper with the result that he had a most violent attack, and could not hold court for two or three days. When able to sit on the bench, the first case tried was an affray in which one man used a pistol and the other knocked him down with a clam (in the shell). Manly appearing for the State, introduced a witness to prove that one clam, so used was a deadly weapon. "Stop there, Manly," said the judge earnestly, "the court will hear evidence whether or not a pistol is a deadly weapon, but the court knows without further evidence that a clam is."

A PHILADELPHIA lawyer said a very bright thing the other day. He was seated with a group of friends, and they were discussing in a desultory way the leading topics of the day. One of the parties present, Mr. ——, persisted in monopolizing more than his share of the conversation, and his views did not at all accord with those of the lawyer. As the men separated, one of them said to the lawyer: —

"That —— knows a good deal, doesn't he?"

"Yes," replied the lawyer, "he knows entirely too much for one man; he ought to be incorporated."

IT was on the coast belt of South Carolina during reconstruction times. Mr. Bissell, a large rice planter, had lost several hogs, found the thief, a black man, had him arrested by a colored trial justice in Colleton County, and the day for the trial was on hand. Defendant demanded a jury. The justice was full of the importance of the case: Mr. Bissell was a rich man, and "dis case gwine ter git in de papers." The justice charged the jury, sent them out into the woods to decide upon their verdict; in about half an hour the jury returned, notified "de cort", and handed their verdict in. This was as follows: "We find Mr. Bissell guilty." The Court, on reading it, replaced the spectacles it had taken off, and said, "Now, look hear, gentlemen, dis ting won't do. What you find Mr. Bissell guilty bout? Him lose he hog, and dis defendant, Joe, tuck 'em or aint tuck um; what you gots to do wid Mr. Bissell? You got no sense anyhow; you jest go right straight back in dem woods and you bring in de right werdict, or I'll put de las one o' you in jail. Go tarrogate again." The jury retired, and in another half-hour returned, handing in as their new verdict, "We finds Mr. Bissell guilty of accusin'." The Court said, "I spigious bout dis werdict, but lem stan; you shan't git no coss, nohow; en don't come to dis cort gen yah? Nigger got no sense nohow."

NOTES.

In our March number we referred to Sir Frederick Pollock, who is on a visit to the United States, as a son of Chief Baron Pollock. This was an error. Sir Frederick is a *grandson* of the late Chief Baron, and his father (the Chief Baron's eldest son) was for many years Queen's Remembrancer, and before the Judicature Act a Master of the old Court of Exchequer.

The following is a copy of a letter received by the clerk of the Supreme Court of Arkansas: —

September, the 29, 1893.

to the Supream coart of the State of Arkansas this is to certify that thair is three men, in this State that is Practing medicin to my noing Without a leagle Wright or a diplomia, never was in a collage in thair Lives. I think it is your duta to have thim attended too, at once. I Will now, name them. [Names omitted.] Thoes now have distroid Lives of Severl People By the Poisness norcatics. Morphen I Say if We Have a Law Let it Be Put in foars if We Have a goverment Let it Be ruled. I Had to go to the time truble and Expence of the colledges and Medical Board to Practice medicine and it Should Be the Duty of Ever individeual Who wishes to Practic medicine. now mr coart it is your Duty to Send a officer on thoes men, and Have them Broat into regalation,—— is a Juastes of the Peace in —— town Ship He taken an oath that He Would Suppart the constitushon of the State of Arkansas right to the county clerk of —— co and you will find this is not faults.

Endorsed on envelope:

P. M. Please Hand this Dyreckley to the Cheaf Justes, of Arkansas Pleas Doo this and oblige

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At one time in the Michigan City Penitentiary there was a renaissance in the moral discipline of the prison, and all were compelled to attend chapel regularly. One of the prisoners came to the warden one day and begged to be allowed to stay away from the chapel exercises, as he wanted Sunday to write letters to his friends.

The warden looked at the beseeching convict in amazement. "What!" he exclaimed, "allow you to stay away from religious exercises all the time! No, sir. Why, man, don't you know that it is a part of the penalty?" And the convict continued to worship regularly while the warden led in prayer.

LITERARY NOTES.

The story of Lincoln's secret night journey from Harrisburg to Washington in 1861, to escape the possibility of assassination at Baltimore, is told in the June number of McClure's Magazine, by Col. A. K. McClure, editor of the Philadelphia "Times," who himself took part in all the conferences preparatory to the journey and saw Lincoln aboard the train at Harrisburg.

"The Decline in Railway Charges" is discussed in The Popular Science Monthly for June, by Henry T. Newcomb. In view of the fact that this decline has steadily reduced the profits that railroads yield to investors, Mr. Newcomb believes that the future will require considerable economies, such as may be brought about by the practical consolidation of lines.

The complete novel in the June issue of Lippincott's is "The Battle of Salamanca," a stirring tale of the Napoleonic wars, from the Spanish of Benito Pérez Galdós, an author of high repute in his own country, but hitherto too little known in America. It is followed by a brief account of "Galdós and his Novels," by the translator, Rollo Ogden.

A curious and striking feature of the great collection of pictures in McClure's Complete Life of Napoleon is a number illustrating the Russian campaign. These pictures were drawn during the terrible march to and from Moscow by an officer in Napoleon's army, and have not been published before in this country. They are of the most terrible realism and give an idea of the horrors of that fatal invasion which no words can equal.

Under the caption of "The Silver Question" two papers of special interest appear in the North American Review for June, Count von Mirbach of the Prussian House of Lords and of the German Reichstag giving his views on "Germany's Attitude as to a Bi-Metallic Union," and the Mexican Minister at Washington describing effectively the working of "The Silver Standard in Mexico."

PRESIDENT Seth Low, of Columbia College, in discussing "Some Questions of the Day" in the June HARPER'S, advances the proposition that all disputes between capital and workingmen and all abuses of power by corporations and labor-unions should be settled from the standpoint of neither side in the controversy, but from the point of view of that commonly forgotten and usually silent partner, the general public.

THE June ATLANTIC contains installments of the two leading serials by Mrs. Ward and Gilbert Parker, also a short story of frontier garrison life, by Ellen Mackubin, entitled "Rosita." Lafcadio Hearn contributes a delightful paper entitled "In the Twilight of the Gods," which, with Mary Stockton Hunter's poem, "A Japanese Sword-Song," gives this issue a distinct flavor of the Orient. Percival Lowell continues his readable papers upon "Mars," discussing in this issue the "Water Problem."

SCRIBNER'S MAGAZINE for June opens with a dramatic presentation of the three epochs in the history of Chicago — "Before the Fire," "After the Fire," and "To-day." The author, Melville E. Stone, has long been associated with the growth of Chicago as the owner and editor of a great newspaper, and he writes with the fullest knowledge of the men and material conditions that have made the new Chicago. The illustrations, which, on facing pages, show Chicago as it was before the fire and is now, are from exactly the same points of view, and give in the most striking manner a vivid idea of what the growth of Chicago has been. The illustrations of to-day are from original paintings and not from photographs. They represent Chicago as it never before has been pictured.

MR. W. D. HOWELLS has written for THE CENTURY MAGAZINE two papers entitled "Tribulations of a Cheerful Giver," which make a wide appeal to the public interest as being a graceful and diverting series of confessions of the writer's experiences with the begging fraternity, with incidentally considerable philosophy of charity of a somewhat deprecatory sort. The first of these papers appears in the June number.

THE directors of the Old South studies, in Boston, have added to the series of OLD SOUTH LEAFLETS President Monroe's message of Dec. 2, 1823, in which the famous "Monroe doctrine" was stated. It is fortunate that at this time, when there are such frequent appeals and often such ignorant appeals to the Monroe doctrine, the original document is thus made available for everybody. Ignorance at any rate is unnecessary when Monroe's message in its entirety may be had for five cents.

"UNIFORM State Legislation" is the subject of a paper just issued by the American Academy of Political and Social Science in its series of Publications. It is written by Frederic J. Stimson, Esq., of Boston, the author of "American Statute Law," and commissioner from Massachusetts on the Board of Commissioners to establish uniformity of law throughout the Union, and secretary of the National Conference for that purpose.

A BRIEF but valuable paper for those interested in parliamentary procedure is General Marcus J. Wight's account of the British House of Commons in the June ARENA. He points out the differences between its rules and those of the House of Representatives, and shows wherein each excels the other in certain conveniences and methods.

THE editor of the REVIEW OF REVIEWS, in his running comment on "The Progress of the World" in the June number, reviews the Cuban situation and England's Nicaraguan relations at some length; he also summarizes the probable results of peace in the far East. Other international matters which receive attention in the editorial pages of the REVIEW are the relief of Chitral, German and Austrian politics, France and the Nile, the new Speaker of the British House of Commons, elections in Greece and Denmark, the Pope's Encyclical to England, and the school question in Manitoba.

BOOK NOTICES.

MUNICIPAL HOME RULE. A Study in Administration. By FRANK J. GOODNOW, A.M., LL.B. Macmillan & Co. New York, 1895. Cloth. $1.50.

This work of Mr. Goodnow's displays the same careful research and exhaustive learning which distinguished his "Comparative Administrative Law," and is a most valuable and important treatise upon a subject which appeals to every thinking citizen. That there is room for much improvement in our form of municipal government there can be no doubt, and the changes that are being made in this direction in many of our large cities demonstrate that the people are alive to the fact of municipal shortcomings. But as a result of the intimate connection of the municipal with general government, all concrete attempts at

municipal reform must, as the author says, of necessity depend upon an accurate delimitation of the sphere of action which can, with due regard to the interests of the State as a whole, be assigned to our municipal organizations. The attempt to delimit such a sphere of action is the purpose of this work. The treatise will be useful from both a legal and political point of view, and we heartily commend it to the attention of our readers.

THE AMERICAN CONGRESS. A History of National Legislation and Political Events, 1774–1895. By JOSEPH WEST MOORE. Harper & Brothers, New York. 1895.

This volume is one of exceeding interest. In a popular and interesting form, Mr. Moore gives a clear and concise account of the national legislative and political affairs of the American people from the colonial period to the present time. The many notable occurrences in the halls of Congress are graphically described, and the origin and growth of parties, the memorable acts of presidents, and innumerable other matters pertaining to the broad and diversified field of American politics are discussed. Scattered through the work are extracts from famous speeches and debates. Mr. Moore writes with a delightful freedom from all partisan bias, and the accuracy of his statements cannot be doubted. Altogether his book is one of exceeding interest, and as instructive as it is entertaining.

THE RISE OF WELLINGTON. By General LORD ROBERTS, V.C., with portraits and plans. Roberts Brothers, Boston, 1895. Cloth. $1.25.

General Roberts in this work confines himself to the military career of Wellington. This career naturally divides itself into three periods — the Indian period, the Peninsular period, and the period during which he commanded the allied forces in the Netherlands, terminating in the battle of Waterloo. The story of the rise of this great commander reads like a romance, and General Roberts writes of his subject *con amore*. The book is replete with dramatic incidents. Excellent maps and portraits accompany the text, and add greatly to the value and interest of the work.

LIFE OF HER MAJESTY QUEEN VICTORIA. By MILLICENT GARRETT FAWCETT. Roberts Brothers, Boston, 1895. Cloth. $1.25.

The story of Queen Victoria's life is one of a true and noble woman. The charming simplicity of her private life, the ideal happiness of her wifehood, and the pure atmosphere of her family circle, all serve to endear her, not only to her subjects, but to the world. To read of such a life is thoroughly ennobling and inspiring. The author of this sketch has done her work well, and gives a most interesting account of England's queen.

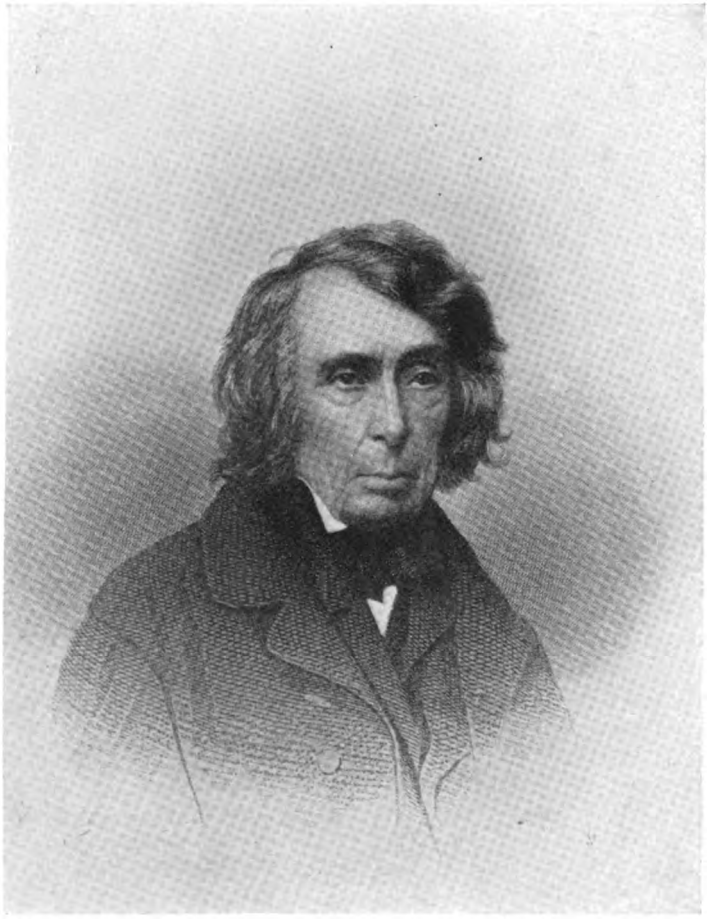
COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SEYMOUR D. THOMPSON, LL.D. In six vols. Vols. I, II, and III. Bancroft, Whitney Co., San Francisco, 1895. Law Sheep, $6.00 a volume.

It is impossible within our limited space to adequately notice this stupendous work of Judge Thompson, the first three volumes of which are now before us. The reputation of the distinguished author is so well established that anything from his pen is sure of a hearty welcome by the profession, and this, his great life-work, will serve to add new lustre to his fame as a law writer. The work was commenced more than sixteen years ago, and the subject is one of such enormous proportions that it has required much condensation to bring the text within the limit of six thousand pages. Every topic, however, is treated with such fullness of detail that the state of the law in respect of it can be learned from the pages of the work, without the necessity of searching the adjudged cases. In other words, it is a full and comprehensive statement of the whole law governing the law of private corporations, and as such is an invaluable working tool for the practitioner. The subject is considered under nineteen titles, as follows: —

I. Organization and Internal Government. II. Capital Stock and Subscriptions Thereto. III. Remedies and Procedure to Enforce Share Subscriptions. IV. Shares Considered as Property. V. Liability of Stockholders to Creditors. VI. Directors. VII. Rights and Remedies of Members and Shareholders. VIII. Ministerial Officers and Agents. IX. Formal Execution of Corporate Contracts. X. Notice, Estoppel, Ratification. XI. Franchises, Privileges and Exceptions. XII. Corporate Powers and the Doctrine of Ultra Vires. XIII. Corporate Bonds and Mortgages. XIV. Torts and Crimes of Corporations. XV. Insolvent Corporations. XVI. Dissolution and Winding Up. XVII. Receivers of Corporations. XVIII. Actions by and against Corporations. XIX. Foreign Corporations.

A careful examination of the first three volumes impresses one with the fact that the author's work has been thoroughly and honestly done, and that these commentaries are thoroughly to be relied upon.

We congratulate both author and publishers upon their successful venture, and we also congratulate the legal profession upon the addition of such a masterpiece to our legal literature.



R. B. Taney

The Green Bag.

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ROGER B. TANEY.

BY EDWARD S. TANEY.

ROGER BROOKE TANEY, the fifth Chief Justice of the Supreme Court of the United States, was a lineal descendant on his mother's side of Robert Brooke, who arrived from England in Maryland the 29th day of June, 1650. He was soon after appointed, by Lord Baltimore, Commander of Charles County, and was chosen by the Commissioners, appointed by Cromwell, Governor of Maryland. His forefathers on his father's side were among the early emigrants to Maryland, and owned and lived on the estate where the Chief-Justice was born, for many generations.

His father, Michael Taney, owing to the disabilities attached to Roman Catholics at that period, was sent to France to be educated at the noted Jesuit College at St. Omer. Soon after his return to America he married Monica Brooke, daughter of Roger Brooke, whose plantation adjoined Michael Taney's, the two houses being nearly opposite, on the banks of the Pautuxent River. The third child and second son of this marriage, Roger Brooke Taney, was born March 17th, 1777. His first teacher was a "queer" man who only pretended to instruct his scholars in the rudiments; his only books were a Bible and Dilworth's spelling book. He was next sent to a grammar school kept by an eccentric Scotchman, who imagined he could walk on water, that he was a disembodied spirit. He had the reputation of being a classical scholar. About three months after the opening of school he finally drowned himself whilst attempting to walk across the river. After a short time spent with a private tutor at home, he was sent to Dickinson College, at Carlisle, Pa., in the spring of 1792. It was no small undertaking for a boy of fifteen, in that day, to get from the lower part of Calvert County to Carlisle; embarking on board a schooner, which, owing to unfavorable winds, did not reach Baltimore for a week; and as there was no regular stage line between Baltimore and Carlisle, he and his two young friends were obliged to stop at an inn until they could find a wagon returning to Carlisle, that would take their trunks and allow them to ride occasionally. In this way the journey occupied two weeks.

At college he made rapid progress and was soon noted for application and thoroughness in every branch of his studies.

He graduated with the highest honors of his class in 1795, and was chosen by his classmates to deliver the valedictory. After returning home he spent the ensuing winter in leisure, hunting foxes with his father, fishing, shooting ducks with his brothers, and in similar sports.

In the spring of 1790 he went to Annapolis to study law with Jeremiah T. Chase, one of the judges of the General Court of Maryland, and was admitted to the Bar in 1799. His first case was tried in the Mayor's Court at Annapolis. He used to say he was so badly frightened, that his knees trembled so much when he arose to address the Court that he was obliged to press them against the desk for support.

Mr. Taney's temperament was morbidly sensitive and very painful to him. After

much effort he succeeded in gaining the mastery over this feeling to a great extent. Naturally quick of temper, he was always on the alert to keep it under subjection and to keep his mind calm and free from prejudice. He was the kindest of men, at all times, to every one, young and old, white or black. Poor and struggling young lawyers always found in him a kind friend, never too busy to advise and assist them in their efforts to rise in their profession.

In 1799 he was elected to the Legislature, and although a very young man, took a prominent part in all of the most important debates.

Mr. Taney's tastes were simple. He was very fond of rural life; the fields and flowers were a never-failing source of pleasure to him during the whole of his long life.

In 1801 Mr. Taney removed to Frederick City, and made his first speech in the March term of Court. He soon showed marked ability and rose rapidly into prominence. Here he spent much time in the study of ancient history and letters.

The notes which he took at Dickinson, on moral philosophy, the dead languages and classical education, the character of the principal classic authors, beginning with Homer and ending with Seneca, covering 360 closely written pages, those on criticism and logic, 483 pages, were now to bear good fruit. On these solid foundations he built his future greatness.

Five years after his removal to Frederick his practice was becoming quite lucrative, and he was enabled to marry his first love, Miss Ellen Key, a sister of Francis Scott Key, author of the "Star-Spangled Banner." During his residence in Frederick he held many offices of trust from her people. In 1816 he was elected to the State Senate, serving with marked ability throughout his term of five years. In 1811, General Wilkinson, then commander-in-chief of the United States Army, was tried at Frederick, for supposed complicity with Aaron Burr. Gen. Wilkinson selected Mr. Taney to defend him. Mr. Taney threw every energy of his mind into the case, and after several months of hard work, and opposed by Walter Jones of Washington, one of the ablest lawyers of his time, had the satisfaction of seeing General Wilkinson acquitted, and his sword restored to him. Mr. Taney's defence of one Gruber, a Methodist minister from Pennsylvania, who came over to Maryland and preached an incendiary sermon to several hundred slaves, throws light on his whole after-life, and shows how wrong the opinions in regard to his views on the question have been. In many other cases he gave his services unasked in defence of criminal slaves and abolitionists, always without pecuniary compensation.

The Chief-Justice has been so often maliciously misquoted in the Dred Scott case, that I cannot refrain from here giving the exact words. *Mr. Taney merely asserted* "that the *legislation of every civilized country, at the time of the formation of our Constitution*, was of such a character as *not* to *recognize* that the negro had any rights that the white man was bound to respect." It was not his decision, nor that of the Supreme Court. Mr. Taney in early life manumitted all the slaves he had inherited, and the old ones were pensioners on his bounty as long as they lived.

In 1860 Mr. Taney had some large-sized photographs of himself taken; two of these he ordered to be put into gilt frames, one for his old negro servant-woman, and one for his old negro man-servant. At the bottom of one picture was written, "To Martha Hill, as a mark of my esteem, R. B. Taney, February 14th, 1860, Washington;" on the other, "To Madison Franklin, as a mark of my esteem, R. B. Taney, February 14th, 1860."

Mr. Taney's reputation for skill and prudence in handling the law had so extended, that he argued cases before the Court of Appeals from every county in the State. It

has been said that in conducting a cause before a court and jury he had few equals.

On his removal to Baltimore, where there were many well known and brilliant lawyers, his ability soon placed him at the head of the Monumental City Bar. In 1827 Mr. Taney was appointed Attorney-General of Maryland, the only office he ever expressed any desire to hold.

General Jackson, soon after his election to the Presidency, in consultation with his friends, was told by one of them, "Roger B. Taney, now leader of the Maryland Bar, is suited for Attorney-General." Although personally unacquainted, General Jackson knew that Mr. Taney was a man firm of purpose, and strongly in sympathy with his views. Mr. Francis Scott Key, knowing Mr. Taney's great aversion to political life, wrote to him, insisting upon his acceptance, as it would be a great gratification not only to General Jackson, but to his many friends. Mr. Taney's services in supporting the President's measures proved that he was a man after his own heart. General Jackson had determined to remove the Government deposits from the United States Bank. Mr. Duane, Secretary of the Treasury, who at the last moment withdrew his support from the President, was dismissed, and Mr. Taney appointed in his place. Mr. Taney's knowledge of finance and banking was thorough, his judgment sound, and his principles incorruptible. Mr. Taney's opinion was that the United States Bank had become, in the hands of a few unscrupulous men, a political machine. The deposits were removed by Mr. Taney on the 1st of October, 1833. The Senate called upon the Secretary for a report of the financial condition of the Treasury, hoping to show that the Government would be without sufficient revenue, and that the President would be compelled to restore the deposits, and continue the bank. Mr. Taney's report was a crushing defeat for the Senate, as it showed an increased revenue in every branch of the Government; vindicating his administration of the Treasury Department.

Upon his retirement by the Senate he was congratulated by the friends of the President all over the country. Baltimore gave him a grand ovation: a barouche drawn by four white horses and escorted by a troop of several hundred horsemen conveyed him to his home. A dinner was given him a few days later, to which Martin Van Buren asked the favor of sending the following sentiment: "R. B. Taney, — He has, in his last, best, brilliant official career, passed through the severest ordeal to which a public officer can be subjected, and he has come out of it with imperishable claims upon the favor and confidence of his country."

Public dinners were everywhere tendered him. Primary meetings were held over the whole country at which resolutions were passed endorsing his wise policy. In January, 1836, he was invited to a dinner given in Cincinnati to celebrate the expiration of the United States Bank charter.

So nice was Mr. Taney's sense of honor that he refused, while Secretary of the Treasury, to accept two small boxes of fine cigars, sent to him by some unknown friend, and retained them unopened until he learned that they had been sent by a gentleman in the New York Custom-House, to whom, in a letter of thanks for his kind intentions, Mr. Taney enclosed the price of the cigars. He had made it a rule of his life that a public officer should accept no present, however trifling.

On the death of Chief-Justice Marshall in 1835, President Jackson, entertaining the highest opinion of Mr. Taney's great ability, nominated him to fill the vacancy, and although violently opposed by Clay and Webster, the Senate ratified the nomination by a majority of fourteen. Mr. Taney's reputation as a great judge soon reversed the feelings of his old political enemies; they were now his greatest admirers. Mr. Clay, in the presence of Mr. Reverdy Johnson,

made a personal apology for his remarks in the Senate, upon his nomination as Secretary of the Treasury, and was ever after one of his warmest friends, and Mr. Webster too, by the many instances in which he sought Mr. Taney's advice on state matters, showed his appreciation of his great ability.

Mr. Taney presided as Chief-Justice of the Supreme Court for twenty-eight years. To the end his mental powers exhibited no infirmity. His memory, clear and vigorous, shone out to the last, with a force that seemed to defy decay. At the advanced age of eighty-seven years, he could state the most complicated case with every important detail of names and dates with extraordinary clearness and skill. His recollection of principles of law and of the decisions of the Court was as ready as his memory of facts. The Chief-Justice was a constant reader to the end of his life. Macaulay and Shakespeare were favorite authors. Newspapers of every political cast were daily read. On the 12th of October, 1864, in the eighty-eighth year of his age, he departed this life. At his own request he was buried by the side of his mother in the little graveyard attached to the Novitiate in Frederick, Maryland.

LEGAL REMINISCENCES.

By L. E. Chittenden.

X.

THE CAUSES OF THE DECREASE IN THE VOLUME OF LEGAL BUSINESS.

THE number of lawyers increases, and the volume of legal business diminishes every year. It may be that the lawyers are themselves responsible for this disagreeable state of things, and they are certainly interested in finding a remedy for it, if one exists. It is claimed that the bar has made litigation so expensive that clients can no longer afford it. It is an unquestionable fact that the formation of corporations to guarantee the title to real estate, to insure railroad companies, manufacturers and others against suits for damages and for other purposes, has deprived lawyers of some of their best sources of income, and that if there is any way of making up the deficiency the lawyers are deeply interested in discovering the way, and giving it a practical application.

Is it true that litigation is more expensive than it formerly was? If it is, what has caused the increase? These questions involve historical enquiries which will be found interesting.

The convictions of the fathers of New England of the necessity of a government of the people to be established upon the most economical principles were very strong. They appear in all their experiments in self-government. The early history of Vermont furnishes an example of these economical ideas which is worthy of attention.

The early settlers of that state were involved in a controversy with influential New Yorkers over the validity of the New Hampshire grants. New York was one of the largest of the original thirteen states or colonies; influential enough to exclude Vermont from recognition by the others, and, after it was formed, from admission into the Federal Union. This controversy was agreed to be suspended when the Revolution came, and the Vermonters fought by the side of New York in the war which followed. But all the settlers recognized the necessity of a local government, and without any delay they set about making one for themselves. By a spontaneous movement, the towns elected delegates to a convention to form a constitution, which met, and after several adjournments convened again at Windsor on the second of July, 1777. The draft of a constitution had been amended and improved,

and was ready to be voted upon, when an express came which summoned the members to defend their homes against the invasion of Burgoyne. There was no time to lose, the British-Hessian-Indian army was at their doors. The motion to adjourn was put and carried, when a sudden thunder storm caused a slight delay. Parson Hutchinson, who had opened the convention with a sermon, declared that the Almighty had sent the storm to delay them while they adopted the constitution. The convention was reorganized, and in the old hall at Windsor, on the second of July, 1777, with an oratorio of the rolling thunder, the first constitution creating the independent State of Vermont was adopted. A member had it printed in Hartford, Conn., and without submission to the people or further ceremony the state was organized and maintained under it by annual elections until 1791, when upon the equal terms for which she had always contended Vermont was admitted into the Union.

We shall never know who was the real author of that instrument, but we do know that it was the first to prohibit slavery, and that to secure the kind of government which Lincoln hoped might be perpetual, no better was ever formed. It was the work of men who could scarcely write a grammatical sentence, yet it comprised some very sound principles of political economy. It declares a most excellent rule for the adjustment of salaries: "They should not be so large as to tempt the citizen from the pursuits of private life; but those who serve the public at the expense of their private business ought to be fairly compensated. Nevertheless, when the salary of an office is so large as to cause many to seek after it, the salary ought to be reduced by the Legislature."

In other words, the incumbent of a judicial or any other public office ought to be paid *quantum meruit*, and not according to any fanciful notions of its dignity or its importance. There was a very practical application of this principle in the case of the first governor of Vermont. His salary was fixed at £300, then equal to $1000 per annum. He was a plain man, he thought the salary was more than the people could then afford to pay, and recommended a change which would relieve them of the whole burden, a fee upon the grant of each township of land. These fees probably never in any year amounted to $500, but they satisfied the governor of that time. The next change of the governor's salary was to $750, where it remained for half a century, until 1857, when it was raised to $1000. In 1884 it was made $1500, which is the amount now paid.

One element in the cost of litigation is the number of the judges and their compensation. The payment of salaries to judges in Vermont began in 1804, when the Supreme Court consisted of a chief judge and two assistants. The chief received a salary of $1000, and each assistant $900. In 1826 the salaries of the three were made $1050 each. In 1839, the number of assistants having previously been increased to four, all the salaries were made $1375. In 1854 these salaries were increased to $1500 each. They were afterwards gradually raised and more assistants added, until 1886, when the court consisted of a chief and six assistants, and the salaries were made $3000 each, with an additional allowance of $300 for traveling expenses. A judge of the Supreme Court presides at two terms annually in each county for the trial of jury and other cases, civil and criminal, and there is one term *in banc* annually in each county.

It is the opinion of lawyers of the greatest experience that the greatest volume of business was done when the court comprised a chief and four assistants, receiving salaries of $1050 and $1375. Land-titles were then unsettled, actions of ejectment were numerous, there was a greater number of criminals, and defective highways and bridges caused many suits against towns. This also

was the era of able judges. Royce, Williams, the two Redfields and the brothers Pierpoint, Poland and others were content with the salaries of $1375, and for judicial learning and all other qualities they were certainly not inferior to the judges of any court in the Union. And they earned their salaries. Their courts usually opened at nine o'clock in the morning, or at eight o'clock if there was a large number of cases noted for trial. There was an adjournment from twelve to one o'clock for dinner, and the afternoon session continued until five o'clock, and was often protracted until nine o'clock in the evening, with a short adjournment for supper.

There were no stenographers; judges and counsel wrote their own minutes of testimony, notes of objections to evidence and other memoranda of the trial, and yet it was seldom that a jury trial occupied more than one day. The defeated party in such a trial was not ruined, nor was it necessary that his fee should support his counsel for a fourth of the year.

I think the things which chiefly contributed to the brevity of jury trials were, first, the preparation of counsel. No good lawyer ever undertook a trial without preparation, unless he was retained so near to its beginning that there was absolutely no time. Consequently he tried no experiments with the judge, and imperiled his case with no doubtful points. Secondly, he offered no evidence which he did not think admissible, and objected to none, unless he had considered the question of its admissibility. The senseless repetition of "I object," "I object," to every question of the opposing counsel, and of "I move to strike it out!" to every answer of the witness, was seldom heard. Irritation was thus avoided, time was saved, and justice to the parties more certainly secured.

On a recent visit to my native state I found the opinion universal, that there is not one half as much legal business there as there was forty years ago. A few visits to one of the courts, and a few conversations with my surviving contemporaries, left me in no doubt of the causes of its diminution. It is largely the fault of the Bar. It is true that the exemption by statute of towns and cities from liability for injuries caused by defects in highways and bridges has taken away one fruitful source of litigation. But the principal cause is the fact that the increased time consumed in trial wears out the patience of the client, who swears in his wrath that if he is ever delivered from the cost and perplexity of that one trial, he will never, never have another; or if his patience is inexhaustible or his sensibilities are not blunted by his long experience, his money is used up, and his resources destroyed by expenses, so that he has nothing left to be used in another litigation. If the lawyers will learn when *not* to cross-examine a hostile witness, not to object to any question by way of experiment, and to apply their energies to limiting the trial to the issues really involved, they will find the time of their trials lessened, their income increased, and their own comfort greatly promoted.

The readers of the GREEN BAG may be as much entertained as I was by a practical illustration of the lengthening of a jury trial under the more recent system. A number of persons had been injured and several killed by an accident on the railroad. It happened on the approach to a bridge crossing a river seventy feet below, where a broken rail derailed the train, and threw it into the gulf. Actions were commenced by the persons injured, charging negligence on the part of the railroad, and one came to trial. The trial occupied about six weeks, and ended in a disagreement of the jury.

I asked an old lawyer how it was possible to consume so much time in the trial of the only issue which the pleadings ought to have presented, that of the defendants' negligence, which might have involved the sub-

ordinate question whether the defect in the rail ought to have been known to and repaired by the defendants. He informed me that I was mistaken; that when the trial began it was expected that the only question of fact was whether or not the defendants had been guilty of actionable negligence, as that was the only question presented by the pleadings. But the action was found to have raised two other questions which were complicated and difficult. One was, "Why did not Governor Smith (president of the defendant corporation) go to the war?" The other, "Was not the plaintiff or his father, or some of his near relatives, once convicted of, or charged with, or suspected of a violation of the Maine liquor law, of the sale of intoxicating liquor, wine, ale, or beer without license?" As the Governor excused himself for not going to the war, on the ground that, being governor at the time, he could serve the country more efficiently by staying at home, raising, equipping, and clothing regiments, and putting them into the field, than by shouldering his musket and going to the war — and as many were of opinion that the Maine law was unconstitutional, and its violation consequently no crime, the enquiry took a wide range, and everybody could be called as a witness, so that the evidence could only be closed by the physical exhaustion of the court and counsel, or the financial exhaustion of the parties. The final result was a jury equally divided as to numbers, which settled nothing, and satisfied nobody.

While this statement is an exaggeration, there is a foundation for it, or its sarcasm would not be so acceptable. It suggests an evil which does exist, in the reformation of which the Bar is chiefly interested. But reformations move slowly. I have not much faith in them. I know well that unless something is done to stop the overcrowding of the legal profession, its high standard of virtue and morality will not be maintained. Lawyers will be driven by necessity to lower and more disreputable means of securing an income.

There is a field which promises to the student much better rewards than the profession of the law. It is the great and almost illimitable field of the physical sciences and mechanics. It has been opened within my recollection. My memory goes back to the time when there were no departments of mechanics or engineering in our universities, and a school of mines did not exist in the country. We have as yet scarcely entered upon this great field. And even now it is giving better means of subsistence and success to multitudes of young men than they could have found in any of the older professions. It is also the field in which the great discoveries and inventions of the future are to be made. Electricity is fast becoming the motive power of the world. Our hills and mountains teem with metals and minerals, to be mined and applied to use by cheaper and more economical methods. Scarcely a month passes in which chemistry does not announce some new and profitable discovery applicable to many departments of human industry, or new shields against the weapons of the great Destroyer. And this is not the half of the catalogue. While it is true that the strict practice of the law is less profitable than formerly, the world cannot dispense with good lawyers, and no good lawyer who adds to his profession a thorough knowledge of any one subject of scientific research connected with any human industry or valuable to the preservation of human life, will suffer for want of profitable employment.

MORAL INSANITY AS A DEFENSE TO CRIMES.

By Frank B. Livingstone.

In later times a species of mental disorder that has been a good deal discussed is one variously styled moral or emotional, or impulsive or paroxysmal insanity. It is also known among medical writers as lesion of the will.

The peculiarity of this insanity is said to be that, while the mental perception is unimpaired, the mind is powerless to control the will; that, while its unhappy subject knows the right and desires to pursue it, some mysterious and uncontrollable impulse compels him to commit the wrong. This moral mania, like intellectual, is of two kinds, partial and general. Instances of the former are kleptomania, or propensity to steal, pyromania, or propensity to destroy by fire, and homicidal mania. "General moral mania," says Dean's "Medical Jurisprudence," "consists in a general exaltation, perversion or derangement of function, of all the affective or moral powers."

Those who have written, or, more correctly speaking, some of those who have written upon this form of "mental alienation or moral derangement," unite in describing those who labor under it as "persons of singular, wayward, and eccentric character. Their antipathies are violent, and suddenly taken; their suspicions unjust and severe, and their propensities strong and eagerly indulged. They are generally proud, conceited, ostentatious, easily excited and obstinate in the maintaining of absurd opinions. The unhappy subject will generally be found to have experienced a great change in temper, disposition, and moral qualities, either sudden and dating from some reverse of fortune or loss of dear friends or relatives, or gradual and imperceptible, consisting in an exaltation or increase of peculiarities which were always natural or habitual. The moral maniac will rarely exhibit any signs of derangement in his conversation. He will often be regular, systematic and methodical in all his business transactions, and to all appearance regular in the use of his intellect. One man sees him in business transactions only, or converses with him when he is free from excitement, and he does not hesitate to pronounce him perfectly sane; another has an opportunity to witness some strange and unaccountable eccentricity of conduct, totally irreconcilable with the possession and exercise of a sound mind. The facts to which these two persons would testify, if called upon to do so, are apparently contradictory, and yet they are perfectly consistent when the form of the malady is known. The conversation discloses intellectual mania, and the conduct moral mania." Other authorities describe it as "a state in which the reason has lost its empire over the passions and the actions by which they are manifested to such a degree that the individual can neither repress the former nor abstain from the latter. It does not follow that he may not be in possession of his senses and even his usual intelligence; since, in order to resist the impulses of the passions, it is not sufficient that the reason should impart its counsels; we must have the necessary power to obey them. The maniac may judge correctly of his actions without being in a condition to repress his passions, and to abstain from the acts of violence to which they impel him."

Whether this derangement of the moral faculties will exculpate a person who has committed a criminal act, is a question on which the most learned justices cannot agree. The following are some of the decisions of the American courts on the subject.

One of the first cases, considering this

question in this country, was decided by the Supreme Court of Pennsylvania,[1] Justice Gibson, recognizing the existence of moral or homicidal insanity as "consisting of an irresistible inclination to kill, or to commit some other particular offense," adds: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance." He adds further: "The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases." In a case in Kentucky,[2] in the year A.D. 1863, the court recognized the defense of moral insanity in criminal cases, but says, "This ground of defense is so peculiarly liable to abuse, to guard against which the utmost care and circumspection are required, on the part of the Court, in presenting to the jury the legal principles relating to it."

In the year A.D. 1870, in a most interesting case in New Hampshire,[3] it was held to be a question of fact for the jury to determine, "whether there was such a mental disease as dipsomania" (which is an irresistible craving for alcoholic liquors). In this case is the learned opinion of Mr. Justice Doe, which is one of the most instructive discussions on the law of insanity which can be found in legal literature. The court of Connecticut, in the year A.D. 1876,[4] said, regarding the subject of moral insanity: "It is not our purpose either to ignore or recognize this form of insanity as an excuse for crime. The question is not whether an act committed under its influence is criminal, whether the actor should be punished, or be exempt from punishment, but whether he is a proper subject of capital punishment. If it be conceded that one afflicted with it never loses the power to distinguish between right and wrong, and is at all times master of himself, and may control his actions, still his mind may be enfeebled, and the power of his will readily yield to the influence of temptation or provocation without that wilful, deliberate, and premeditated malice which is essential to constitute murder in the first degree. The jury, therefore, ought to consider moral mania, if satisfied of its existence, in determining the degree of crime, and give it such weight as it is fairly entitled to under the circumstances." The court of Mississippi, in the year 1870,[1] denies the doctrine, and the Court, by Justice Chalmers, says: "The possibility of the existence of such a mental condition is too doubtful, the theory is too problematical and too incapable of a practical solution, to afford a safe basis of legal adjudication. It may serve as a metaphysical or psychological problem to interest and amuse the speculative philosopher, but it must be discarded by the jurist and the law-giver in the practical affairs of life." This Court further holds "that insanity, to excuse crime, must be such as to destroy the power of distinguishing between right and wrong."

In Alabama, in 1879,[2] it was decided by the Court that the doctrine of moral insanity, or irresistible impulse, coexisting with mental sanity, has no foundation in psychology nor support in law. Judge Stone, in writing the opinion of the Court, says: "There is a species of mental disorder, a good deal discussed in modern treatises, sometimes called 'irresistible impulse,' 'moral insanity,' and perhaps by some other names. If by these terms it is meant to affirm that a morbid state of the affections or passions, or an unsettling of the moral system, the mental faculties remaining meanwhile in a normal, sound condition, excuses acts otherwise criminal, we are not inclined to assent to the proposition. The senses and mental

[1] Commonwealth *v.* Mosler, 4 Barr. 264.
[2] Scott *v.* Commonwealth, 4 Metc. 227.
[3] State *v.* Pike, 49 N. H. 399.
[4] Anderson *v.* State, 43 Conn. 514.

[1] Cunningham *v.* State, 56 Miss. 269.
[2] Boswell *v.* State, 63 Ala. 307.

powers remaining unimpaired, that which is sometimes called 'moral' or 'emotional insanity' savors too much of a seared conscience or atrocious wickedness, to be entertained as a legal defense." And he says, further, of that clause in the decision of Chief-Justice Gibson (the first case mentioned in this article), that "there may be an unseen ligament pressing on his mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance:" "With all respect for the great jurist who uttered this language, we submit if this is not almost or quite the synonym of that highest evidence of murderous intent known to the common law — a heart totally depraved and fatally bent on mischief." In Texas, in 1881,[1] kleptomania was recognized as a defense in a case of larceny. In California, in 1882,[2] the Court held that an irresistible impulse to commit a criminal act does not absolve the actor, if at the time and in respect to the act he had the power to distinguish between right and wrong. The same was held to be the law in Texas, A.D. 1886.[3] Justice White, in writing the opinion of the Court in this case, relies on and quotes from the case decided in Alabama in 1879,[4] and decides that "moral insanity has no support, either in psychology or law."

The next year, A.D. 1887,[5] the Court of Alabama declares incorrect their former decision, and decides that "one who by reason of mental disease has lost the power of will to control his actions and choose between right and wrong, is not responsible to the criminal law for an act which is solely the product of such disease, although he may know right from wrong." In this case, Justice Somerville, who wrote the opinion of the Court, comments on the case of Guiteau,[1] who was tried, sentenced, and executed for the assassination of James A. Garfield, then President of the United States, which occurred in July, 1881, in such a way as to indicate that he has doubts whether Guiteau's delusions ought not to have exculpated him. Chief-Justice Stone wrote a dissenting opinion, in which he says: "Impulse is emotional rather than intellectual. It is a sudden emotional influence brought to bear on the will as an intellectual faculty, and not the offspring of the reasoning faculties. It is rather the antithesis of a formed judgment. It differs from the cognitive or knowing faculty, and not infrequently so dominates the latter as to acquire for the time the mastery of the will. The will, the executive faculty of the mind, cannot, with propriety, be said to be subverted or overturned. To be subverted or overturned, is to cease to have purpose — to cease to act; for without the function of the will there can be no physical action. The will retains all its power, but for the time ceases to act in harmony with the knowledge-possessing faculty. It is perverted, but not subverted. When the will is perverted by a disease of the brain or intellectual faculties, then any act caused thereby is blameless in the sight of the law. On the other hand, if there be no disease of the intellectual faculties, and the act done, though by a perverted will, is nevertheless the offspring of moral depravity, debauched appetite, blunted sense of right, or other kindred promptings of a wicked heart, then for such an act there is a moral and legal accountability, in the amplest sense of those terms. The murderer, the assassin, the burglar, the incendiary, can truthfully plead that their wills have ceased to be the executors of their intellectual promptings. Criminal passions or appetite has obtained mastery over their higher and purer intellectual endowments, and perverted their wills to its baser use." "I have in-

[1] Looney *v.* State, 10 Tex. Ct. App. 520.
[2] People *v.* Hoin, 62 Cal. 120.
[3] Leache *v.* State, 22, Tex. Ct. App. 279.
[4] See p. 369.
[5] Parson *v.* State, 81 Ala. 357.

[1] United States *v.* Guiteau, 10 Fed. Rep. 161.

dulged in these reflections," he adds, "because I think the expression 'sudden impulse' and 'subversion of the will' are inaccurate and misleading, at least under our jurisprudence. It will be a sad day for this State when 'uncontrollable impulse' shall dictate a rule of action to our courts."

The doctrine of "moral insanity" was again recognized in 1890, this time by the Court of Indiana. The Court held[1] that "a person may have sufficient mental capacity to know right from wrong, and to be able to comprehend the nature and consequence of his act, and yet be not criminally responsible for his act; for if the will power is so impaired that he cannot resist an impulse to commit a crime, he is not of sound mind." In South Carolina, in 1891,[2] the Court decided that "moral insanity," or "uncontrollable impulse," was not a defense against crime in that State. Justice McIver, in writing the opinion of the Court, says, in regard to the doctrine of moral insanity, or uncontrollable impulse: "While it is not to be denied that there are cases in some of the States which recognize this doctrine as a defense against a charge of crime, yet it never has, and we trust never will, obtain a foothold in this State; for we agree with Judge Sherwood when he said, 'It will be a sad day for this State when uncontrollable impulse shall dictate a rule of action to our courts.' He further adds, 'It is a matter that is not susceptible of proof, and to allow a person to escape the consequences of his criminal act, by asserting that he acted under an impulse which he could not restrain, although he knew his act to be unlawful, would be dangerous, if not destructive to the peace of society.'"

[1] Plake *v.* State, 121 Ind. 433.
[2] State *v.* Levelle, 24 So. Carolina, 120.

The above cases are some of the most important on the subject of "moral insanity," or "irresistible impulse," as a defense to criminal acts that have been decided in the courts of this country, and are sufficient to show the great diversity of opinions among the learned justices of the different States on the subject.

By the above decisions it appears that some persons sentenced by the courts of South Carolina, California, or Mississippi, to prison, or even to the gallows, would be by the courts of Alabama, Pennsylvania, Indiana, and some of the other States, discharged or committed to the insane hospital.

Such a diversity of opinion ought not to exist. This mental insanity is either a fact or a theory. If it is a fact, it should be recognized by the courts of all States and countries; if only a theory, the courts have no power to recognize it.

Every unknown scientific fact, in whatever profession or department of knowledge, must first be discovered by experts before becoming a matter of common knowledge. The existence of such a disease as moral insanity is earnestly alleged by modern physicians and experts on insanity. The writer would, therefore, conclude that there is such a disease as moral insanity, and that in some cases it would be a good defense to crime.

It lies with the medical profession, however, to determine in what cases, and to establish a reliable test for sanity if, as they claim, the old rule, which makes "the knowledge of right and wrong the test of criminal responsibility, is too narrow, and its application often erroneous, cruel, and unjust; and the law, which abhors error, cruelty, and injustice, would be made to conform thereto.

THACKERAY'S LEGAL CAREER.

NOTWITHSTANDING the supposed antagonism between literature and law, it is a somewhat curious circumstance that so many of our literary immortals have been connected with the legal profession. Glancing backwards we instantly recall such names as those of Fielding, Burke, Cowper, Moore, Scott, Jeffrey, Macaulay, Talfourd, Dickens and many others, all more or less intimately associated with law. In our own day this tradition has been continued by such men as the late Robert Louis Stevenson, Mr. Lewis Morris, Mr. F. C. Burnand, Mr. Rider Haggard, Mr. Stanley Weyman, Mr. Anstey Guthrie, Mr. "Anthony Hope," and other popular writers. In view of this, it was therefore only in accordance with the fitness of things that we should find Thackeray also among the lawyers. True, he never practiced, but his Temple career counts for much, as to it we owe that vivid and delightful sketch of the bar student's life of a couple of generations ago, to be found in the pages of "Pendennis."

Several writers who have touched on this part of Thackeray's career have not been very accurate in their account of it. Mr. Laurence Hutton, whose "Literary Landmarks of London" is a remarkable tribute to the potency of literary genius, informs us that Thackeray was called to the bar in 1834, while Mr. Loftie, in his pleasantly written and charmingly illustrated "Inns of Court and Chancery," says that it was in 1830. Neither writer is correct, as a reference to a Law List, or to the "Law Times" of the 3d June, 1848, would have shown. The true date was the 26th May, 1848.

After leaving Cambridge, Thackeray oscillated a good deal between law, literature, and art. He, however, did make a beginning in 1832 to acquire a knowledge of the law, for in that year he entered the chambers of William Taprell, then practicing under the bar as a special pleader, but who, later, was called to the bar at the Inner Temple, and who survived his illustrious pupil. His chambers were at No. 1 Hare Court. This court has just undergone a complete transformation, the western side having been demolished and a brand new set of chambers erected. No. 1 has, however, not as yet come under the spoiler's hand; it still exists as in Thackeray's pupil-days, and there we can imagine him going fairly regularly in 1832, fancying all the while that, like his hero Pendennis, he was "reading hard for the bar." The novelty of going to a pleader's chambers soon wears off, even with the most enthusiastic of law's votaries, and in Thackeray's case this soon became apparent, as we find him after a very short experience of Taprell's chambers, writing thus: "This lawyer's preparatory education is certainly one of the most cold-blooded, prejudiced pieces of invention that ever a man was slave to . . . a fellow should properly do and think else than law"; and again, "The sun won't shine into Taprell's chambers, and the high stools don't blossom and bring forth buds . . . I do so long for the fresh air, and fresh butter I would say, only it isn't romantic." Despite this expression of lassitude, his term of pupilage was not altogether without interest. We get a pleasant glimpse of the occupation in the sundry humorous sketches of the "Dumb-Crambo Junior" order with which he embellished some of his letters and books, in which direction his legal knowledge for a long time found its only outlet. Several of these sketches, which can be seen in "Thackerayana," are highly amusing.

About the same period Thackeray appears to have had residential chambers at 10 Crown Office Row, with his friend Tom Taylor. 10 Crown Office Row has now disappeared, but a pleasant memory of it remains

in the lines written by Tom Taylor on the announcement that the chambers were to be pulled down. The verses will be found in "Punch" of 26th February, 1858; the opening stanza runs thus: —

They were fusty, they were musty, they were grimy, dull and dim,
The paint scaled of the panelling, the stairs were all untrim;
The flooring creaked, the windows gaped, the door-post stood awry;
The wind whipt round the corner with a wild and wailing cry.
In a dingier set of chambers no man need wish to stow,
Than those, old friend, wherein we denned, in Ten, Crown Office Row.

The writer then recalls the many pleasant hours spent in the dusty old rooms, their Bohemian dinners, and their life generally. The praises of the same set of chambers are sung by Thackeray himself, in his ballad, "The Cane-Bottomed Chair," where he sings of his

Snug little kingdom up four pair of stairs,
To mount to this realm is a toil to be sure,
But the fire there is bright, and the air rather pure;
And the view I behold on a sunshiny day
Is grand through the chimney-pots over the way.

After this Thackeray deserted for some years the temple of Themis, and entered the wider and invigorating domain of literature. But he came back at a later date, ate his dinners, and was duly called to the bar. In the Law List for 1849 we find his name for the first time, and from that year till 1851 the entry is the same: "Thackeray, Wm. Makepiece (*sic*), Esq., 10 Crown Office-row, called M., 26th May, 1848." In 1852 and 1853 no address is given, but in 1854 and onward to 1859 we find him in chambers at 2 Brick Court. The fact of his association with this address seems to have eluded the vigilant eye of Mr. Laurence Hutton in tracking the footsteps of our men of letters. Goldsmith's residence there has received due recognition, but the augmented interest attaching to the chambers by reason of Thackeray's association with them has been strangely overlooked. Is it possible that Thackeray selected that address just because it had been consecrated by poor Goldy? It may have been so. It is difficult to say, too, whether he ever expected any result from his call to the bar. At that time, it must be remembered, his literary position was by no means assured, although it was soon to be put beyond doubt, and it has been conjectured that the idea of getting some magisterial post had something to do with the call. We need not much regret, however, that such views, if ever entertained, were never realized. Too close an absorption in legal pursuits, while it may strengthen a man's intellectual force, has a tendency to blunt the finer and more sensitive parts of his nature; and although there was little fear of Thackeray ever being too closely absorbed in his law, his attention might yet have been distracted from his life-work, and that work we could ill afford to lose. On the other hand, we cannot but feel glad of his connection, slight though it was, with our profession, as in it he found the inspiration of some of his brightest pages — pages which have helped to relieve the dullness and routine of the Templar's life by throwing a fresh light on the scene of his labors, and by adding to our gallery of living portraits. — *Law Times.*

TANGHIN, OR THE POISON ORDEAL OF MADAGASCAR.

THOUGH ordeals by fire and water are, or have been, national judicial institutions of world-wide distribution, recourse to a deadly poison as a legal remedy has not met with such universal recognition. With the exception of the "Red Water" ordeal of the Papuans, and the "Bitter Water" of certain Melanesian tribes, poison ordeals are strictly confined to the Dark Continent, of which the ordeal of the Calabar bean as practiced by the negroes of Old Calabar is the most popular and well-known instance. Although Livingstone, Du Chaillu, and other African explorers mention the use of certain roots for poison ordeals by Central African tribes, and Guinea natives are known to use a form of *strychnos* for the same purpose, we think we are justified in stating that no exact analogue of the tanghin of Madagascar can be found in any of the ordeals practiced elsewhere.

The source of the poison — from which it also derives its name — is the "Tanghinia venenifera," a plant indigenous to Madagascar. Teacourt, governor of the French settlement at Fort Dauphine in the seventeenth century, wrote an account of the island of Madagascar on his return to France, and in this quaint and interesting work a description of "Le Tangèna" is given, which evidently was not the modern form of the ordeal, but was more akin to the Melanesian "Bitter Water," in that death never resulted from the direct action of the poison. Evidence from various sources leads to the conclusion that the "Tanghinia venenifera" was first used for judicial purposes at the beginning of this century, from which period it was consistently employed until the abolition of ordeal by poison in 1864 by international treaties.

The tanghin tree is somewhat like a chestnut in appearance. As its foliage is of a dark-green hue and its flower of a gorgeous crimson, it presents a very attractive sight during the months of October and November. Botanists would more accurately describe the tree as belonging to the order of the "Apocynaceae," and its fruit as a drupe; but as botanical names only appeal to the initiated, we will continue the description without employing them.

About the middle of November, the flowers fade, and a small green fruit appears, which rapidly increases in size until Christmas, when the fruit attains maturity. It is then something like a large yellow egg-plum, though the skin is not of one uniform tint, but is streaked with varying tints of red and brown. The pulpy portion of the fruit is of a repulsive gray color, and possesses a correspondingly disgusting taste; and in the center of this is found the kernel, which is enclosed in a bivalve like the common almond. The kernel is the poisonous part of the fruit, and has been found to contain a most violent poison, which is not strychnine, or, in fact, an alkaloid or nitrogenous compound at all, but a substance which is probably unparalleled in the whole range of toxicological chemistry.

The tanghin was reserved for the detection of such crimes as treason and witchcraft, or anything directly or indirectly due to the intervention of the supernatural; and as such crimes were frequent and the circle of suspicion wide, it acted as a constant drain on an already scanty population. Ellis computes that three thousand persons perished annually under this ordeal, and a tenth of the entire population drank it in their lives — some four or five times — while, of those who drank, more than half died on the spot or from the after-effects.

For minor offenses the ordeal was performed thus: If two parties disputed on a

subject on which no direct evidence could be got, each selected a dog from a pair of equal size and condition, and both animals received similar doses of tanghin. The party whose dog first succumbed was adjudged to be in the wrong; and if both dogs expired simultaneously, the case was decided on a basis of equality; or if this was out of the question, the ordeal was repeated.

In the case of serious crimes, however, being alleged against anyone, the ordeal was much more severe, as the persons suspected had themselves to swallow the tanghin. The ordeal was a truly national institution; government officials called *mpanozon-doha*, or "cursers of the head," or more colloquially, *mpampinona*, that is, "those who compel to drink," administered the ordeal; and to be a *mpampinona* was considered both a lucrative, respectable, and even an honorable position. The *mpampinona*, by personal and secretly transmitted experience, could so manipulate the ordeal that their clients had a chance of escaping with little more than a violent fit of vomiting; while they could insure with deadly certainty the removal of an obnoxious individual. The tanghin thus administered became a most powerful agent in carrying out the crooked ends of an unscrupulous state policy; and we need hardly say that the Government in power freely availed themselves of this convenient method for the removal of prominently obtrusive members of the Opposition.

A great gathering always collected to witness a tanghin ordeal, the center of attraction, of course, being the *mpampinona*, his executive, and the victim or victims. To inspire confidence, the poison was prepared in public by the *mpampinona*, who took two kernels of the fruit of the "Tanghinia venenifera," and having split each carefully in half, he ground two halves of different kernels — to insure uniformity of poison — on a stone, with a little water. A white emulsion is thus obtained, which on dilution with the juice of a banana leaf, partially dissolves. Having administered this potion, the "curser of the head" placed his hand on the brow of the victim, and broke forth into a wild stream of denunciation and invocation, beginning, "Ary mandranesa, mandranesa. Manamango, Listen, listen, oh Manamango [the Poison Spirit or "Searcher of Hearts"]. Thou hast no eyes, but thou seest; ears hast thou not, but thou hearest; a round egg brought from afar, from lands across the great waters [possibly an allusion to the introduction of the poison ordeal by the Arabs], thou art here to-day. Hear and judge, for thou knowest all things, and wilt decide truly. If this man hath not done aught by witchcraft, but has only employed natural powers, let him live. If he has only committed a crime against the moral code [in the original, a long category of these offenses is given], slay him not; but by the door where down thou wentest, return, oh Manamango! [The poison is a violent emetic.] But if he has employed witchcraft, then hasten; stay not; end him; slay him; choke him; seize his vitals in thy deadly clutch, and destroy at once and forever the foul life of this wicked man, oh Manamango, thou that knowest all things, and who searchest the secret hearts of all men."

Some years ago, a friend of the writer's took a verbatim copy of the above harangue as reproduced by a native who had twice successfully undergone the ordeal, and on whom the whole ceremony had left very vivid and lasting impressions. The above is a fair translation of the leading points in the argument, which in the original are fully expanded by minute details as to the crimes within and the misdemeanors without the jurisdiction of the tanghin, as well as by very horrible minutiae of the fearful agonies to be inflicted on the guilty, and the exhilarating prospects for the self-righted innocent.

This adjuration ended, the accused was forced to swallow three pieces of fowl-skin, each about an inch square, without touching them with his teeth. Copious draughts of

rice-water were then given to wash down the three pieces of skin; and when this was at last effected, warm water was added to accentuate the emetic character of the poison. If the three pieces of skin are discharged intact, Manamango has decided on the innocence of the suspect; and his friends are then free to do anything they please to increase his chances of recovery. If the three pieces are retained, or are only partially discharged, the man is declared guilty; and one of the executive, whose especial duty it is, puts an end to the writhing and speechless agony of the unfortunate victim by a blow from a wooden rice-pestle or *fanolo*.

Establishment of innocence by this method more often than not resulted in death from the after-effects, unless special precautions had been taken, or the subject was possessed of an abnormally tough constitution. Practiced experts, by using immature fruit and selecting kernels of light color, which are not so poisonous as the redder ones, and also by skillful arrangements of things, could secure a satisfactory termination — from the patient's point of view, — of the ordeal, so that it became quite noticeable that filthy lucre could often tempt the immaculate Manamango to favorable decisions. Notwithstanding this obvious corruption, the masses of the people believed confidently in the tanghin and in Manamango; and even now many natives would avail themselves of it, if allowed to do so.

In 1857, a Frenchman called Laborde, who headed a frustrated conspiracy to assassinate Queen Ranavalona I and to place Radama II on the throne, was arrested and charged with high treason. He appealed to the tanghin ordeal; but the Government refused him that privilege on the ground that he was a foreigner; and so he was banished from the island, much to his chagrin.

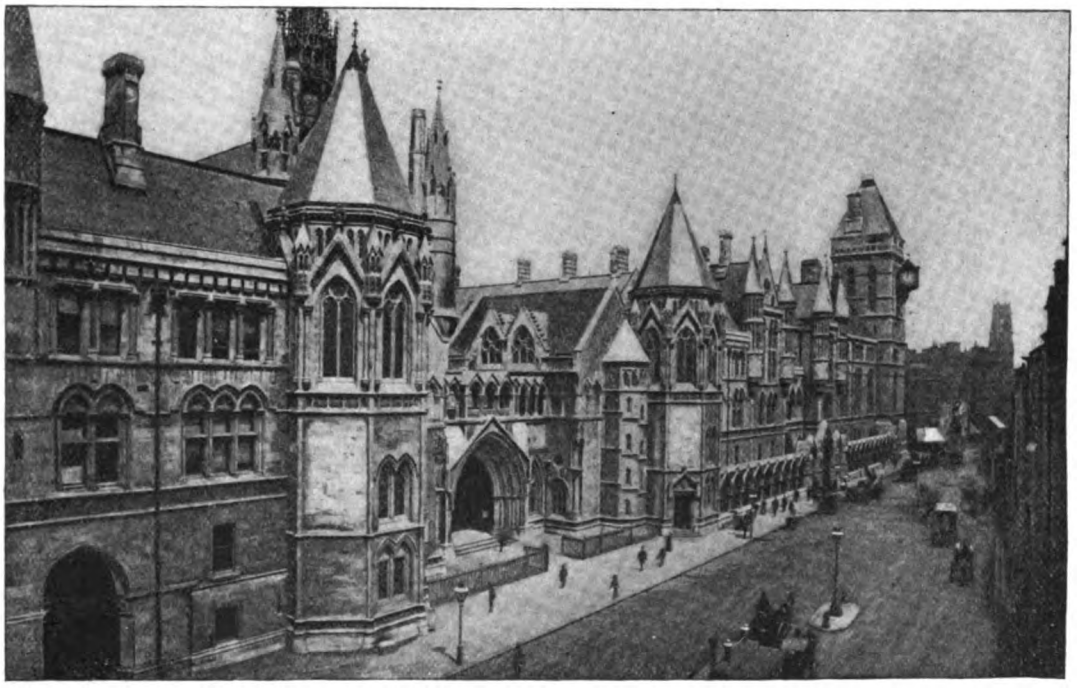
It is thought that M. Laborde had cultivated a provident intimacy with the chief *mpampinona*, and consequently was quite prepared to undergo the necessary gastric convulsions if thereby he could 'quash' an inconvenient charge of high treason. However that may have been, we think M. Laborde was the only European who had sufficient confidence in this somewhat risky tribunal to be willing to stake his existence upon it. — *Chambers' Journal.*

THE ENGLISH LAW COURTS.

III.

THE COURT OF APPEAL.

THE modern Court of Appeal was constituted by the Judicature Act, 1873. It consists of six *ex-officio* judges. The Lord Chancellor, who is President, two ex-Chancellors, the Lord Chief-Justice of England, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Divisions, and five ordinary judges, with the title of Lords Justices of Appeal, each of whom receives a salary of £5,500 a year. The Court of Appeal consists of two divisions, Court of Appeal No. 1 and Court of Appeal No. 2. The former is presided over, as a general rule, by the Master of the Rolls, with whom two of the Lords Justices sit. In the latter there are three Lords Justices. Cases of unusual importance are, however, sometimes argued before the full Court — the Master of the Rolls, and the five Lord Justices, — e. g., when the construction of a new rule of practice has to be settled (*Ex-parte* Holloway, "Times," April 16, 1894). —Under ordinary circumstances, however, the two Courts sit separately, and exercise concurrent jurisdiction. The Court of Appeal exercises the old jurisdiction of (1) the Lord Chancellor and the Court of Appeal in Chancery; (2) the County Palatine of Lancaster Appeal Court; (3) the Court of the Lord Warden of the Stannaries; (4) the Court of Exchequer Chamber; (which was the Appeal Court from the Exchequer);



THE NEW LAW COURTS.

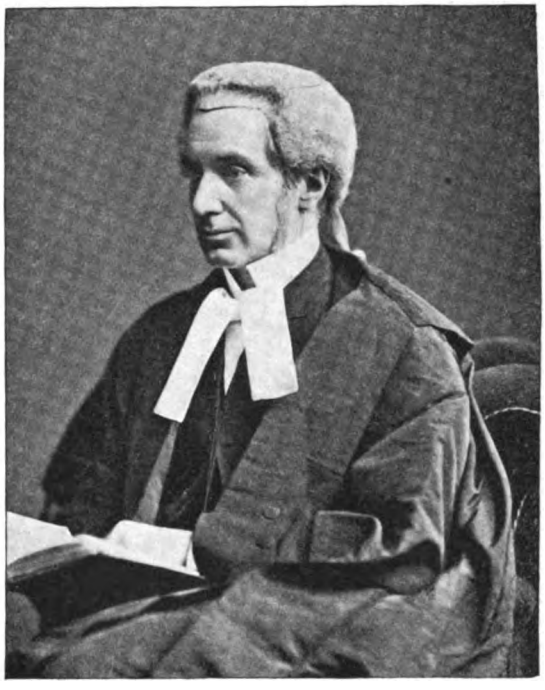
and (5) the Police Council in Admiralty and Lunacy Appeals. The Court of Appeal is also the tribunal in which all applications for new trials in any division of the High Court, whether in jury or non-jury cases, must now be made. At one time the verdicts of juries were pretty frequently impugned. But in recent years the principle has been established that the verdict of a jury will not be set aside unless it was one at which reasonable men, applying their minds to the evidence, *could not have* (and not merely *ought not to have*) come. The effect of this rule, which has been recently applied by Lord Esher, Master of the Rolls, has been to reduce "the new trial papers" to the smallest dimensions. Students who wish to examine the growth of this canon will find the "Evidences" of it in Phillips *v.* Martin (15 App. Cas. 193); Metropolitan Railway Co. *v.* Wright (11 App. Cas. 152). Appeals from the Railway and Canal Commission go to the Court of Appeal, and under Lord Herschell's Procedure Bill, it will be the appellate tribunal for appeals for the Judge at "Chambers" in matters of practice. Two counsels are generally heard on each side on the hearing of an appeal. The Privy Council is located at Whitehall; the House of Lords sits in the gilded Chamber at Westminster, where the legislative body of the same name holds its deliberations. The Court of Appeal, however, is situated in the new Law Courts at the Strand. The Judicature Acts, as every one is aware, substituted for the old common law and equity courts at Westminster, a Supreme Court of Judicature, divided into (1) a Court of Appeal, and (2) a High Court of Justice, subdivided into (a) the Queen's Bench division, in which the jurisdiction of the old courts of Common Pleas, King's (or Queen's) Bench and Exchequer are now vested, (b) the Chancery division, with the powers of the old Courts of Equity, and (c) the Probate, Divorce and Admiralty division, to which the jurisdiction of the courts of probate, divorce and admiralty have been assigned. We shall deal with the various divisions of the High Court in subsequent papers. In the meantime it may be of interest to give an account of a few of the past and present judges of the Court of Appeal.

LORD ESHER.

MASTERS OF THE ROLLS.

The Master of the Rolls was the chief of a body of officers called the Masters in Chancery, of whom there were eleven others, including the Accountant-General. He then became Judge of the Court, and had the keeping of the rolls and grants which pass the great seal, and the records of the Chancery. The court of this high official was held in the Rolls office in Chancery Lane, anciently called *Domus Conversorum* as being appointed by King Henry III for the use of converted Jews. The irregularities of these convertites were, however, so great that Ed-

ward II. expelled them, and the place was deputed to the custody of the Rolls. The Master of the Rolls is now a judge of the Court of Appeal, and his old jurisdiction over patents is transferred to the High Court. But he is still keeper of the Records, and has power to amend clerical errors in patent grants. He usually presides in the Court of Appeal, but in point of legal precedence comes after the Lord Chancellor and the Lord Chief-Justice of England. We proceed now to sketch the forensic and judicial careers of a few of the greatest Masters of the Rolls.



LORD JUSTICE FRY.

LORD LANGDALE.

Henry Bickersteth, Lord Langdale, was born on June 18, 1783, at Kirkby Lonsdale, where his father practiced medicine. He was educated at the grammar school of his native town, and afterwards studied medicine at the University of Edinburgh, — then as now one of the most famous medical colleges in the world — in order to qualify him for entering on his father's business. A brief experience of practice as a leech at Kirkby Lonsdale was sufficient to satisfy Bickersteth's ambitions in this direction, however; he abandoned medicine and entered Caius College, Cambridge, in 1802, with a scholarship on the Hewitt foundation. His health broke down under his studies, and he was forced to take rest in the form of a tour in Italy as attendant to the family of the Earl of Oxford. Having narrowly escaped the clutches of Bonaparte (then at war with Italy) at Florence, he spent some time at Venice, Vienna and Dresden, and then returned home. In 1805 he went back to Cambridge and after having conquered a passing fancy for the army, devoted himself to academic work and graduated as senior wrangler and Smith Prizeman in 1808. In the same year he joined the Queen's Temple. In 1811 he was called to the Bar. For several years he had nothing to do; and even after he became known, his sympathy with the visionary views, as they were then deemed, of Bentham retarded his professional success. But Bickersteth gradually overcame his difficulties. In 1820, Sir John Copley, afterwards Lord Lyndhurst, then Attorney-General, requested his assistance in drafting a bill for the reform of the Court of Chancery. Four years later he gave valuable evidence before a Commission on law reform. In 1827 he took silk and attached himself definitely to the Rolls Court, refusing, it is said, on one occasion, a fee of three thousand guineas to go into the Court of Exchequer. The case in which this tempting fee was rejected was Small *v.* Attwood. The English Bar has certainly never had a more conscientious member than Bickersteth. He refused the post of judge of the new Court of Bankruptcy in 1831, because he disapproved of its creation. He declined Lord Lyndhurst's invitation to become a Baron of the Ex-

chequer, because he was an equity lawyer. He point blank refused to be nominated as member for Marylebone, because he was expected to give election pledges beforehand. Eventually, however, in January, 1835, he was raised simultaneously to the mastership of the Rolls, and to the peerage as Baron Langdale of Langdale in Westmoreland. In early life Langdale had been a radical; his views were tempered, however, by the excesses of the French Revolution: and although in the House of Lords he took no active share in party politics (indeed he made an understanding that he should not be required to do this a *sine qua non* to his acceptance of office) he showed his political characteristics in the work of legal reform, zeal in sweeping away abuses, and moderation in safe-guarding existing rights. We owe to him the abolition of the old practice of taxing suitors with fees towards the establishment and support of the courts and their officers, and the creation of the Record Office. During the illness of Lord Chancellor Coltenham, Langdale, along with Sir Lancelot Shadwell and Baron Rolfe, held the great seal in Commission from June 19th, 1850, till July 15th in the same year, when Sir Thomas Wilde was raised to the woolsack as Lord Truro. He retired from the Bench on March 28th, 1851, and died on the 18th of the following April. Langdale's greatest judgment was delivered in the case of Gorham *v.* the Bishop of Exeter. The Bishop refused to institute Mr. Gorham to the Vicarage of Brampton Speke on account of a difference of opinion on a point in the doctrine of baptism. Mr. Gorham appealed to the Privy Council, whose judgment, delivered by Lord Langdale, was in his favor.

LORD JUSTICE COTTON.

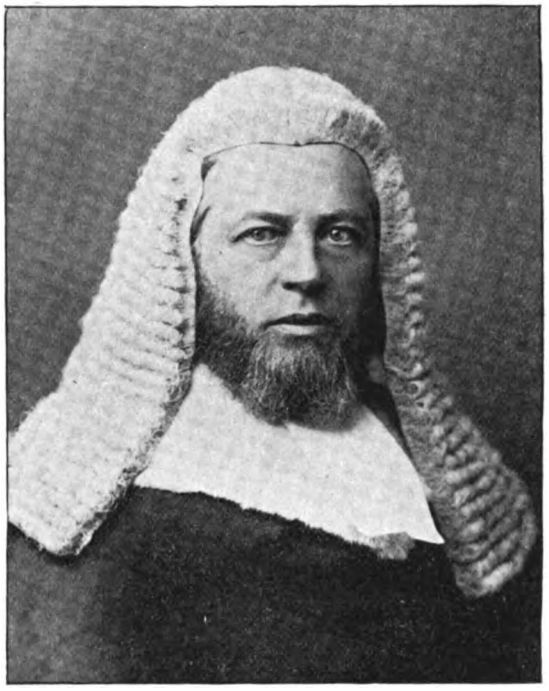
LORD ROMILLY.

A sketch of Lord Romilly naturally follows an account of Lord Langdale, for the former judge entered upon and completed the great work of the latter in regard to the public records, and supplemented it by the effective interest which he took in the reproduction of the State papers and early chronicles. Descended from a Huguenot family which the revocation of the Edict of Nantes had driven into England, John Romilly was born in the early years of the present century. He was educated at Trinity College, Cambridge, and joined the bar of Gray's Inn (one of whose glories he is) in 1827. Five years later he became member of Parliament for Bridport, a constituency from which he changed to Devonport in 1851. He was made Solicitor-General in March, 1848, Attorney-General in July, 1850, and Master of the Rolls in 1851. In 1865 he was raised to the peerage as Lord Romilly of Barry. He died in 1873 and was succeeded by Sir George Jessel. Lord Romilly was a distinguished lawyer, and he made a painstaking and com-

petent judge. But it is by his contributions to the cause of law-reform, and above all by his labors in connection with the records and the state papers that he will be remembered. His decisions are republished by Benson, and his opinions while at the Bar may be found in the Romilly memoirs.

SIR WILLIAM GRANT.

Having touched upon the careers of the two great law reformers who have occupied the office of Master of the Rolls, we may now take a group of great mercantile lawyers who have held the same high position. First in order is Sir William Grant. Like Lord Mansfield, to whose genius he, in some points, more nearly approached than any of his successors, Grant was a Scotchman. He was born at Elchies in Morayshire, in 1755, and was educated at the grammar school of Elgin, the University of Aberdeen and the University of Leyden. After a brief apprenticeship in an attorney's office, he became a student of Lincoln's Inn in 1769, and was called to the bar in 1774. Grant commenced his public career by commanding a body of volunteers during the siege of Quebec, whither he had gone to practice. His military efforts commended him to the Governor who made him Attorney-General of the colony, and he at once sprang into a large practice. Grant's ambition was not, however, satisfied by his colonial successes. He returned to England and joined the home circuit. At first fortune hid her face, and he was about to return to the theatre of his old triumphs. But accident threw him in the way of the incalculable Pitt; he was able to give the great commoner some information which he desired relative to Canada; and a seat for Shaftesbury in November, 1790, rewarded his intelligence. For many years he was one of Pitt's most constant supporters in the House of Commons, as Member of Parliament, first for Shaftesbury and afterwards for Banff. The fortune which Pitt commenced for Grant, Lord Thurlow completed. Struck by the advocate's ability in arguing a Scotch appeal before the House of Lords, the grim old Chancellor advised him to betake himself to the Equity side. The result justified Thurlow's counsel. Grant soon acquired a leading practice. In April, 1793, he was appointed one of the judges of the Carmarthen Circuit; in 1795 he became solicitor-general to the Queen; in 1798 he was appointed Chief-Justice of Chester; in July, 1799, he was made Solicitor-General and knighted. On May 27th, 1801, he was raised to the mastership of the Rolls. While holding this office Grant was destined once more to resume his military habits. Bonaparte was threatening England with invasion and men of all ranks and professions threw themselves into the work of organizing the national defence. No one who reads Robert Hall's sermons will have diffi-



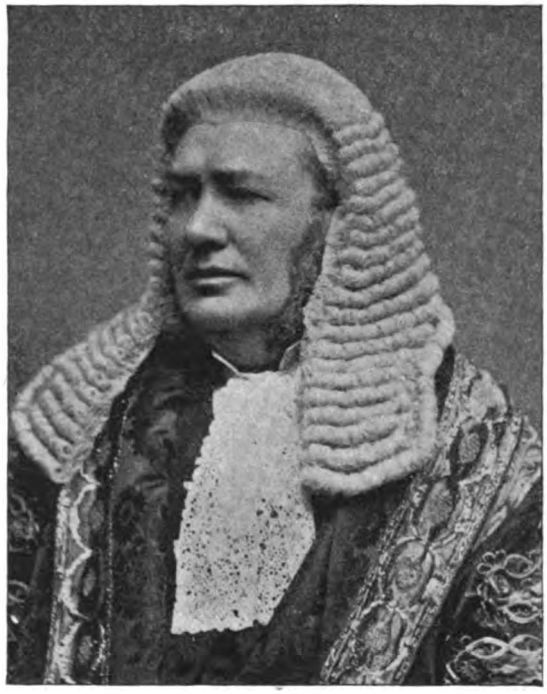
LORD JUSTICE LOPES.

culty in perceiving how strong the anti-Napoleonic and patriotic feeling of the country was at the time. At this crisis the Master of the Rolls took the command of the Lincoln's Inn corps of volunteers whom he put into a state of thorough efficiency. But the danger passed away. The Grande Armée and its great leader marched off to Boulogne to deal with their Austrian and Russian foes and Sir William Grant was permitted to discharge his judicial duties undisturbed. He did so in a manner which has left a permanent mark on English law. His judgments were nearly always correct, were expressed with praiseworthy simplicity and lucidity, and were characterized by that faculty of making sound precedents when necessary, which is the highest exercise of the judicial art. He retired from the bench on 23d December, 1817, and died at Dawlish, in Devonshire, in May, 1832. Perhaps the highest tribute ever paid to his political ability was that of Fox, who once being annoyed by some members talking behind him while he was listening to an argument of Grant's which it would be his duty to answer, rebuked them sharply with the question, "Do you think it so very pleasant a thing to have to answer a speech like that?"

SIR GEORGE JESSEL.

The career and character of Sir George Jessel were sketched in our issue of January, 1893, by Mr. Willard, and we need not recapitulate the points with which he dealt so ably. But the record of the greatest of the Masters of the Rolls is one not easily exhausted, and it may be possible to present some of its aspects in a fresh light. Born in 1823, and educated at London University — Oxford and Cambridge were then closed to the children of Israel — Jessel was called to the Bar of Lincoln's Inn in 1847, and soon made his mark in the Court of Chancery as a profound and yet broad and vigorous lawyer. It was not however, till after he took silk some fifteen years later, that his practice became very large, in comparison with those of his rivals at the Equity Bar. Among the cases in which he was engaged may be noted Wilson's Trusts (1865, L. R. 1 Eq. 247), turning on the old theory of the indissolubility of any English marriage by a foreign tribunal; Bush's case (1870, L. R. 6 Ch. App. 246), and Chappell's case (1871, ib. 902), both as to the approval or rejection of transfers by directors, and Hoxt. *v.* Gill (1872, 7. Ch. 699), the reservation of minerals. In 1871 Jessel was raised to the solicitor-generalship, and held this office till Nov., 1873, when he succeeded Lord Romilly as master of the rolls. While he was Solicitor-General, his income is said to have been £25,000 a year. But this of course included his official salary and fees and — subject to these important deductions — is much less than many other law-officers have made, and even in the gross it falls far short of what some counsel, without any official title or remuneration, have annually reaped from English litigations. Sir Henry Hawkins is said to have made £50,000 a year prior to his elevation to the Bench, and according to the gossips of the Temple, his clerk owned a box at the opera and drove a carriage and pair in the Park. It was at this period in Jessel's forensic career that he had his celebrated rencontre with Cockburn. The story is differently told, even by eye-witnesses, and the real facts are by no means easy to elicit. Jessel was arguing before Cockburn and Martin *in banc*. Martin said — with reference to some argument — "I don't understand what you are talking about." Jessel caught up the observation and contemptuously said, "Of course your lordship doesn't understand." Thereupon Cockburn drew himself together and said, "The Court *understands* its powers, Mr. Solicitor." According to one narrative the incident stopped at this point. Jessel accepted the rebuke and profited by it. According to an-

other Jessel persisted and silenced "the Chief." Sir George Jessel remained on the Bench till the 7th of March, 1883, four days before his death, and built up for himself a unique judicial reputation. He was not a "complete" judge in the sense in which we should apply the term to Cairns. His mental fibre was coarse-grained, and he lacked the cultivated imagination which is an essential element to judicial supremacy. But in swiftness and sureness of intuition, in tenacity of memory, in healthy superiority to mere precedent, and in masterful grasp of facts he presented a combination of qualities to be found in no other equity judge in this century. To Mr. Willard's able review of Jessel's decisions one instance may be added, Day *v.* Brownrigg (1878, L. R. 10 Ch. v. 294). The plaintiffs all agreed in their statement of claim that their house had been called Ashford Lodge for sixty years, and the adjoining house belonging to the defendant had been called "Ashford Villa" for forty years, and that the defendant had recently altered its name to that of the plaintiff's house. They alleged that this act had caused them great inconvenience and annoyance, and had materially diminished the value of their property, and claimed an injunction to restrain its continuance. It was held by the Court of appeal, overruling the decision of Vice-Chancellor Malins, that the alleged act of the defendant in calling his house by the name of Ashford Lodge was not a violation of any legal right of the plaintiffs, and there being no allegation of malicious intention a demurrer to the statement of claim was allowed. The Master of the Rolls said: "the plaintiffs are quite at liberty to change the name of their estate. If they think proper they may call their house "Ashford House," or "Ashford Hall," or "Ashford Castle," if they please, or they may call it "Old Ashford Lodge," or "The Original Ashford Lodge," or anything else they like, but to say that they have a right to use that name to the exclusion of all other of Her Majesty's subjects, is admitted to be novel. No authority has been produced for it, and I can see no good reason for the allegation that such a right has so existed from time immemorial and is part of the customary or common law of the land." Jessel's unbounded confidence in his own judgment and comparative ignorance of history led him into a rather serious error in the Orr-Ewing case of 1885, (L. R. 10, App. Cas. pp. 473, note, 521, 533). He seized hold of an observation made in the course of the argument in the Court of Appeal, that Scotland is "a foreign country, a foreign jurisdiction," and denounced it as "quite erroneous." As every one who has studied Scotch history is aware, it is the statement of the Master of the Rolls to which the terms "quite erroneous" are in this case applicable; and the Lord President of the Court of Session (Inglis) was not long in pointing this out to him.



LORD JUSTICE LINDLEY.

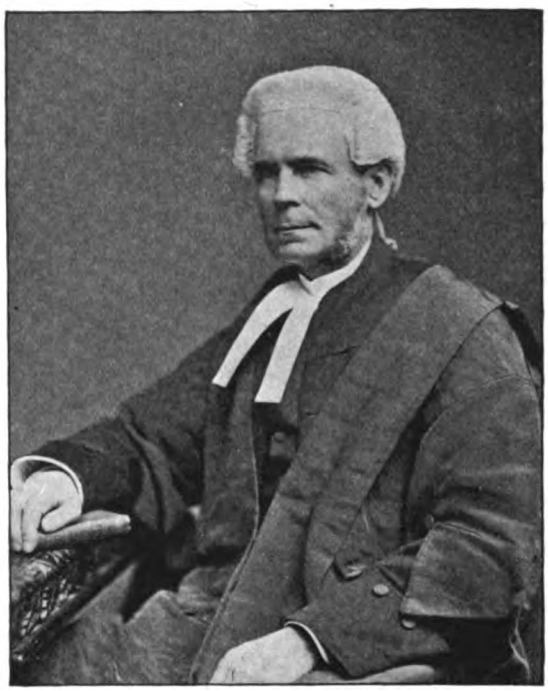
LORD ESHER.

William Baliol Brett, Lord Esher, has been a typical instance of the identity which may exist between physical and mental power. The son of the Rev. Joseph George Brett of Ranelagh, Chelsea, he was born in 1815, and educated first at Westminster School and afterwards at Caius College, Cambridge, where he graduated as B. A. in 1840 and M. A. a few years later, and exhibited prowess as a rower which is one of the most cherished memories of his College at this day. He was called to the Bar of Lincoln's Inn in 1846, and joined the Northern Circuit where he distinguished himself so highly as a mercantile and admiralty lawyer that he was able to take "silk" in 1860 and to enter upon the political career to which every lawyer looks forward. At first fortune did not crown his efforts. He was defeated in his attack, as conservative candidate, on Rochdale, first by Mr. Cobden — of Free Trade and Corn-Law Repeal immortality — and afterwards by Mr. T. B. Potter. But in 1886 Mr. Brett was returned for Helston in Cornwall. In August, 1868 he was raised to the solictor-generalship and the honor of knighthood, and soon afterwards, partly in recognition of the henchman's service he did in Parliament in connection with the passing of the Registration and Corrupt Practices Act, 1868, but far more as a tribute to his great legal abilities he was appointed a Justice of the Court of Common Pleas. In 1876 he was raised to the Court of Appeal and in 1883 — on the advice of Mr. Gladstone, long his political opponent — he became Master of the Rolls in succession to Sir George Jessel. When Lord Salisbury accepted the premiership in 1885, it was universally expected that Lord Esher — who had been raised to the peerage on his appointment as Master of the Rolls — would be made Chancellor, and he is said to have been congratulated in Lincoln's Inn Hall on the honor that was supposed to be awaiting him. But Sir Hardinge Gifford had the prior claim, and he ascended the woolsack as Baron Halsbury. The Master of the Rolls could ill have been spared to the Court of Appeal. He has been for the last ten years the great apostle of judicial common sense. He has been the idol of solicitors, for his judgments were always couched in language which they could thoroughly comprehend, and yet in robustness of intellect and breadth of view, and at the same time in legal acumen, Lord Esher has not been surpassed by many of his contemporaries. His decisions were delivered in a style of running comment which was apt to conceal at times his strong sense and great intellectual ability. In point of courageous independence of precedent Lord Esher stands second to Sir George Jessel among the lawyers of this generation. His judgment in the Imperial Loan Co. *v.* Stone (1892, 8 Times, L. R. 408) is a fine illustration of this quality. The plaintiffs sued to recover the balance due upon a promissory note signed by the defendant as surety. The defendant pleaded that when he signed the note he was — as the plaintiffs well knew — of unsound mind and incapable of understanding what he was doing. The action was tried before Mr. Justice Denman and a jury. The jury found that the defendant was not of sane mind but could not agree as to whether or not the plaintiffs were aware of the fact. Thereupon Mr. Justice Denman entered judgment for the defendant being of opinion that the onus lay upon the plaintiffs, to show that they did not know the defendant to be of unsound mind. This judgment was however reversed by the Court of Appeal, and Lord Esher said, "If one went through all the cases and endeavored to point out the grounds on which they rest, one would get into a maze. *The time has come when this Court must lay down the rule.* In my opinion the result of the cases is this. When a person enters into a contract and afterwards alleges that he was insane at the time, and that he did not know

what he was doing, and proves that this was so by the law of England, that contract is as binding upon him in every respect, whether executed or executory as if he were sane, unless he can prove that at the time he made the contract, the plaintiff knew that he was insane, and so insane as not to know what he was doing."

LORDS JUSTICES.

The lords justices are now the ordinary judges of the Court of Appeal. They formerly constituted together with the Lord Chancellor and the Master of the Rolls, the Court of Appeal in Chancery, whose jurisdiction the Court of Appeal now enjoys. The lords justices have also an important jurisdiction in lunacy. By the common law the crown has, in virtue of its prerogative, the care and custody of the persons and estates of those who from defective understanding are not capable of taking care of themselves. But although the sovereign was theoretically capable of exercising his jurisdiction in lunacy at his own instance, this right was never exercised until an inquisition or inquiry into the alleged lunacy had been held; and the royal authority was delegated under the sign manual, usually but not necessarily, to the Lord Chancellor. It is now, as we have said, exercised (Judicature Acts, 1873–75) by the lords justices of the Court of Appeal and any other judge of the High Court whom Her Majesty may entrust under the sign manual with the care and custody of the estates of lunatics.



LORD JUSTICE KAY.

LORD JUSTICE KNIGHT BRUCE.

James Lewis Knight Bruce was descended from an old Shropshire family and was born at Barnstable in 1791. His father was Mr. John Knight of Llanblethian in Glamorganshire. His mother was a daughter of the ancient house of Bruce, of Kennet, (Foss's *Judges*, p. 134). Down to 1837 he bore his father's name, but in that year, on the occasion of his eldest brother assuming the surname of Bruce, on succeeding to an estate, he added, by license, that of his mother (ib. 135). Educated at Exeter College, Oxford, Knight Bruce joined Lincoln's Inn as a student, in 1812. Five years later he was called to the bar and went the Welsh circuit, where his knowledge of the Welsh tongue made him a power with native juries. But it was not in *nisi prius* work after all that his great strength lay. Equity was his forte, and his success in the Court of Chancery was so rapid that twelve years after his "call" he was able to take silk. In 1841 he was knighted and raised to one of the two vice-chancellorships which were then created for the relief of the Lord Chancellor's Court. In October, 1851, he became a lord justice of appeal in chancery and held this office until October, 1866,

when he resigned. In the following month Lord Justice Knight Bruce died. The typical chancery barrister or judge is supposed to be a person of mouldy tastes, black-letter knowledge and profound ignorance of human nature and instincts. To this popular type, however, Knight Bruce at least did not conform. Both at the bar and on the bench he displayed a degree of wit, humor, strength of will and judgment, and warm human sympathy which made him a being very different from the "Jones, Queen's Counsel," whom *Punch* has made us all familiar with, as the beau-ideal of an equity lawyer. Knight Bruce's best judgments are models of classical English as well as good law. The curious may consult: Walter *v.* Selfe (4 de G. & Sm. 315); Prince Albert *v.* Strange (2 de G. & Sm. 652), where the defendant proposed to exhibit in a public gallery private etchings taken by Queen Victoria and the Prince for their own amusement and of course without their consent; and Thomas *v.* Roberts (3 D. & Sm. 758), "the Agapemone case." In ex-parte Banks (2 de G. M. & G. 937), Knight Bruce described a litigation over a plumber's bill in the following vigorous terms: "Upon a matter that if the parties had not good sense enough to settle it for themselves, some respectable neighbor would probably, upon application, have adjusted for them in an hour, began the career of cost and heat and hatred, of reproach, scandal and misery, in which they are now engaged, and which neither this day nor this year will, I fear, see the end, and which seems to exemplify an old English saying that "the mother of mischief is no bigger than a midget's wing."

LORD JUSTICE TURNER.

George James Turner, the son of a clergyman, at Great Yarmouth, was born in 1798, and was educated at the Charterhouse and at Pembroke College, Cambridge, where he graduated as a wrangler, and was afterwards elected to a fellowship. Joining the bar of Lincoln's Inn in 1821, he read in the chambers of Mr. Pepys, afterwards Lord Coffenham, and after nineteen years of assiduous and successful work as a junior, became one of Her Majesty's Queen's Counsel. His greatest forensic success was as counsel for Mr. Gorham in the great "baptismal regeneration" case which was the cause of Manning's secession to the Church of Rome. After a brief period (1848–51) of Parliamentary life as member for Coventry, he was raised to the bench as one of the vice-chancellors, and knighted. In 1853 he succeeded Lord Cranworth as a Lord Justice of Appeal, and sat with Knight Bruce till 1866. He died on July 9, 1867. He was as skillful a lawyer as his colleague, but lacked his robustness of character. Taken together they constituted an ideal tribunal.

We must take the remaining members of the Court of Appeal who call for notice very briefly. Sir Edward Fry retired from the bench about two years ago. The son of a manufacturer at Bristol, he was born in November, 1827, and educated at University College, London, where he carried off very high honors in classics and physiology. Fry was called to the bar of Lincoln's Inn in 1854, and speedily acquired a large chancery practice. In 1869 he took silk. In 1873 he was made a justice of the chancery division and knighted. Ten years later, when Lord Esher was made Master of the Rolls, he succeeded him as a Lord Justice of Appeal. Sir Edward Fry is a Quaker. He is the author of a text-book on Specific Performance, which is, and deserves to be, a classic, and he was one of the greatest technical masters of equity jurisprudence in the present generation. Sir Henry Cotton was born in 1821, educated at Eton and at Oxford, where he defeated the late Lord Coleridge in one memorable competition, was called to the bar of Lincoln's Inn in 1844, became a Queen's Counsel twenty years later, and was

raised direct to the Court of Appeal in 1877, with the usual honor of knighthood. Cotton died in 1892. He was a man of the same intellectual type as Fry, but was more suave and deferential in manner than his brother lord justice. Sir Edward Ebenezer Kay was born in 1822 and educated at Trinity College, Cambridge. He was called to the bar of Lincoln's Inn in 1847, reported the decision of Vice Chancellor Wood, and ultimately fought his way into a sufficient practice to justify him in taking silk in 1866. In 1881 he became a knight and a justice of the chancery division. Eleven years later he succeeded Sir Henry Cotton as a Lord Justice of Appeal. His knowledge of equity case-law is unique and he has a considerable aversion to solicitors. The gossips of the bar attribute this characteristic to the fact that at an early period of his own career Sir Edward Kay had some difficulty in recovering his fees. Sir Nathaniel Lindley is the only son of the well known professor of botany at University College, London. He was born in 1828 and was called to the bar in 1850. Twelve years later he was made a Queen's Counsel. In 1875 he was raised to a puisne judgeship of the Common Pleas, and knighted. But his *forte* was chancery, and since he was promoted to the Court of Appeal in 1881 his chief judicial work has been equitable. Had Lord Justice Lindley been a politician he would have been Lord Chancellor. He is one of the fairest, most liberal-minded and most legislative — if the expression can be pardoned — judges that have sat on the bench in our time. His treatises on company and partnership law are fit for law universal. Sir Henry Charles Lopes is the third son of Sir Ralph Lopes, Mariston, Devonshire. He was born in 1828, was educated at Winchester College and Baliol College, Oxford, was called to the bar in 1852, took silk in 1869, and was knighted and raised to a judgeship of the Queen's Bench division in 1876. Contrary to expectation he made a model puisne judge and was rewarded by promotion to the Court of Appeal in 1886. He is not a great lawyer, but is eminently patient, fair-minded and practical. Occasionally he does excellent duty at first-instance work in the probate, divorce and admiralty division.

LEX.

EXTERRITORIALITY OF ORIENTALS IN ENGLAND.

THAT the Oriental use of the privilege of exterritoriality is extensive and peculiar is a fact of which London citizens are becoming increasingly aware. The privilege of exemption from the jurisdiction of English courts has been tested by actual experience for only thirteen or fourteen years, as far as the bulk of our Eastern visitors are concerned: the Chinese Embassy being established in 1878. Before that date, the fiction — consecrated in England by the statute of Queen Anne — that foreigners attached to an embassy were exempt from the local jurisdiction, was dying a natural death, owing to the fact that few European ambassadors felt called upon to claim the exemption: wisely preferring, instead, to keep out of embarrassing situations which might lead to legal dispute. But now, with the oblique light shed upon it by the Oriental mind, exterritoriality is rapidly becoming a license to seduce, a charter to kill if not to murder, and a monopoly to commit suicide without the inconveniences of a coroner's inquiry in prospect, besides furnishing a protection for the more everyday pastime of incurring debts and refusing to pay. The Chinese and Japanese Embassies have developed with perturbing facility into a veritable Alsatia, wherein the law applicable to common Englishmen may be contemned.

A very flagrant instance of exterritoriality *in pessimis* occurred some months ago. A servant of the Japanese minister seduced an unhappy English girl, and then refused to support her child, or, indeed, to acknowledge in any way the jurisdiction of English courts to adjudicate on his conduct. The general public was surprised in a passing way about the baseness to which diplomatic privilege could be turned. That surprise was not shared by lawyers, who are obliged to have a longer memory for cases, and so have been led to catch the perspective of the Oriental tendency.

The view of our Eastern visitors appears to be that perfect license to do what they like, free from legal consequences, would be conferred in pure waste, and perhaps would become atrophied from want of exercise, if it were not made use of. Accordingly, the Chinese delegates, who condescended in 1878 to come to London in the interests of the Middle Kingdom, have managed, in the brief space which has elapsed, to exclude the coroner twice. The latter troublesome barbarian wanted to decide on the causes of two violent deaths, one, that of a child, occurring within the precincts of the Chinese functionaries' house, the other, alleged to be a case of suicide, occurring outside the sacred enclosure.

Another illustration of the strange uses of the privilege possible to the Asiatic, is furnished by the remarkable case of the "Sultan" of Johore. This Malay chief, on whom the British Government had not then conferred the title of "Sultan," came to London in 1885, to enter into an agreement with the Foreign Office as to his territory near the Straits Settlements. The not very important negotiation was concluded on December 11, 1885; and in reward for placing the supervision over his local affairs in the hands of the British Government, the chief was to be supplied with various things, including coinage from the Straits Settlements, and the title of Sultan. Meanwhile, during the arrangement of these details, he beguiled his hours of leisure by assuming an English name, and entering into intimate relations with an English woman. When recently sued in an English court, he im-

peached the jurisdiction, and claimed exterritoriality as a foreign "sovereign." The Court of Appeal had to allow this preposterous contention, as an English statute makes the certificate of the Foreign Office that the potentate is a "sovereign" conclusive in the courts. It is conceivable that German jurists would feel thankful for the creation of a similar beneficent agency for the interpretation of "sovereignty;" but to the ordinary mind a *reductio ad absurdum* like that furnished in the Johore case seems rather an argument against the present statute, and against entrusting to a non-legal official like a Secretary of State a matter properly for judicial decision. Even in the face of the statute, the court would have been within its right in holding the privilege of exterritoriality waived by the conduct of the defendant. This precise point about the exterritoriality of the "Sultan" of Johore has been repeatedly before the British Court of the Straits Settlement. That court, being much nearer to the territory of the potentate, had no difficulty whatever in deciding on the "sovereignty" contention in a precisely contrary way. It seems, in fact, to be a hereditary device of Sultans of Johore to incur liabilities, sometimes on bills of exchange, and then to plead exterritoriality; but in the Straits Settlements the pleasing fiction is brushed aside.

Another case, though in connection with a minor matter, deserves notice. The executor of the late Turkish ambassador, Musmurus Pasha, sued for the recovery of bonds admitted to be the property of the Ambassador, and tried to prevent the defendants from raising a counter-claim for £3,000, due as far back as 1873. The court, in its decision of the 22d November, found for the defendants, holding that the exterritoriality of the Ambassador having prevented his being sued in England, also prevented the Statute of Limitations from running against the defendants. The inconvenience arising from the fiction in this case was apparent; the defendants' claim could not be decided during twenty years, although the Ambassador was in England the whole period.

The time seems rapidly approaching when some international agreement on the subject will become inevitable. The drift of opinion among leading writers on international law is setting steadily in that direction, and the tendency will be rendered irresistible by the increasing number of instances of abuse of exterritoriality by the Oriental additions to the ranks of diplomacy.

Writers of the Italian school of international Law have for many years past advocated the abolition of the privilege of exterritoriality, root and branch. Jurists, such as Esperson and Fiore in Italy, Laurent in Belgium, Pintheiro-Ferreira in France, maintain that the privilege is really an antiquated survival from a radically different state of society. When judges were removable in in England and the Continent at the pleasure of the Crown, it was reasonable enough that ambassadors should not be subject to a legal process which might very probably be used to hamper them in the discharge of their functions. Again, there is much truth in Esperson's ascription of the exorbitant extent of the privilege to "le orgogliose pretese dei sovrani per diritto divino." Not merely the despot, but his servant, and his servant's servant, were above the law.

The original utility of the privilege has, in fact, been greatly diminished, if not altogether superseded, by change in the position of the tribunals, and in the policy of executives, as well as in the general conditions of European society. Some change seems required, if not in the way of abolition, at least of modification of the extent of the privilege. Laurent sums up the question: "Sans doute, l'ambassadeur doit être libre; mais faut-il pour cela qu'il soit hors de la loi et audessus de la loi? Pour être libre, il n'est point nécessaire qu'il puisse contrac-

ter des debtes sans les payer, qu'il puisse assassiner et adultérer à son aise."

Even those who uphold the privilege of exterritoriality admit that it should be formally abolished as regards domestic servants. Vercamer points out that the extension of the privilege to servants really originated in the jurisdiction which the ambassador formerly exercised over his domestics; when necessarily any aggrieved person had a prompt remedy by appeal to the ambassador's jurisdiction. It is on record that Sully, the French ambassador in London in 1603, tried for murder one of his domestics, and on conviction gave him up to the local authorities. English courts have, however, long assumed jurisdiction over domestics of an embassy in criminal cases. There is no valid reason why they should not in civil suits also. Apart from that, it is unanimously held by all recent authorities that it is the ambassador's duty to surrender the delinquent domestic on requisition, and to allow the local courts to do justice.

It is also to be remembered that the extent to which the privilege is pushed at the present day, especially by our Asiatic visitors, is not merely unsustained by any settled practice under international law, and denounced by modern authorities, but has some tolerably ancient precedents against it. In 1772, under the *ancien régime*, the Baron von Wrech, a German envoy who contracted debts in Paris, was refused his passport until his master, the Landgrave of Hesse-Cassel, had promised to pay his debts. The memoire on this subject of the Duc d'Aiguillon, minister of Louis XV, given in Marten's "Causes Célèbres," is an admirable example of the common sense way of regarding such questions, and may be recommended to the attention of the Foreign Office.

When, in this age of general international conventions, a conference is held on exterritoriality, the least to be hoped is that the privilege may be abolished in regard to all persons other than purely political officials. It should under no circumstances be held applicable to domestics. Even political officials should be held to waive their privilege if they voluntarily enter into commercial transactions, and especially if they incur legal obligations through seduction, or other quasi criminal acts. The right to investigate into all cases of violent death should not be withheld from local authorities.

The case of Oriental embassies, as has been shown, stands by itself. The exceeding extent of the modern privilege of exterritoriality arises from the fact that Europeans have not abused it. There is no such basis of experience in the case of the Oriental embassies. Any experience there is points unmistakably to the probability of great inconveniences from according to our Asiatic visitors the historic privileges of ambassadors of the community of Europe.

M. J. F.

LONDON LEGAL LETTER.

LONDON, July 6, 1895.

THE line which divides the barrister from the solicitor in the English practice is so shadowy in some respects, although so distinct in others, that it is hardly to be wondered at that confusion exists on the subject in America. In fact there are a good many professional men in England who would be puzzled to know where the function of the solicitor stops and the practice of the barrister begins. An American who was recently called to the bar desired to retain a copy of a letter on private and personal business, which, therefore, he had taken pains to write in copying ink. He handed it, with a letter-press copying book, to the clerk of his chambers. The latter understood that a copy was required, but he failed to see what the copying book had to do with it. At last when it dawned upon him, he said with much disdain: "I am sorry, sir, but there is no copying press in the Temple. Solicitors take letter-press copies of their letters, but barristers have their opinions written out in fair hand." In other words, the clerk plainly intimated that Barristers had no connection with business, that was an affair of Solicitors only. He was, in the main, correct. Solicitors do what in America is known as "chamber work." They see the client, and act for him, in every possible way, performing services in this respect which an American lawyer would never dream of consenting to do, and charging therefor fees of "six-and-eight pence" and "thirteen-and-four pence" and other small sums which would be too trivial to figure on the books of your lawyers, as well as larger and more imposing amounts. And now, of recent years, they are encroaching upon the preserves of the barrister to an extent which is most alarming to the latter. They may appear as advocates in the County Courts and before referees, masters and judges in chambers. In the County Courts they don a gown and wear bans at the neck, and, but for the absence of the wig, would pass in appearance for Barristers. In almost every respect except in high court work, they are taking the places of those who are popularly spoken of as belonging to the "upper branch" of the profession. But the barrister has exclusively the right of audience in the higher courts.

In addition to this he is called upon by the solicitors to "settle" the pleadings, that is to say, to draft them; and to pass upon all the formalities in a case which is the subject-matter of litigation up to the point where issue is joined. He is also "instructed" to give an opinion upon evidence and such technical questions of law as may arise. This he is supposed to do only upon a "brief" submitted to him by a solicitor. But, fortunately for him, and as a set-off to the encroachments upon his functions by the solicitor, he is now beginning to see the lay client directly, and not solely, as heretofore, through the intervention of the solicitor. When Sir Richard Webster was Attorney-General some time ago, and, therefore, the leader of the bar and the custodian of its prerogatives, he decided that a barrister might advise a layman in all matters which were not in litigation or likely to result immediately in litigation. It cannot be said in truth that in consequence of this clients are tumbling over each other in their mad eagerness to get access to the sacred precincts of a barrister's chambers; but it is true that more and more, each year, consultations are being held with those who seek legal advice, and opinions are being written without the intermediary of solicitors' briefs.

Just now both branches of the profession are agitated over matters which affect them most closely. The Lord Chancellor has brought in a bill to create the office of legal trustee. At present there is no such office. Trustees act independently of all control, and are only answerable, in case of breach of trusts, to their *cestui que trust*, who must apply to the Chancery Courts for relief. Most of the trustees are solicitors, and all of them serve without compensation.

The idea of fees or commissions is abhorrent to the English Courts, and they are never allowed. It is sometimes the case that when solicitors are appointed the instrument creating the trust provides that they shall be allowed to charge for such work as they may professionally perform, but otherwise even such services receive no compensation. Notwithstanding this rule the solicitors make money out of trusts and trustees. A trustee is not simply the holder of a legal title or the administrator of a fund. He is a family friend and confidant, a representative of a deceased father, or the grantor of a marriage settlement. He sympathizes with the beneficiary of the trust — but he takes no step without consulting the solicitor, and the solicitor permits no consultation without entering up a charge for it. An aggrieved party stated in one of the newspapers a few days ago that the appointment of an additional trustee of his estate, although there was no opposition, and the proceedings were of the friendliest character, had cost a little over eighty pounds! In other words, nearly four hundred dollars had been expended in "consultations," "conferences," "visits," "instructions," and the "fair copying" of formal documents. It is feared that if an official trustee is appointed he will not allow these charges and in consequence there will be so much the less business to do. The argument in favor of the official trustee is based upon the fact that he will be an officer of the Court and that he will be obliged to give a bond and will be compelled to report at stated intervals to the Court the result of his transactions. It is urged that the irresponsibility of trustees under the present system encourages malversations and misappropriations of moneys. The other day five solicitors were struck off the rolls for wrongdoing. Lord Halsbury, now again the Lord Chancellor, says that no less than seventy-seven solicitors were disqualified during his last administration

as Lord Chancellor, and that in his opinion the number of breaches by trustees which never come to light is enormous.

On the other hand it is claimed that, as there are more than fifteen thousand solicitors on the rolls, the proportion of those who are dishonest to the entire number is infinitesimally small. Where the matter would have ended cannot be safely predicted, but it will be hung off for a while, as the recent change in government will suspend legislation on the subject for some time to come. The matter which has interested the other branch of the profession, the bar, concerns its domestic or internal management. A large majority of the barristers, particularly the younger members, are desirous of forming an organization for the purpose of directing, controlling and governing their own affairs; and to this end a General Council of the Bar was formed. But it cannot get on without funds, and the barristers who before being called are obliged to pay large sums to the already wealthy bodies which are known as the Inns of Court, naturally object to put their hands in their pockets to provide these funds. There are four inns of court — The Middle Temple, The Inner Temple, Lincoln's Inn and Gray's Inn. Conjointly they have a revenue approximating $500,000 a year. Their affairs are administered by a board of governors or managers or trustees called "benchers." They make no report of their income or their expenditures. Of course they are men of integrity and high character, and no one questions the honesty of the administration of the funds they handle. There is simply the feeling that they might do more to advance the interests and the professional success of the men for whom they administer the big trust. They have offered to subscribe something towards the Bar Council, but the amount is small, and the conditions which accompany the offer render it almost impossible of acceptance. However there is a general desire for peace and compromise, and the difficulty may be solved. If so I will have great pleasure in telling you later on in what manner a revolution or strike of the largest professional trades union the world has ever seen, has been accomplished, and what results have been attained.

STUFF GOWN.

The Lawyer's Easy Chair.

. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

NOVELS AS LEGAL AUTHORITY. — It is tolerably well understood that Mr. Howells is anxious to suppress the vogue of the Waverley Novels in order to make an opening for his own. Mr. Howells has undertaken a serious task. He will find much difficulty in persuading people to accept "The Lady of the Aroostook" for "The Heart of Mid-Lothian," or "Silas Lapham" for "Old Mortality," or "A Modern Instance" for "A Legend of Montrose." It is extremely doubtful that any of Mr. Howells' tales will ever be cited by a grave legal author of the first rank to elucidate the history of legal customs. Mr. Maine, in "Early Law and Custom," twice pays Sir Walter Scott that tribute. To illustrate the fact that the early English kings made "progresses," by which they united the administration of justice with a prudent living at the expense of their lieges, he cites "Kenilworth," with its description of Queen Elizabeth at that stately seat. (He shows that King John was so little discouraged by his enforced granting of the Great Charter, that he kept right on "progressing" with the greatest industry.) So also, to illustrate the landholder's enforcement of tribute from his tenants, he cites "The Bride of Lammermoor," observing: —

> "But perhaps fiction is even more instructive on the point than history. Turn to the 'Bride of Lammermoor,' and gather from it the opinion which the feudal tenants of the Lord of Ravenswood had of the raids of Caleb Balderstone on Woloshope — extend this to a whole population and understand that a legion of Caleb Balderstone overran France — and one may be able to bring home to oneself the view which the French peasantry took of the institutions under which they lived."

Sir Henry does mention one American in this work — the late Professor Hammond, of whose preface to Sanders' edition of Justinian's Institutes he says that it contains "much the best defense I have seen of the classical distribution of the law" into the law of persons, of things, and of actions. Such a compliment reminds one of what Thackeray said of Gibbon's praise of Fielding — it is like having your name inscribed on the dome of St. Peter's.

THE CURFEW. — A good deal of harmless criticism has been aimed from the newspapers at the recent statute of Minnesota commanding that young persons shall not be allowed in the streets after a certain hour in the evening — nine o'clock, we believe — unless attended by some adult person. We are not informed of the precise wording of the act, but this is the substance. It has been decried as tyrannical and puritanical, and likened to the blue laws of Connecticut. It seems to this Chair a very sensible piece of police regulation. The license that children have to walk the streets at night is a dangerous and unnecessary one. They are much safer at home. They ought to be able to get all the out-door exercise and recreation they need in the daytime and early evening. The darkness and the moonlight are not essential to their proper education, nor to their happiness. If they need to be out late, let them have sponsor or guardian to take care of and answer for them. If the cigarette laws are defensible, much more is this. Indeed it is a much less offensive interference with personal liberty. So let curfew ring, in spite of the railing of the smart-Aleck newspaper writers.

FRIENDS. — It seems that one of William Penn's descendants has been at law with the city of Easton, Penn. The great Quaker deeded to that community a site for a court-house. Why a peaceable and law-shunning Quaker should have done this, we cannot imagine, any more than we could imagine why he should have deeded them a site for an armory; but he did. Many years ago the court-house was torn down, and the site was converted into a public park, and it is reported that the court has held that this worked a reverter of the land. Probably William would not have insisted on his rights in the premises, but the modern Friend has always united thrift with piety. He has always kept himself informed "how calicoes go at the India House." (See Charles Lamb's "Imperfect Sympathies.") Just now the Quaker-delphians have hoisted a huge and hideous effigy of Penn up to the top of the lofty tower of their grand City Hall. It would have been much more

appropriate to place it on the steps, like the statue of Washington in Wall Street. But it seems a fulfilling of the scripture, "he that abaseth himself shall be exalted," and doubtless the spirit of the good Friend is regarding his exaltation with a contented and cherubic smile. It is quite remarkable how much allowance the law has made for Quakers, and might repay a special investigation. They seem to form an exception to Darwin's law of the struggle for existence and the survival of the fittest. The law lets them affirm because they stand on the scriptural injunction, "swear not at all," and it lets them marry themselves after their own sweet will even in States that do not otherwise recognize common-law marriages. We have sometimes wondered what the law would say if they had asserted a conscientious belief in bigamy or robbery, or anything else forbidden. No doubt most of our women-readers occasionally sigh for the prevalence of the she-Quaker gown, kerchief and close bonnet, which style is *so* becoming to everybody and entails so little trouble and heart-burning.

DANCING. — It is but a step from poesy to dancing. It seems to this chair that the Supreme Court of Missouri does not put a correct estimate on dancing, when it holds that it is libellous to accuse an institution of learning, in print, of teaching the art of dancing. This is what that learned Court has done in the case of St. James Military Academy *v.* Gaiser, 28 S. W. Rep. 851. It seems that a number of clergymen of Macon, Missouri, assembled themselves together and resolved that the academy in question, because it "fostered the practice of dancing, which is antagonistic to the teaching of our churches and homes," and "hurtful to the moral and spiritual well-being of all engaging in it," and because the academy obstinately refused to discontinue it, although thereunto requested by said clergymen, was "harmful to the moral and religious interests of our community," and that they recommended "the members of our churches and all friends of religion and good morals that they absent themselves from and discourage and discountenance in every way all receptions and other gatherings at the academy as long as dancing is allowed in the building." The Court holds that this publication constituted a cause of action for libel, but leave it to a jury to say whether it was justified on the ground that dancing was immoral. It seems to us that the charge is not libellous, because it does not accuse the academy of promoting anything immoral. Would it be libellous, for example, for the proprietors of the academy to publish that the churches presided over by these clergymen should be avoided, so long as the clergy thereof combed their hair behind their ears and sang through their noses? Or suppose the clergy had denounced the academicians for teaching the lascivious angles of geometry, or unfolding the unholy mysteries of algebra, or encouraging the contemplation of the deleterious principles of geology, would that have been libellous? Is not the one charge as ridiculous and manifestly baseless as the other? To justify the court's decision it must be conceded that to accuse an academy of teaching, or permitting dancing has the natural tendency to bring it into odium, unpopularity, or contempt. This can hardly be true. The world has moved considerably since "The Waltz" was so vehemently denounced by the pious and saintly Lord Byron. It is now recalled that David danced before the Lord, that Hatton danced himself into the Lord Chancellorship before Queen Elizabeth, and that dancing is taught at the government's expense, or at all events publicly favored, at West Point.

BROKEN-DOWN ANIMALS. — Those of our profession who own broken-down horses or dogs will be glad to learn that in that finely endowed institution, the University of Pennsylvania, provision has been humanely made for such unfortunates. This we learn from an address at the late commencement of that university, by Horace Howard Furness, the admirable Shakespearian scholar, who conveys the information in the following words: —

"We see a Veterinary Building, with its long row of pathetic hospital stalls — I say 'pathetic,' because in them stand the patient, disabled bread-winners of many and many a poor household, to which, by the best skill of this beneficent institution, they are restored, when possible, sound and ready for renewed gain-giving toil; behind this long low building we see the pretty, cottage-like Hospital with its piazzas and verandahs, where, for that most faithful friend of man, the dog, every canine comfort is provided in his ailments, and where physic is gently administered, and not brutally *thrown* to him as Macbeth prescribes. (But what else could we expect from that wicked tyrant? Ah, what profound lessons Shakespeare teaches! In that tragedy he shows us that when once a man has entered on the downward path by murdering his king, he goes from bad to worse until at last he will not scruple to recommend that physic be *thrown* to dogs! We always administer it at the veterinary gently, with a spoon — and plenty of it.)"

In our mind's eye we see our learned friend portrayed, like that other Shakespearian scholar, George Steevens, with his dog sitting on its haunches with a big collar around its neck, and we hear him exclaim with Richard, "A horse, a horse! my kingdom for a horse!" All the hack-horses in Philadelphia will probably volunteer to walk behind him to his last resting-place.

SCHOOL TEACHERS USING TOBACCO. — An outcry was raised by some of the newspapers in the State of New York, against a proposed bill to prohibit the employment of public school teachers who use tobacco. This might seem at first thought to be a singular and unwarrantable intermeddling with the personal habits of teachers, but there is a peculiar ground on which it can be justified in that State. There is a law on the statute-book that when physiology is taught in the public schools, the effect of narcotics and intoxicants on the human body shall be explained, in the text-books employed and by oral inculcation. In view of that law the present measure would seem not out of keeping. It would be rather absurd for a pedagogue, while telling the children to beware of tobacco, to take a chew or squirt his tobacco-laden saliva into a neighboring cuspidor, or light up his pipe or cigar at recess or on leaving the school-house at the close of the day. Example in a teacher's person is fully as strong as inculcation, and when it is inconsistent with it, the latter must suffer.

NOTES OF CASES.

CARRIER — ARREST OF PASSENGER BY SERVANT. — In Central R. Co. *v.* Brewer (Maryland Court of Appeals), 27 L. R. A. 63, it was held that the superintendent of a street-railway company has no implied authority to cause the arrest of a passenger for placing in the fare-box a counterfeit coin in payment of fare, so as to make the company liable for false imprisonment in case of such arrest without proof of precedent authority or subsequent ratification of his act. This was grounded on Carter *v.* Howe Machine Co. 51 Md. 290; 34 Am. Rep. 311. The Court cited: Roe *v.* Birkenhead etc. R. Co. 7 Exch. 36; Eastern Co. R. Co. *v.* Broom, 6 Exch. 314; Mali *v.* Lord, 39 N. Y. 381; 100 Am. Dec. 448 *v.* Mobile & G. R. Co. 15 Fed. Rep. 199; Bank of New South Wales *v.* Owston, 48 L. J. P. C. 25; Danby *v.* Beardsley, 43 L. T. N. S. 603; Edwards *v.* London & N. W. R. Co. L. R. 5 C. P. 445; Allen *v.* London & S. W. R. Co. L. R. 6 Q. B. 65; Brokaw *v.* New Jersey R. & Transp. Co. 32 N. J. L. 328. 90. Am. Dec. 659; Vanderbilt *v.* Richmond Turnp. Co. 2 N. Y. 479; 51 Am. Dec. 315. To these may be added: Mulligan *v.* N. Y. etc. R. Co. 129 N. Y. 506; 25 Am. St. Rep. 539; 13 L. R. A. 791, (two judges dissenting); Charleston *v.* London etc. Co. Q. B. Div. Somewhat to the contrary, Palmieri *v.* Manhattan R. Co. 133 N. Y. 261; 28 Am. St. Rep. 362; 16 L. R. A. 136; Staples *v.* Schmid, 18 R. I. ———; 19 L. R. A. 824; Gillingham *v.* Ohio R. R. Co. 35 W. Va. 588; 29 Am. St. Rep. 827; 14 L. R. A. 798; not on account of difference in principle, but in circumstances showing authority or ratification. In Gabrielson *v.* Waydell, 135 N. Y. 1, 31 Am. St. Rep. 793, 17 L. R. A. 228, it was held (three judges dissenting) that an assault by a captain on a seaman, for refusing to work on account of illness, does not render the owner of the vessel liable.

ROBBING IN GOOD FAITH. — There is one principle of criminal law that has always seemed to us rather dangerous, and that is that where one has money or other chattels which another in good faith believes to be his, the latter may take them away secretly or openly and forcibly, without being deemed guilty of robbery or larceny. Thus taking under a claim of right, however unfounded, it is said is not larceny if the claim is made in good faith, and just now, in Utah (People *v.* Hughes, Utah, 39 Pac. Rep. 492), it was held that where a man, under a *bona fide* belief that money is his own, obtains it by threats, there is a trespass, but no robbery; and that it is competent for a defendant to testify that at the time of an alleged robbery he thought the money taken was his own, and that he had the right to take it. This was where the accused, a gambler, while intoxicated, had lost a large sum of money, unfairly, as he thought, and proceeded to reimburse himself, with the aid of a revolver, from the table and person of the saloon-keeper. The Court said: —

"The rule governing this class of cases seems to be well settled and thoroughly defined. In a note in 70 Am. Dec. 188 (State *v.* McCune), where a number of authorities are collected, this proposition is laid down; 'When the prisoner takes the property under a *bona fide* impression that the property belongs to him, he commits no robbery, for there is no *animus furandi* (Long *v.* State, 12 Ga. 293; Brown *v.* State, 28 Ark. 126, where the taking was in the presence of others, as was the case at bar.) Again, it is held that when a creditor compels the payment of his debt by the use of violence, he is not guilty of robbery, for there is no *animus furandi* (State *v.* Hollyway, 41 Iowa, 200). In the Iowa case, Miller, C. J., says: 'In robbery, as in larceny, it is essential that the taking of the goods be *animo furandi*. Unless the taking be with a felonious intent, it is not robbery. If a man, under a *bona fide* belief that the property is his own, obtain it by menaces, there is a trespass, but no robbery. Though the defendant take the goods with violence, or by putting in fear, yet, if he do so under a *bona fide* claim, it is no robbery, for the reason that the felonious intent is wanting.' 'In all cases of this kind, the question whether the act is done with a felonious intent is one of fact for the jury.'"

This seems like making a man a judge in his own case. What especially puzzles us is the idea that such a taking, although not robbery or larceny, is still a trespass. If defensible at all, it is only on the

ground that a man has a right to take his own when he finds it. If a man has stolen my horse, or has my stolen horse and will not give it up, I certainly may take it, if I can without force, without committing a trespass. Suppose a thief has stolen a pair of diamond earrings, and the owner discovers them (or thinks he does) in the ears of a lady who has bought them in good faith, who is walking on the street, and he snatches them from her ears, or with a pistol compels her to surrender them. If this is not robbery, why is it any offense whatever? But however much this doctrine of taking one's own by force appeals to the uncultivated sense of right, it is rather dangerous. A man may very easily kill his debtor in the process of collecting his debt in good faith. In the principal case of the gambler, the facts appeal very strongly to a court, because the prisoner probably had no adequate civil remedy; but the evident answer is that he did not deserve any. He was breaking the law in gambling (at least we suppose so), and could not reasonably invoke its protection. Suppose he had killed the monte man in the struggle; would he not have been guilty at least of manslaughter?

MISTAKE OF LAW. — In a recent article, under this heading, in the "New Jersey Law Journal," it seems to be assumed that no relief can be obtained from a mistake of law, disconnected from fraud, citing the case of Wintermute *v.* Snyder, 3 N. J. Eq. 489, and observing: "In New York, neither on the law nor equity side of the court can relief be obtained from a mistake of law. Vanderbeck *v.* Rochester, 122 N. Y. 285, is a good case on the subject." That case hardly warrants that conclusion. It simply decided that a voluntary payment of an assessment, made under a mistake of law, and not induced by any fraud or improper conduct on the part of the payee, cannot be recalled. The law on the subject is thus laid down in Browne on Parol Evidence, section 44: —

"Equity will generally relieve either party against a mutual mistake of law affecting the written expression of their agreement, but not against a unilateral mistake of law unless the mistake was brought about by or known to the other party; and not against a mutual or a unilateral mistake respecting the general law on the subject of their agreement."

In Adsit *v.* Adsit, 2 Johns. Ch. 448, Kent thought that a widow's acceptance of a legacy in lieu of dower, under the mistaken impression that by the terms of the will an acceptance waived her dower, would not estop her from claiming dower. So in Evan's Appeal, 51 Conn. 435. Mr. Pomeroy treats the topic learnedly in 2 Eq. Jur. §§ 845, 846, 849. The New York doctrine is admirably explained by Earl, Com's, in Pitcher *v.* Hennessey, 48 N. Y. 415, which we think supports Mr. Browne's rule, and it also finds clear support in Dinwiddie *v.* Self, 145 Illinois, 290; Lee *v.* Percival, 85 Iowa, 639; Benson *v.* Markoe, 37 Minn. 30; 5 Am. St. Rep. 816; Parker *v.* Parker, 88 Ala. 362; 16 Am. St. Rep. 62; Griffith *v.* Townley, 69 Mo. 13; 33 Am. Rep. 476; March *v.* McNair, 48 Hun. 117; Park Bros. & Co., Limited, *v.* Blodgett & Clapp Co., 64 Conn. 28; Goode and Riley, 153 Mass. 585. The writer in the "New Jersey Law Journal" admits that the law is different in England and in some of the States in the case of mutual mistake of law. The subject is rather difficult, and not free from obscurity, and affords a field for development of the law and the adoption of a more reasonable and practical rule than the idea that every citizen is presumed to know the law, when not only does no lay citizen know it, but no lawyer and no judge knows it.

SUNDAY — HUNTING ON. — In Gross *v.* Miller, Iowa Supreme Court, 26 L. R. A 605, it was held that the mere fact that both parties were violating the Sunday law, by hunting on that day, will not prevent one of them from recovering from the other for injuries caused by the negligent discharge of a revolver by the other. The opinion gives a very convenient summary of the law on this somewhat vexed question. The decision is unquestionably in harmony with the great preponderance of authority. The Court refer to the distinction raised in the Massachusetts cases between an action by one joint violator against another and an action by one violator against a person who is not violating the Sunday law, allowing a recovery in the latter and denying it in the former case, and characterize it as "a doctrine abhorrent to our enlightened civilization, and fit only to be administered in the dark ages." In respect to the theory of contributing cause, the Court say: "We cannot see, upon principle, why the mere act of violating such a law should in any case be held a contributing cause to the injury, if one follows. If the boys had not gone to the woods, the accident would not have happened; and the same is true if they had not been in existence." . . . "It could not have been reasonably anticipated that going out hunting on Sunday would result in plaintiff's being shot. It was at most a possible, and not a probable, result of the violation of the law." And the Court cite with approval Judge Cooley's dictum, from his work on Torts: "The principle is, that to deprive a party of redress because of his own illegal conduct, the illegality must have contributed to the injury." Mr. Pollock says of the Massachusetts cases on this question: "They are not generally considered good law." (Torts, ch. 4 [13]).

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THE GREEN BAG.

"INCOME TAX" BUSINESS.

Editor "Green Bag."

SIR:— Your "Disgusted Layman" is immensely mired by the wisdom lawyers are shooting off about one side or the other of the latest decision of the U. S. Supreme Court on the income tax. Of course as long as it is only polemics between lawyer and lawyer, the layman needn't care, but as he's the subject of the matter, and is the final gainer or loser, according to what *is* the constitution and what isn't, he thinks that the lawyers ought to talk so that he can understand. Now whether there is a difference as to "directness" between a tax on land and on income derived from land, is mighty hazy to a layman, and a "Disgusted Layman" suspects that there's some "Common Law" at the bottom of that, otherwise it wouldn't be so deep and incomprehensible. But the funny thing to a layman is that not a lawyer considers the matter in the light of the original deal on the matter. Wasn't it the fact that some States — the wealthy ones — wouldn't go into the Union unless there was a bargain that the poorer States shouldn't be able to tax them (the wealthy ones) out of sight? And wasn't that provision forbidding direct taxes, unless "accordin' to popilation," the bargain that made the Union possible? Then how in sense do taxes on whiskey and tobacco pass through? Aren't they "direct?" There is nothing about "in accordance to population" in those taxes. Of course times have changed, and if the Union was to fly to pieces now it is not likely that this "direct" bargain would be insisted on, but that don't seem to change the fact that there *was* a bargain, and, as a layman looks at it, "a bargain's a bargain" in constitution-making as well as in a horse deal. So after all, isn't the fact of the bargain of more force than fiddling round on fine distinctions? and, if the bargain is now a bad one, won't it be better to change it than finesse about delicate discriminations?

YOUR DISGUSTED LAYMAN.

FACETIÆ.

"Now, Mr. Breeves," asked the chairman of the investigating committee, "is it not true that you took the case of Jones *v.* Brown on a conditional fee — that you agreed to accept a part of the amount recovered as your fee?"

"It is not true, sir," replied the lawyer, "I stipulated that I should have all of it and $500 besides."

"Gentlemen," said the chairman, "I fail to see where Mr. Brown has been guilty of unprofessional conduct at all."

THE following anecdote is vouched for by the stenographer, and will be appreciated more especially by lawyers, says the Rochester "Post-Express":—

At a term of the Circuit Court, held not long since in one of the up-river counties, a horse case was on trial, and a well-known horseman was called as a witness.

Counsel: "Well, sir, you saw this horse?"

Witness: "Yes, sir, I"—

"What did you do?"

"I jest opened his mouth to find out his age, an I sez to him, sez I, 'Old feller, I guess you're purty good yet.'"

Opposing Counsel: "Stop! Your Honor, I object to any conversation carried on between this witness and the horse when the plaintiff was not present."

The objection was sustained.

A lawyer was cross-questioning a negro witness in one of the justice courts at Macon, Ga., the other day, and was getting along fairly well until he asked the witness what his occupation was. "I'se a carpenter, sah." "What kind of a carpenter?" "They calls me a jack-leg carpenter, sah." "What is a jack-leg carpenter?" "He is a carpenter who is not a first-class carpenter, sah." "Well explain fully what you understand a jack-leg carpenter to be," insisted the lawyer. "Boss, I declare I dunno how ter splain any 'mo 'cept to say hit am jes' the same difference twixt you an' er fust-class lawyer."

Col. Dellett of Claiborne represented the Mobile district in Congress as a whig in the middle of this century and was a well-known lawyer in Southern Alabama. While trying a case before Judge Lipscomb one time, the Colonel locked horns with the Judge. The rulings left little standing in court for the plaintiff, Dellett became angry and fiercely exclaimed that he had his remedy. "Well, what is your remedy," inquired Lipscomb. Rather meekly the Colonel said, "I will take a non-suit." The bar took in the situation, and "Dellett's remedy" became a proverb.

B— is a young attorney. He likes to think that he belongs to a learned profession. He was telling another lawyer the other day of an honest, old German who had come to his office for advice in regard to trouble with a landlord.

"Said I to him — Did you enter into a synallagmatic with this man?"

"Well, what did he say to that?"

"Will you believe it,—the d—d fool told me that he didn't know whether he had or not."

An old Irishman, a resident of Bangor, Me., was an important witness in a case, and both he and the lawyers who were trying to examine him were having a hard time of it. The witness was very slack and frowzy in his personal appearance, and this heightened the effect of his blarney immensely. He perspired freely under the ordeal of examination, and was evidently wishing it well over, when the door at the rear of the court-room opened, and in came a little, sharp-eyed, old Irishwoman. The witness saw her, and a look of intense relief spread over his features as he blurted out: "There! There is me old woman come in. Ax her some of your dum foolish questions. She kin take care o' ye."

LEGAL ANTIQUITIES.

It was said by Alexander ab Alexandro, a famous Neapolitan lawyer about 1500, that, when he saw it was impossible for advocates to support their clients against the power and favor of the great, it was to no purpose to take so much pains in studying the law, for the issue of suits depended, not on the justice of the cause, but on the favor and affection of a lazy and corrupt judge, whom the laws suppose to be a good and upright man.

NOTES.

British Fair-Play. — The late rowing *fiasco* of the Cornell boys on the Thames hardens us in our favorite vacation theory of the inutility of exercise and the safety of indolence. Those lads have probably shortened their lives by over-exercise. It also affords an opportunity for a few remarks on the British legend of "fair play." The Buffalo "News" very justly says: —

> "The Englishmen won the contest with the oars, but the second and vastly more important contest — that of supremacy in gentlemanliness and national honor — went to Cornell by much more than eight lengths."

The great trouble with the English is that they are insubordinate against the rulings of their own arbitrators. Their umpire said to our boys, "go," and they went, and he did not order them back. In larger affairs they show the same spirit — they railed against the *Alabama* award. Now will any Englishman pretend that if Cornell had refused to go, the English crew would have come back? They cannot make any American believe it. Such politeness they reserve for their own people. This peculiar notion of "fair play" was illustrated in the Heenan-Sayers fight, in which the spectators broke up the ring when they found their man was whipped. Even Thackeray claims the result as a British victory, in "Roundabout Papers." Sullivan encountered the same spirit in his fight with Mitchell. Corbett probably had very good reason for declining to fight in England. Henry Ward Beecher met the same spirit when he tried to address the mob at Liver-

pool. Carlyle showed it when he sneered at our war for the "niggers." The English nation has always evinced the same spirit in affairs of state. So Nelson was applauded to the echo for bombarding Copenhagen and burning the Danish fleet because Denmark would not surrender her ships to England as a hostage for neutrality in the Napoleonic war. So she crowded her commerce on China. So she pushed the French out of America and India and off the islands of the sea. So she burned our capitol, and impressed our seamen. So she made war upon the Boers. So she keeps Ireland under the foot of her landlords. So she would have interfered to our national destruction in the Civil War if she could have seen her way clear. The same encroaching and bullying spirit has always marked her counsellors and her people all through her history. She has built herself up by crushing out small and weak nations. She could never be magnanimous to her conquered enemies — she allowed Joan to be burnt, Ney to be shot, Napoleon to be banished. The St. James Gazette says that if Cornell had won the challenge cup there would probably have been serious unpleasantness. We can easily believe it. The cup never will be allowed to leave the island. England's motto is "get all we can and keep all we get." She sneers at Brother Jonathan for his love of the "almighty dollar," but John Bull loves a guinea more than five times as much. We have reserved our crowning proof of the legendary character of England's "fair play" — the one most interesting to lawyers — until the last. In England a man may have a divorce for his wife's adultery, but a woman cannot have a divorce for her husband's adultery unless it is accompanied by personal cruelty to her.

JUDGE ERSKINE. — The tribute of the Georgia bar to the memory of Judge Erskine could have been written by no other pen than that of Chief Justice Bleckley. It contains an accurate, honest and felicitous estimate of his powers and achievements, and is imbued with a tender and appreciative spirit that is peculiar to its author. Several things in it are new to us and striking. It is remarkable that the favorite historical hero of this Irishman should have been Oliver Cromwell. We here learn that the Judge was an expert in and a lover of the old science of special pleading. Also that like Lord Chancellor Eldon he "stole his wife." "Falstaff was a perpetual delight to him," says the memorialist; he might have added that he once wrote an essay to prove that the "fat knight" was no coward. Part of this was published in the Albany Law Journal years ago. Only one expression in the memorial grates on us — "wholesome vanity." Wholesome pride would better express the character of his self-respect, it seems to us, and convey a better idea of the beautiful old man's nature.

LITERARY NOTES.

THE July number of the NORTH AMERICAN REVIEW opens with a discussion of "Fenimore Cooper's Literary Offences," in which Mark Twain satirically protests against Cooper's poverty of invention and dullness of word-sense. The Hon. Frederic C. Penfield, U. S. Diplomatic Agent and Consul-General to Egypt, contributes a highly interesting paper on "Contemporary Egypt," showing the land of the Nile as it exists to-day, while in "Thirty-Years in the Grain Trade," Egerton R. Williams reviews the history of the grain trade in the United States for the last three decades. "How Free Silver would Affect Us," is ably explained by the Hon. Edward O. Leech, late director of the mint, who, writing from the gold standard point of view, considers free silver coinage would be a national disgrace as well as a national misfortune.

Two articles by Herbert Spencer are to be published in the July POPULAR SCIENCE MONTHLY. One is devoted to the "Dancer and Musician," in his series of "Professional Institutions; the other is an occasional article under the title "Mr. Balfour's Dialectics," in which he discusses some of the claims concerning things supernatural made in Balfour's Foundations of Belief. An article of especial interest to the legal profession, is "A Medical Study of the Jury System" by Dr. T. D. Crothers.

IN the July ARENA one of the features to attract attention is the symposium on "The Age of Consent," to which several well-known representatives of different states contribute. Among those who oppose any change in the present laws, regarding them as adequate and based upon physiological as well as sociological requirements are the Hon. C. H. Robinson of Iowa and the Hon. A. C. Tompkins of Kentucky.

THE editor of the REVIEW OF REVIEWS, in his record of "The Progress of the World" for the July number, comments on many matters of national and international moment — the recent cabinet changes following Secretary Gresham's death, the peculiar prominence of Mr. Carlisle in the leadership of his party, the present status of the silver question in politics, the duty of the United States toward Spain and Cuba, the progress of American universities, Russia's relations with China and Japan, the prospects of Pacific cable construction, the opening of the Kiel Canal, the progress of amateur sports in England and elsewhere, the recent Italian elections, the fall of Count Kalnoky, anti-Semitism in Vienna, British politics, the future of Chitral, the Armenian question and various other timely topics. This department of the REVIEW is illustrated by a score or more of portraits of the men and women of the day, together with maps and views.

BOOK NOTICES.

A TREATISE ON THE LAW OF REAL PROPERTY. By DARIUS H. PINGREY, LL.D. H. B. Parsons, Albany, N. Y. Two Volumes. Law Sheep. $12.00, *net.*

The fundamental principles of the law of real property are very fully expounded by Mr. Pingrey in this work, and the treatise compares favorably with the accepted standard works upon the subject. The author has endeavored to prepare a book equally serviceable to the practitioner and to the law-student, and in this respect he has been eminently successful. Over seventeen thousand cases are cited including the very latest decisions. The work deserves a careful examination, and will prove a valuable addition to any working library.

THE STATUTE RAILROAD LAWS OF NEW YORK. By GEORGE A. BENHAM of the Troy Bar. W. C. Little & Co., Albany, N. Y., 1895. One Volume. Law Sheep. $4.50.

This is a very convenient manual containing the general railroad laws of New York, and will be especially useful to New York practitioners. The general laws regarding taxation and receivers are also included as well as the Inter-State Commerce Act.

AMERICAN RAILROAD AND CORPORATION REPORTS. Vol. X. Edited and annotated by JOHN LEWIS. E. B. Myers & Co. Chicago, 1895. Law Sheep. $5.00 net.

This series of reports is almost indispensible to Corporation Lawyers. The selection of cases covers the most important decisions pertaining to railroads and corporations, and each case is accompanied by very full and valuable annotations. Two volumes are published each year.

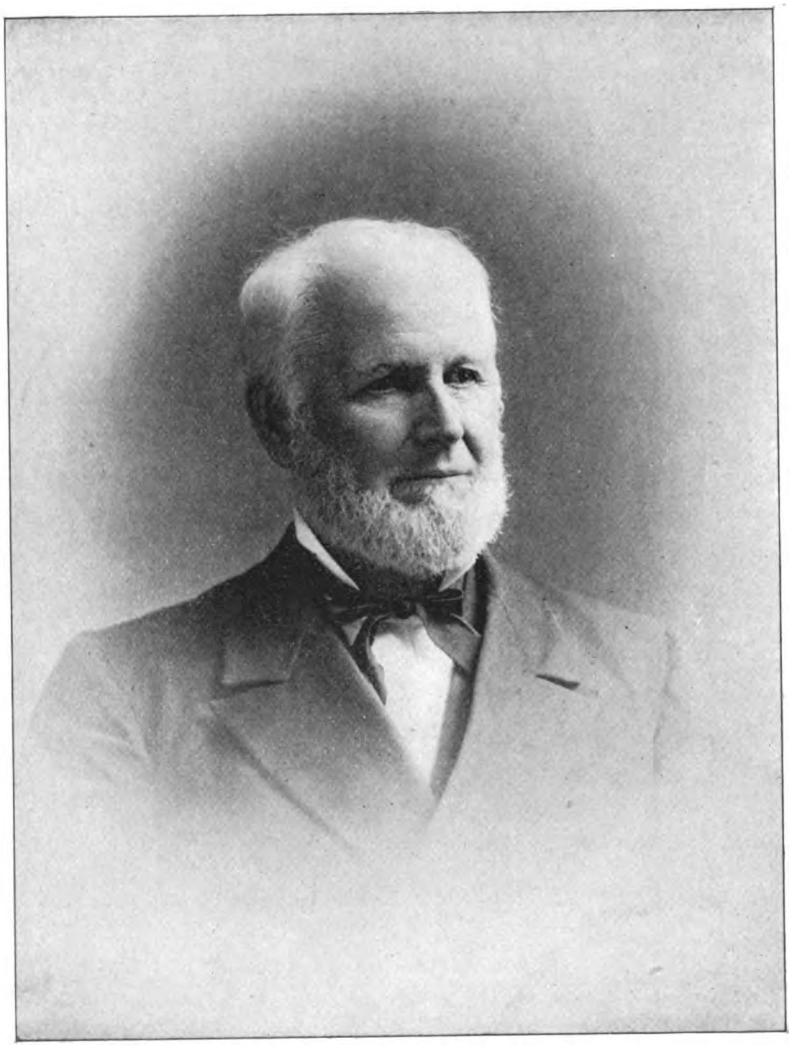
BOOKS RECEIVED.

HANDBOOK OF CRIMINAL PROCEDURE. By WM. L. CLARK, JR. West Publishing Co., St. Paul, Minn. $3.75.

A COMPLETE INDEXED DIGEST OF THE UNITED STATES SUPREME COURT REPORTS, VOLUME III. The Lawyers' Co-operative Publishing Co., Rochester, N. Y., 1895. Law Sheep. $6.00.

HISTORY OF THE LAW OF REAL PROPERTY IN NEW YORK. By ROBERT LUDLOW FOSTER. Baker, Voorhis & Co., 1895. $3.00, *net.*

THE BREHON LAWS. By LAURENCE GRINNELL. Charles Scribner's Sons. Cloth. $2.40.



John B. Minor

The Green Bag.

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JOHN BARBEE MINOR,

PROFESSOR OF COMMON AND STATUTE LAW, 1845–1895, UNIVERSITY OF VIRGINIA.

BY THOMAS J. MICHIE.

IN the early summer of the present year, the writer of this article, an alumnus of the University of Virginia, and an admiring pupil of John Barbee Minor, was visiting relatives in the typical Virginia college town of Charlottesville. The great event of the college world, and indeed of the town life, was then in progress — the finals, perhaps better known to Northern readers as the commencement. The chief feature of this celebration, and by far the most interesting to the great number of busy men of the world, lawyers, politicians and men of affairs, who have during the last fifty years, at one session or another sat under John B. Minor, was the unveiling of a bust of him by the distinguished Virginia artist Valentine, author of the fine recumbent figure of Lee at Lexington. The ceremony of unveiling took place in the public hall of the University, on Wednesday, June 12. The large hall was filled to overflowing. The veil was lifted by James B. Green, chairman of the Minor bust committee. Mr. Green is blind, and after a few appropriate remarks, as he lifted the veil he said: "Thou art unveiled to all but me; but a niche in my heart is filled by thee."

Mr. Thornton, chairman of the faculty of the University, then accepted the bust, on behalf of the visitors of the University, the faculty, alumni and students, and introduced as the orator of the day, the senior senator of Virginia, John W. Daniel. Mr. Daniel is well known to the legal profession as the author of "Daniel's Negotiable Instruments." Mr. Daniel's address was worthy of the occasion, and I will perhaps have an opportunity to quote from it in the course of this article. The bust was dedicated by the alumni of the Law School to the University, and has been placed in the library among other worthies of the institution, alumni, professors and students, — Poe, Cabell, Grady, Jefferson, etc.

The library is one of the chief features of the University, not so much as a valuable collection of books, though the collection is good, numbering upwards of fifty thousand volumes, and embracing the libraries of Jefferson, Madison, and Austin of Boston, but for its unique architectural features. It is situated at the top of the rotunda, the principal building of the University, and, as the name implies, is circular, commanding, from its many windows, a beautiful view, uninterrupted in every direction. Upon one side, in the distance, can be seen Monticello, the home of Jefferson; on the other the Ragged Mountains, the scene of Poe's tales; and in front the famous lawns of the University. The walls of the room itself are, as has been said, decorated with portraits of professors, students and benefactors of the college. In this room the bust of Mr. Minor will stand, a testimonial to future generations of students, of the love, affection and admiration borne by his disciples for their great teacher. In common with all those who have been so fortunate as to have benefited by the teach-

ings of this distinguished professor, the writer has always been an ardent admirer of the original of this representation. Upon this occasion he conceived the idea of writing a short sketch of Mr. Minor's life. Circumstances have prevented the fulfilment of this design until the present date (August). When undertaken he little anticipated that the sketch would become an obituary. Such however is the fact, Mr. Minor having died on Monday, July 29, 1895, after the completion of the longest and ablest career as a teacher of law known to Anglo-Saxon jurisprudence. The writer has been tempted to say, the *sad* fact, but why so? The man's course was complete, his memory is dear and living to a larger number than often falls to the lot of man, — his enemies are none. He is at rest, and why should his friends, among whom he counted every student that attended his school for fifty years, grieve for him? It is true that they must feel a personal loss, but they may console themselves by remembering the perfect life, which it remains for me to imperfectly sketch.

John Barbee Minor was the youngest son of Launcelot and Elizabeth Minor, and was born at his father's home, "Minor's Folly," in Louisa County, Virginia, on June 2, 1813. He obtained his early education at home and at a neighboring school, until delicate health in his seventeenth year compelled him to suspend his studies for a time, in order to lead a more active out-of-door life. He spent most of the next year on horseback, acting as collector for numerous country newspapers, riding from county to county, visiting the patrons of his clients. In the fall of 1830 he, with two older cousins, walked to Kenyon College, Ohio, where he studied for a year. Among his classmates was David Davis, afterwards a justice of the United States Supreme Court, and a United States senator. Another was Stanton, Lincoln's secretary of war. With both of these he maintained the friendship there formed for many years. At the close of the college session, he made a pedestrian tour alone, through New York and Ohio, visiting Niagara and all points of interest on his route, and observing particularly the people of those States, who at that time, before the days of railroads, differed more materially perhaps from the people of his native State than they now do. This experience, together with his year on horseback in the Virginia counties, undoubtedly gave him a much wider knowledge of man than that usually acquired by a student of his age, and in after years he profited by it as a lawyer and teacher. Upon his return he entered the University of Virginia as a student, where he remained until 1833, graduating in several academic schools and taking the degree of B.L. John A. G. Davis was professor of law at the University at that time, and about a year after graduating Mr. Minor married his sister.

Mr. Minor began the practice of law at Buchanan, Botetourt County, Virginia, but removed, in 1840, to Charlottesville, where he formed a partnership with his elder brother, who was afterwards Professor of Law at William and Mary College. Mr. Minor was an ardent advocate of the common-law system of pleading and could never discuss the code system with patience. I remember well his illustrating in class, the effect of a careful pleader upon the bar at large. He said that when he first went to Buchanan, the procedure in the courts was very loose, but by always insisting upon conformity with the strict rules of common law, in the cases in which he was engaged, he alone succeeded in reforming the entire procedure of that court, so that upon his departure it was said that the pleading in the courts of Buchanan was the best in the State. It is thought by many, that it is due to Mr. Minor's influence and the influence of his many students throughout the State that Virginia is not now numbered among the code States.

In the year 1845 Mr. Minor was elected Professor of Law at the University of Vir-

ginia, to succeed the Honorable H. St. George Tucker, former President of the Virginia Court of Appeals. For the first few years of his professorship, he had entire charge of the Law School. It was then divided, he becoming Professor of Common and Statute Law. Throughout the troublous years of 1861 to 1865 he again alone maintained the Law School of the University, against many difficulties. In 1866, he was again relieved from double duty, by the appointment of an additional professor. Since that time the school has steadily grown having now a faculty of four apart from the chair of Medical Jurisprudence, the maximum number of students being one hundred and fifty-one. In the vacation of 1870 Mr. Minor established a summer law-school, which he continued until his death. He began with a school of twenty, which steadily increased, attaining a maximum of one hundred and twenty-one. It will thus be seen that for the last twenty-five years of Mr. Minor's life, he allowed himself a vacation from teaching, of only one month a year, and during this time, he was constantly at work upon his great book. He might well say, as he frequently did, that he lived by work. The degree of LL.D. was conferred upon him by the Universities of Washington and Lee and Columbia. He always preferred, however, to be called simply "Mr. Minor," disliking even the designation of professor, which, he very truly said, has become the property of the bootblacks, tonsorial artists, patent medicine quacks, and dancing masters, to the exclusion of its true proprietors.

In praise of Mr. Minor as a teacher, it would be hard to say too much, and indeed no student of his will admit that it is possible. We do not allow that he has a superior, and since Kent, but one equal — Professor Dwight of Columbia, for whom Mr. Minor always had a sincere admiration. The most salient feature of Mr. Minor's teaching was his analytical method. Following the analysis of Blackstone, founded on Hale, he carried it to an extent never dreamed of by either. The advantages of this system of instruction can only be comprehended by those who benefited by it, and I will have more to say of it when I come to speak of Mr. Minor's book, "The Institutes." As a lecturer Mr. Minor was unsurpassed. His manner was entirely conversational — rarely raising his voice. His habit was to question the members of his class on the subject of his lectures, requiring from them the most concise replies, — usually no more than "Yes" or "No.' Indeed it was not well to be too fluent, as he had no patience with a parrot-like repetition of the text-book. Upon these replies he built up his lectures, amplifying, explaining and illustrating in his inimitable manner. Perhaps the best proof of his merit as a lecturer is, that no student of his ever returned to the University without going to hear "old John B." lecture, a compliment seldom paid to professors, I think.

Mr. Minor's influence with his students was very great. His personality was such that it could not fail to impress strongly any who knew him. This influence must have been indirectly of great service to his country, as he had numbered many public men among his students. Indeed, at the present time, at least two cabinet ministers, one Justice of the United States Supreme Court, both Senators from Virginia, together with many other senators, representatives and state and federal judges are counted among his graduates.

For the first thirty years of his work as a teacher, Mr. Minor was collecting material for his work on Common and Statute Law. For several years previous to 1873, synoptical notes of his lectures were lithographed for the benefit of his classes. In that year he published the first edition of the first and second volumes of his work under the style of "Minor's Institutes of Common and Statute Law." Their fourth edition ap-

peared in 1891 and 1892. In 1878 the first edition of the fourth volume was published, its third edition in 1893 in two parts. Owing to the exigencies of the class-room, the third volume was delayed until after the publication of the fourth, appearing first in an incomplete form, but it has now appeared in 1895, bound in two books as a "second edition, revised and corrected." The whole work covers nearly five thousand pages. Of its value to the practitioner I can do no better than quote Senator Daniel, himself an active practitioner and legal author. He says: "It cannot be surpassed as a *vade mecum* of the law. It is like a statue — solid, compact, clear cut. Jefferson lamented that Matthew Bacon adopted the alphabetical, or dictionary system, in his abridgement. How a scientific mind like his would have delighted in a scientific work like this! Adopting the system of analysis which was delineated by Hale and amplified by Blackstone, he built upon it those expositions of common law principles, and statutory alterations, which reveal the law to the mind's eye as a topographical map of a country cast in bas-relief. It has been said of Francis Bacon's Essays, that of all compositions they contained the most matter in the fewest words. Minor's Institutes contain more law in fewer words that any work with which I am acquainted. The Roman Forum had an empty place lacking Cato's figure; and a lawyer's library without this work has one also." The analytical arrangement of the work I have often heard commented upon as very repellent to lawyers not familiar with Mr. Minor's method of teaching, but this is its chief merit as a text-book for the student. In other classes at the law-school of the University we used at the same time such standard works as Greenleaf on Evidence, Smith's Mercantile Law, Adams' Equity, Vattel's Law of Nations, etc., and though I would be the last to decry the merits of these great works, I must say, and every student of the University will agree with me, that as an aid to the student they are far inferior to Minor's Institutes. This perhaps appears undue partiality, but nevertheless I cannot modify the statement an iota. The book was written for students and is the result of fifty years' experience as a professor of law, and upon its value as a text-book for students I think it must rest its chief claim for immortality.

I would like to say something of Mr. Minor's personal charm, of his family life and the respect and affection borne for him by all who knew him, but this article has already exceeded the space allowed it by THE GREEN BAG, and I can only refer to the resolutions of the numerous bar associations, of the faculty and visitors of the University, and to the cloud of testimonials which have appeared in the periodicals and newspaper since his death, bearing witness to the regard in which he was held.

LONDON POLICE COURTS.

By William Holloway, B.A.,

Author of "Leaves from a Lawyer's Diary," etc., etc.

IN this article I shall endeavor to describe the system administered by our London stipendiary magistrates. Many persons, especially those of the criminal class, who have come to regard them as an inevitable evil, one of the vices of a constitution, calling loudly for reform, will be surprised to learn that they are comparatively a modern creation.

Until 1792 the police of the metropolis was administered by the Lord Mayor and twenty-six aldermen, sitting in rotation every forenoon at the Guildhall and Mansion House for the City; and at Bow Street by three magistrates sitting in rotation every day for Westminster and those parts of Middlesex, Surrey, Herts, Essex and Kent lying within the metropolis.

Old Bow Street Police Court was nearly opposite the present one, and close to Covent Garden, then, as now, one of the worst neighborhoods in London. Is it the irony of Fate or some economic law, that among the choicest flowers of our English gardens are found our rankest human weeds, that the howl of the midnight ruffian and the oath of the harlot are heard side by side with the strains of Mozart and the voice of Patti?

"Throughout a great part of the eighteenth century," says Sir James Stephen (History of the Criminal Law of England, I, 229-230), "the business of magistrates in that part of London which was not included in the City was carried on by magistrates who were paid almost entirely by fees. What the fees precisely were, and by what law their execution was justified, I am not able to say, nor is it worth while to inquire."

Townsend, a well-known Bow Street runner, who had been in the police since 1782, in giving evidence before a committee of the House of Commons in 1816, said: "At that time, before the Police Bill took place at all, it was a trading business; and there was Justice This and Justice That. Justice Welch in Litchfield was a great man in those days, and old Justice Hyde and Justice Girdler, and Justice Blackborough, a trading justice of Clerkenwell Green, and an old ironmonger. The plan used to be to issue out warrants and take up all the poor devils in the street, and then there was the bailing of them, two shillings four pence, which the magistrates had; and taking up one hundred girls, that would make, at two shillings four pence, eleven pounds, thirteen shillings and four pence. They sent none to gaol, the bailing them was much better."

"Look with thine ears: see how yond justice rails upon yond simple thief. Hark in thine ear! change places, and, handy-dandy, which is the justice, which the thief?"

The author of "Tom Jones," "that exquisite picture of human manners," thus describes his experience as a justice for Westminster: "By composing instead of inflaming the quarrels of porters and beggars (which, I blush to say, has not been usually practiced), and by refusing to take a shilling from a man who most undoubtedly would not have had another, I reduced an income of about five hundred pounds of the dirtiest money upon earth to little more than three hundred pounds, a considerable proportion of which remained with my clerk; and, indeed, if the whole had done so, as it ought, he would be but ill paid for sitting almost sixteen hours in the twenty-four in the most un-

wholesome as well as nauseous air in the universe, and which hath in his case corrupted a good constitution without contaminating his morals."

Five hundred pounds, I may state, is the salary which, with three exceptions, the Legislature has since assigned to the chief clerks of the metropolitan police courts. At Bow Street and Great Marlborough Street the salary is indefinite, and at West Ham it is eight hundred pounds.

Fielding adds: "A predecessor of mine used to boast that he made one thousand pounds a year in his office, but how he did this (if indeed he did it) is to me a secret. His clerk, now mine, told me I had more business than he had ever known there; I am sure I had as much as any man could do. The truth is, the fees are so very low, when any are due, that if a single justice of peace had business enough to employ twenty clerks, neither he nor they would get much by their labor. The public will not therefore think that I betray a secret when I inform them that I received from the government a yearly pension out of the public service money."

> "God moves in a mysterious way
> His wonders to perform."

Fate, which had condemned Fielding, like his contemporaries, Johnson and Goldsmith, to toil for the booksellers, ordained also that the hand which drew Sophia and Amelia should sign mittimuses for bleareyed Molls and Molly Segrims. But vex not his ghost, oh, let him pass!

> "Here lies poor Ned Purdon, from misery freed,
> Who long was a bookseller's hack;
> He led such a damnable life in this world,
> I don't think he'll wish to come back."

Fielding was succeeded as justice for Westminster by Saunders Welch, who, Boswell tells us, "established a regular office for the police of that great district, and discharged his important duties for many years faithfully and ably." He was the friend of Johnson, who, when Saunders Welch's health gave way, obtained for him through Chamier (Under-Secretary of State) leave of absence to go to Italy, and a promise that the pension of two hundred pounds a year should not be discontinued.

Johnson, who "had an eager and unceasing curiosity to know human life," told Boswell that "he had attended Mr. Welch in his office for a whole winter to hear the examinations of the prisoners, but that he found an almost uniform tenor of misfortune, wretchedness and profligacy."

In spite of one or two magistrates like Fielding and Welch, the state of the metropolis was so serious that 32 Geo. III. c. 53 was passed, establishing seven public offices: at Queen's Square, St. Margarets Westminster; Marlborough Street, Oxford Road (as Oxford Street was called then); Hatton Garden, Holborn; Worship Street, Finsbury Square; Lambeth Street, Whitechapel; High Street, Shoreditch; and Union Street, Southwark. Three magistrates, two clerks, and six constables were attached to each office. The fees were paid to a receiver, as they are now, and by him distributed among the different offices, none of them receiving more than two thousand pounds. The salary of the magistrates was four hundred pounds each, and no other Middlesex or Surrey justice was allowed to take any fee within their jurisdiction. Two of them are still remembered, Monias Leach and Patrick Colquhoun, author of a treatise on the Police of the Metropolis, which passed through seven editions in ten years, and of which the Select Committee of the House of Commons (1838) say: "The merit of being the first to point out the necessity and practicability of a system of preventive police upon an uniform and consistent plan, is due to Mr. Colquhoun."

Leach is described by his biographer in the Dictionary of National Biography (that most catholic work which embraces murderers in its fold) as "an able man," but it is added, "ill health made him irritable." The last

feature would scarcely distinguish him from many of his successors on the bench, but he is remembered as the editor of Hawkins' "Pleas of the Crown," and of numerous Reports.

It was while the court was in Hatton Garden that the father of the present Sir George Lewis, whose offices are still in Ely Place, laid the foundation of the business which Sergeant Ballantine describes with loving care, and to which he, Sergeant Parry, Mr. Montague Williams, and other members of the race of Chaffanbrass, owe their rather doubtful fame.

A singular thing about the Old Bailey, the final cause of the police courts, and which once shared with them the favors of a certain class of counsel more largely than now, is the blight which seems to fall upon its practitioners. Whether a legacy of death hangs round those grey walls, or that the shadows of a hundred years fall like a pall upon the living, the fact is unquestionable. Except parts of Erskine's closely reasoned, but rather turgid speech for Hardy, and Sergeant Shee's defence of Palmer — an admirable piece of reasoning and eloquence (the peroration is one of the most beautiful and pathetic passages in the language) — and neither Erskine nor Shee was an Old Bailey man, none of the speeches delivered there survive — can be quoted as literature.

> Omnes illacrimabiles
> Urgentur ignitique longa
> Nocte.

They are buried in

> "A gulf profound as that Serbonian bog
> Betwixt Damiata and Mount Casius old,
> Where armies whole have sunk . . . .
> . . . . . .
> A universe of death which God by curse
> Created, evil for evil only good,
> Where all life dies, death lives, and Nature breeds
> Perverse, all monstrous, all prodigious things."

Although the new police courts did much to relieve the mischief which led to their creation, grave evils remained. This was partly the fault of the criminal law — even now, as Sir Edward Fry called it, a thing of "threads and patches," but then still more defective. For instance, it was not an offense to receive cash, or bank-notes, or bills, knowing them to be stolen, as for that purpose they were not regarded as chattels. According to Colquhoun, there were upwards of three thousand receivers in the metropolis alone. The thefts, in small sums, from houses, shops, warehouses, etc., were something like seven hundred thousand pounds a year. An immense trade was done in counterfeit coin, two persons together being able to produce from two hundred to three hundred pounds of base silver coin in six days. As usual, the unfortunate attorney was the scapegoat. "No sooner," says Colquhoun, "does a magistrate commit a hackneyed thief, or receiver of stolen goods, a coiner or dealer in base money, or a criminal charged with any other fraud or offense punishable by law, than recourse is immediately had to some disreputable attorney, whose mind is made up and prepared to practice every trick and device which can defeat the mode of substantial justice."

Tindal might well speak of "Christ, our attorney, suffering for us."

The plunder from ships in the Thames alone was so enormous — nearly half a million a year — that in 1798 a marine office, with two magistrates, was established at Wapping New Stairs. At first it confined itself almost wholly to offenses committed on the river or connected with the stores in arsenals, but gradually its jurisdiction extended until it became the present Thames Police Court.

The glories of Ratcliff Highway have faded, but readers of De Quincey's immortal history of the murders of Mar and Williamson, can form an idea of what it was eighty years ago, when the largest ships discharged up stream, and the purlieus of the docks were "full of strange oaths," and the haunt of sailors of every race. Then, and until the advent of the large cargo steamers and short

voyages, the Thames was the busiest police court in London, and it was not uncommon to hear as many as sixty summonses in a single day for wages alone — often for considerable amounts.

Thirty or forty years ago it supported four solicitors, all making good incomes; now it provides a bare living for two gentlemen who, with the aid of the police, maintain a close preserve, from which trespassers are jealously excluded. Some years ago a friend of mine, an able man and an excellent lawyer, endeavored to establish himself in Arbour Square, but was boycotted so effectually (one of the two gentlemen remarking that he would sooner do a case for nothing than let it go to him) that he was obliged to abandon the attempt.

Another difficulty to which Colquhoun refers is the absence of any provision for backing warrants, but this was supplied by 2 and 3 Vic. c. 71; 11 and 12 Vic. c. 42; 11 and 12 Vic. c. 43, and 42 and 43 Vic. c. 49. These statutes, added to 10 Geo. IV. c. 44, placed our police upon its present footing. Part of their effect is to enable the Queen to establish thirteen police courts (in addition to Bow Street), and to appoint any number of magistrates up to twenty-seven; the chief magistrate with a salary of one thousand eight hundred pounds, the others one thousand five hundred pounds each. There are now fourteen courts, with Bow Street, but only twenty-six magistrates. "Magnum vectigal est parsimonia" is an old liberal doctrine, but when Mr. Asquith,[1] who is a scholar, recognizes that thrift is not parsimony, we may hope to see the end of a system which sends magistrates racing across country, from court to court, like the Jew in Beranger's ballad, "qu'un tourbillon toujours emporte," leaving complainants and defendants to curse the false economy of an undermanned bench.

The powers and duties of magistrates are derived in the first instance from the commission of the peace, which directs them to "keep the peace," and "to keep and cause to be kept" all statutes for the maintenance of the same, and to bind over or commit any person guilty of threats of assault or fire. In addition to this an ever increasing load, "tam immensus aliarum super alias acervaturum legum cumulus," both ministerial and judicial, is laid upon them by the babblers at St. Stephen's, upon whom, in a pious moment, the late Thomas Carlyle prayed that our "only general" might "live to turn the key."

In indictable cases the magistrate's duty is clear, to commit, if there is a prima facie case, although I have known so experienced a magistrate as Mr. Hannay tell a defendant that he had no doubt his intention was to defraud (which he had no right to say unless he meant to commit), and then dismiss the charge on the ground that no jury would convict.

One of the weakest parts of the system is the way in which depositions are taken. Statements are often put on the file which could never become evidence. Of course in indictable cases, such a thing can do little harm beyond burdening the depositions uselessly; but injustice is often caused by the omission of material facts. No means exist of compelling magistrates' clerks, many of whom, as Sir James Hannen said of the present Attorney-General, "sometimes seem to preside over the court," to make a note of anything which they may consider unimportant. The consequence is that any witness who may have made an inconvenient admission, and who finds that it is omitted from the depositions, to which he can have access at any time through his solicitor, "plucks up heart of grace" and repudiates it altogether.

I have no wish to attack magistrates' clerks. They are an industrious and underpaid body. One, Mr. Martin, joint author of "A Magisterial and Police Guide," is an accomplished lawyer. But it must not be

[1] This article was written in 1893.

forgotten that while a barrister, to become a clerk, must be of fourteen years' standing, although seven years are sufficient to qualify him for the bench, the post may be filled by a solicitor just admitted, and with no experience at all of criminal work.

With regard to witnesses, a great deal of nonsense has been talked about their treatment by counsel and solicitors. To hear the dithyrambs of the press one would think we had returned to the days of Peacham, "examined before torture, in torture, between torture and after torture." My own experience is that witnesses are quite able to take care of themselves.

There is one class, the police, of which I ought to say a word in conclusion. They have been attacked as if they had been born with a "double dose of original sin." My experience is that they are much as other men are. No doubt they are inclined to make rather ample drafts on the magisterial faith, which are, perhaps, honored a little too readily. Possibly magistrates feel that if they begin to doubt anything, they may end, like Gibbon, by believing nothing. Of course it is obvious that, by making a man one of a class, with his chance of promotion depending upon his reputation as a smart officer, as well as upon the good will of his comrades, you give him a direct interest in securing a conviction and in supporting others in doing so.

If I were asked for my advice, it would be that of Talleyrand, "Surtout pas trop de zèle."

EBENEZER ROCKWOOD HOAR.

By Darwin E. Ware.

ON conscience, as on rock New England's hills,
His life was built. With reason's inward sight
He saw, as though from a cold mountain height,
When the white day pure winter's radiance fills.
Hot with the wrath of justice, against ills
Wrought out of wrong he waged a fearless fight,
And stood unflinching for imperiled right,
Freedom and country, — one who greatly wills.
Sparkling his wit as beads of foaming wine,
But keen to pierce as pointed rapier blade;
Tender in heart, wise, cheerful to the end,
To Concord's soil as native as its vine,
There with most precious dust New England laid
The statesman, jurist, judge and steadfast friend.

Atlantic Monthly.

IMPRISONMENT FOR DEBT.

By Benjamin F. Washer.

"Behind him stalks
Another monster, not unlike himself,
Sullen of aspect, by the vulgar called
A catchpole, whose polluted hands the gods
With haste incredible and magic chains
Erst have endured. If he his ample palm
Should haply on ill-fated shoulder lay
Of debtor, strait his body, to the touch
Obsequious (as whilom knights were wont),
To some enchanted castle is conveyed,
Where gates impregnable and coercive chains
In durance strict detain him till, in form
Of money, Pallas sets the captive free."
— *Phillip's Splendid Shilling.*

WE, living in this country at the day when personal liberty has reached its highest culmination, and where every act — executive, judicial and legislative — is carefully and scrupulously weighed in the balance of individual freedom, can hardly appreciate or fully understand the real meaning and complete significance of incarceration for debt.

To layman and barrister imprisonment of this character is looked upon as one of the humors of modern legal proceedings. We have heard of wandering minstrels or stranded base-ballists languishing in "castle keep" on account of an unpaid obligation; we have witnessed a transient guest within our city taken into custody for a previously contracted hotel account or cigar bill, and have from experience in a representative character come to know the end — the insolvent debtor's oath and liberation.

But that this process was ever urged against citizens in all walks and stations of life; that every one who contracted a debt, or assumed a liability became amenable to a criminal prosecution in the event of default, and that nothing but a statement of an account unliquidated was necessary to a confinement in prison, and, perchance, death, seems to us as unlikely as it is repulsive. The principle at once impresses us as lacking in justice, as being deficient in equity, devoid of all morality and adverse to all policy.

Nothing that one can imagine could so completely wreck commercial credit or undermine financial transactions as to hold not only the property of an individual subject to his liabilities, but to give to a rapacious creditor the person of the debtor. It calls into the realm of the business world not only the commercial representative, it makes parties to contracts not only those who have entered into them, but it brings into those transactions the weeping wife, the hungry children and the sympathetic friends and relations of the one whom fortune has denied the ability to pay. By this pernicious system the unfortunate are condemned to further and more terrible misfortune and to the pangs and sufferings of poverty is added the sting of disgrace.

The doctrine of imprisonment for debt is fallacious in its every particular. Under what theory a man unable to meet a matured liability will be rendered capable of liquidating the same by being deprived of his freedom and facilities for work is more than modern intelligence can explain. The old lawyers and law makers sought to work out the problem through the medium of fraud. They claimed that he who assumed a monetary responsibility, and failed to meet the same, was guilty of perpetrating a fraud on his creditor. The case may have been wanting in all the elements of fraud. The motive may have been the purest, the intentions the most honest and fair, the efforts at payment the most strenuous and diligent, but if the final outcome was failure the transaction was fraudulent. What a technically perverted meaning! To-day fraud in some aspects merits and receives incarcera-

tion, but it is only where the elements of criminality exist, and every unfortunate debtor is not branded a felon.

The history of imprisonment for debt forms an interesting but revolting chapter in the book of the law which can hardly be employed to substantiate the eloquent Burke in his statement that law is "the collected reason of ages, combining the principle of eternal justice with the infinite variety of human concern."

The jurisprudence of Rome, of Greece, of England and even of America is blotted and stained with the pollution of its touch. In Greece, before the advent of Solon, arbitrary and absolute dominion over the life and liberty of a debtor was vested in the creditor. Refusal to pay meant condemnation to a life of the basest slavery. The creditor could take possession of his debtor's person, yoke him to the oxen of the field or compel him to perform the most menial of household duties. No account was ever asked of him. The food and raiment of the poor insolvent was left to the discretion of the creditor, and many felt the scourge of hunger and the pains of exposure as well as the indignation aroused by insulting wealth and arrogance.

In Rome, however, this debased practice developed with the greatest rapidity, and assumed the most alarming and cruel proportions. A Roman writer born about the first half of the second century of the Christian Era, in a compilation of facts, conditions and circumstances relating to the Roman Empire which he had observed or become familiar with through his stay at Attica or in Rome, gives the provision of the Twelve Tables in reference to incarceration for debt, or, as he terms it, "Legis actis per manus injectionem." He puts the following statements in the mouth of a character in one of his works: —

"If a magistrate decree judgment against a party for admitted money, the judgment debtor had thirty days in which to settle. At the expiration of this time he was again taken before the magistrate, who consigned his body to the keeping and control of the creditor. The delinquent was thereupon taken to the house of his creditor, and there confined in chains of not over fifteen pounds weight for sixty days, during which time he was forced to live at his own cost, or accept whatever the generosity of the creditor saw fit to allow him.

"When the sixty days had passed, the debtor was conveyed to the marketplace before the praetor, and his debts proclaimed for three consecutive days. If a vindex appeared for him, he was liberated. This intervener was a third person, who came forward, attacked the claim and judgment as invalid, and agreed to pay double the amount of the indebtedness if he should not prove it so.

"If no vindex presented himself, the person of the debtor was again placed in the custody of the creditor, who could dispose of him as a generous or cruel impulse might dictate. He could inflict on him the death penalty, or send him to a life of misery and bondage beyond the Tiber. In the event two or more creditors prosecuted their claim to judgment at the same time, like proceedings were had in all the cases, and the two reprieves bringing no settlement of the demands, the body of the debtor was divided amongst them according to the amounts of their respective demands."

If this account be true, the practice, for diabolicalness, finds no parallel in the history of the world. Men have, in the insanity engendered by intense religious enthusiasm, committed deeds of blood at which we shudder, but the barbarity of their acts becomes insignificant when compared to an officer of justice, calmly and in the performance of the duty imposed on him by the positive law of the land, condemning a man to be quartered, and the reeking parts to be delivered to the Shylocks who stood ready to receive their portion in return for a few pieces of silver.

Imprisonment for debt in England, besides being a depraved and deformed offspring of the English law, at the same time offers a striking example of judicial usurpation; of the courts taking unto themselves authority unwarranted by law, and asserting a power neither vested by statute nor sanctioned by policy. The power exercised was the result of the gradual encroachment upon the rights of the people by the judges of the past acting through the medium of misconstruction and misinterpretation of the law and aided by that most efficacious of processes — a legal fiction. It represents the power of precedent, good or bad, and of pernicious principles established by the judiciary, being finally sanctioned by legislative enactment.

Until the reign of Henry II, imprisonment for debt had no being in the English law. During the reign of that monarch the power of the barons asserted itself, and Parliament passed an act authorizing the feudal lords to imprison tenants for duties unperformed or taxes unpaid. Insulted by this display of Parliamentary favoritism, the merchants demanded that a like privilege be vested in them, under pain of deserting the government if their request was not granted. Such a claim so potently urged could not be disregarded, and the rights of the masses were again ignored to appease this comparatively small portion of the community.

The courts acting on these special grants of power, every case presented was construed with an intellect perverted by a desire of self aggrandizement and a conscience stunted by servile dependency. Any case prosecuted by a plaintiff of influence or prestige was held to come within the scope of the statute, which was given an interpretation liberal at times to the extent of being entirely ignored.

Parliament had not the temerity to so trample upon the rights of the individual, but the judiciary having blazed the way, the legislative function progressed another step in the direction of universal application of the rule authorizing imprisonment for debt, and therefore passed an act extending this method of enforcing satisfaction of claims to all obligations of debt (in its narrow common law meaning) and detinue. It was again the courts' time for action and, emboldened by the success of their former encroachment, they proceeded to apply the practice to all cases and controversies in which the remedy was sought. The various legal tribunals adopted different means of accomplishing the result. The King's Bench, exercising criminal jurisdiction, held that a debtor refusing to satisfy an obligation was a disturber of the peace and a violator of the intendment of the statute, and hence ordered his confinement.

The Court of Common Pleas came to the conclusion that the ordinary process of the court was insufficient to meet the exigencies of certain cases, and invented the bill of Middlesex and Latitat under which the debtor was first taken into custody, and the court, through this medium, secured the appearance and, subsequently, jurisdiction over the person of the party. The Court of Exchequer worked out the problem by resorting to sophistry of this character. The creditor was debtor to the king, and one refusing to meet liabilities accruing to the creditor rendered him less able to perform his obligations to the crown, and, as the dignity of the treasury had above all things to be upheld, the process of imprisonment was granted the creditor in order to coerce the payment of demands due him. The courts having thus developed the system in all its completeness and entirety, the legislature, during the reign of Henry VIII, feeling itself in a position to pass a general law providing for imprisonment for debt without incurring the righteous indignation and just condemnation of the people, gave to the action of the judiciary the sanction of parliamentary enactment. Since then public opinion in England has greatly modified the harshness of this remedy, but it still prevails in that coun-

try to an extent that reflects rather severely on its civilization and culture. Statistics show that during the past year no less than six thousand poor insolvents have been confined in prison for debts unpaid, ranging in amount from three shillings to twenty-five pounds.

In America, strange as the fact may appear, the practice also throve. The creditors, usually a wealthy and influential class in the community, favored the importation of the law from England. The legislatures of the various states as well as Congress vested the courts with power to employ the proceeding in the enforcement of a money demand. The punishment provided for was slight, but, mild as it was, it was taking liberty when property alone had been contracted for, and soon became obnoxious. The first blow struck at the iniquity was in the halls of Congress. In 1832 a measure was proposed in the Senate abolishing all imprisonment for debt under process of a federal court, and, be it said to the fame and glory of our national legislature, the bill was passed. Here the reform began. The debate and discussion that the measure engendered stimulated the various state legislatures to thought upon the subject. It aroused the people to the evils and injustice of the practice, and impressed upon all the necessity for a change in the law of the states governing the subject.

The masses of men, or the representatives of the masses are not often wilfully or knowingly unjust or despotic, and when the system of incarceration for debt was presented in its true aspect and the science and theory of the law made manifest, its abolition was inevitable. State after state either wiped the law from the statute book or modified it so materially that it could work no hardship. And to-day America has virtually thrown off this legal leech, which sucks the blood of the body corporate, and must eventually paralyze the community or nation that permits it to live and flourish.

A proposition of this character should be considered theoretically. To argue theory is often to explode a fallacy; to talk practice is apt to sanction error—the theory of imprisonment for debt is this: A having ample facilities of discovering B's present condition and future possibilities, advances him, on the faith of these, a sum of money. B by an unfortunate investment loses the money, or otherwise becomes unable to repay the sum borrowed. What is the natural conclusion? Simply this: A has entered into a transaction with his eyes open, being in no way compelled to lend B money, but, satisfied that B will liquidate the demand, supplied him with funds. Subsequent events develop the fact that he erred, and, like most errors in the business world, the result has been a pecuniary loss. To most sound-minded men this would seem reasonable and just, but the advocates of the principle say, "No, A has suffered a loss at B's hands; it is true through no intentional wrong of B, but yet B is liable to make good the amount." Therefore, as a consideration is a benefit to one or a disadvantage to the other, and as A cannot secure the benefit by reason of B's insolvency, therefore the other alternative of the proposition must be applied and B put under the decided disadvantage of deprivation of liberty and loss of reputation.

We must presume that this is the reasoning urged in behalf of the system, and it needs but be stated to be pronounced fallacious in its every particular.

OUR LINCOLN.

By Benoni-Benjamin.

THE voice of prophecy was his: *A crisis is at hand;*
A house divided 'gainst itself cannot divided stand;

One tendency must bind the parts to make the Union strong;
The conflict's irrepressible between the right and wrong.

Through mists that dimmed so many eyes how clearly he discerned
That every man has right to eat the bread his hand has earned.

When days were darkest, his the faith, so simple yet sublime,
That somehow God would lift the weight from all men in due time.

He led us onward step by step, slow too when we were slow,
But when we turned toward freedom's goal, struck freedom's grandest blow.

Back through the years fourscore and more he saw the fathers' plan —
A Nation whose chief corner-stone should be the Rights of Man.

And then he saw thick clouds and darkness cover all the land,
And heard the awful silence that presaged the storm at hand.

And when the war-god sped the lightning 'cross the southern sky,
He raised the fathers' flag above the fathers' house full high,

And to the Northlands blew a bugle-note so loud and clear,
That all the Northlands heard it and responded with one cheer.

They came by thousands at his call, the Nation's life to save,
By thousands, too, the last full measure of devotion gave.

And at his bidding, by the graves of our heroic slain,
We made the high resolve: *These dead shall not have died in vain;*

This Nation, under God, shall have of freedom a new birth;
Self government — the people's — shall not perish from the earth.

For years, how fondly did we hope, how frevently all pray,
That speedily the mighty scourge of war might pass away.

In vain our hope and prayer: *A great offence we must atone;*
God wills that nations too must reap the harvest they have sown;

All sunk must be the wealth piled up by unrequited toil;
For all the blood drawn with the lash our blood must drench the soil;

The judgments of the Lord are true, He's righteous in His wrath;
He gives no peace until the sword of justice hews the path.

Thus had our Lincoln pondered o'er the cause of all our woe,
When he with the occasion rose and struck the fateful blow.

With faith that right makes might, he felled disunion's upas-tree;—
In giving freedom to the slave, saved freedom for the free.

Thenceforth were we thrice armed; we had, though still beneath the rod,
The judgment of mankind and favor of Almighty God.

At Gettysburg the tide of Southern valor reached its height,
And spent its crimson surges 'gainst the rock of Northern might.

Again the Father of Waters went unvexed unto the coast;
And from Atlanta to the sea Old Glory led our host.

The dove of peace went forth once more above the waters dree;
At Appomattox found her quest beneath the apple-tree.

And then, a lasting peace assured — with malice toward none,
Nay more, with charity for all — our Lincoln's work was done.

And as he stood on Pisgah's mount and saw the whole land free,
Death came and crowned him with the crown of immortality.

The mystic chords of patriot love touched by *his* spirit hand,
The chorus of the Union swell all over this broad land.

From Plymouth Rock to Golden Gate, from lakelands to the bar,
We greet one flag with star for state, — free state for every star.

THE ENGLISH LAW COURTS.

IV.

THE CHANCERY DIVISION.

THE Chancery Division of the High Court of Justice is the legitimate descendant of that hoary sinner, the old Court of Chancery, whose misdeeds Dickens so graphically described in "Bleak House." A sketch of the origin and history of this venerable tribunal is a necessary prelude to an account of its offspring, and a series of brief biographies of the leading exponents of equity jurisprudence in England.

SIR THOMAS MORE.

The common law of England at a comparatively early stage in its history acquired the rigidity of a *jus strictum*. If the study of the civil law had been as prevalent and as thorough in this country as it was in France, Scotland and elsewhere, this defect would doubtless have been avoided or alleviated, by the adoption of the devices whereby the Roman law obviated the necessity for any distinction between common law and equity. But unhappily the Roman law was under a cloud in England just at the very time when the common law most needed its assistance. The pretensions of the Holy Roman See to exercise jurisdiction over the national church of England had made men intolerant of every form of Roman influence. And accordingly England's jurisprudence was left to work out its own salvation from the bonds of the common law. The difficulties against which it had to contend were very serious ones. The fixity of the principles of the common law was bad enough; but to this was added an inflexible, cumbrous procedure, failure to comply with which, or to fall within whose purview, was fatal to the most righteous claim. The evil, as we have hinted, manifested itself in two forms. Every species of civil wrong was assumed to come within a few particular classes, for each of which an appropriate writ or *breve* existed. A litigant might select the wrong *breve*; or the injury of which he complained might be one for which no *breve* existed. In either case he was liable to be left without redress. The former of these contingencies was ultimately met by the Common Law Procedure Act of 1852, under which it became unnecessary for a plaintiff to mention any form of action in his writ of summons. The latter was dealt with at a much earlier stage in English history, and the statute dealing with it holds an important place in the development of English equity jurisprudence. The statute in question, the *in consimili casu* — 13 Edward I, stat. 1, cap. 24, 11 — provided that "whensoever from henceforth it shall fortune in the

chancery" (from which by the way the original common law writs were issued), "that in one case a writ is found and in like case (*in consimili casu*) falling under like law and requiring like remedy none is found, the clerks in chancery shall agree in making the writ, or the plaintiff may adjourn it until the next parliament, and the cases in which the clerks cannot agree are to be written and referred by them unto the next parliament, and by agreement of men learned in the law a writ is to be made lest it should happen that the court should long time fail to minister justice unto complainant."

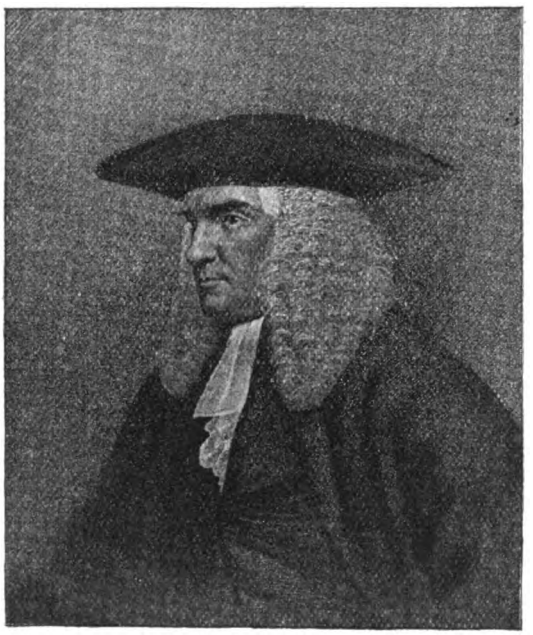
PHILIP, EARL OF HARDWICKE.

Here we have the beginning of a sort of equitable interference with the common law. But the statute *in consimile casu* proved abortive. In the first place the judges in many cases refused to recognize the writs issued by the clerks in chancery. In the second place, the multiplication of new forms of action was too rapid and too complex for the clerks in chancery to grapple with, accordingly the practice grew up among suitors of petitioning the sovereign in council for redress, where other relief could not be had. The sovereign, too deeply occupied with the high things of foreign policy to find time to overtake such petitions, referred them to their chancellors, and in the reign of Edward III (*ordinance of 22 Edward III*) the Court of Chancery was firmly established as a permanent jurisdiction, separate from the court of common law, and empowered to grant relief in cases where common law remedies were not available.

We cannot here enter into minute details as to the development of procedure in the old Court of Chancery. The original course was for a suitor to present his bill or petition to the chancellor, who perused it, and if he thought the case was one for extraordinary relief, a writ of *subpoena* was issued by his order in the king's name, calling upon the defendant to appear in chancery, answer the complaint and abide by the order of the court. In time a personal examination of the bill or petition by the chancellor was dispensed with, — the signature of counsel to it being accepted as a guarantee that the case was one in which the immediate issue of a writ of *subpoena* should be authorized. In 1852 a further change was introduced. The chancery jurisdiction act passed in that year superseded the writ of *subpoena* by the mere endorsement of the substance of the writ on a copy of the bill or petition served on the defendant. In this way the bill or petition became the first step or pleading in a chancery suit.

Under the Judicature Acts, 1873–75, law and equity were fused: it was provided that in every civil cause or matter, not particularly mentioned, they should be administered concurrently, and that where there was any conflict or variance between the rules of the two systems, the rules of equity should prevail, and the Court of Chancery was merged

in the Chancery Division. At the present time the Chancery Division has a practically *exclusive* jurisdiction over the following matters: (1) administrations; (2) the dissolution of partnerships and the taking of partnership and other accounts; (3) the redemption and foreclosure of mortgages; (4) the raising of portions and other charges on land; (5) the sale and distribution of the proceeds of property, subject to any lien or charge; (6) the execution of trusts, charitable and private; (7) the rectification, the setting aside, and the cancellation of deeds and other written instruments; (8) the specific performance of contracts between vendors and purchasers of real estate, including contracts for leases; (9) the partition or sale of real estate, and (10) the wardship of infants and the care of infants' estates.



LORD THURLOW.

The Chancery Division has now also, as we have seen, a concurrent jurisdiction with law, in all matters whatsoever, subject to the provisions of the judicature acts. Some accounts of the defects of the old Court of Chancery and of the working of the modern Chancery Division will be given incidentally in the course of the biographical sketches which we now proceed to attempt of a few of the leading Lord Chancellors, Vice-Chancellors, and Judges of these tribunals

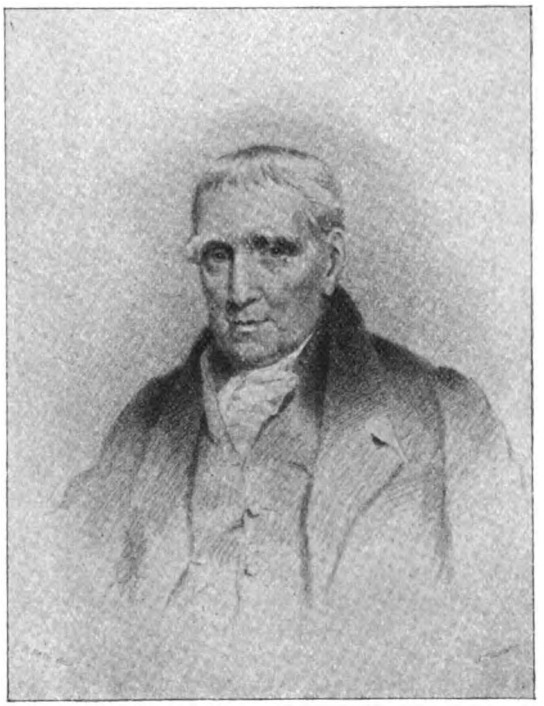
LORD CHANCELLORS.

Cardinal Wolsey, Sir Thomas More, and the other ecclesiastical Chancellors — not to speak of Francis Bacon — belong too largely to general English history to render any notices of them here desirable — we may commence with

LORD NOTTINGHAM.

Heneage Finch, the Earl of Nottingham, and "The Father of English Equity," was born December 23, 1621. Educated at Westminster School and Christ Church, Oxford, he joined the Inner Temple, in 1638, and was called to the bar in 1645. He soon acquired a large practice, as anyone who refers to "Siderfin's Reports" will see at a glance. One of his most famous forensic appearances was in 1659, for Mr. Street, who had been returned for Worcester to the parliament of Richard Cromwell, son of the great Protector, and was petitioned against on the ground that he had borne arms as a cavalier. Finch was known at the bar as "the silver-tongued lawyer" (a title which was revived in our own time in the person of the late Lord Chief-Justice of England), and "the English Cicero." He rose to the highest legal office in the state with great rapidity. In 1660 he received the solicitor-generalship and the honor of a baronetcy. In 1670 he became Attorney-General. In 1673 he received the Great Seal, and held it at first as Lord Keeper and afterwards as Lord Chancellor, till his death in 1682. He was made Earl of Nottingham in 1681.

In regard to Nottingham's character, abilities and judicial work there can be but one opinion. In private life he was a model of all the virtues. The foul and venomous tongue of Restoration society could lay nothing to his charge. He was the patron of literature and learning. In the words of Blackstone he was "endued with a pervading genius that enabled him to discover and pursue the true spirit of justice notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind arising from the great change in property, by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations." North, the eulogist of his successor Guilford, described Nottingham as a formalist and a hairsplitter. But a perusal of his decisions will satisfy anyone that this charge is unfounded[1] and that he always endeavored to decide cases on principles which — to use his own words — "might stand with the reason of mankind when debated abroad." We owe to him the settlement of the leading doctrine of equity, in regard to trusts, and the enactment of the statute of Frauds, directed against the enforcement of verbal contracts, the validity of verbal conveyances of interests in land, the creation of trusts of land without writing, and the allowance of nuncupative wills. "In modern times, says Mr. Kerly, in the able work already referred to, "this statute has not infrequently been decried, especially so far as it restricts the verbal proof of contracts, but in estimating its value and operation at the time it became law, it must be remembered that the evidence of the parties to an action at law could not then be received, and the defendant might have been charged on the uncorroborated statement of a single witness, which he was not then allowed to contradict, as Lord Eldon argued many years afterwards, when the action upon the case for fraud was introduced at law. It was therefore a most reasonable precaution while this unreasonable rule continued to lay down the rule that the defendant should be charged only upon writing, signed by him."



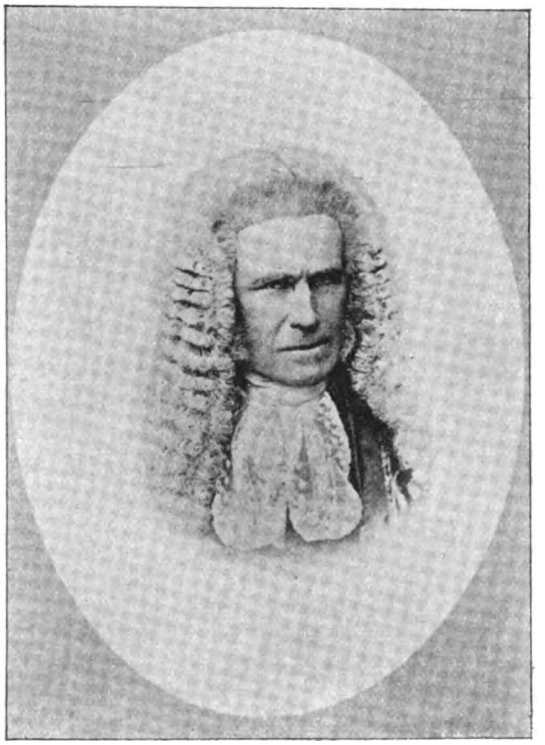
LORD ELDON.

[1] See an excellent account of Nottingham in D. M. Kerly's *History of Equity*, a work which well deserves to have a transatlantic reputation.

EARL OF HARDWICKE.

Philip Yorke, Earl of Hardwicke, was the son of a lawyer, who filled the office of Town Clerk of Dover, and was born in 1690. He was educated at a school at Bethnal Green,

where he gave the highest promise of future eminence, was afterwards placed for several years in the office of a well known attorney, Mr. Salkeld, brother of the famous Sergeant whose "Reports" are in every good English law library; and was called to the bar of the Middle Temple in 1715. Before his call, he had made the acquaintance of Lord Macclesfield, Chief Justice of the King's Bench, and the friendship of this distinguished man, together with his own family's legal influence, speedily gave him the introduction to private professional practice which was all that he needed or desired. He was soon recognized as a rising figure at the bar. In 1719 he was returned to Parliament as member for Lewes. In 1720 he was raised to the solicitor-generalship and the honor of knighthood. In 1724 — at the age of thirty-four! — he became Attorney-General. In1733 he was made Chief Justice of the King's Bench, and as Lord Hardwicke, in 1737 he was appointed Lord Chancellor — an office which he held till 1756 — having in the mean time (1754), been created Earl of Hardwicke and Viscount Royston. He died on 6th March, 1764.



LORD HATHERLEY.

Hardwicke had the misfortune to have many bitter enemies, some disclosed, others anonymous, and they unhappily supplied the materials out of which his biographies have been written. Horace Walpole charges him with baseness, and asserts that "in the House of Lords he was laughed at, in the Cabinet despised." An anonymous correspondent of Mr. Cooksey, who published a sketch of him in 1791, has gathered with malicious industry every story and piece of idle gossip to his discredit on which he could lay his hands; and Lord Campbell, who was always ready to accept scandal without sifting it, has relied too much upon these writers. Lord Chesterfield gives a juster estimate of Hardwicke's character, saying that "he was never in the least suspected of any kind of corruption," that "he was an agreeable, eloquent speaker in Parliament," and "that he was a cheerful, instructive companion, humane in his nature, decent in his manners, and unstained by any vice (except avarice)." Even the charge of avarice resting on such testimony is not very formidable. This opprobrious term is apt to be applied to a man who, having no great private resources, husbands his professional income with care. The Earl of Hardwicke's memory is now cleared, however, from the reproaches which some of his contemporaries heaped upon it. His private character stands as Lord Chesterfield described it, *minus* the avarice. His personal qualities and attractions were thus not less accurately than elegantly summed up by Savage: —

"Were all, like Yorke, of delicate address,
Strength to discern, and sweetness to express,
Learned, just, polite, born every heart to gain."

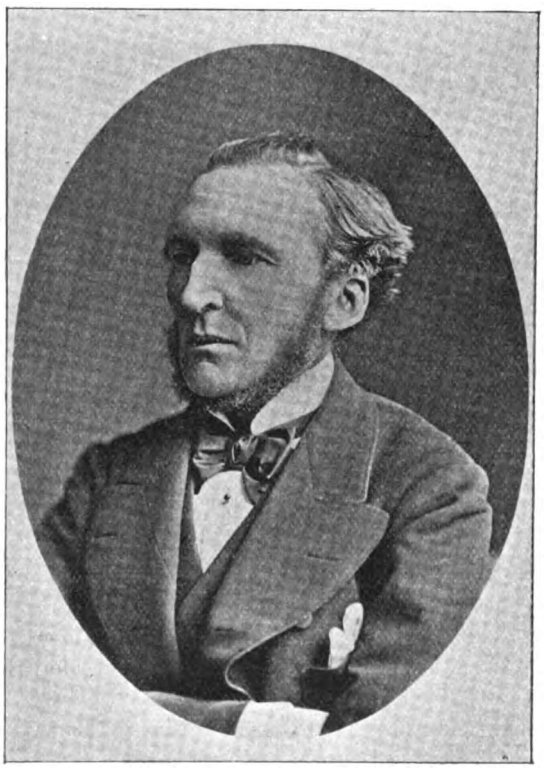
As a public prosecutor, in an age of sedition and political unrest, he was conspicuous for his fairness. Both in the House of Commons and in the House of Lords, he exercised immense influence over the minds of his colleagues and fellow members. He acted as a great conciliatory force, not only in the Cabinet, but in his relation with the Crown. Sir George Jessel considered him to have been the greatest equity lawyer that ever held the seals, putting Lord Cairns second, and Lord Eldon in a rather low place. Hardwicke's chief defect as Chancellor was his habit of requiring cases to be reargued, and of postponing indefinitely the delivery of his judgments. A still worse eminence in this bad practice was obtained by Lord Eldon. It became a fruitful source of those arrears which have harassed and discredited the work of subsequent Chancery judges so seriously. In the time of Hardwicke there was a strong movement among equity lawyers in favor of greater definiteness in the principles on which the Court of Chancery acted, and he did his best at once to encourage this movement and to confine it within proper limits. "Some general rules," he said, "there ought to be, for otherwise the great inconvenience of *jus vagum et incertum* will follow, but yet the praetor must not be so absolutely and invariably bound by them as the judges are by the rules of the common law, for if he were so bound . . . he must pronounce decrees which would be materially unjust, since no rule can be equally just in the application to a whole class of cases that are far from being the same in every circumstance. This might lay a foundation for an equitable relief even against decrees in equity and create a kind of superfectation of courts of equity." The most noteworthy of Hardwicke's decisions are Chesterfield *v.* Janssen, in which he analyzes the various kinds of frauds against which equity would relieve, and Penn *v.* Baltimore, a case described by Hardwicke himself as "worthy the judicature of a Roman senate rather than of a single judge," in which he held that it was within the jurisdiction of the court to grant specific performance of an agreement as to real property situate in America, comprising two provincial governments and three counties.

LORD THURLOW.

Edward Thurlow was the son of an English rector. Born at Ashfield, in Suffolk, in 1732, he was educated at King's School, Canterbury, and Caius College, at Cambridge, from whose books, to avoid expulsion, he was obliged to withdraw his name in 1751. The incident which led to this *denouement* was amusing and characteristic. As a punishment for some act of insubordination, Thurlow was told to translate a paper of the *Spectator* into Greek. He performed his task, but instead of taking his pencil theme, as he ought to have done, to the Dean of his college, he left it with the tutor. The Dean called upon him for an explanation, whereupon Thurlow stated that he had acted not disrespectfully, but with a compassionate desire to save the Dean from being puzzled. In fairness to Thurlow it should be recorded that he afterwards made the *amende honorable* for this and other delinquencies. When he became Chancellor he sent for his old superior, and on his entering the room where he was, said, adopting an insolent query of his undergraduate days, "How d'ye do, Mr. Dean?" "My lord," was the answer, "I am not now a Dean, and do not deserve the title." "But you are a Dean," Thurlow replied, handing him a paper of nomination, "and so convinced am I that you will do honor to the appointment, that I am sorry any part of my conduct should have given offence to so good a man."

Thurlow was called to the bar in 1754, and joined the Home Circuit. Although he gained considerable credit and a little prac-

tice by the success with which he put down Sir Fletcher Norton, then the bully of the bar, in the case of Luke Robinson *v.* the Earl of Winchilsea, a chance conversation with an attorney in a debating-club, which procured him a brief in the Douglas Peerage case, is the circumstance to which his rise is generally attributed. In 1768, Thurlow, who had taken silk six years before, became member for Tamworth. In 1770, he was made Solicitor-General. In the following year he was appointed Attorney-General. The leading cases that he conducted, or assisted in conducting, as Law Officer of the Crown, were the prosecutions of Almon, Woodfull, and Miller, for publishing Junius' letter to the King, of the Duchess of Kingston for bigamy, and of Horne Tooke (who ever afterwards bore towards him a malevolent and unfounded hatred) for libel. In 1778, Thurlow, raised to the peerage as Baron Thurlow of Ashfield, succeeded Lord Bathurst as Chancellor, and held this office till his double dealings with the opposition compelled Pitt to insist on his removal. He died on September 12, 1806, at Brighton, and was buried in the Temple Church, in London. For some time after his entrance into the House of Lords, Thurlow was regarded by his brother peers with overt antipathy, partly as a *novus homo*, it may be, but chiefly because of the insolence, brutality and frequency of his attacks upon them. On one occasion the Duke of Grafton, stung into indignation by Thurlow's observations, commented on his plebeian origin. The sequel is well told by Mr. Fox (English Judges, p. 662), quoting from Butler's Reminiscences. "His lordship rose from the woolsack and advanced slowly to the place from which the Chancellor generally addresses the house, then fixing upon the Duke a look of lowering indignation, 'I am amazed,' he said, 'at His Grace's speech. The noble Duke cannot look before him, behind him, or on either side of him, without seeing some noble peer who owes his seat in this house to his successful exertions in the profession to which I belong. Does he not feel that it is as honorable to owe it to these as to being the accident of an accident? To all these noble lords the language of the noble Duke is as applicable and as insulting as it is to myself. But I don't fear to stand single and alone. No one venerates the peerage more than I do. But, my lords, I must say that the peerage solicited me, not I the peerage. Nay more, I can say, and will say, that as a peer of Parliament, as Speaker of this honorable house, as Keeper of the Great Seal, as guardian of His Majesty's conscience, as Lord High Chancellor of England, nay even in that character alone in which this noble Duke would think it an affront to be considered, but which character none can deny me, as a *man*, I am at this moment as res-



LORD CAIRNS.

pectable, and beg leave to add, I am at this time as much respected, as the proudest peer I now look down upon.'"

It is painful to be obliged to remark that in spite of these high self-encomia, Thurlow was not politically honest, and no one regretted his downfall. As a judge he relied too much on the industry of Hargrave, to whom many of his most elaborate decisions were due. But he was, for all that, a strong and competent Chancellor. In the case of Fox *v.* Mackreth, he laid the foundation of the doctrine that no person in a fiduciary position is entitled to deal for his own advantage with the subject of his trust. In Ackroyd *v.* Smithson, he developed the doctrine of "conversion," while we owe to him that "restraint on anticipation," which so many settlements still impose as a fetter on the freedom of married women in dealing with their separate estate. Thurlow had a stern and rugged appearance, and bushy eye-brows, whose conjoint effect, in the language of Charles James Fox, made him "look wiser than any man ever was." A redeeming point in his character was his affection for the gentle and retiring poet Cowper.

LORD ELDON.

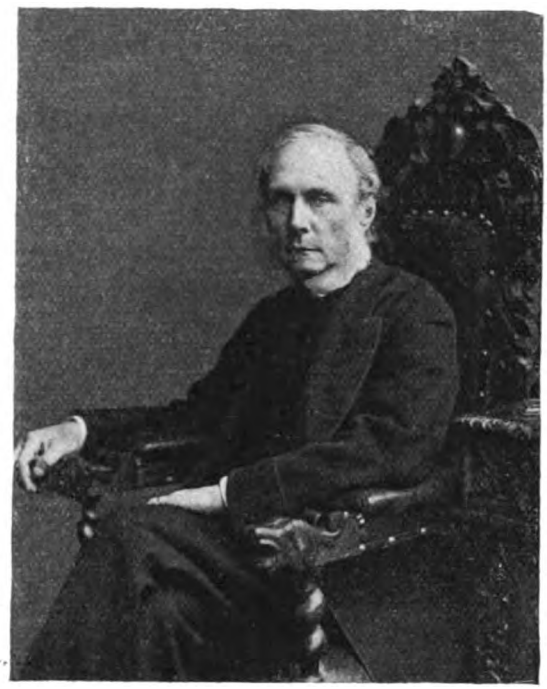
John Scott, Earl of Eldon, the son of a coal "fitter" in Newcastle-on-Tyne, and the brother of the great Lord Stowell, was born 1751. He was educated first at the Newcastle Grammar School under the Rev. Hugh Moises, who did not neglect the caution of the preacher against sparing the rod; and afterwards at Oxford, where he was elected to a fellowship in 1767, and graduated as B.A. in 1770. In 1771 he gained Lord Lichfield's prize for the best prose essay on "The advantages and disadvantages of foreign travel."

In the following year he carried off another prize in the shape of Elizabeth Surtees. This success was not at first highly appreciated by the parents of either party. But the couple were ultimately forgiven, and Scott entered the Middle Temple as a candidate for admission to the bar. He was called in February, 1776, and at first devoted himself to circuit and common law work; but failing to make much impression on the court of King's Bench he soon transferred himself to the chancery side, where he made his mark by the preparation of an argument which had the good fortune to secure the assent of Lord Thurlow, in the case of Ackroyd *v.* Smithson. The success with which he argued the Clitheroe election case was, however, the determining point in his career. He rose rapidly in professional favor and repute; and in 1783 became member of Parliament for Weobly. In 1787 he was appointed Chancellor of Durham. In the following year Mr. Pitt made him Solicitor-General. In 1793 he succeeded to the attorney-generalship and was charged with the conduct of the state prosecution, instituted against Hardy, Horne Tooke, and the other democrats whose revolutionary instincts, aroused by the stirring events which were in progress in France, led them perilously near the edge of high treason in England. It was on the occasion of these trials that Scott laid down the doctrine of "Constructive Treason," which is familiar to all constitutional lawyers. His speeches will be found in Howell's "State Trials," and are eminently worthy of being studied.

In 1799 his reward reached him. He was made Chief-Justice of the Common Pleas in place of Sir James Eyre, as Baron Eldon, and in the summer of 1801 accepted the Great Seal, which he held with various interruptions till 1827. He became Earl of Eldon in 1821, and died in 1838.

Eldon's political career as Lord Chancellor fills a large part of the history of his days. He was one of the old school of Tories, to whom every change in administration and each concession of political freedom or privilege

spelt revolution. He opposed the repeal of the Test and Corporation Acts, the emancipation of the Romans Catholics and the Reform Bill with equal bigotry and honesty, and the resolute *non possumus* which he opposed to all the movements of his day contributed largely to the defeat and disintegration of the Tory party. As a judge he is entitled to the high credit of having strengthened the growing fixity of the principles of equity. "The doctrines of this court," he himself said in Gee *v.* Pritchard (2 Swan. 414), "ought to be as well settled and as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed by every succeeding judge. Nothing would inflict on me greater pain than the recollection that I had done anything to justify the reproach, that the equity of this court varies like the chancellor's foot." This reproach certainly cannot be laid at Eldon's door; what he may, however, be justly charged with, is the fostering if not the parentage of that terrible accumulation of arrears of which the equity judges are only now getting rid. We have already noticed Lord Hardwicke's contributions to the increase of this malign brood. Lord Eldon was an even greater sinner. "It is unnecessary," says Mr. Kerly (*ubi sup.* 270), "to dwell upon the complaints made in the House of Commons and in the press of the day of the number of causes waiting after hearing for Lord Eldon's judgment, of cargoes rotting while he considered to whom they belonged, and of frantic appeals from ruined families, that some end might be put to the fatal continuance of their suits . . . The facts are indisputable that a common administration suit, *where the parties were not hostile*, took from three to five years; that eminent counsel stated that no man could begin a contested suit and hope to see its end; that clients were advised to compromise good claims and to plead to bad ones rather than risk a suit, and that on the average causes took at least three years to reach the top of the list after they were ready for hearing. The delay after the causes were ready for hearing were the worst delays of all."



LORD SELBORNE.

In order that we may overtake as many occupants of the woolsack as possible, we shall treat the remaining Lord Chancellors, whose names, even at the cost of some repetition, call for notice in this paper, in a somewhat more cursory style than we have hitherto adopted. Thomas Wilde, Lord Truro, the brother of Lord Penzance, the second son of a London attorney, was born in 1782, educated at St. Paul's School, and called to the bar of the Inner Temple in 1817. Overcoming by unremitting perseverance an impediment in his speech (a defect, by the way from which curiously enough Sir William Erle

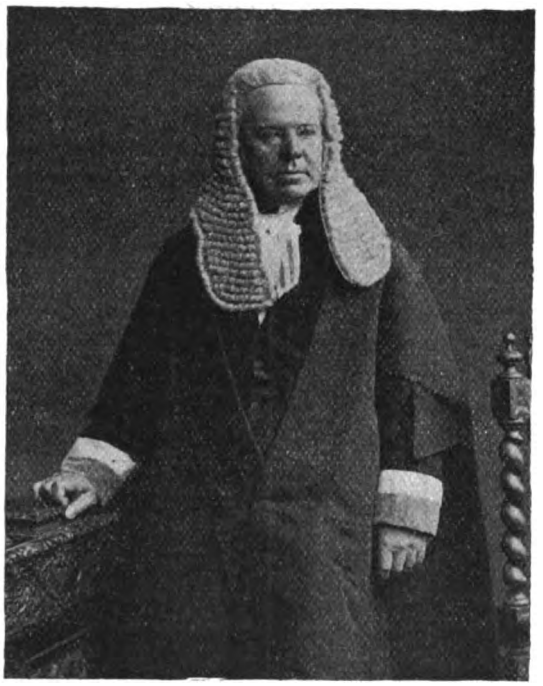
also suffered), he gained a footing at the bar by his appearance as junior counsel for the defence in Queen Caroline's case, and rose with remarkable rapidity through the usual grades of professional distinction to the woolsack. He was a most patient, competent, and enlightened judge. He died in 1865.

Robert Monsey Rolfe, Baron Cranworth (1790–1868), did his most distinguished judicial work as a Baron of the Court of Exchequer. He held the Great Seal from 1852 to 1858, and again on the resignation of Lord Westbury, from 1865 to 1867. He was a Liberal in politics. His death in 1868 was attributable to the phenomenal heat of the weather. He died without issue.

Frederick Thesiger, Lord Chelmsford, was the seventh son of Charles Thesiger, Collector of Customs in the island of St. Vincent, and was born in London in 1794. He was educated at Greenwich, and before betaking himself to the law served as a midshipman at the bombardment of Copenhagen. He was at first designed for the West India Bar, and joined the society of Gray's Inn merely with a view to acquiring the formal degree of barrister at law. But the pleader in whose chambers he read strongly advised him to try his fortune in London first. Although hopeless of success, Thesiger hearkened to his counsellor, and commenced his career as an English barrister in the end of 1818. His unfavorable expectations were disappointed. He picked up some briefs at sessions; then he made a good appearance in defending Hunt, who was tried along with the infamous Thurtell (the author of the modern English scaffold) in 1824, for the murder of Mr. Weare, and in 1832 won a great ejectment case at Chelmsford — a victory from which he derived his title, and which he always considered to be his palmary triumph. Probably outside critics would assign this place to his cross-examination of the forger Provis in the Smyth estate case. Thesiger became successively Solicitor-General (1844), Attorney-General (1845), on the death of Sir William Webb Follett — an infinitely greater lawyer — and Lord Chancellor as Baron Chelmsford in 1858, under Lord Derby's ministry. The most interesting event in his subsequent career was his being passed over by Mr. Disraeli, in 1868, for the Chancellorship, in favor of Lord Cairns. "He dismissed me," Chelmsford said, speaking of the Conservative Premier, "with no greater ceremony that if I had been his butler." Chelmsford's friends raised a great outcry over this dismissal, and it is still sometimes ignorantly spoken of as a job. In point of fact, however, Mr. Disraeli knew what he was about and acted with perfect propriety. Although a facile and pleasing speaker and a fairly valuable political henchman, Chelmsford was not the kind of Chancellor that Disraeli needed. The Conservative party were weak in the country and in the House of Lords, and their leader required a representative in that House who would do his work not only competently, but supremely well. No man with such an end to attain could hesitate for a single moment between Chelmsford and Cairns. Chelmsford was in his seventy-fourth year, and he was only an average debater, an average politician, an average lawyer, and an average man. Cairns was only forty-eight; he was a debater of the highest ability; he was a statesman as well as a politician; he was, in Disraeli's own language, "great in counsel"; as a lawyer he has had no equal in the present century, except Jessel, and he was also naturally a man of the greatest force and breadth of character. It is ridiculous to impute unworthy motives to Mr. Disraeli when reasons of such solidity and sufficiency for his promotion of Lord Cairns over Lord Chelmsford's head can be given.

Lord Campbell (1781–1861) need not long detain us here. The story of his life is familiar to everybody. The son of an established church minister in Fife, he began

his course at the bar in 1806 as a reporter, making a few odd extra professional guineas as dramatic critic to the "Morning Chronicle." A marriage with Mary Scarlett, daughter of the future Lord Abinger, Lord Chief Baron of the Exchequer, gave an impetus to his career, and he followed his predecessors through the grades of honor which lead to the woolsack, deviating from the ordinary triumphal paths only to pick up the Lord Chancellorship of Ireland and Lord Chief-Justiceship of the Queen's Bench by the way. It was as Chief-Justice that Campbell did his best work. But he succeeded as well in his Chancellorship as an industrious, competent common lawyer could hope to do. His *nisi prius* reports contain Lord Ellenborough's decisions, the lives of the Chief-Justices and the Chancellors, which, in Wetherell's language, "added a new terror to death," are his only *magna opera*. He was found dead in his chair on the morning of Sunday, June 24, 1861. He had always wished to die suddenly, and his prayer was granted. The puisne judgeships of the Chancery Division have in our own time been occupied by many interesting figures.



LORD HALSBURY.

Perhaps the most picturesque of these was the last of the Vice-Chancellors — Sir James Bacon. An acute though not extremely accurate lawyer, he will be remembered chiefly by his vivacity, his brilliant wit, the literary flavoring which he imparted to all his judgments, and the ripe old age to which he retained his seat on the Bench. His son is one of the most successful of the County Court Judges. We must notice also Sir Joseph Chitty, whose phenomenal practice at the bar seemed at one time to mark him out for a law-officership of the Crown. Sir Ford North, who was originally appointed a Judge of the Queen's Bench Division, but was shortly afterwards transferred to the more congenial atmosphere of Chancery. Mr. Justice Romer who is the greatest judge of facts in the equity courts, and has scarcely a rival in his mastery of patent cases. He has two cardinal virtues in an equity judge. He seldom postpones his decision, and his judgments are almost invariably short. Mr. Justice Romer has done more than any living judge to wipe out Chancery arrears and prevent fresh masses of them from accumulating. He has a fine presence and an exquisite delivery.

Mr. Justice Stirling divides with Lord Watson the honor of being a Scotch judge on the English Bench. In spite of the fact that the English Bar is a hunting-ground for Scotch talent, comparatively few members of that hardy and audacious race have in recent years reached the judge's seat. Mr. Justice Stirling is able and sound, but has not many other distinguishing features. We may conclude this sketch with a brief notice of the evangelical Chancellors. The first of the group, Lord Hatherley, Sir William Page

Wood, was born in 1801, called to the Bar in 1827, took silk in 1845, was made Solicitor-General in 1851, Vice-Chancellor in 1853, a Lord Justice of Appeal in 1868, and Lord Chancellor in the same year. He resigned in 1872, and died in 1881. The second Lord Cairns is too familiar a figure to readers of THE GREEN BAG to need the facts of his life to be recorded. The third Lord Selborne (Sir Roundell Palmer), was Lord Chancellor in 1872, and again in 1880. These three great judges possessed very different characteristics, and did very different work. Hatherley's name is most strongly associated in the mind of his profession with the elevation, so fiercely denounced by Sir Alexander Cockburn, of Sir Robert Collier to the Privy Council by a technical evasion of the Judicial Committee Act and by Lord Campbell's unfair comments on his habit of delivering judgments *ore tenus*. The fusion of law and equity and the establishment of the present English judicature system were the chief works of Selborne and Cairns. But they were all three alike in their devoted Churchmanship and Evangelicalism. Hatherley and Cairns taught in Sunday-schools almost to the end of their brilliant careers, and Selborne has contributed to religious literature three works of permanent value. "Hymns of Praise," "A Defence of the Church of England against Disestablishment," and "Ancient Facts and Fiction concerning Tithes."

Lord Herschell, who became Chancellor in 1886, and again in 1892, has made a great name for himself as a sound commercial lawyer, and also as an administrator who declines to apply "the spoils system" unduly in the distribution of legal patronage.

Lord Halsbury, who was Tory Chancellor in 1885, and again in 1886 to 1892, is one of the cleverest men upon the Bench, and surprised everybody by developing singular judicial qualities during his tenure of the Great Seal.

LEX.

THE ETHICS OF LAW.[1]

By Col. J. T. Holmes.

IT is the wisdom of the Odyssey, unchanged by the flight of time, that,

"True friendship's laws are by this rule expressed,
Welcome the coming, speed the parting guest."

With whom, what class, or guild, or calling, or profession, in the affairs of this life, can they find more appropriate illustration than with the ministers of justice!

That justice, a crowning attribute of Deity, committed, in part, to human keeping, for the centuries, is the touchstone of the law. Every rule that favors and facilitates its administration in and through the conduct of judges and lawyers and officials lies within the domain of the theme proposed.

Professor Swing defined in attractive language: "Geography is a map of the world; ethics is a beautiful map of duty. This ethics is not Christianity, it is not even religion; but it is the sister of religion, because this path of duty is in full harmony, as to quality and direction, with the path of God."

"The science of right conduct and character."—The ethics of law must, therefore, be the science of right conduct and character in the enactment and the enforcement of law, and the "character" must affect both actor and enactment.

Perhaps the most accurate recorded definition—it is said to be most "satisfying"—is that of Professor Birks. "Ethics is the science of ideal humanity." The legal profession, being an intensely practical body of humanity, substitutes that word practical for the professor's ideal. The code of morals in law, or medicine, or religion, which remains in the region of the ideal is largely useless.

This is not dispensing with the ideal, or giving rein to licentiousness. Nothing human is perfect, and so the highest standard of ethics attainable in practice is a response to the calls of human and divine laws.

If driven to a single word as a definition, that word in English would possibly be "duty."

The *eleven* commandments contain the grandest code of ethical rules that the world has ever seen.

Their spirit, friendly to human life, to human society, to good government, to human happiness, pervades the body of our human laws, written, unwritten, and mixed.

Their details and refinements, ever of binding obligation on the life and the conscience, circumscribed and embraced by the limits of duty, are infinite.

"Learn to do well; seek judgment, relieve the oppressed, judge the fatherless, plead for the widow," are telling types from the pen that was touched with fire from the skies.

In this code of duty are loyalty to law, loyalty to judges, loyalty to the talents and essential integrity of professional brethren, loyalty to clients and to their honorable causes.

It is the fact, and the consciousness of judge, jury, officers, and counsel that duty has been performed, when the millionaire or the penniless infant, the powerful corporation or the natural person steps into the corridor, victor or vanquished, after the forms and substance of law have been invoked and finally exhausted, when thereunder justice has been done, that true ethics are illustrated.

The abuse of the power of the law-giver, the wabbling, and indirection, here and

[1] An address delivered at a Columbus, Ohio, Bar banquet, Feb. 8, 1895.

there, of the law's executors, whether clothed with the ermine or holding the brief, cannot modify or shade these rules any more than crime can spot the law, or the imprisoned or executed murderer abrogate social rights.

It is germane to the subject to say, no matter whose the original "happy thought" which this occasion bodies forth — a living reality — he was thinking for the good of his fellows, of his clients, of his city, of the commonwealth — discharging duty, the measure of all true ethics, and, unknown though he may be, he has, for one, my sincere thanks.

It is said that whenever a salt spring breaks out at a distance from the ocean, its vicinity immediately abounds with salt plants, although none ever grew there before.

In some regions, when the spruce pine and the white birch are destroyed, poplars spring up instead, though none were ever seen there before; where the fires sweep away the original wood, the new saplings are often of wholly different species. It would be well to nurture this new growth which comes out of soil o'erswept by the vivifying heat of that "happy thought."

Usage and some respectable authority recognize "bad ethics," but there is an anachronism, or better, a solecism in the phrase. It is the inversion, in a sense, of the sentiment of a waggish cynic of fifty years ago, who described some of his neighbors as "religious devils."

The ethics of the law are presumptively good, and therefore, the other kind goes over the garden wall.

Divorced from the members of the profession, the ethics of law would be a dried "barren ideality."

When with uplifted hand, in the days of supple body, of youthful face, of eyes undimmed that looked far into the future, of hopes that bounded and thrilled, each took the simple, solemn formula as his rule of professional life: "I do solemnly swear that I will support the Constitution of the United States and of the State of Ohio, and that I will honestly and faithfully demean myself as an attorney and counselor at law in these courts," he adopted, in few words, the code of ethics which the oath of the Genevan Advocate makes binding on the conscience through the professional duties of each day until the final sunset.

It is an epitome which never loses its interest or its eloquence.

"I solemnly swear before Almighty God to be faithful to the Republic, and the Canton of Geneva; never to depart from the respect due to the tribunals and authorities; never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defense of an accused person; never to employ, knowingly, for the purpose of maintaining the cause confided to me, any means contrary to truth; and never to seek to mislead the judges by any artifice or false statement of fact or law; to abstain from all offensive personality, and to advance no fact contrary to the honor or reputation of the parties, if it be not indispensable to the cause with which I may be charged; not to encourage either the commencement or continuance of a suit from any motive of passion or interest; not to reject for any consideration personal to myself the cause of the weak, the stranger, or the oppressed."

"Clear, stern, lofty language"; it has in it the square and compass, the plummet and anchor of the truest, purest legal ethics. The gifted Duffield said: "It has in it the sacred savor of Divine inspiration, and sounds almost like a restored reading from Sinai's original, but broken tablets."

WHEN MIGHT WAS RIGHT.

By Archibald R. Watson.

THAT there should ever have been an age when the violence of combat was sanctioned by the law, seems strange in these days of crusade against pugilists and duellists. In early times, however, when ignorance held extensive sway, and superstition caused humanity to quake with the dread of unknown evils; when a martial spirit ruled the mind of man, tinctured with fanciful religious conceptions, it was not necessarily contempt of court to resort to an argument of arms in its presence. Far from it; for, under circumstances, the grave and dignified justices, ermined and bewigged, would even "arrange the preliminaries," and then observe with that disinterested interest which becomes the judiciary, the belligerent litigants. With weapons sharper than tongue of shrewdest lawyer, with repartee readier than anything presently forensic, and with confidence more sublime than any modern justice seeker, the plaintiff and defendant appealed to a heavenly tribunal to judge between their conflicting pretensions and manifest its decision in the overthrow of him whose arm was raised unrighteously. What a glorious, chivalrous thing, was this simple and bold device! What an exalted notion that of an original resort to a dispensary of justice, omniscient, omnipotent and incorruptible! And was not ample sanction and perhaps suggestion, afforded by the scriptural precedent of David and the giant?

Thus far the enthusiasm of our ancestors carried them when trial by wager of battle was introduced. But here they stopped to think. *How about witches?* It was a well known fact that dogs' teeth, bits of stone and such things if worn about the person, would enlist the sympathies of these unearthly creatures. In view of the absolutely impartial attitude of Heaven, might not the tide of war, *in a doubtful case*, be turned in favor of the disputant who possessed these symbols of sorcery? Legal ingenuity triumphed.

A prefatory oath was devised, embracing, with true legal comprehensiveness, "all possible cases." The parties were made to proclaim: "*Hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, nor grass; nor any enchantment, sorcery or witchcraft, whereby the law of God may be abased, or the law of the devil exalted. So help me God and his saints.*"

And so the farce proceeded. From sunrise until sunset, the conflict, if not sooner terminated, might continue. By this means was the guilt or innocence, right or wrong of the litigants decided. As legally controverted facts are now-a-days determined by their probability, as established by evidence, this monument to the ignorance, superstition and ferocity of our progenitors has been destroyed. Wager of battle is no longer in vogue. Wrongs are redressed and rights recognized by means of gentler arts, just as effective, and, as we like to say, "much more civilized."

LONDON LEGAL LETTER.

LONDON, Aug. 1, 1895.

THE law of the bag has never been set out in print in this country or, so far as I am aware, in America. May I therefore give it publicity in the forum of THE GREEN BAG, the place of all places where it should first appear? It may be retorted that the bag has no law, which of course is true; but only in the sense and to the extent in which it may be said that the relations between solicitors and barristers are not matters of law. Custom governs them, and it is custom and not law which provides the limitations upon the intercourse between client and counsel, and the garb which a barrister shall wear when in court, and how he shall comport himself in his social meetings with "the other branch of the profession," and the amount and the manner of the payment of his fees, as well as scores of other things more or less important in the daily life of an English lawyer. But this custom has all the weight and authority of law, and doubtless, if occasion should arise, would be construed as if it were law.

In the first place, then, only barristers use bags; and by bags are generally understood the stuff-goods bags of the pattern which adorns the title-page of this magazine. Solicitors go about with leather hand-bags which are sold in the portmanteau shops as "brief-bags." The stuff bags are to be procured only at the quaint, Dickens-looking wig-shops in the various alleys and courtyards of the Inns of Court. In the next place, and with all due deference to the GREEN BAG, there are only two colors known in stuff bags — blue and red. The blue bag is used exclusively by juniors, and a junior is one who has not "taken silk," or, in other words, become a Q. C. As many able barristers do not care to take silk, there are hundreds of gray-haired juniors. All Queen's Counsel use red bags, but all who use red bags are not Queen's Counsel. This sounds a good deal like the Athanasian Creed, and is, perhaps, quite as comprehensible; but I may make it plainer by saying that the blue bag is used almost exclusively by men who have been only a comparatively few years at the bar. While a Q. C. has the red bag by virtue of his position, the junior has it only by favor, and by favor of the Q. C. If a junior in a case in which he is led by a Queen's Counsel attracts the attention of his leader and gives him commendable assistance, the Q. C. may, if he likes, present the junior with a red bag; but in such a case the bag is sent to the chambers of the junior by the Q. C.'s clerk, who is expected to receive a guinea for the favor — as his perquisite. Thenceforward the junior will carry his own bag, as it has changed color; whereas a small boy or a clerk was necessary as a bearer of the blue bag. Such, in brief, is the law of the bag. It may be childish and absurd, particularly in the eyes of Americans, but so are many other of the customs which have grown up in the Temple during the past three or four hundred years, and not even the most radical of modern reformers would care to abolish them.

The Society of Co-operative Legislation, in which it is hoped all English-speaking people will take an interest, has now got fairly to work — at least it has begun to map out a programme of work, and there is no doubt that the programme will be well carried out. Sub-committees have been appointed on (*a*) Forms and Methods of Legislation; (*b*) Mercantile Law; (*c*) Comparative and Historical Jurisprudence; (*d*) Procedure, and (*e*) Foreign and Colonial Correspondence. The names of those who have agreed to serve on these committees embrace eminent barristers and solicitors, text-book writers and university professors. Many of them are well known in America, as, for instance, Lord Davey, Professor Thos. Erskine Holland, professor of international law at Oxford; Sir Courtenay Ilbert; Sir Wm. R. Mason, Warden of All Souls, Oxford; Judge Chalmers; Arthur Cohen, Q. C.; Lord Justice Lindley; Master Macdonnel; Mr. Justice Matthew; Dr. Stubbs; Professor Dicey; Professor Jenks; Professor Maitland; Sir F. Pollock; Lord Watson; Professor Westlake; Lord Justice Rigby; Lord Shand, and Mr. Justice Wright. The committees have met and each has taken up one or two subjects upon which certain members of the

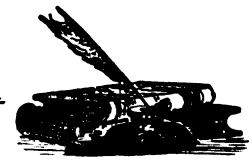
Committee will compile papers. These papers, after being submitted to the General Committee, will then be given to the members of the society; and it is hoped that in the course of a comparatively short time the fruits of these labors will form a substantial addition to the accessible sources of information on comparative law and legislation.

It is a matter for congratulation that from the outset the committee have undertaken work that will have a practical and not a purely speculative value. The Committee on Forms and Methods of Legislation, for example, in endeavoring to procure information as to how laws are enacted in other countries, what revision bills have before they are introduced into the legislative body, under what circumstances they may be offered, to what scrutiny and redrafting they are subject in committee, and how they are passed through successive stages until finally they develop into laws. The Committee on Mercantile Law will consider the question of the laws of bankruptcy in various countries, and of bills of exchange and negotiable instruments and a part of the broad question of partnership. The Committee on Procedure has begun with even a still more practical subject, and that is the question of fees and costs in litigious matters. It is proposed to issue to lawyers in various countries a series of questions as to how fees and costs are arrived at, and to ascertain if possible, by submitting a hypothetical case, what they would amount to in a given suit. It is probable that no report the Society may make will be read by lawyers and laymen with so much interest as this on fees. The fees and costs here in England appear to many Americans and to all Englishmen to be excessive. They certainly are restrictive if not almost prohibitive of litigation, for no one can contemplate the consequences of an unsuccessful appeal to the courts without considering the possibility of bankruptcy. And yet there are those in this country who, having had an experience of the charges of American lawyers, prefer the English system, for here the litigant may make some calculation of the prospective cost. He knows what will be charged for each visit to his solicitor and, at least approximately, what fees for settling pleadings, advising on evidence, retainers for attendance in courts and refreshers, will be paid to counsel; and when it is all over he knows that he may have the satisfaction of having an itemized bill of the charges, and if he is not satisfied with it, he may have it taxed. But his experience in America teaches him that his lawyer there will make his charge in a lump sum, that it will be based upon no fixed rule, that it will amount to as much as there is a hope of collecting, and that from it there is no appeal.

How unsatisfactory this is may be gathered from a recent New York lawyer's charge which has occasioned considerable comment here. In 1890 a firm of merchants in London obtained judgment here in the English court against a New York business man for £184, or about $894. The defendant appeared and defended the suit. Not being able to collect the judgment here, the English solicitors sent it to a New York firm of lawyers. They brought suit on the judgment, collected the money and remitted it, less $1000, which they charged for their services to their London clients. Fortunately the proceedings were protracted for four years and a half, and the judgment carried with it interest at six per cent upon the sum claimed, otherwise there would have been nothing to remit. As it is, the unfortunate London plaintiff, after nearly five years' delay, received $139.85, while the New York lawyers pocketed $1000!

STUFF GOWN.

The Lawyer's Easy Chair.



. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

LITERARY ADVERTISING. — If this is not the golden age of modern light literature — and clearly it is not — it is at least the golden age of literary advertising. What matters it that the literary giants of the century have passed away, leaving no competent successors, if the press can inflate the latter to dimensions foreign to their nature and capacities? Take for a prominent example "Trilby" — in its best aspect a feeble imitation of Thackeray (even to the name of "Little Billee"), and for the rest a clever sketch of Bohemian artist-life, with a perfectly absurd and incredible plot; by what right has it found a larger sale than any other novel of the last quarter of a century? Why should it distance the exquisite "Lorna Doone" and the heart-breaking "Tess"? By no right, but simply by dint of printers' ink. So of Mrs. Humphrey Ward's unspeakably dreary tales. So of Robert Louis Stevenson's adventurous romances. The taint of the puffer is over them all. The public are told when the novelist sets at work; what he eats, drinks, wears, and where and how much he sleeps; an interview is furnished to enable him to puff himself. We are told where he has gone to get "local color." The kettle is kept stirring, until the cover is taken off finally. Then we are told how much he receives (generally about four times the value of the thing), and how many copies Mudie or the Mercantile takes in, and how you can't get a copy of the first edition for love or money, and how many thousands a week it is selling, and so on. Correspondents spring up in the newspapers to discuss or conjecture. (On some of the letters probably no postage is paid.) *The Critic*, for example, has had a distinct department of "Trilbyana" for months, and has even issued a small book as a tender to the famous novel. So one can hardly take up a newspaper or magazine without learning of the birth of a new and successful author, or the rehabilitation of an old and unfortunate one. They come thicker than summer clouds or autumn leaves or Canada flies. The number of new poetical stars discovered would keep an astronomical observatory busy, but they mostly turn out rockets — one cannot be found bright enough even for a laureate. When one of the newcomers makes a fair success, immédiately his waste-basket is eagerly ransacked, by the publisher or himself, for all the trash he has ever perpetrated, and then that is spawned on the market. As one who has read four hundred novels in the last twelve years, the writer hereof may reasonably believe that his statement should cause some surprise when he confesses that, standing by the counter of a public library, and listening to the titles of books demanded by high-school misses, raw boys, and sentimental old maids, wan widows, and worn wives, he does not recognize one title in four. If the novelist can gain the stage as a helper, even in the form of a burlesque, his fortune is indeed secured, as witness "Mr. Barnes of New York" and "Trilby." The magazine interview, especially when illustrated, is worth (and costs) much money to the aspirant. An American lecture tour, or even a tour without lectures, is valuable even more as an advertisement than for its immediate product. An authoress's divorce has been utilized as an advertisement of her works. The anonymous dodge is also highly esteemed, as witness "The Bread Winners" and the current life of Joan of Arc. When a prize to the right guesser is added, this is very fetching. So is a well-advertised prize contest for best authorship — it carries the rejected as well as the accepted. Even the death of the author adds to his "boom," and his first edition brings a fanciful price. Think of a copy of Poe's worthless "Tamerlane" selling for $1875! This instrumentality of puffery is used even in the law-book market. The patient legal camel is kept well informed of the monstrous paper burden preparing for his aching back. Almost every law-book publisher runs his own law periodical, to advertise and puff his own books, and damn (at least with faint praise) those of his rivals. This is sometimes done very politely — reminding one of the extreme and deadly courtesy of the hero of the clever story, "The White Company." (We get nothing for this puff.) "Blow your own horn" is a shrewd maxim, and so, for example, the enterprising West Company blows its own "Horn-Books." It is bad enough that books should be published. We sometimes sigh for an inquisitorial bonfire of them. But it would be

a public blessing if the entire herd of hired puffers could be afflicted with pen-paralysis, although even then they probably would dictate to type-writers, and the last state would be worse than the first.

JUDGE THOMPSON'S BOOK. — Now, having freed our minds on the subject of puffery, we desire to try our own hand at it, not on a retainer, but from a sense of duty to our profession. A great legal ship has lately been launched, or at least partly, for it is so big that it has to be sent off the ways in compartments. Judge Seymour D. Thompson's work on Corporations is half out of its shell — to change the figure — and will be wholly delivered in the autumn. This is the largest legal treatise ever published in America, or anywhere else, probably, and the most important since Kent's Commentaries and Story's Equity Jurisprudence. The subject is the most vital one in this time and this country, and it is discussed, as the result of sixteen years of thought, research, and labor, by one who is a master of the subject, and probably the ablest master of it now living, or who has ever lived, in America. We have examined the first three volumes with considerable care, and put them to a practical test in study and in writing upon some of the minor topics treated, and although our expectation was large, it is not in the least disappointed. The summary and plan of the work laid out in the first volume is in itself a masterpiece of analysis and arrangement, and it almost follows that the man who could draw it up can write up to it with the same wisdom — *ex pede Herculem*. It is evident that when these six volumes are completed the last word will have been uttered on Corporations, at least (as the author would probably say) until the courts are called on to decide more cases, and it would be as foolish for a lawyer to try to do without them as it would be to try to navigate a ship without a compass through the Archipelago. It is not our office, nor have we the space, to point out its merits, save in a general way, but it requires small space to allude to its sole demerit, which, after all, is a mere matter of taste. To our taste, then, Judge Thompson exhibits a too frequent tendency toward polemics and a lack of temperateness in criticism, — a characteristic very noticeable also in another celebrated writer, Mr. Bishop, in whom it shows to a ridiculous extent. Judge Thompson's honest indignation against judicial construction which helps corporations in wrong and oppression, as he deems it, leads him sometimes to indulge in language more remarkable for robustness than politeness. This is not the way in which legal classics are written. Kent and Story did not thus write. The style that would be perfectly suitable in the "American Law Review," and is intended to produce an impression of advocacy, will not effect so lasting an influence as a calm and judicial tone. Suppose Judge Thompson should really be wrong and the judges right? This is not impossible, but Judge Thompson writes as if it were not possible. We love one who has the courage of his honest convictions, in debate or in polemical writing, but when he embalms his convictions in print and sheepskin, with a reasonable hope of influencing the legal world, he should temper the wind to the shorn lamb of the bench, and as it were, blow through a seive. It is however a great triumph to write six thousand pages and commit no more serious fault in them than this, and it will be considered by many a failing that "errs on virtue's side." At all events, Judge Thompson, by vast labor, by exceptional ability, and by considerable self-sacrifice, has (to change the figure again) produced the most stupendous monument of legal learning and mental vigor that has been reared anywhere in the world in half a century. He has a right to be proud of it, and he has made the legal world greatly his debtor.

THE INCOME TAX. — The enterprising publishers who issued Mr. Carrington's and Mr. Roger Foster's "treatises" on the late lamented Income Tax Law,— an English edition of the latter was issued in June,— should not have been "knocked silly" and have allowed another publisher to put forth a treatise on "How to get it Refunded." There is nothing like presence of mind in emergencies.

NOTES OF CASES.

THE DUTY OF RETREATING. — The old common law is generally believed to have held that if a man was murderously assailed he could not stand his ground and forcibly resist, but must run away if he could, or "retreat to the wall," as the old phrase was, if he could safely do so. Probably most of the old cases held this, and probably the doctrine has been pretty generally accepted in this country until a recent period. The old text-writers differed, however, Hale laying down the duty to retreat, East holding the contrary. This was a singular inconsistency in the common law, for under that law one might not do for himself what he might do for his wife, his child, or even a stranger, that is, forcibly prevent a felony. The law was inconsistent also in its application of the doctrine, making a distinction between an assault in one's own house and an assault outside, even on his own land; even holding that a man threatened with highway robbery, with a good horse under or in front of him, and thus well pro-

vided for retreat, was not bound even to try to run away. Mr. Bishop, who is always original, scouts the doctrine of retreating (as does Wharton), and holds that one failing to resist a murderous attack and endeavoring to get away is guilty of misprision of felony!

The states of Iowa and Alabama are prominent adherents to the old dogma of the necessity of retreating. In State *v.* Donnelly, 69 Iowa, 705; 58 Am. Rep. 234, it is held that where one is feloniously and dangerously assailed, he is bound to retreat if he can do so without danger; citing People *v.* Sullivan, 7 N. Y. 396, and cases from Georgia, Mississippi and California. (The doctrine of the Sullivan case is that "the right to defend himself would not arise until he had done every thing in his power to avoid the necessity of defending himself." In Shorter *v.* People, 7 N. Y. 193, the court said, "After a conflict has commenced, he must quit it, if he can do so in safety, before he kills his adversary; but this was *obiter* because the assault by the deceased was only with the naked hand, and the defendant pursued him with a deadly weapon; so the question of retreat was not involved.) The Alabama court carries the duty of retreating to extreme length. Thus in Lee *v.* State, 92 Alabama, 15; 25 Am. St. Rep. 17, it was held that one must retreat even from his own land, if beyond the curtilage; and in Martin *v.* State, 90 Alabama, 602; 24 Am. St. Rep. 844, it was held that when one assailed in his own house retreated from it, he lost the protection of his "castle," and must continue his retreat and could not defend himself with a deadly weapon unless it appeared to be reasonably necessary to avoid great bodily harm.

But there is an important and increasing line of recent decisions which deny that one thus assailed must retreat at all, and hold that he may "stand his ground."

In Runyan *v.* State, 57 Indiana, 80; 26 Am. Rep. 52, the court said: "A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence. The weight of modern authority, in our judgment, establishes the doctrine that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable." And so a charge that "before a man can take life in self-defence, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault," was held error. This doctrine is reiterated by the same court in State *v.* Page, 40 N. E. Rep. 745, where the duty of retreating is limited to cases of non-felonious assaults and mutual broils and combats. The court observe: —

> "But if applied to all cases where a person going his lawful way is assaulted, without reference to the question whether a felony or a mere trespass on the person is manifestly intended, it (the duty of retreat) would require a man to flee before another who murderously assailed, or a traveler to flee before a highway robber, or a woman to flee before her would-be ravisher, before resorting to extreme measure of defense. It is safe to say that the law puts upon a person no such necessity. The old writers on 'justifiable homicide' — that is, homicide committed in the resistance of felonies — make no mention of the duty of retreating."

The same doctrine was adopted by the Ohio supreme court, in Balker *v.* State, 29 Ohio St. 184; 23 Am. Rep. 731, where the subject is learnedly examined, and the decision was that where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm. The court remark: "We can safely say that the rule announced is at least the surest to prevent the occurrence of occasions for taking life; and this by letting the would-be robber, murderer, ravisher and such like know that their lives are in a measure in the hands of their intended victims."

It has even been held that the person threatened may assume the defensive-offensive and make his assailant retreat in case of reasonable apprehension. So the Michigan supreme court, in Pond *v.* People, 8 Mich. 177, held: "If any forcible attempt is made, with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger." This was followed, People *v.* Dann, 53 Mich. 490; 51 Am. Rep. 151, when the deceased came armed upon the defendant's premises to take away property purchased by him at an invalid execution sale.

In Kentucky the courts go still further, and hold,

as in Bohannon *v.* Commonwealth, 8 Bush, 481; 8 Am. Rep. 474, that where a man has been threatened by another with murderous violence, he may arm himself and go about his legitimate business, and if "he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances of the meeting, he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting."

In Missouri, the doctrine of the last case has received an extension, and it was held in the very recent case of State *v.* Evans, 28 S. W. Rep. 8, that one whose life has been threatened may arm himself and knowingly go into the vicinity of the threatening party; and that the mere fact that he does so in the expectation of being attacked will not deprive him of the right to take life in self-defense. In commenting upon this case a recent writer of the Harvard Law Review suggests a doubt whether the right of the threatened person to go into his enemy's presence is not dependent on the necessity of his doing so in the pursuit of his legitimate business. But I agree with the editor of the New York Law Journal that no such distinction is reasonable, and that no person can by murderous threats exclude another from any part of the habitable globe, so long as he does not provoke an assault. The doctrine intimated by the Review would be extremely inconvenient in case the threatening party were a commercial traveller or a or a post-office carrier. May not one go to church or to the theatre although he knows his enemy is lying in wait for him there? The liberty of the citizen may not be thus circumscribed. In some of our frontier communities such a rule would amount to a serious embarrassment if not a total suspension of commercial industry and enterprise.

The most recent and authoritative judicial declaration on this subject is found in the case of Babe Beard, in the United States supreme court. This was a case of homicide upon the defendant's premises and in resistance to an unlawful carrying away of his property, and must be regarded as a notable extension of the "castle" doctrine. Mr. Justice Harlan said: —

"The Court, several times in its charge, raised or suggested the inquiry whether Beard was in the lawful pursuit of his business, that is, doing what he had a right to do, when, after returning home in the afternoon, he went from his dwelling-house to a part of his premises near the orchard fence, just outside of which his wife and the Jones brothers were engaged in a dispute — the former endeavoring to prevent the cow from being taken away, the latter trying to drive it off the premises. Was he not doing what he had the legal right to do, when, keeping within his own premises and near his dwelling, he joined his wife, who was in dispute with others, one of whom, as he had been informed, had already threatened to take the cow away or kill him? We have no hesitation in answering this question in the affirmative. * * * In our opinion, the Court below erred in holding that the accused, while on his premises, outside of his dwelling house, was under a legal duty to get out of the way, if he could, of his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused.

"The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as under all the circumstances he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

The necessity for retreating is necessarily ignored, although the point is not explicitly passed upon in Tillery *v.* State, 24 Tex. App. 251; 6 Am. St. Rep. 882, and Bemarda *v.* State, 88 Tam. 183; and in Perkins *v.* State, 78 Wis. 551, it was held error to charge that self-defence "will not justify the killing if the necessity for the killing can be avoided by retreat"; and in State *v.* Reed, 53 Kans. 767; 42 Am. St. Rep. 322, it was held "that if one is unlawfully attacked by another, he may stand his ground and use such force as reasonably appears necessary to repel the attack and protect himself."

It seems to the writer that the modern doctrine is the more reasonable. As the question of the safety of retreat is one that must be instantly decided by the person assailed, he should be left to judge of it, and if he chooses to stand his ground he is exercising the right of the citizen and should be absolved. There is no pretence that one assailed with bare fists may not resist with bare fists and is not bound to run away, and it seems a travesty on justice to say that a would-be murderer has larger privileges and must be afforded a greater opportunity to commit wrong.

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

THE GREEN BAG finds the following in a letter to it from a New York lawyer: "Recently I had as a guest, under introductory letters, a London solicitor whom I was escorting around the courts. Upon first starting on our tour something occurred causing him to ask, 'Is there really a forgetfulness of civil war times and a fraternization of Northern and Southern men?' Following up the remark, I led him into a room of the Common Pleas, and pointing out a swarthy judge with a Roman face and picturesque black locks of hair, I said, 'That is Judge Roger A. Pryor, who on the night before the firing on Fort Sumter, made in Charleston a most fiery speech against the North, and who, as an aide on the staff of Confederate General Beauregard, made afterwards the demand for the Fort's surrender. He is now one of our most admired jurists, by popular election. At the Clerk's desk, before him, sits William S. Keily, keeping the minutes, who was at one time in the Confederate army of Northern Virginia. The lawyer addressing Judge Pryor is Counselor Swayne, son of a Lincoln justice of the Supreme Court, and the crutch on the chair beside him is needed to support him because of a wound he received as a Union officer. But come now into the Court of Oyer and Terminer.' And there I showed him District Attorney Fellows, familiarly styled Colonel because he held that rank in an Arkansas Confederate army. 'The prisoner he is trying is an ex-Union soldier, and the gentleman he is conversing with is J. Fairfax McLaughlin, another Confederate soldier who is now Clerk of the Surrogate's Court.' In the portion where lawyers have seats, I pointed out Major J. D. McClelland, a now one-armed ex-Northern soldier; Burton S. Harrison, now a leading member of the Bar, who was private secretary to Jefferson Davis; and not far from him, leaning on his crutch, General Sickles who, since his recent retirement from Congress, has rejoined the Bar of the city at which he was once corporation counsel. 'Say no more,' said the solicitor, 'I fully recognize the fraternization.'"

LEGAL ANTIQUITIES.

IN the Jewish Commonwealth, judgment seats were placed on the gates of the cities (Ruth iv. 2), intimating quick despatch, that causes should not spend so long as to become aged and gray-headed in courts, lest they force the client to say to his lawyer, as Balaam's ass said to his master, "Am I not thine ass, which thou hast ridden upon, since the first time till the present day" (Num. xxii. 36).

FACETIÆ.

SEVERAL years ago in one of the southern counties of Ohio, a case was being tried before a Court and Jury wherein a poor widow named Coine was plaintiff, and a railroad company defendant. The widow was seeking damages for the death of her husband, and plaintiff's counsel, in arguing before the jury, was dwelling upon the poverty of his client and her nine helpless children, one at the breast (the case had not then been as long drawn out as that of Jarndyce *v.* Jarndyce), and had drawn himself up for a final pitiful appeal to the sympathies of the court and jury, when opposing counsel desired to ask him a question, and was courteously requested to proceed with his question. "Your Honor, I desire to ask Judge R. how there can possibly be so great poverty where there's so much Coin?" This spoiled the finale of counsel's argument, and he soon subsided.

SOME months ago a young lawyer of Milwaukee, not over bright, faced Judge J. at the opening of

court and presented an *affidavit of prejudice* in a case marked for trial on that day's calendar. The Judge, who dislikes affidavits of this nature more than anything else in the world, held it up and said to the rest of the Bar assembled in the room, as well as to the young lawyer: "Well, here is another of these affidavits; don't you know, sir, (looking directly at the young man) that I do not know either of the parties to this action." The young man looked downcast for a moment, and then looking suddenly up as though a happy thought had struck him, said: "No, your Honor, but they know you." The court and bar were considerably startled, but the matter ended in a universal shout.

A WELL known barrister relates the following story with great gusto. Some time ago he had under cross examination a youth from the country who rejoiced in the name of Samson, and whose replies were provocative of much laughter in the court.

"And so," questioned the barrister, "you wish the Court to believe that you are a peacefully disposed and inoffensive kind of person?"

"Yes."

"And that you have no desire to follow in the steps of your illustrious namesake and smite the Philistines?"

"No, I've not," answered the witness. "And if I had the desire I ain't got the power at present."

"Then you think you would be unable to cope successfully with a thousand enemies and utterly rout them with the jawbone of an ass?"

"Well," answered the ruffled Samson, "I might have a try when you have done with the weapon."

BEFORE a Western judge a lawyer was pleading a case and was making a regular red-fire-and-slow-curtain speech, which stirred the jury to its profoundest depths. In the course of his peroration he said:—

"And, gentleman of the jury, as I stand at this bar to-day in behalf of a prisoner whose health is such that at any moment he may be called before a greater Judge than the judge of this court, I—"

The judge on the bench rapped sharply on the desk, and the lawyer stopped suddenly and looked at him questioningly.

"The gentleman," said the court, with dignity, "will please confine himself to the case before the jury and not permit himself to indulge in invidious comparisons."

It almost took the attorney's breath away, but he managed to pull himself together and finish in pretty fair shape.

IN a bill for pulling down the Old Newgate in Dublin and rebuilding it on the same spot, it was enacted "that the prisoners should remain in the old jail till the new one was completed."

NOTES.

IN the days of John Eliot, a court was established at Nonantum, over which presided Waban, an Indian justice of the peace. By him justice was speedily and impartially administered. His sagacious and sententious judgment in a case between some drunken Indians would do no discredit to a much higher civilization than that at Nonantum: "Tie um all up," said he, "and whip um plaintiff, and whip um 'fendant, and whip um witness."

THE new Recorder of the City of New York, on the first day of his beginning his term, was reported as having reproved a young lawyer for indulging in extraneous pleasantry. He might be reminded of Lord Chief Justice Erle — in office in England thirty years ago — who said to a counsel who apologized for a sally of wit that disturbed the court-room with laughter: "The Court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity."

LORD CHIEF BARON POLLOCK, when age began to invade his body, was wont to have a nap pretty regularly about the middle of the sitting. His waking was often comical: when he would start and seizing his pen say to the counsel, "What was your last citation?" and some of his friends thought he ought to resign. One of these expressly waited on Sir Frederic Pollock and hinted at resignation. "Oh! you think me too old, eh?" he said, "come waltz with me;" and then seizing his interlocutor by the waist began capering with him about the private chambers. Next he put

himself into boxing attitudes and fairly boxed the other to the door. On another occasion he said, "If every man were to take advantage of every tempting occasion 'to have the law' of his neighbor, life would not be long enough for the litigations which would result, for all flesh and blood would be turned into plaintiffs and defendants."

Ex-Justice William Strong died on August 19th. He was born in Somers, Conn., May 6, 1808, and was the eldest of eleven children of Rev. W. L. Strong. The son was graduated at Yale in 1828, and engaged in the study of law, teaching at the same time.

He finished his legal studies by a six months' course in Yale Law School, and decided to practice in Pennsylvania, where he was admitted to the bar in 1832, and settled at Reading.

In 1846 he was a candidate for Congress, and was twice elected on the Democratic ticket, serving from 1847 until 1851. In his second term he was appointed chairman of the committee on elections. He declined a third election and retired from active politics, but when the Civil War began he gave up a high judicial post, which he was occupying, and gave all his support and influence in aid of the government.

In 1857 he was elected a justice of the supreme court of Pennsylvania, and he served eleven years, attaining a high reputation as a jurist. In 1868 he resigned his seat on the bench and opened an office in Philadelphia, at once obtaining a large and lucrative practice.

In February, 1870, he was appointed a justice of the Supreme Court of the United States, and served until December, 1880, when he resigned.

The following extract from a pleading on file in the Supreme Court of North Carolina, is taken from 112 N.C. 476: The plaintiff says, "Every such allegation is unjust to her credulity, manifests a lamentable want of the gallantry and courtesy to a lady which usually guides the strong arm of the draughtsman of pleadings in courts of justice, and she respectfully and kindly submits that such harsh and cruel accusations are not in keeping with that elegant, lofty and polished sentiment which is the crowning glory of the American law."

Two prison romances were simultaneously enacted during the first week of June. Two men were discharged from the penitentiary of New York City within a week of their statutory release in consequence of discovery by the authorities that they were innocent of their alleged crime of burglary — the real culprits having been tardily discovered. Informed of this, the innocent men, then hard at work in a stone-quarry, wept — the warden joining in their tears. For said one, "my innocence will add years of life to my heart-broken mother." The second romance culminated at New Buffalo, Michigan, in the marriage of a recently discharged convict to a woman who had remained faithful to him during his twenty years of confinement. Jealousy of his rival incited his killing the latter for undue attentions to the woman. But he was convicted only of manslaughter committed in the heat of passion. The bridegroom came out of prison silver-haired and bowed with physical weakness, and the bride's face was furrowed with the lines of sorrowful remembrances. During his long confinement she regularly visited him and had devoted herself to earning and saving a competence that should support them when united. Thus the wonderful annals of legal romance receive two additional chapters.

LITERARY NOTES.

For seven years Scribner's Magazine has had the habit of publishing a midsummer Fiction Number, in which have appeared some of the most notable short stories that have been written by American authors. The August issue is no exception to this remarkably successful record. Any number of the magazine would be notable with an array of contributors which includes Anthony Hope, H. C. Bunner, Hopkinson Smith, Richard Harding Davis, Octave Thanet, Noah Brooks, George Meredith, George I. Putnam and Theodore Roosevelt. The number contains seven short stories, six of them illustrated by artists of the first rank, including W. H. Hyde, Reinhart, C. Y. Turner, Orson Lowell and others.

Mr. Henry Dwight Sedgwick of Stockbridge, Massachusetts, contributes to the Midsummer Holiday (August) Century a delightful series of "Reminiscences of Literary Berkshire." Mr. Sedgwick is a nephew of Catherine Sedgwick, and has enjoyed the acquaintance of nearly every one of the many not-

able literary men and women who have visited Berkshire within the past half-century or more. Mr. Sedgwick tells a series of interesting incidents and anecdotes concerning Fanny Kemble, Macready, President Van Buren, Dr. Channing, G. P. R. James and many others, and the article is full of portraits and other illustrations, including beautiful pictures of Miss Sedgwick and Mrs. Kemble.

HERBERT SPENCER opens the August POPULAR SCIENCE MONTHLY with the fourth of his papers on "Professional Institutions," in which he shows that the functions of the orator, poet, actor and dramatist are all developed from the acts of the primitive tribesman in welcoming his victoriously returning chief. Andrew D. White, writing on "The Continued Growth of Scientific Interpretation," describes the battle by which reason conquered tradition in English theology. In an illustrated article on "Art and Eyesight," Dr. Lucien Howe shows that artists are by no means exempt from the irregularities of vision that other persons have, and hence that, to see their pictures as they see them, one must for the moment induce the same irregularity in his own eyes. In the series on the Development of American Industries since Columbus. John G. Morse describes "Apparatus for Extinguishing Fires," with many pictures of apparatus ancient and modern. Prof. E.L. Richards sets forth the importance of the "Physical Element in Education."

ROBERT LOUIS STEVENSON'S last story, "St. Ives," was left at his death practically completed, so it is stated by those who have seen the manuscript. Many chapters had even received the author's final revision. Stevenson had been at work upon this novel for more than a year, and the first half of it had been entirely rewritten several times. "St. Ives" will be published serially in MCCLURE'S MAGAZINE.

THE idea that ten cents for THE COSMOPOLITAN means inferiority from a literary point of view is dispelled by the appearance in the August number of such writers as Sir Lewis Morris, Sir Edwin Arnold, Edgar Fawcett, Tabb, W. Clark Russell, Lang, Sarcey, Zangwill, Agnes Replier, etc. Nor can we entertain the idea of inferiority in illustration with such names as Hamilton Gibson, Denman, Van Schaick, Lix, Sandham, etc., figuring as the chief artists of a single month's issue.

THE most striking paper of general interest in the August *Arena*,— the one that will surely be read from Atlantic to Pacific, — is Mrs. Helen H. Gardener's review of recent age-of-consent legislation in the United States. She deals with the bills that have been introduced in the various States, and gives the history of the three bills passed in New York, Arizona and Idaho, raising the age to eighteen. Mrs. Gardener bases this demand for fuller protection to young girls, not upon any moral or religious views, as these vary according to birth and training, but upon the legal rights which are recognized in property and citizenship.

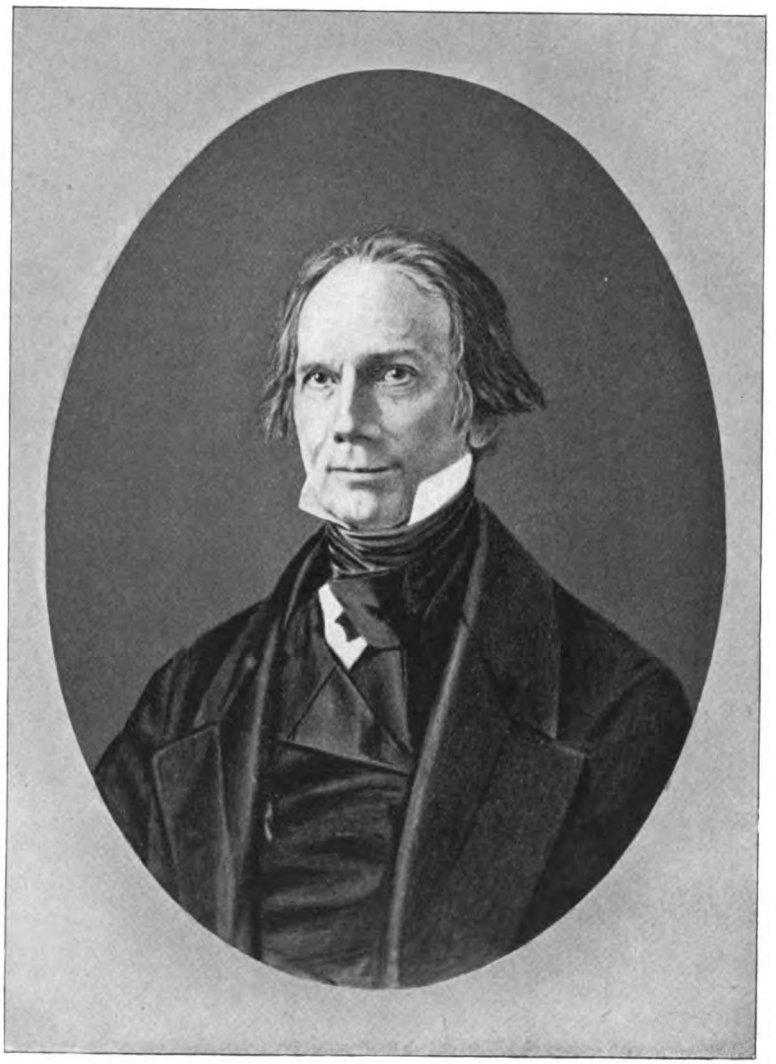
THE August ATLANTIC MONTHLY contains several articles which are calculated to create widespread interest. One of the most striking contributions is by Jacob D. Cox on "How Judge Hoar Ceased to be Attorney-General." Mr. Cox was a member of Grant's Cabinet with Judge Hoar, and this paper is an important chapter in our recent political history.

UNDER the title of "Female Criminals," Major Arthur Griffiths, Her Majesty's Inspector of Prisons, furnishes an article to the August number of the NORTH AMERICAN REVIEW presenting in a peculiarly attractive style his observations respecting many and varied types of female offenders.

MCCLURE'S MAGAZINE for August is a great short story number. Besides a new Zenda story by Anthony Hope, and a new Jungle story by Rudyard Kipling, there is a California story by Bret Harte, and a story of adventure by Stanley J. Weyman.

HARPER'S for August is strong in fiction. The "Personal Recollections of Joan of Arc" relate the story of Joan's examination by the bishops, her approval by the church and the beginning of her campaign against the enemies of the French king. Mr. Hardy's "Hearts Insurgent" is continued, and there are four short stories: "Bobbo," by Thomas Wharton, is a humorous tale of Paris life; "An Evangel in Cyene," by Hamlin Garland, is a study of a rural community in Illinois; "Jimty," by Margaret Sutton Briscoe, is a love-story of Old Virginia and New York; and "The Little Room," by Magdalene Yale Wynne, is a mystical New England sketch.

THE complete novel in the August issue of LIPPINCOTT'S, "Little Lady Lee," by Mrs. H. Lovett Cameron, narrates the vicissitudes of a faithful heart which found its true mate after its owner, obeying the customs of English high life and match-making fathers, had lost her freedom. "A Friend to the Devil," by Maurice Thompson, is an amusing story of Georgia superstitions. The "Applied Art" of which William T. Nichols treats was akin to that of the late M. Worth of Paris, but it did not prevent the artist from winning his ladylove.



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"THE GREAT COMMONER."

BY HENRY COYLE.

"THE lives of great men," observes a writer, "are a constant inspiration, both to young and old. They teach Garfield's oft-repeated maxim, that 'the genius of success is still the genius of labor.' They teach patriotism — a deeper love for and devotion to America. They teach that life with some definite and noble purpose, is worth living!"

Carl Schurz, in his life of Clay, remarks: "Few public characters in American history have been the subject of more heated controversy than Henry Clay. There was no measure of detraction and obloquy to which, during his lifetime, his opponents would not resort, and there seemed to be no limit to the admiration and attachment of his friends. While his enemies denounced him as a pretender and selfish intriguer in politics, and an abandoned profligate in private life, his supporters unhesitatingly placed him first among the sages of the period, and * * * sometimes even among its saints. The animosities against him have naturally long ago disappeared; but even now * * * we may hear old men, who knew him in the days of his strength, speak of him with an enthusiasm and affection so warm and fresh as to convince us that the recollection of having followed his leadership is among the dearest treasures of their memory. The remarkable fascination he exercised seems to have reached even beyond his living existence."

Henry Clay was born on the 12th day of April, 1777, in a place called "The Slashes," a part of Hanover County, in Virginia. His father was a Baptist clergyman, who labored hard and earnestly, receiving but little earthly reward. When Henry was only four years old, his father died, and Mrs. Clay was left with seven children, two of them being younger than the future statesman. The widow was a hard-working woman, and she creditably reared her large family; Clay's whole life was colored and influenced by her high courage and energy.

Men, in the fierce battle of life, may forget to be kind and compassionate, but they never forget the teachings and prayers of a good mother. It was at his mother's knee that Lincoln learned to read and write in the little breaks that the busy woman could make between her many tasks. "God bless my mother!" he exclaimed one day, when he was president; "all I am or can be I owe to her."

When Henry was about fourteen years old, he went to work in a store in the city of Richmond, and remained there about twelve months. His education was limited, and many years later he described himself at this period as "a lank, awkward youth." About this time his mother married again, and through his step-father's influence he entered the office of the Chancery Court, Richmond.

He now began the study of law, but with no regularity, and with no fixed design of becoming a lawyer. Attorney-General Brooke, who had formerly been governor of Virginia, became interested in the young

student, and invited him to enter his office. Clay gladly accepted the offer, and in November, 1796, he was admitted to practice, through the influence of his distinguished friend.

Soon after her marriage, his mother removed to Kentucky, and Henry followed her there, locating himself at Lexington. His fees at this time were very small, and he was often unable to pay his board; but he diligently pursued his studies, and prepared himself for the part he was soon to be called upon to perform in the great arena of life. The Kentucky bar had in its ranks a number of distinguished lawyers, but the young man fearlessly fought his way to the top, and rapidly acquired practice, fame and wealth.

Clay was employed on many important cases, and became famous as a criminal lawyer. Early in his professional career he secured the liberty of two clients who were charged with deliberate murder. Clay addressed the jury in his most passionate and eloquent manner, and they were so moved, that, in spite of the evidence, they rendered a verdict of manslaughter only; the case was tried again, and he finally secured their acquittal. It was said that not one of his clients who were tried for capital crimes ever received sentence of death at the hands of the law.

Henry Clay's political career began soon after his removal to Kentucky. In 1797, when the plan for a new constitution for that State was under discussion, he advocated the abolition of slavery. He said, at this time, "when we consider the cruelty of the origin of negro slavery, its nature, the character of the free institutions of the whites and the irresistible progress of public opinion throughout America, as well as in Europe, it is impossible not to anticipate frequent insurrections among the blacks in the United States; they are rational beings like ourselves, capable of feeling, of reflection, and of judging of what naturally belongs to them as a portion of the human race. By the very condition of the relation which exists between us, we are enemies of each other. They know well the wrongs which their ancestors suffered at the hands of our ancestors, and the wrongs which they believe they continue to endure, although they may be unable to avenge them. They are kept in subjection only by the superior intelligence and superior power of the predominant race."

During the delivery of this speech, every muscle of the orator's face was at work. He was thoroughly in earnest; his whole frame was agitated, as if each part was instinct with a separate life; his small, white hand, with its blue veins apparently distended almost to bursting, moved gracefully, but with all the energy of rapid and vehement gesture. He made a powerful impression, but the majority of the people were slave-holders, and for a time he was very unpopular.

But Clay cared nothing for this; the clear conception, the high purpose, the firm resolve, the dauntless spirit speaking on the tongue, beaming from the eye, informing every feature, urged the whole man onward, when he knew he was right. Purity of motive was the most prominent characteristic of his public career. One of his personal friends gives the following anecdote:

"On one occasion he did me the honor to send for and consult with me in reference to a step he was about to take. After stating what he proposed, I suggested, whether there would not be danger in it, whether such a course would not injure his own prospects, as well as those of the Whig party in general. His reply was, 'I did not send for you to ask what might be the effects of the proposed movement on my prospects, but whether it is right; for *I would rather be right than president!*'"

Clay, through all his public career, favored the gradual abolition of slavery, and was criticised severely by his Southern

friends. A short time before his death, he said, "Among the acts of my public life which I look back to with the most satisfaction, is that of my having co-operated with other zealous and intelligent friends to procure the establishment of that system in this State. We were overpowered by numbers, but submitted to the decision of the majority with that grace which the minority in a republic should ever yield to the decision. I have, nevertheless, never ceased, and shall never cease, to regret a decision the effects of which have been to place us in the rear of our neighbors, who are exempt from slavery."

Hon. R. C. Winthrop, who knew Clay personally, says, "Mr. Clay's personal love of human freedom was recognized by William Ellery Channing — one of whose impressive sermons I took him to hear at the old Federal Street Church — when he addressed to him his letter against the annexation of Texas. It was recognized, too, by Joseph John Gurney, when he addressed to him his letters on emancipation in the West Indies. He himself gave signal testimony to it, as we have seen, in relation to the constitution of Kentucky. * * * Nor should it be forgotten * * * that when the late William Lloyd Garrison was imprisoned in Baltimore, Henry Clay is understood to have made an immediate, though unsuccessful effort to stand bail for his release."

In 1797 he married Lucretia Hart, a young lady of good family; soon after the honeymoon he purchased Ashland, a beautiful estate, and here he entertained many of his distinguished friends. During this year he opposed the alien and sedition laws of John Adams's administration, and he became very popular. In the presidential election of 1800 he supported Jefferson; his party carried the State, and finally the entire country.

In 1803, when Clay was but twenty-six years old, he was elected a member of the Kentucky legislature, and his nomination and election were altogether unsolicited by himself. He remained in the legislature for some years, and took an active part in the discussion and settlement of several important measures.

In the year 1806, the young lawyer was elected a member of the United States Senate, although he lacked three months and seventeen days of thirty years, which is the legal age of a senator; he served but for one short session, however, it being the balance of an unexpired term of a senator who resigned, and the mistake was not discovered until after his return to Kentucky.

In 1807 he was again elected to the State legislature, and was chosen speaker of the house. It was in the course of this session that he opposed the proposition "to prohibit the reading in a Kentucky court of any British elementary work of law, or the citation of any precedent of a British court." The measure found favor with the majority of the house, but Clay soon convinced them of their error, and introduced an amendment "to exclude from the Kentucky courts only those British decisions which have been made since the Declaration of Independence." Notwithstanding the great popularity of the original resolution, the eloquence of Clay secured for his amendment a large majority.

About this time he fought a duel with Humphrey Marshall, a brother of the distinguished Chief Justice. Mr. Marshall was a bitter Federalist, and gave to his tongue and pen a degree of license that led to much ill-feeling. In the course of a speech of Mr. Clay, Marshall indulged in rude and sarcastic remarks. Clay retorted in kind, and he finally challenged Marshall to a duel. They met and fought with pistols, and each was slightly wounded.

Clay was intolerant and aggressive, delighting in gladiatorial combats, and mingling personal imputations with argument, striving to overwhelm his antagonist by ac-

cumulating accusations and disparaging allusions to the unworthiness of his motives. In denunciation he was unsparing and merciless. His armory was filled with all the weapons available in sarcasm and ridicule, and no man better understood the advantage of depreciating his adversary's character, while he assailed his public conduct.

Clay excelled in denouncing his enemies; in retort he was merciless; he did not hesitate to allude to physical defects or natural infirmities of any description. Senator Buchanan, of Pennsylvania, disliked Clay very cordially. On one occasion, when the Democrats were in the majority, Clay complained of some act of Senator Wright, alluding to him as the leader of the Senate. From the spot where Clay was standing, Wright and Buchanan were nearly in a range in the semi-circle. Buchanan rose to reply, supposing himself to have been referred to. Mr. Clay, with an expression of derision and contempt, said, "Mr. President, the senator from Pennsylvania is giving himself a deal of unnecessary trouble. I made no allusion to him, sir. I spoke of the leader of the Senate," pointing directly at Mr. Wright.

Mr. Buchanan,with much embarrassment, replied, "Mr. President, I did not intend to arrogate to myself any such distinction. I make no pretensions to be the leader of the Senate. ["I should hope not," said Clay, without rising.] But Senator Clay certainly looked at me!"

"No, Mr. President," said Clay, "I did nothing of the kind. It was not that I looked at the senator [here he held his hands up, making a cross with two fingers]; it was the way the senator looked at me."

A pompous senator from Connecticut was haughty and overbearing to all colleagues, and Clay in the course of a speech referred to the senator, imitating his language and manner, and applied the verses of Peter Pindar's mag-pie:

"Thus have I seen a mag-pie in the street,
A chattering bird we often meet,
A bird for curiosity well known,
With head awry,
And cunning eye,
Peep knowingly into a marrow-bone."

This sally convulsed the house, and completely vanquished the senator from Connecticut.

Clay was again chosen a member of the United States Senate in 1809, to serve out an unexpired term; he remained there two years, supporting the administration of President Madison. On the 4th of November he entered the House of Representatives, and on the same day was chosen speaker, receiving seventy-five votes out of a total of one hundred and twenty-eight. He was an ideal leader; his oratory was almost faultless, his manner fascinating, his voice full of melody, and he always spoke in a confident, positive tone, impressing all with a conviction that he must be in the right.

His frank bearing, his self-developed vigor, his spontaneous eloquence and command of language were western characteristics, and reached the heart of the common people. While Calhoun engaged the attention of philosophers, and Webster had the ear of lawyers and the mercantile classes, Clay, "the mill-boy of the Slashes," was out in the open air with the people, exciting at will their sympathies and friendship.

He never hesitated in the use of words, * * * but he was defective in early culture, and occasionally his most finished speeches lacked that rare felicity always exhibited by his scholarly rivals, Webster and Calhoun. In reply to John Randolph, who, in the course of a speech, sneered at his lack of education, he said, "The gentleman from Virginia was pleased to say that in one point, at least, he coincided with me in an humble estimate of my grammatical and philological acquisitions. I know my deficiencies. I was born to no proud patrimonial estate. I inherited only infancy, ignorance and indigence. I feel my defects.

But as far as my situation in early life is concerned, I may, without presumption, say it was more my misfortune than my fault. But, however I regret my want of ability to furnish the gentleman with a better specimen of my powers of verbal criticism, I will venture to say it is not greater than the disappointment of this committee as to the strength of his argument."

When Clay took his seat in the House, the great question was whether the United States should longer submit to encroachments by Great Britain, and some of his ablest speeches were made in support of the war policy; finally war was declared in 1812. In the course of the spirited debates that preceded that great event, Clay compelled Randolph to submit to the rules of the house, a not very easy task, as the senator from Virginia had long been to the house like "a bull in a china shop."

During the war, Clay vigorously supported the administration, and his glowing words stirred the heart of the nation. Almost everything he said and did was illumined by a grand conception of the destiny of his country, a glowing national spirit, a lofty patriotism. Whether he thundered against British tyranny, or urged the recognition of the South American republics, or entreated for compromise and conciliation regarding the tariff or slavery — there was always ringing through his speech a fervid plea for his country, a zealous appeal in behalf of the honor and the future glory of the great republic.

Clay was a second time chosen speaker, in 1813, but in the following January he resigned to accept the appointment of commissioner to treat with Great Britain for peace. He went to Europe, and peace was finally concluded on the 24th of December, 1814, at Ghent. He was firm and intensely patriotic at all times, and it was a just judgment which he pronounced upon himself when he said, "if any one desires to know the leading and paramount object of my public life, the preservation of this Union will furnish him the key!"

Soon after he returned from abroad, Clay was re-elected to Congress, and on the 4th of December, 1815, he was chosen speaker for the third time, which office he held for the following ten years, with the exception of one term; he took a conspicuous part in all the great debates that occurred during that period, and his fame and influence continued to increase. President Madison offered him a place in his cabinet, or any foreign mission he might select, but he declined the honors.

When General Lafayette came to Washington, in December, 1824, he visited the House of Representatives, and Mr. Clay, as speaker, made the address of welcome, in the course of which he said: —

"The vain wish has been sometimes indulged that Providence would allow the patriot, after death, to return to his country, to contemplate the intermediate changes which had taken place; to view the forests felled, the cities built, the mountains levelled, the canals cut, the highways constructed, the progress of the arts, the advancement of learning, and the increase of population. General, your present visit to the United States is a realization of the consoling object of that wish. You are in the midst of posterity. Everywhere you must have been struck with the great changes, physical and moral, which have occurred since you left us. Even this very city, bearing a venerated name, alike endeared to you and to us, has since emerged from the forest which then covered its site. In one respect you behold us unaltered, and this is in the sentiment of continued devotion to liberty, and of ardent affection and profound gratitude to your departed friend, the father of his country, and to you, and to your illustrious associates in the field and in the cabinet, for the multiplied blessings which surround us, and for the very privilege of addressing you which I now exer-

cise. This sentiment, now fondly cherished by more than 10,000,000 of people, will be transmitted, with unabated vigor, down the tide of time, through the countless millions who are destined to inhabit this continent, to the latest posterity."

Clay was very witty, and many anecdotes are told of him, illustrating his readiness of reply. At the time of the passage of the tariff bill, as the House was about to adjourn, a friend of the bill observed to Clay, "We have done pretty well to-day." "Very well indeed," rejoined Clay, "very well; we made a good stand, considering we lost both our Feet;" alluding to Senator Foot of New York, and Senator Foot of Connecticut, both having opposed the bill, although it was confidently expected a short time previous that both would support the measure.

On another occasion, Senator Smyth, of Virginia, a gentleman of unusual ability and erudition, had been speaking for some hours, vexing the members with the length and number of his quotations and citations of authorities, and turning to Mr. Clay, he said, "You, sir, speak for the present generation, but I speak for posterity." "Yes," replied Clay, "and you seem resolved to speak until the arrival of your audience."

When Senator Lincoln, of Maine, was considering before the House the Revolutionary Pension bill, and replying to an argument which opposed it on the ground that those to whom it proposed to extend pecuniary aid might perhaps live a long time, and thus cause heavy drafts to be made upon the treasury. In one of his flights of eloquence, he said, "Soldiers of the revolution, live forever!" Mr. Clay succeeded him, in favor also of the humane provision, but he did not respond to Lincoln's desire relative to the length of the lives of those soldiers for whose benefit it was devised, and when he closed, he turned to him and said, with a smile, "I hope my worthy friend will not insist upon the very great duration of these pensions which he has suggested. Will he not consent, by way of a compromise, to a term of nine hundred and ninety-nine years, instead of eternity?"

The House of Representatives was called upon to choose a President of the United States in 1825, the people having in the preceding year failed to make a choice. Clay had been one of the candidates before the people, but the number of votes he received was not large enough to bring him before the House. He gave his support to John Quincy Adams, who appointed him Secretary of State.

He was accused by his enemies of having been bribed into voting for Adams, but he answered this calumny as follows: "I have wished the good opinion of the world, but I defy the most malignant of my enemies to show that I have attempted to gain it by any low or grovelling acts, by any mean or unworthy sacrifices, by the violation of any of the obligations of honor, or by a breach of any of the duties which I owed to my country. If I know myself, if my head was at stake, I would do my duty, be the consequences what they might."

Soon after Clay became Secretary of State, he fought a duel with John Randolph; this was the result of some vile language used by Randolph in the Senate. In 1828 Clay was again a candidate for the highest office in the gift of the people, but he was defeated, and he retired to private life. Of his journey home to Ashland, he wrote to a friend: —

"My progress has been marked by every token of attachment and heartfelt demonstrations. I never experienced more testimonies of respect and confidence, nor more enthusiasm — dinners, suppers, balls, etc. I have had literally a free passage. Taverns, stages, toll-gates, have been generally thrown open to me, free from all charge. Monarchs might be proud of the reception with which I have everywhere been honored."

In private life Clay was generous and charitable to a fault. His door and his purse were alike open to the friendless stranger and the unfortunate neighbor. Frank, open, and above the meanness of deception himself, and consequently never searching for duplicity and treachery in those around him, he more than once suffered from the vile ingratitude of men who had been cherished by his bounty and upheld by his influence.

One of his household gave the following picture of Clay, as she knew him: "Life with him was solemn and earnest, and yet all about him was cheerful. I never heard him utter a jest; there was an unvarying dignity in his manner; and yet the playful child regarded him fearlessly and lovingly. Few men indulged their families in as free, confidential and familiar intercourse as did this great statesman. Indeed, to those who had an opportunity of observing him in his own house, it was evident that his cheerful and happy home had attractions for him superior to those which any other place could offer."

In the year 1831, Clay returned to the Senate, in which body he remained until the summer of 1842. During these eleven years he was prominent in public affairs and made many powerful speeches on the great questions of the day. In 1835 he received a severe blow in the loss of a favorite daughter; all his daughters died early, and of his three sons, one was in a lunatic asylum, another was dissipated, and a third, his favorite son Henry, was killed at the battle of Buena Vista in 1847.

The most remarkable controversial personal discussion that ever occurred in Congress took place in 1838 between Clay and Calhoun. The debate lasted several days, and it was indeed a conflict of giants. This quarrel grew out of the change of the relations of Calhoun with the Democrats; it was the most elaborate and finished effort of Clay's career. The exciting debate finally ended in a spirit of courtesy and good will, but the controversy was renewed again with great bitterness. When Clay resigned his seat in 1842, and took leave of the Senate in a speech of great pathos and power, Calhoun, overcome by his feelings, tendered his hand to his retiring enemy, and the reconciliation was complete.

From 1822 to 1848, a period of twenty-six years, Henry Clay lived the strange life of a candidate for the presidency, and such were his sincerity and healthfulness that he came out of this fiery trial still a patriot and a man of honor. When charged in the Senate with using his position for his own ends, he replied. "For many a long year, Mr. President, I have aspired to an object far higher than the presidency; that is, doing my duty under all circumstances, in every trial, irrespective of parties and without regard to friendships or enmities, but simply in reference to the prosperity of the country."

In the elections of 1832, 1839 and 1844, Clay was a candidate for the presidency, and each time was defeated, but not conquered. In the contest of 1844, the party which had placed Clay in nomination started with vast chances in its favor, which were greatly increased by the dissensions existing in the other party. Yet Clay was beaten, and by a man far inferior to him in every respect; there is no doubt that his want of success was due to his views on the slavery question.

The following is an extract from his great speech on the Oregon question before the House, March 16, 1846: —

"But I oppose war, not simply on the patriotic ground of a citizen looking to the freedom and prosperity of his own country, but on still broader grounds, as a friend of improvement, civilization and progress. Viewed in reference to them, at no period has it ever been so desirable to preserve the general peace which now blesses the world. * * * Chemical and mechanical discoveries and inventions have multiplied be-

yond all former example — adding, with their advance to the comforts of life in a degree far greater and more universal than all that was ever known before. Civilization has, during the same period, spread its influence far and wide, and the general progress in knowledge and its diffusion through all ranks of society, has outstripped all that has ever gone before it. The two great agents of the physical world have become subject to the will of man, and have been made subservient to all his wants and enjoyments; I allude to steam and electricity, under whatever name the latter may be called. The former has overcome distance both on land and water, to an extent which former generations had not the least conception was possible. It has, in effect, reduced the Atlantic to half its former width, while, at the same time, it has added three-fold to the rapidity of intercourse by land. Within the same period, electricity, the greatest and most diffuse of all known physical agents, has been made the instrument for the transmission of thought, I will not say with the rapidity of lightning, but by lightning itself. Magic wires are stretching themselves in all directions over the earth, bringing men closer together."

At the Philadelphia convention in 1848, Clay was again defeated, and this was the culmination of his mortification and wrath at the final overthrow of all his schemes. He passionately aspired to be president; he wished this for many reasons; he was sure that his theory of the policy of the government would insure prosperity to the country and the people; then he desired to reward his friends and punish his enemies. Clay had resigned his seat in the Senate previous to the election, and he retired to Ashland; but he could not long remain inactive, and he soon returned to the Senate.

Clay's last public effort was in support of the "compromise measures" in 1850. His health was now failing and he visited New Orleans and Havana the following winter. Ashland was mortgaged for $50,000, and upon his return from the South he discovered that this had been removed privately by his friends. "Had ever a man," he exclaimed, "such friends or enemies as Henry Clay!" "The careless reader of our history in future centuries," wrote Horace Greeley, "will scarcely realize the force of Clay's personal magnetism, nor conceive how millions of hearts glowed with sanguine hope of his election to the presidency, and bitterly lamented his and their discomfiture."

Clay resigned his seat in the Senate September 20, 1851, and in his valedictory address, he said: "My acts and public conduct are a fair subject for the criticism and judgment of my fellowmen; but the private motives by which they have been prompted are known only to the great searcher of the human heart and myself. * * * Whatever errors, and doubtless there have been many, may be discovered in a review of my public service to the country, I can, with unshaken confidence, appeal to that divine arbiter for the truth of the declaration that I have been influenced by no impure purpose, no personal motive; have sought no personal aggrandizement, but that, in all my public acts I have had a sole and single eye, and a warm and devoted heart, directed and dedicated to what, in my best judgment, I believed to be the true interests of my country."

While on a visit to Washington the following June, he was taken suddenly ill. A friend who had just returned from Kentucky, and who bore a message from his wife, went to visit him. Clay said to him, "I am not afraid to die, sir; I have hope, faith, and some confidence. I do not think any man can be entirely certain in regard to his future state, but I have an abiding trust in the merits and mediation of our Saviour."

He met his end with composure, surrounded by a few friends. On July 1, 1852, his body lay in state in the Senate Cham-

ber, and the following day it was removed to Ashland, where the funeral was met by 100,000 people. "The great man had missed the presidency, but he had not missed the love of a whole nation." It was said of him, "his last years were his best; he ripened to the very end."

"Of our public men of the sixty years preceding the war," said James Parton, "Henry Clay was certainly the most shining figure. Was there ever a public man, not at the head of a state, so beloved as he? Who ever heard such cheers, so hearty, distinct and ringing, as those which his name evoked? Men shed tears at his defeat, and women went to bed sick from pure sympathy with his disappointment. He could not travel during the last thirty years of his life, but only make progresses. When he left his home the public seized him and bore him along over the land, the committee of one State passing him on to the committee of another, and the hurrahs of one town dying away as those of the next caught his ear. The country seemed to place all its resources at his disposal; all commodities sought his acceptance."

BENCH AND BAR WITTY ENCOUNTERS.

WHAT entertaining volumes might have been made for the delectation of the legal profession — and for laymen as well — if from the earliest times of the institution of courts and of their officers some record could have been kept of the asides between judges and counsel, or between members of bench or bar themselves (or litigants or witnesses) during argument or trial hours. These asides might have included epigram, sarcasm, wit, and trenchant repartee. One meets with specimens of them in legal biographies and in many published recollections. These, too, abound in anecdotes. But their paucity compared with the estimation of what must have been their frequency only serves to increase curiosity now alive and create longing for more.

To the clever things uttered in court-rooms might be added the clever things done — the caricatures and drawings of counsel or judges, for instance, on the margin or in the body of briefs and notes of testimony or argument. It is mentioned in recent newspapers, of Sir Frank Lockwood, Q. C., who was lately Solicitor-General of England, that ushers in the courts, after their duties of attendance end, find on the floor near where he has sat as acting counsel, slips of blotters and papers that contain humorous or serious etchings made by him with lightning-like rapidity, and illustrative of passing events in the court-room, or of officials, witnesses and jurors. He has not hesitated even to polish off with deft pen a lordship or two in robes upon several occasions.

Few who know of Sir William Jones only through his treatise on Bailments can credit that he was one of the sweetest poets at the close of the last century. He has been known to often pen verses *ad captandum* in court; and to an effort on one such occasion is ascribed his couplet reading:

> "Seven hours to law, to soothing slumber seven,
> Ten to the world allot, but all to Heaven."

Which reads as a great improvement over another similar couplet ascribed to Coke, a century before Jones:

> "Six hours in sleep, in law's grave study six,
> Four spend in prayer, the rest on Nature fix."

Sir George Rose was a brilliant Chancery Q. C. of the era of Lord Eldon, who in the awful presence of the latter wrote on his notes these epigrammatic lines regarding a

pending equity case — which lines, although heretofore given in legal literature, may in this connection again see light: —

"Mr. Leach has made a speech
Which is witty, neat and strong.
On the other part brother Hart
Has been heavy, dull and long.
Brother Parker made the case darker
Which was dark enough without.
Then on his close the court uprose
And Eldon muttered — 'Doubt.'"

No doubt many a judge, wearied by the prolixity of an arguing counsel, and who has already extracted the kernel of the nut that counsel is cracking with repeated blows, has whiled away the moments by pencilling some *bon mot* or epigram and handed it to associates for their enjoyment. Perhaps they of the Bench are often thus recreating when counsel, seeing busy pens moving above him, fondly fancies that the Judges are taking copious notes of his argument and citations.

New Orleans lawyers narrate of their once Chief-Justice George Eustis — sire of the American Ambassador to France — that his great amusement during tedious arguments was to indite pleasantries on his official note-book. They also narrate that Judah P. Benjamin, when at the New Orleans Bar — long before he became Federal Senator, then Attorney-General of the Confederacy and subsequently a great Q. C. in England — was noted for his exchange of repartees with Judge Eustis.

A capital impromptu satire on Chief Baron Pollock — grandfather of the great Q. C. who has recently been a guest of the Harvard Law School alumni — is ascribed to George Augustus Sala, constructed while acting as reporter of a *cause celèbre* for the "London Telegraph." At the time the Chief Baron had become — to quote a Biblical phrase — "well stricken in years" and was very deaf; so that he would often misunderstand and confuse matters in his rulings. The impromptu lines may serve as an instance of what is lost through absence of court reporters, to chronicle smart forensic sayings. The preservation of the line is due to barrister Percy Fitzgerald — who, however, is better known as author and playwright than as lawyer.

It seems that in observing the mistakes of the Chief Baron through his diminution of hearing, Fitzgerald, in an aside, had reminded Sala of the sketch in the Pickwick Papers by their mutual friend, Charles Dickens, of deaf Justice Stareleigh when presiding at the Trial of Bardell *v.* Pickwick. That fictional Judge, when witness Nathaniel Winkle of the club was called to the box, had after many vain attempts to hear the name called, finally noted it as Daniel. Thus the Sala impromptu:

The plaintiff, John Doe, is as deaf as an adder,
More deaf the defendant, one Roe, and what's sadder,
Much deafer than both is the judge, enthroned high
This intricate action of trover to try!
Doe claimed many drachmas for rent left unpaid.
Deaf Roe in defence with great emphasis said:
"It is always by night that my corn I do grind."
Quoth the judge looking down, "Why not be of one mind?
After all she's your mother; why can't you agree
To keep her between you and let the law be?"

These irrelevant misunderstandings among the deaf triune were indeed trenchantly hit off.

Chief Justice Xavier Martin, of Louisiana — first reporter of its court, and to remove whom, because he was an octogenarian, purblind and deaf, and would not resign, the State Constitution was changed in 1846, — was continually blundering through his deafness. When the eloquent Sergeant S. Prentiss, who had come down from Vicksburg, in Mississippi, to argue a case before the Martin Court, the senile Chief Justice whispered to an associate on the bench, "New face; don't know him. What's his name?" This being given, all the conversation perfectly audible in the court-room that was crowded by auditors attracted by the fame of one of the most matchless

orators the Union ever knew — Chief Justice Martin, hearing the word Prentiss, said testily, "Yes, yes, Mr. Sargent: but who is he apprentice to?"

"Himself," responded, in an aside, Alfred Hennen, *arbiter elegantiarum* of the then bar, "Prentiss is the apprentice to the Muse of Eloquence."

Elijah Paine, best known to the Bar of New York City half a century ago as author of a ponderous book of practice, was later a judge of the Superior Court of that city by gubernatorial appointment to fill a vacancy. He was fast becoming deaf and often mistook ringings in his ears for spoken words; and upon one occasion soon after his debut startled the court room by suddenly exclaiming to the crier beside him, at the very moment when counsel paused to consult a volume and quietude reigned. "Demand more silence," adding "I may be somewhat hard of hearing, but I do not want confusion."

It was this judge of whom Daniel Lord, junior, having said to John Van Buren (while both were engaged in a trial and each fairly shouting) "this is another Elijah fed by ravings," was responded to by the witty Prince thus: "And the pleasure we delight in physics Paine."

But deaf as some judges might be, it was dangerous for a juror to play — a common one — the game of deafness as an excuse for release upon Sir Henry Hawkins, the eminent English judge, who would often catch a juror after hearing his excuse by emitting in a faint whisper scarcely to be heard by his clerk a few paces off, "excuse granted; you may go," and when the trapped juror answered, "Thank your lordship," showing he was not deaf, Sir Henry would gruffly say, "Now take the box."

It was before Sir Henry — who was fond of holding criminal assizes — that a Hebrew barrister made this appeal for clemency for his client, convicted of perjury: "He is the best man in the kingdom for de trut'. He always spoke de trut', and indeed he was so fond of it that he would tell more than de trut'."

Arguing a case once in the Federal Supreme Court, a western lawyer thinking to compliment Justice Story, then on the bench, quoted almost entirely from some of the judge's law books: and venturing to pun, as looking at the shining scalp of the great jurist (which to veterans who remember him seemed always blushing) said "but to at least one of your Honors these references may seem an old story." Reverdy Johnson, who sat near by, whispered to the advocate, "Your whole argument is built Story upon Story."

Vice Chancellor and also Civil Judge Anthony S. Robertson, of New York City, was noted for indulging in bench repartees and witticisms without compromising his own dignity or that of an occasion. He was listening patiently at chambers to an argumentative conflict over the amount of a fee claimed by a counsel. At the close of the contention he remarked, "Let me have your papers and the affidavits of the expert, and I will see what is feasible as to the fee and endeavor to see my way to a just solution between the contention on the one side that the fee is a phenomenal one and on the other side that there should not be a nominal fee."

He was very much beloved by all the profession, who scarcely ever referred to him otherwise than as "Tony." He had a brother Justice, James R. Whiting, who had been a District Attorney, and for his bitter prosecutions was named "Little Bitters," being abnormally short of stature. Judge Whiting was not college bred, but had an ambition to be thought literary, and was much given to quotations which often became curiously verbally mixed. Called upon to speak regarding the death of a judicial brother he rounded his peroration with, "our brother has gone where the weary cease from troubling and the wicked are at rest."

"The judge has given a non-jurisdictional post mortem sentence," remarked Judge Tony, who was not altogether friendly with Whiting. And later when the latter, wearied of the Bench, left it in disgust, and a lawyer meeting Judge Tony in the court, rather ungrammatically announced: "Judge Whiting *is* resigned," was answered, "And so am I to the news."

The Southern congressman who is credited with inventing the question put to the Speaker, "Where am I at?" was anticipated a quarter century ago before Judge Lewis B. Woodruff, Federal Circuit Judge in New York. The latter was continually given to making interruptions during arguments, and also interlocutory digressions which often embarrassed the counsel. After a rather long interruption during an argument by the late William O. Bartlett, an eminent lawyer, Judge Woodruff said, "And now you may resume the thread of your argument." Bartlett, a master of repartee, said, "That thread is now so interwoven into the woof and warp of your Honor's excellent cloth of observations that I have lost it. But will your Honor kindly tell me where I was at?"

Chief Baron Kelly, during argument, was given to much wool-gathering, and one could see from his countenance when the fit of absent-mindedness was upon him. But he was sometimes like the fox in the fable, who outstretched and with closed eyes was nevertheless wide awake for the innocently straying chicken. On such a last-mentioned occasion, Mr. Cole, Q. C., repeated a point when the Chief Baron, still with closed eyes, languidly remarked, "Mr. Cole that is the third time you have said that — why repeat?"

"If your lordship pleases, I wanted at least one of them to carry attention."

"I heap a coal of fire upon your head by informing you that each shot took effect. I can readily shut my eyes to bad law and sophistry."

George Wood, an eminent lawyer at both the Philadelphia and New York bar, was never suspected of waggery. Yet according to Marshall Bidwell, whom, as a great Canadian barrister the provincial revolution engineered by Mackenzie in 1837 exiled to New York to become one of its grandest and most impressive-looking ornaments — with his massive gray head, Roman features and spotless white cravat of the Prince Regent folds, — George Wood one day, while they were associated in a pending case, suddenly whispered, "Don't be alarmed at brother Ogden's earnestness on the other side. There is only one case in his favor, and if he knows of it he cannot get the volume."

"Why not?"

"Because I have drawn it from the library and I am now sitting on it."

Richard Busteed, when Corporation Counsel of New York city, once claimed that Chief-Justice Thomas J. Oakley, who was never jocular, had lost him a verdict by perfunctorily saying, without meaning any slur, in the midst of the counsel's very amusing address to a jury, — "Now we will take a luncheon recess to give the jury opportunity to laugh."

Busteed, after the civil war, was made, by President Johnson, Judge of the Federal District Court in Alabama. There he was regarded as a carpet-bagger, and the Confederate lawyers took every occasion to hetchell him. Busteed was an erratic man, and faddish. He insisted upon having his judicial chair in Mobile draped with the American flag. On one occasion the judge was compelled to kindly rebuke a member of the bar who, insolently pointing to the exposed flag observed, "Yes, the court makes me see stars." Whereunto Busteed calmly observed, "And have a care lest the court should in self-respect be compelled to make you also see stripes."

Before Mr. Chauncey Depew drifted from general law practice into special legal practice for the Vanderbilt interests, and lastly into railway management, his well known wit

and readiness of repartee was remarked. When just admitted to the bar, he was before a Peekskill justice of the peace and was perhaps youthfully overbearing when the Justice of the Peace remarked — with emphasis on the word me — "D'ye expect *me* to teach you manners, young man?" The answer was, "I have no such expectation, your honor, and I do not believe any one else has such hopeless expectation."

A member of the New York bar, who was professor in one of the Metropolitan law schools, on one occasion when the late Judge George G. Barnard was a member of a court in banco, fairly lectured the Bench on the law applicable to his appeal; when Barnard thus pleasantly interrupted: "Be kind enough to remember, Professor, that we have all at least attended a primary law school."

A counsel once arguing the question of premeditation in murder and whether a design to kill could be formulated on an instant of thought, had said before the Court of Appeals that no instance of such a possibility of design and fulfilment concurrent was extant, was interrupted by Chief-Justice Henry G. Davies — a great churchman — with, "Oh yes; in the first chapter of Genesis: 'And God said let there be light: and there was light.'"

"Quite so, Chief Justice," was the repartee, "but my client had no divine aid; for the indictment on page 3 of the Bill of Exceptions charged him with 'being moved and instigated thereunto by the devil.'"

When the vast scope of the constant attrition of judicial and legal minds that is afforded under the court machinery of this entire Union is considered, only then due estimation can be had as to the extent and quality of the rhetorical result of "keen encounter of wits" in its two or three hundred courtrooms habituated by men of mental training in thought and fancy, as well as of the interest which full reports of such encounters, if possible to be made, would disseminate to readers.

THE FAILURE OF PUNISHMENT.

EVERY now and then the conscience of the community is horrified by some abominable crime. Public interest becomes violently excited, and all the details are read with avidity. Should the criminal be discovered, his trial is watched by the eyes of the nation, and if his crime be murder, the public conscience of the majority is appeased when he is sentenced to death. Formerly the execution was a festive occasion for all but the prisoner. People went to view it as they go to see a horse-race, a circus performance, or any other pleasant show. Seats were paid for, and places taken early. Rude jokes were cracked, and ribald songs sung. Refreshments were devoured at the foot of the gallows, and the Bill Sykes of the hour was cheered by his friends, and exhorted to die "game." If he showed signs of fear, the mob cursed and howled. Bravado, insolence, and impudence were expected from him for their approval, and he seldom disappointed them.

We find that punishments after the Christian era were little, if any, less cruel than those under Paganism. Virginity was the supreme theoretical virtue of the early Church, the foundation of her wealth and strength. Thus the first Christian emperors issued edicts by which panderers were condemned to have molten lead poured down their throats, and not only was the ravisher put to death, but the ravished also if she consented to his act. Nevertheless, nowhere are fouler records of immorality to be found than among those who were the most strenuous upholders of chastity. The comparative immunity of monks and priests made them the most debauched and most debauching classes of the community. They were not slack, however, in imposing pains and penalties upon others. The punishments inflicted by the Church exceeded the civil manyfold, both in number and severity, but they did not succeed in checking ecclesiastical offenses. For instance, when witches were punished with most cruelty was precisely the time when witches most abounded. Each *auto-da-fe* was followed by an abundant crop of fresh victims. We look on these follies of our predecessors with scorn and pity, and perhaps, in the future, our errors, to which we so fondly cling to-day, will be similarly regarded.

It has been found by ages of experience that the most horrible punishments or sufferings were least deterrent. In many cases they seem to have had a strange fascination for weak minds that boldly courted them, just as the Circumcelliones, in the fourth century, courted suicide. These insulted the Pagan customs to provoke martyrdom — killed each other for the glory of God — and, as St. Augustine informs us, assembled by thousands at a time, and "leaped with paroxysms of frantic joy from the brows of overhanging cliffs till the rocks below were reddened with their blood." Healthy minds regard horrors with wholesome abhorrence, but not so the unhealthy. And we are still so ignorant of the extent to which these latter exist, and of the peculiarities of mental and moral weaknesses, and the influence upon them of current events, that it becomes doubtful whether severe punishments do not incite to new crimes, and, indeed, whether all forms of punishment, except restrictive ones, may not be mistakes.

It has been proved over and over that crime is in its nature epidemic, and from this it would appear to be the outcome of disease. Lunatics in this country were regularly whipped in former times, and those who had infectious complaints, such as smallpox,

were similarly treated if they broke bounds even during delirium. In the parish constable's account for 1710, at Great Staughton, Huntingdonshire, is this entry: "Pd. Thomas Hawkins for whipping two people that had the smallpox, 8d.;" and in 1714: "Pd. for watching, victuals, and drink for Mary Mitchell, 2s. 6d.: pd. for whipping her, 4d." Yet the people who ordered and performed these atrocities were not destitute of humanity, but were gravely wanting in perception.

If it were possible to abolish crime by severity, then despots should be the greatest social purifiers. Henry VIII, in the twenty-second year of his reign, made poisoning treason, and the penalty, to be slowly boiled to death; but so ineffective was this that, in the first year of his son's reign, it was repealed. We have had all kinds of maiming and lopping by law. Eyes, lips, ears, noses, hands, tongue, besides an unnameable one. When men were disemboweled and hanged for petit treason, women were disemboweled and burnt. To be hanged, drawn and quartered was common. English women were burnt for witchcraft and for all kinds of treason, whether poisoning a husband or defaming the Queen, until the thirtieth year of George III. Next they were drawn and hanged; and now they are hanged only, and for murder alone. Who can say whether the repeal of this last might not be as wise as that of the previous ones? Had we the same moral courage as our ancestors, we should try it.

We are aware that this proposal would be indignantly rejected by a large number. Many would bang us with that verse of Scripture, "Whoso sheddeth," etc. But they were the same sort who clamored for the burning of inoffensive women, on the ground that "Thou shalt not suffer a witch to live." Those who believe in the amelioration of harsh laws rather than in extreme punishments, who hold that men can be drawn into goodness, but can never be driven, are forever encountered by these Biblical "bangs." We protest against yielding to the narrow zealots who meet every suggestion for the improvement of social conditions in this age by a quotation from the Pentateuch. In addition to the maiming and capital punishments named, and often for the most frivolous offences, such as stealing a sheep or killing a hare, there have been a host of excruciating tortures inflicted to extort confession.

When Felton was threatened with torture, he said: "If I be put upon the rack, I will accuse you, my lord of Dorset, and none but yourself." Secretary Winwood wrote of a prisoner in James I's reign: "Peacham this day was examined before torture, in torture, between torture, and after torture; notwithstanding, nothing could be drawn from him." Queen Elizabeth once tortured all the servants of the Duke of Norfolk, yet no lawyer found fault with this violation of the laws. As an able writer says: "The truth is, lawyers are rarely philosophers; the history of the heart read only in statutes and law cases, presents the worst side of human nature; they are apt to consider men as wild beasts."

Minor punishments were liberally provided by borough towns. These, like little independent states, while acknowledging a suzerain, made their own laws and administered their own punishments. Fear was the ruling feature of their systems, as in those of the higher powers. Now a single hanging creates a sensation. But in 1787, thirteen men and women were conveyed to the gallows at once at Worcester, not one of whom had committed murder. In the borough towns there were the tumbrel for such as pilfering millers, the ducking-stool for scolding wives, the brank for taming shrews, the cage or pillory, the skimmington, and the stocks for all. In the ballad, Titus Oates is made to say: —

> "See the rabble all round me in battle array,
> Against my wood castle their batteries play;
> With turnip granadoes the storm is begun."

Immorality was punished sometimes by the stocks and a whipping. Cardinal Wolsey, when incumbent of Lymington, was set in the stocks on a Fair day for drunkenness. Then there were also the dark house or dungeon, the drunkard's clock, the whipping-post, entries in the Hustings Book, branding, and all sorts of arbitrary fines and imprisonment. Nothing was too high or too low for the borough magnates, except such matters as had to go to sessions. A man who had associated with another man's wife "in a very suspicious manner," was imprisoned for more than a year. A walk on the Sunday, a hasty word, or absence from church, were also duly punished. Even love matters were not above the cognizance of justices.

The game-laws have been very fertile in punishments, and still occasion a large part of the crime of country districts. To take an egg out of the nest of a swan, falcon, goose-hawk, lanner or goose, was visited by a year and a day's imprisonment and a fine at the will of the Crown. For "killing or wounding any deer in any park or enclosed ground" was, by a statute of George I, transportation to the plantations for seven years. As time proceeds, these cruel punishments, so incommensurate with the offences for which they were designed, have dropped one by one away. With this amelioration, the habits and happiness of the people have correspondingly improved. Our morals are purity itself compared to those of the past. And why? Because we are better instructed in secular knowledge; because we have more freedom, and so acquire habits of self-control and self-respect; because we have got rid of prying agitators and social spies. But the madness of those who would restore the old state of things is like that which afflicted the inhabitants of the Neapolitan districts for two centuries ending with the seventeenth — the madness of self-destruction. Theirs was attributed to the bite of the tarantula; ours is a more virulent poison of the mind. Lecky tells us "the patients thronged in multitudes towards the sea, and often, as the blue waters opened to their view, they chanted a wild hymn of welcome, and rushed with passion into the waves." So amongst us are thousands who advocate those harsh measures and backward marches which would ultimately engulf us in all the horrors of anarchy and general criminality. — LADY COOK, *in the Humanitarian.*

THE SUPREME COURT OF MAINE.

I.

By Charles Hamlin.

THE first organized government within the limits of Maine exercising judicial powers appears to have been established by Sir Ferdinando Gorges, who, under his nephew, William Gorges, set up a court at Saco in 1636. The members of the court, seven in number, were styled commissioners, and resided in different parts of the province styled New Somersetshire, extending beween the Piscataqua and Kennebec rivers. Of these commissioners, Purchase was from Brunswick, Cammock and Josselyn from Scarboro, Bonithorn and Lewis from Saco, and Godfrey from York. The court thus established by William Gorges assumed general jurisdiction, and exercised governmental as well as judicial authority, endeavoring to introduce good order among the detached settlements along the coast from the Piscataqua River to Pemaquid. An early step thus taken by this court was an order, dated February 7, 1636, directed to Thomas Lewis, requiring him to "appear the next court day at the new dwelling-house of Thomas Williams (Winter Harbor), there to answer his contempt, and to show cause why he will not deliver up the *combination* [regulations of government adopted by the companies settled at Agamenticus and other places] belonging to us, and to answer to such actions as are commenced against him." The records of this time are fragmentary, but there remains enough to show that the forms of procedure were simple and free from technicalities — due to the absence of lawyers. Actions of trespass, slander, incontinency, for drunkenness and "rash speeches" occurred frequently.

The name of the territory was changed to the Province of Maine under the patent issued to Sir Ferdinando, dated April 3, 1639, and he was empowered, among other things, to establish courts of justice, ecclesiastical, civil and temporal, and to appoint magistrates, judges and officers, with the right of appeal to the Lord Proprietor. Under this charter he appointed an executive council. The board, consisting of able men, was composed of Thomas Gorges, deputy governor, and his councillors, Vines, Champernoon, Josselyn, Bonithorn, Hooke and Godfrey. In the records of their courts they are styled commissioners. Besides the usual civil and criminal powers, the court was also invested with admiralty and probate jurisdiction. The first session of the court was held June 25, 1640, when Roger Garde was sworn in as register, and Robert Sankey as provost marshal. Eighteen civil actions and nine complaints were then entered. At the September term, the deputy governor presided, and there were pending twenty-eight civil actions, nine of which were tried before a jury, and thirteen indictments. The council ordered one general term to be held annually, on the twenty-fifth day of June, at Saco, and divided the province into two districts; the dividing line being the Kennebec River, with three terms of court in each district to be held by an inferior court. At the same term, letters of administration upon the estate of Richard Williams were granted to Payton Cooke, gent., being the first granted in the Province of Maine.

Besides these courts, commissioners were appointed from time to time, in the different towns with powers similar to trial justices of the present day. Their jurisdiction in civil

matters was limited to forty shillings, and an appeal laid to the higher court. The records disclose the same simple forms of procedure that had previously prevailed. They exhibit also the first bill in equity in Maine, filed June, 1640. It is probably the first in New England. The names of the parties are John Kinkford *vs.* George Cleeves and Richard Tucker. The cause of action related to accounting for some clapboards, . . . "notwithstanding the said George Cleeves and Richard Tucker did formerly know that the said clapboards were in controversy, neither can the plf. enjoy them; and they utterly refuse to give the complainant any satisfaction for the same" . . .

It required forty years' incessant effort, and at the cost of nearly all his estate, by Gorges, to establish a government giving protection to the scattered colonies of Maine. As will be readily seen, the future of the judicial department depended upon the success of his government as an entirety. Judgments of a court without power to enforce them, or doubts and strife as to the lawfulness of its right to hear and determine causes, must, of necessity, create confusion and uncertainty. That is what did happen soon after the Civil War broke out in England, in the spring of 1642, when Gorges, returning to the mother country to espouse the royal cause, died in 1647. Sir Alexander Rigby, at the instigation of Cleeves, purchased the Plough Patent of 1630, as it was called, and the latter, sent over in 1643 as Rigby's deputy, held courts at Casco and Scarboro' for seven or eight years, in conflict with the courts of Gorges, held by Vines. This was the beginning of thirty years' conflict ending in 1677, when Massachusetts purchased of Gorges' grandson all his interests in the province for £1250 sterling. During the last-named period, the law did not exist among the people as a science, nor was its practice regulated by men trained to the profession.

After the purchase of Maine by Massachusetts, in 1677, the way was fairly open for the peaceful rule of the Bay Colony. Courts were immediately established, over which Thomas Danforth presided, and, in 1680, he was appointed president of the province. He proceeded at once to York, where he held an assembly of representatives called to reorganize the government. The judicial system then prevailing in Massachusetts was not extended over Maine, as it was decided that the purchased territory must be governed according to the charter granted to Gorges. Provision, however, was made for appeals in all cases from the superior courts, and death penalties were subject to the concurrence of a majority of the Assembly. And it was ordered that the laws, orders and precedents that had been practiced before, and were of use in the province, should remain in full force until the General Assembly or Council should take order therein. This jurisdiction continued eleven years from the purchase, until it was interrupted by the second Indian war, which devastated the whole eastern country.

During the existence of the colonial government no educated lawyer except Thomas Gorges, the first deputy of the proprietor, practiced in the courts of Maine. He was educated at the Inns of Court in London. and presided in the General Court of the province four years only.

II.

There was another province, lying between the Kennebec and Penobscot rivers, known as Pemaquid. It was occupied by permanent settlers as early as 1625. In 1630, the year that Boston was founded, it had a population of about five hundred persons. It was at one time the seat of the most considerable transactions of any settlement upon the New England coast. The general reader will find an interesting account of ancient Pemaquid by Mr. Thornton in the fifth

volume of the Maine Historical Collections. We do not know what courts were established, or what laws were enacted. No record of them remains. Mr. Thornton, however, contributes to history the valuable information that Abraham Shurt, agent of the proprietors, is the author of the brief and comprehensive formula by which the acknowledgment of deeds in Maine and Massachusetts has ever been certified. He cites as proof the certificate of Shurt to the deed of the Indian sachems of the Pemaquid territory to John Brown, dated July 24, 1626.

A few other facts in the history of Pemaquid will serve our present purpose. In 1632 a charter was granted by the council of New England to Aldworth and Elbridge of Bristol, England. This passed, in 1650, from their heirs, and became in after years the subject, together with other titles derived from the Indians, English patentees and possessory rights, of a furious and bitter controversy, which was only settled by the interference of Massachusetts, and then by compromise, in 1812. The commissioners of Charles II visited the province in 1664. They reported: "The people for the most part are fishermen, and never had any government among them."

In 1673, when the government of New York was granted to James, Duke of York and brother of the king, Pemaquid became an appendage to the colony of New York, and was represented in its General Assembly. June 24, 1680, courts were established by the council sitting in New York. The noted Sir Edmund Andros was governor at this time, and, as such, issued a commission to Henry Josselyn, who had formerly been one of Gorges' commissioners, residing at Scarboro', and others, to be a court of session, and, "to act according to law and former practice." This court held its sessions in June and November. Justices of the peace were also appointed from time to time, with authority to hear and determine civil and criminal causes. Thomas Gyles lived, at the time of the first Indian war, at Merry Meeting Bay; he afterwards settled at Pemaquid, and was made chief justice of the court there. He was killed by the Indians in 1689. John Jordan, of Cape Elizabeth, was appointed by Governor Andros a special justice for the province, which then acquired the name, County of Cornwall, the principal place being Pemaquid and made a port of entry and shire-town.

In September, 1686, the Duke of York, who had now become James II, transferred the jurisdiction of his eastern territory to Massachusetts, which immediately assumed the government over it, and she lost no time in giving stability to the institutions in her new acquisitions.

The second Indian war, which broke out soon after, 1689, interrupted her plans, and instead of establishing a peaceful government, she was called upon to defend the territory, and to rescue the inhabitants from imminent peril, and before it was over the new charter of 1691 was granted, which united with the old Bay Colony that of Plymouth, the whole territory of Maine, and also Nova Scotia.

III.

It is worthy of note that the political status of the Province of Maine, during the fifty-two years briefly sketched above, was that of a palatinate, of which Gorges was lord palatine; his royal judicial powers are found recited at large in the curious Palatinate of Maine; and is the only instance of a purely feudal possession on this continent.[1]

Under the charter of 1691, above named, granted upon the accession of William and Mary, occurred the second important period in the courts of Maine, when there was established a system which, with few changes, continued for the next one hundred

[1] Ex-Gov. Gen. J. L. Chamberlain's Centennial Address, Phila. Nov. 4, 1876.

and thirty years, or until the admission of Maine as a state into the Union.

After enunciating a declaration in the nature of a bill of rights, great doctrines foreshadowing the principle upon which the war of the Revolution was fought eighty-four years afterwards, laws were passed for the establishment of courts, viz.: justices of the peace for the trial of small causes; quarter sessions, corresponding to courts of county commissioners of the present day; inferior Court of Common Pleas; and the Superior Court. A Court of Chancery was created, but was disallowed by the Home Government. The governor and council were made by the charter a Court of Probate; and a Court of Admiralty was also established by the Crown. The Superior Court was composed of Wm. Stoughton, chief-justice, Thomas Danforth, Wait Winthrop, John Richards, and Samuel Sewall. Judge Lynde, elevated to the bench in 1712, was the first educated lawyer placed upon it; and William Cushing, appointed in 1772, was the first lawyer promoted to the bench from Maine.

This court held two sessions a year in the principal counties, but trials of causes arising in Maine, which formed only one county till 1760, were held in Boston or Charlestown. It was not until 1699 that a term was granted to this state, which was held at Kittery until 1743, when it was removed to York. This continued to 1760, when the counties of Cumberland and Lincoln were established. The first term in Cumberland County was held in 1761, in Lincoln not until 1786; both held in June, but only for jury trials. The court thus established, in 1699, for Maine, consisted of a chief and four other justices, and so continued during the existence of royal authority in the colony. By the Constitution of 1780, the title of this court was changed to that of the Supreme Judicial Court. The judges first appointed under the new constitution were Wm. Cushing, Nathaniel Peaslee Sargent, James Sullivan, David Sewall and Jedediah Foster. Three judges constituted a quorum of the court, which sat in all the counties, and they decided all questions of law arising during the progress of jury trials. In consequence of a large accumulation of business in the courts, the number of judges was increased, in 1800, to seven, with two quorums, so that the court could be held in two places at the same time. In 1805 the *nisi prius* system was introduced, with five judges; three sitting *in banc* to decide questions of law, and one or more presiding at the trial terms.

These judges, until 1792, appeared on the bench in robes and wigs; in summer the robes were black silk, in winter, scarlet cloth. The wig disappeared with the venerable Cushing.

The records of this court for all the counties were kept in Boston until 1797, when they were transferred to the custody of the clerks of the Common Pleas of the several counties, except those of Hancock, Lincoln and Washington, where the clerks were appointed by the justices to reside and to keep their records in such place in Lincoln County as the court should direct. The court appointed Jona. Bowman, Jr., clerk for these counties, his residence to be at Pownalborough, now Dresden, where the court-house, now a large, four-story dwelling-house, remains to be seen as the only remnant of a once promising city. In Maine, the *nisi prius* system was retained and administered by a chief and two associate justices until 1847, when an additional justice, Samuel Wells, was appointed.

A Common Pleas, called the Inferior Court, consisting of four judges, was organized for each county. The first judges of this court, "substantial persons," in the language of the statute, all resided west of Biddeford. John Frothingham of the Cumberland bar, appointed to its bench in 1804, was the first regular practitioner in Maine to sit in this court. Two terms a year were

held in York and two in Wells until 1736, when one term was held annually in Falmouth, now Portland. Sir William Pepperell was then its first chief-justice. After Cumberland and Lincoln counties were organized in 1760, two terms of this court were established in those counties. Lincoln County then embraced the old Sagadohoc, or Duke of York's province, and also all of the state lying east of the Penobscot River.

This court continued with the same jurisdiction to the end of the royal government, and was revived under the Constitution of 1780. In 1804, the number of judges was reduced to three in each county; and in 1811 the circuit system was adopted, under which Maine was divided into three circuits, in each of which a chief justice and two associate justices were appointed. After the separation from Massachusetts, the legislature of Maine in 1822 created a Court of Common Pleas consisting of one chief-justice, Ezekiel Whitman of Portland; Samuel E. Smith of Wiscasset and David Perham of Bangor, associate justices.

Under the circuit system of 1811, the judges appointed in Maine were: for York, Cumberland and Oxford, Benj. Greene, chief, Dana of Fryeburg and Widgery of Portland, associates; for Lincoln, Kennebec and Somerset, Nathan Weston, Jr., chief, Ames and McLellan, associates; for Hancock and Washington, Wm. Crosby, chief, Kinsley and Campbell, associates. These, except Campbell, Kinsley and Widgery, were all educated lawyers. The trials in these courts were by the intervention of a jury, consisting generally of twelve men, although in some instances composed of a less number.

It was not until after the charter of 1691 that the forms of writs and procedure in court acquired any system. In 1701, the General Court established forms of writs, and authorized the courts to frame rules of practice. No rules of practice were adopted, except as relates to irregular practitioners in Suffolk, until after the Revolution. In 1721, says Dummer, "No special pleadings are admitted, but the general issue is always given, and special matters brought in evidence." In 1701, the attorney's oath, as the same now exists, was prescribed.

This intermediate system continued in use in Maine until 1839, when the Court of Common Pleas was abolished, and a new system called the District Court was created. The date of the act is February 25, 1839, and under its provisions the state was again divided into three districts as before. This system lasted only for the brief period of fourteen years. The causes which led to its being abolished, in 1852, and the creation of the Supreme Judicial Court, the system which exists at the present time, will be found in the life of Chief-Justice Appleton, appearing in a subsequent number of THE GREEN BAG.

Under the charter of 1691 a court was established under the name of "A Court of General Sessions of the Peace." Its powers were much like those of county commissioners of the present day, but it was composed of justices of the peace in each county, having power to appoint clerks, officers, summon juries, and establish rules of practice. Its jurisdiction was renewed under the Constitution of 1780, and continued until 1804, when it was transferred to the Common Pleas, except as to county buildings, roads and granting licenses, etc. Other changes in the organization of this court, including that of its name to Court of Sessions, took place, from time to time, by substituting a fixed number of judges in 1807, its reëstablishment in 1811, abolition in 1814, and restoration in 1819 with a chief justice and two associates in each county.

After the separation many changes occurred. In March, 1831, a radical change was made. The governor was authorized to appoint in each of the several counties three suitable persons as county commissioners,

and this name of the court has ever since remained. In 1842, the office was made elective, the effect being to supplant those persons who were lawyers with others not trained to the law.

The jurisdiction of the Probate Court in Maine was confided, under the charter of 1691, to the governor and council, who appointed probate judges in each county. Prior to this the recorder of the province, who was generally the clerk of the County Court, recorded wills and administrations with the records of that court. The records of York County show, as early as 1635, how the jurisdiction was exercised from the first inception of the government in Maine. In June, 1635, the inventory of the "estate of Richard Williams, servant to Mr. Matthew Craddock," was taken and confirmed by deposition in 1660. The conflict of jurisdiction, which harassed the province after the revolution of 1642 in England until the charter of 1691, was made the ground for acts of confirmation. Accordingly we find, in May, 1648, a decree passed confirming to Payton Cooke the administration granted him by the court in 1640, held under Gorges' authority. In March, 1784, after the Constitution of 1780, the legislature passed the first probate act, establishing a Probate Court in each county. The judge and register were appointed by the governor and council, and an appeal was allowed to the Supreme Court. For nearly a century, beginning with Joshua Scottow in 1687 to Jonathan Sayward 1775, there were only nine judges of this court in the Province of Maine. Scottow was both register and judge, and one register, Joseph Hammond, became judge after five years' service. After the separation from Massachusetts, this court was continued by the act of March 20, 1821. The judges had the same tenure of office as the judges of common law courts, — for life, but were paid, as also were the registers, by fees assessed upon the business of their courts. In 1826 the fee table was abolished, and fixed salaries — an excellent provision — established in their place. In 1839, the life tenure was abridged to seven years, and in 1855, both judges and registers were made elective by the people every four years.

This court remains substantially in the same form and with the same powers as thus established; with, however, the added duties of a court of insolvency, taking the place of a bankrupt court since the repeal of the United States bankrupt law.

IV.

The Supreme Judicial Court of Maine was organized in 1820 by the appointment of one chief-justice, Prentiss Mellen, and Nathan Weston and Wm. P. Preble, associate justices. Their tenure of office was during good behavior, but not to exceed seventy years in age. The *nisi prius* system was retained until 1847, when an additional justice, Wells, was appointed. Chief-Justice Mellen presided until 1834, when, having attained the age of seventy, he became constitutionally disqualified, and was succeeded by Nathan Weston, with Parris and Emery, associates. A constitutional amendment having been adopted in 1839, limiting the judicial tenure to seven years, he retired in 1841, when he was succeeded by Ezekiel Whitman, who resigned in 1848.

In 1852 an important change, quite radical, was made in the judicial system of the State. The District Court, created in 1839, was abolished, as before stated, and the business of that court was transferred to the Supreme Court, then increased to seven judges. The change thus introduced, with the addition of another justice, is the system which now prevails.

Chief Justice Whitman's successor was Ether Shepley, an associate justice, who retired at the end of seven years, in 1855, and was succeeded by John Searle Tenney, who also served one term, until 1862, and Chief-

PRENTISS MELLEN.

Justice John Appleton was appointed his successor for three terms, retiring in 1883, after a judicial service of thirty-one years. The present chief-justice is John Andrew Peters, now serving his second term.

It is proposed to give in the following pages a sketch of the lives of the chief justices, and the present associate justices.

The following is a chronological table of the Supreme Judicial Court justices from the beginning to the present date, 1895.

CHIEF JUSTICES.

Prentiss Mellen, Portland, July 1, 1820, to Oct. 22, 1834.
Nathan Weston, Augusta, Oct. 22, 1834, to Oct. 21, 1841.
Ezekiel Whitman, Portland, Dec. 10, 1841. Resigned Oct, 23, 1848.
Ether Shepley, Portland, Oct. 23, 1848, to Oct. 22, 1855.
John Searle Tenney, Norridgewock, Oct. 23, 1855, to Oct. 23, 1862.
John Appleton, Bangor, Oct. 24, 1862, to Sept. 19, 1883.
John A. Peters, Sept. 20, 1883. Reappointed Sept. 19, 1890.

ASSOCIATE JUSTICES.

William Pitt Preble, Portland, July 1, 1820. Res'd June 18, 1828.
Nathan Weston, Augusta, July 1, 1820. Ap'd C. J. Oct. 22, 1834.
Albion K. Parris, Portland, June 25, 1828. Res'd Aug. 20, 1836.
Nicholas Emery, Portland, Oct. 22, 1834, to Oct. 21, 1841.
Ether Shepley, Saco, Sept. 23, 1836. Ap'd C. J. Oct. 23, 1848.
John S. Tenney, Norridgewock, Oct, 23, 1841. Ap'd C. J. Oct. 23, 1855.
Samuel Wells, Portland, Sept. 28, 1847. Resigned March 31, 1854.
Joseph Howard, Portland, Oct. 23, 1848, to Oct. 22, 1855.
Richard D. Rice, Augusta, May 11, 1852. Resigned Dec. 1, 1863.
John Appleton, Bangor, May 11, 1852. Ap'd C. J. Oct. 24, 1862.
Joshua W. Hathaway, Bangor, May 11, 1852, to May 10, 1859.
Jonas Cutting, Bangor, April 20, 1854. Reap'd April 20, 1861, and April 20, 1868.
Seth May, Winthrop, May 6, 1855, to May 7, 1862.
Woodbury Davis, Portland, Oct. 10, 1855. Rem'd April, 1856. Reap'd Feb. 25, 1857. Resigned 1865.
Daniel Goodenow, Alfred, Oct. 10, 1855, to Oct. 10, 1862.
Edward Kent, Bangor, May 11, 1859. Reap'd May 11, 1866.
Charles W. Walton, Deering, May 14, 1862. Reap'd May 14, 1869, May 16, 1876, May 15, 1883, and May 15, 1890.
Jonathan G. Dickerson, Belfast, Oct. 24, 1862. Reap'd Sept. 24, 1869, and Sept. 20, 1876. Died in office, Sept. 1, 1878.
Edward Fox, Portland, Oct. 24, 1862. Resigned 1863.
William G. Barrows, Brunswick, March 27, 1863. Reap'd March 24, 1870, and March 24, 1877.
Charles Danforth, Gardiner, Jan. 5, 1864. Reap'd Jan. 5, 1871, Dec. 31, 1877, and Dec. 31, 1884. Died in office, Mar. 30, 1890.
Rufus P. Tapley, Saco, Dec. 21, 1865, to Dec. 21, 1872.
William Wirt Virgin, Portland, Dec. 26, 1872. Reap'd March, 1880, and March 30, 1887. Died in office, Jan. 23, 1893.
John A. Peters, Bangor, May 20, 1873. Reap'd May 20, 1880. Ap'd C. J. Sept. 30, 1883. Reap'd Sept. 19, 1890.
Artemas Libbey, Augusta, April 24, 1875. Reap'd Jan. 11, 1883, and Jan. 10, 1890. Died in office, March 15, 1894.
Joseph W. Symonds, Portland, Oct. 16, 1878. Res'd March 31, 1884.
Lucilius A. Emery, Ellsworth, Oct. 5, 1883. Reap'd Oct. 4, 1890.
Enoch Foster, Bethel, March 24, 1884. Reap'd March 24, 1891.
Thomas H. Haskell, Portland, March 31, 1884. Reap'd March 31, 1891.
William Penn Whitehouse, Augusta, April 15, 1890.
Andrew Peters Wiswell, Ellsworth, April 10, 1893.
Sewall C. Strout, Portland, April 12, 1894.

PRENTISS MELLEN, the first chief-justice, and the third son of the Rev. John Mellen, was born October 11, 1764, at Sterling, in Massachusetts. With a most affectionate and filial regard, he cherished the memory of his father, who was distinguished for learning, simplicity of manners, and Christian purity of life, often speaking of him as a fine specimen of the New England clergy. From his mother, the daughter of the Rev. John

Prentiss, he inherited the prudence and piety which entered deeply into the building up of his beautiful character, combined with a playful wit which he used to the delight of all, without giving pain to any.

He was prepared for college under the personal instruction of his father, and was graduated at Harvard College in 1784. His elder brother, Henry, and John Abbott, long a professor at Bowdoin College, were among his classmates. His commencement part was a forensic disputation in English, upon the question, whether the knowledge and practice of religion are not promoted more by diversity in sentiment and modes of worship, than by an entire uniformity. The year following he was a private tutor at Barnstable, in the family of Joseph Otis, and at the same time began the study of law in the office of the eccentric lawyer, Shearjashub Bourne. He was admitted to the bar at Taunton, in October, 1788. By the custom then prevailing, students were required, upon their admission to the bar, to treat the judge and all the lawyers. We have his testimony that this ceremony was observed "with about half a pail of punch, which treating aforesaid was commonly called 'the colts' tail'."

He began practice in his native town, but after a few months removed to Bridgewater, where he continued until November, 1791, when he went to Dover, N.H. He spent the winter and spring there with his brother, and in July, 1792, under the advice of Judge Thacher, then a member of Congress, he went to Biddeford, where he soon entered upon a successful practice which placed him at the head of the bar in Maine, and at the head of its highest judicial tribunal.

He thus describes his humble beginning in Biddeford: "I opened my office in one of old Squire Hooper's front chambers, in which were then arranged three beds and half a table and one chair. My clients had the privilege of sitting on some of the beds."

His celebrity as a leader soon called him into the neighboring counties in Maine and New Hampshire. In 1804, he began making the circuit of Maine with the Supreme Judicial Court. In 1806, he removed to Portland, and from that time until his appointment to the bench in 1820, he practiced with eminent success in every county, being retained in nearly every important case. The law term for Maine was then held in Boston, where the records were also kept.

His competitors were men of high legal attainments, of great natural abilities, and able and eloquent as advocates. Among them was the accomplished Parker, afterwards chief-justice of Massachusetts; the grave and cautious Whitman, his distinguished successor on the bench; the sensible and acute Longfellow; Orr, shrewd, skillful and prompt; and the adroit and eloquent Wilde, late of the Supreme Court of Massachusetts. "His most constant opponent," said Professor Greenleaf, "was Judge Wilde; their forensic warfare, adopted by tacit consent, was to place the cause on its merits, produce all the facts, and fight the battle in open field. A generous warfare like this could not but create a generous friendship."

At the bar his manner was fervid and impassioned; his countenance lighted up with brilliancy and intelligence; his perceptions were rapid, and his mind leaped to conclusions to which other minds traveled more slowly. As a consequence, he was obliged sometimes upon more mature reflection to modify such conclusions. On one occasion Chief Justice Parsons remarked to him when he was ardently pressing a point, "You are aware, Mr. Mellen, that there are authorities on the other side." "Yes, yes, Your Honor, but they are all in my favor."

He identified himself with the cause of his client, and never for a moment neglected it, or failed to improve every opportunity in his opponent's weakness or errors, to secure a victory. His voice was musical, his per-

son tall and imposing, and his manner fascinating. At times he was eloquent.

In all his conflicts with his brethren, which at times were ardent, and sometimes impetuous, he was singularly fortunate in never, even unintentionally, inflicting the slightest wound upon their feelings. He was ever gentlemanly and kind.

The same traits of impassioned eloquence reappear, at a subsequent generation, in Sergeant S. Prentiss, the famous orator of Mississippi, when he charmed and electrified the country by his wonderful powers. Prentiss used to attend the Mellen-Prentiss family reunions at Portland, where he was recognized by the Chief Justice as a relative [1] and favorite kinsman.

In 1808, 1809, and 1817 he was a member of the executive council in Massachusetts, a presidential elector in 1816, and elected to the U. S. Senate in 1817, where he had Harrison Gray Otis for his colleague. The latter situation he held until Maine was organized as a separate state, when, in July, 1820, he was appointed chief-justice of the new State. The same year he received the honorary degree of Doctor of Laws from both Harvard and Bowdoin colleges. His associates on the bench were Nathan Weston and Wm. P. Preble.

For this elevated and honorable station, he was eminently qualified by the high order of his legal attainments, his long experience, readiness in dispatch of business, and love of justice and equity. Yet his love of equity was not that morbid sentiment which often leads to a blind sacrifice of the principles of law. Hence, he always held the established principles and rules of the law as too sacred to be disregarded; and no judge bowed with more profound respect to the settled law of the land.

His thorough knowledge of practice, his familiarity with decided cases, and his quick perception of the points and merits of a case, were peculiarly valuable at a time when the new State was forming its system of jurisprudence. The enduring evidence of his sound judgment, his just discrimination, great learning, and the lasting impress of his powerful mind are to be found in his judicial opinions, which are contained in the first eleven volumes of the Maine Reports. Of the sixty-nine cases in the first volume, the opinions in fifty were drawn by him; of eighty-four opinions in the second volume, he drew seventy-four; and this industry and application is apparent through the whole series, in the last of which, of the one hundred and six opinions, he drew seventy-four. None of them are of a light or hasty kind; many of them involved points of the highest importance, requiring profound study, nice discrimination, and keen analysis. Perhaps as ready an illustration of all these elements combined is the case of Prop'rs Kennebec Purchase *v.* Laboree, 2 Greenl. 275, so often cited upon the constitutionality of retrospective statutes, where vested rights are involved.

He grew up with the law of the State which he largely shaped; he was as familiar with the modern as with ancient decisions, and kept pace with the progressive learning of his profession.

His useful career upon the bench ended October 11, 1834, when he reached the constitutional limit of seventy years, beyond which no judicial office could then be held in Maine.

On his retirement from the bench, the Cumberland Bar addressed him with expressions of the high sense it entertained of his services and merits, as an upright judge, and of his qualities as a man, to which tribute of affection and respect he responded with deep sensibility.

His last public service, rendered at the age of seventy-five years, was in revising the statutes of the State. He earnestly engaged in this task, and with the aid of his

[1] The late Henry E. Prentiss, of Bangor, was a second cousin of S. S. Prentiss. His ancestor, Caleb Prentiss, married Pamela, sister of Chief-Justice Mellen.

NATHAN WESTON.

colleagues, Samuel E. Smith and Ebenezer Everett, submitted a report to the legislature January 1, 1840. The work embraced one hundred and seventy-eight chapters arranged under twelve titles, and constitutes the Revised Statutes of 1841, being the first revision. He died December 31, 1840, at Portland, his burial place being marked by a marble monument with suitable inscriptions, erected by the Cumberland Bar. His portrait adorns the Supreme Judicial Court room at Portland. And now after the lapse of half a century, the perusal of his record, like a sweet strain of some half-forgotten song, revives the memory of his beautiful and exalted character, and reminds us how well he served the state which he loved and honored.

NATHAN WESTON, the second chief-justice, like Lord Tenterden and other eminent jurists, is better known as a judge than as a practicing lawyer. He was raised to the bench before he had acquired a high reputation as a jury lawyer; but his eminent career of thirty years upon the bench evidently demonstrates that his was the judicial temperament from birth, while he brought to the discharge of his duties as judge, a high degree of scholarship and ample preparation.

In passing, we may say that the believer in heredity hardly needs to be reminded that his grandson Melville Weston Fuller, Chief-Justice of the U. S. Supreme Court is "to the manner born."

Nathan Weston was born in that part of Hallowell which now constitutes the city of Augusta, July 27, 1782. He was the fourth in descent from John Weston, who emigrated from Buckinghamshire in England twenty years after the landing of the Pilgrim Fathers at Plymouth, and finally settled at Reading, Massachusetts, about twelve miles from Boston. The family was distinguished for their piety, and somewhat remarkable for longevity. His father was an enterprising, active man of varied experience through a long life. After a campaign or two in the old French war, prior to the capture of Quebec, he removed to Maine which then contained a small and scattered population. Before the Revolution, he was the owner of Abicadassit Point on the Kennebec River, where he resided, engaging principally in commerce, and sometimes furnishing masts for the king's ships from the fine timber of that region. Having removed to Augusta he became a public man, and served as a member of the House, Senate and Council of Massachusetts.

Judge Weston's mother was Elizabeth Bancroft. She was a sister of the Rev. Aaron Bancroft, of Worcester, Mass., the father of the historian Bancroft. He often ascribed his thirst for knowledge and his aspirations in his literary and professional career to the influence of his mother, who had a strong and cultivated mind, imbued with piety. She impressed upon the minds of her children lessons of morality, truth, patriotism, devotion to the country, a strict Puritanical observance of the Sabbath and inculcated the truth of God's word.

He fitted for college under the instruction of the learned and talented preceptor, Samuel Moody, at the Hallowell Academy. Being industrious and quick to apprehend, he made great progress and was easily proficient both there and at Dartmouth College, where he maintained a high rank throughout the course, and graduated with distinguished honors, in 1803, with a class of forty-four members.

After spending a few months in the study of the law with Benj. Whitwell in Augusta, he entered the office of George Blake, U. S. District Attorney, in Boston, where he completed his studies, and was admitted to the Suffolk Bar, July, 1806. In the office of Mr. Blake, a learned lawyer, an able advocate and a leader of the democracy, he had ample opportunity for instruction and improvement.

Among the privileges he then enjoyed was that of hearing the eminent lawyers at the Boston Bar. Among others were Parsons, afterwards chief-justice; Dexter, who had been in both houses of Congress, and the cabinet of the elder Adams; Sullivan and Gore, each of whom was subsequently elevated to the governor's chair in Massachusetts; and the elegant and brilliant Otis, at that time the delight and favorite of the city.

Upon his admission to the bar, his teacher, Mr. Blake, who appreciated his talents and acquirements, proposed favorable terms of a partnership; but he declined, although urged to accept the proposal, choosing to push his fortunes in Maine. He first opened an office in Augusta, but in a few months was persuaded by friends in that part of the country to remove to New Gloucester, in the county of Cumberland, where he found an opening made by the removal of Judge Whitman to Portland.

He had a successful business there, and was chosen a representative of the town the next year. In 1810, he returned to his native town, and the next year, at the age of twenty-nine, was appointed chief-justice of the Circuit Court of Common Pleas for the second circuit, comprising the counties of Kennebec, Lincoln and Somerset. His associates were Benjamin Ames and Ebenezer Thatcher.

Judge Weston presided with dignity and ease in the new court, faithfully and promptly discharging the duties of the office to the acceptance of the bar and the people until 1820, when on the organization of the new State, he was appointed an associate justice of the Supreme Judicial Court. He was commended to this honorable position, at the side of Chief-Justice Mellen, by his experience and the satisfaction he had given in the discharge of his official functions in the Circuit Court of Common Pleas. Upon the retirement of Judge Mellen, in 1834, by reason of the constitutional limit of his age, he was appointed chief-justice of the Supreme Judicial Court, his associates being Judges Parris and Emery.

In 1825, he was, by the nearly unanimous vote of the legislature without distinction of party, nominated for governor. Retaining however, a preference for the judicial department, he declined the proffered honor.

His term of service as chief justice was seven years, at the end of which, in October, 1841, a constitutional amendment having been adopted, limiting the judicial tenure to seven years, he retired from the bench. He was nominated by Governor Kent as his own successor, but the council who belonged to the opposite party failed to confirm him.

He was placed so early upon the bench that he was removed from active political life. He was appointed a trustee of Bowdoin college in 1820, and served during his life. In 1843, the college conferred upon him the title of LL.D., he having been previously thus honored by Dartmouth and Waterville. He was also a trustee of Waterville College, now Colby University, for thirty-two years.

He was a sound and able lawyer. At *nisi prius* he presided with perfect ease and dignity, calmness and ability. His long experience enabled him to rule promptly and accurately upon all points of law raised at trials. He was a model of patience in the hearing of causes; his charges to the jury were clear, full and methodical. To the members of the bar, he was frank and courteous at all times.

Of him as a man and judge, in a carefully considered review of his life, ex-Chief-Justice Appleton thus speaks: "With a mind eminently judicial, accustomed to the labors of the bench, its duties were easy and their performance a pleasure. As a judge, kind, prompt and ready in his rulings, he presided with an ease and courtesy which inspired the confidence of the young, and with a dignity which commanded the respect of all. Patiently he listened to the arguments of counsel. His charges were in language clear and distinct. With a tenacious memory, he

retained the facts developed in the testimony; with unusual quickness of perception, he rapidly seized upon the salient points at issue, and then, disentangling the mass of facts which encumber a case and distract attention, selecting those upon which a right decision of the case depends, applying to them with clearness and precision the principles of law applicable thereto, without interfering with their province, he aided the jury in aiming at the great end for which alone they exist — a just determination of controverted facts.

He was a learned man. Of studious habits, he early made himself master of the law. The quaint and rugged style and the vast and antiquated learning of Coke, the classical pages of Blackstone, the dark mysteries of special pleading, almost forgotten or dimly remembered by the bar in these days of innovation, and the principles of commercial law, the grand product of modern civilization, were alike at his command" . . . Of his opinions says the same writer, "he discussed the questions involved with abundant research and ample learning, stating the questions for determination with precision, laying down the legal principles upon which the case must rest with a purity and elegance of diction which Addison might almost have envied, and with a strength of argument which carried conviction."

His opinions extending through the first twenty volumes of the Maine Reports, exhibiting a comprehensive knowledge of the law, are always clear to the point. They are the daily resort of the profession, and, while like Lord Eldon's, not adding much to the law, they are lucid expositions. A good example may be seen in Cram *v.* Bangor House Prop'rs, 12 Maine, 354, in which a corporation was held bound by the acts of its agent, acting within the scope of his employment, but with a seemingly deficient execution of his power. Many of them are not less distinguished for their elevated moral tone than for their sound legal logic.

In social life, the charm of his conversation and the amiability of his disposition he retained to the day of his death, which took place in 1872 at the extreme age of ninety years. While he was not much given to a display of wit, he exhibited flashes of shrewd humor, the want of which, as Prof. Irving Browne well says, "is a serious defect in the human character." The tender of quite a large sum of money was once made to him to redeem a mortgage which he held in trust for another party, and for whom he was surety upon a note. The gentleman making the tender offered to carry the money for the judge and deliver it to the beneficiary, if he so desired — saying the burden of so much money might be irksome, etc. With a twinkle in his eye, the judge replied: "Whenever I have put my name for *this* party to a piece of commercial paper, whether as maker, payee, indorser, drawer, surety, joint-promisor, guarantor, or otherwise, I have not failed to observe that I had to pay it. This is the first time I ever knew the money to come the other way. No, sir, thank you! I will keep it myself."

EZEKIEL WHITMAN, the third chief-justice, was born in East Bridgewater, Mass., March 9, 1776, and died there August 1, 1866. His first American forefather, John Whitman, came to this country about the year 1635, and settled at Weymouth. His descendants were remarkable for their longevity. John, a great-grandson of the founder, died in 1842, at the extreme age of one hundred and seven years. The tenacity of life of others was equally notable. Twelve great-grandchildren of Thomas, John's eldest son, lived to the average age of eighty-eight and two-thirds years. Josiah Whitman, second, the father of Ezekiel, married Sarah, daughter of Caleb Sturtevant, of Halifax, Mass., a lineal descendant of Elder Robert Cushman of Plymouth. Both parents died during the early childhood of

EZEKIEL WHITMAN.

Ezekiel, leaving him and a sister in straightened circumstances. Thus cradled in poverty and obliged to contend with hardship and privation, he found a friend in need in his uncle, the Rev. Levi Whitman of Wellfleet, who gave him his rudimentary instruction, and treated him with great kindness that was gratefully repaid in following years, when their relative circumstances were reversed.

The training he there received had an important influence on his after-life, for had he been left to follow his own inclinations, he would have followed the sea, or gone upon the stage. Of this uncle he gives a charming description in a speech at the two hundredth anniversary of Bridgewater, June 3, 1856; Goldsmith's country parson "passing rich with forty pounds a year" was his prototype; and loving to dwell with those good old times he adds, "it may, however, have been flip or good old cider that 'went round,' instead of ale, in our ancestors' days." He does not appear to have been a diligent and enthusiastic student, although the adventurous orphan was a lad of good parts. He entered Brown University in 1791, with a class numbering twenty-six members, having fitted himself for matriculation in fifteen months under the Rev. Kilborn Whitman of Pembroke. The standard of the college course in those days, however, as well as the expense, was low. He taught school during his first winter's vacation, in Marshfield, where it is related he got into trouble for audibly whispering in church, "Spell it," while the minister, Mr. Leonard, was stammering over the utterance of a difficult word. He supported himself through college by teaching, and was graduated in 1795. Peleg Chandler, a classmate, gives in a letter an interesting account of his first meeting Whitman, and a vivid idea of his poverty. While on his way to Providence, Chandler overtook a young man "with a large bundle tied up in a bandana handkerchief hung over his back on a cane; he had on no coat, nor jacket, or stock. He wore an old pair of nankeen breeches, and I think he had his stockings and shoes in one hand, suspended by his garters." Entering into conversation with this youthful oddity, he soon found out that his name was Whitman, and that both were seeking entrance to the same college. They became fast friends, and agreed to chum together. Chandler adds in the same letter that "he was independent, eccentric, but never vicious. His regard for truth was sacred. His probity commanded universal confidence."

Such a graduate was presumptively sure of success in life. He began the study of law absolutely penniless, in the office of Benjamin Whitman of Hanover, where he remained but a short time, and then went into the office of Nahum Mitchell of East Bridgewater. Mr. Mitchell soon found his student had solid judgment, keen perception, and unusual abilities, for he confided many cases before magistrates and referees to his care. While pursuing his study of law he was sent to Kentucky to settle the affairs of a deceased citizen of Bridgewater. This employment occupied him about one year. He journeyed alone on horse-back and returned by way of Cumberland Gap and Washington, where he attended the special session of Congress convened to discuss French violations of American neutrality, visiting the Senate and listening to the address of President Adams. He used to delight to relate his experiences of this part of his life; and in after-years, when holding court at Paris, found willing listeners among the young members of the family of Doctor Cyrus Hamlin, Sheriff of Oxford County, where he boarded during term-time.

He was admitted to the bar of Plymouth County, in 1799, but determined to seek a settlement in Maine. No one was better qualified by instruction, discipline and self-reliance than he to carve his way to fortune and fame in the wilds of Maine. He evidently entertained a different view of the state than that by Webster, who said to his friend

McGaw: "You may go down East, if you think best, and grow up with the country, where there's no money now and nothing but black flies and mosquitoes; as for myself, I am going where the money is already made."

His law library consisted of Blackstone, Nisi Prius Digest of Espinasse, and four books of forms by Samuel Freeman, styled "The Clerk's Assistant," "Probate Auxiliary," "Town Officer," and "Justice's Assistant." These, of course, were only the tools of trade, but the want of others compelled brevity both of argument and pleading. The application of testimony and law to the case in hand was close and direct. The opinions of the judges were often made up without reference to the arguments of counsel. "It is of no use to argue the case," said Whitman to his associate in a trial before Judge Parsons, "for the old fellow has got his opinion already drawn up in his pocket." Like Judge Parsons, Whitman did his work in the directest, plainest and simplest way.

He came to Maine, in April, 1799, where he found his college friend and chum, Chandler, at New Gloucester, then a half shire-town with Portland. Chandler and Samuel Thatcher were the only lawyers there, and there being no others to the north, he settled in Turner; but, after a short sojourn of three months, he returned to New Gloucester, taking the office vacated by Thatcher's removal to Warren; and, having decided to make his home here, he married a daughter of Cushing Mitchell of his native town. Here reputation, popularity and business flowed in upon him. But lawyers in those days must have been satisfied with small fees and moderate living, for we learn that two dollars and a half was the usual charge for arguing a case in the Common Pleas, and twenty-five to fifty cents for drafting deeds and similar papers. Like other leaders of the bar, his office was constantly sought by students, and he never had less than two or three at the same time. His half-brother, Josiah W. Mitchell and Simon Greenleaf (author of Greenleaf on Evidence) were fellow-students there; the one a genial, rollicking fellow, the other a studious, plodding, pious young man. Of them he said the former possessed greater natural talent, but the latter a persistent industry which yielded greater results. His success at the bar was rapid, and he soon became a leader in politics. Like Parsons, he was solid and practical, cool and impartial, penetrating and just; he stripped off all disguises, and held up facts to the light of simple truth. In argument he was lucid, logical, conclusive. Mere rhetoric and diffuseness he despised. In talking to the jury his manner was that of a friend anxious to show the real merits of the controversy. He was tall and manly in person, honest and intelligent in countenance. His addresses invariably carried great weight and force.

He was the candidate of the Federal Party for Congress in 1806, but was defeated by Daniel Illsley, a Democrat, by a few votes. At the next election in 1808, he was returned by a majority of three hundred, having moved the previous year to Portland, where his ability and character brought him an increased clientage. The life of representative in Congress did not prove agreeable to him; on the contrary, it was irksome and unpleasant. There were three sessions of the Congress of which he was a member, and the journeys in those days were tedious and expensive. He was defeated at the next election by William Widgery, after two trials, the first being a tie. From that time to 1815, he attended exclusively to his profession, and that year and the next he was a member of the executive council of Massachusetts. He was a member of the constitutional convention at Brunswick in 1816, to consider the question of separation. He was the Federalist candidate for its president, but William King was chosen by a vote of 97 to 85. He led the minority against the authority of the convention to act, basing its

opposition upon the ground that the requisite five-ninths of the whole vote of the people was not in favor of separation. The protest of the minority drafted by him was sustained by the legislature of Massachusetts. In 1816, 1818, and 1821, he was again a representative in Congress where he took strong ground in favor of restricting slavery in Missouri. He favored a bankrupt law; advocated a reduction of the duty on molasses; and strenuously opposed Jackson's course towards Florida as illegal, unjustifiable, and arbitrary. In 1819 he was a member of the constitutional convention which prepared the constitution of Maine.

In 1822, Maine having been erected into a state, he was appointed chief-justice of the Court of Common Pleas by Gov. Parris, a Democrat of the most pronounced type. The Governor had been a student in the office of the Chief-Justice and selected his teacher for the important office, notwithstanding their political antagonisms, because he knew he possessed the highest qualifications for the discharge of its duties; for, says a member of the Cumberland Bar, one in every way well qualified to judge, "he was a man of strong convictions upon all subjects, having the courage to assert and maintain them on all proper occasions, caring not for popularity, but living true to his own views, doing what duty called for, and leaving results to care for themselves."

Judge Whitman presided in the Common Pleas for about twenty years, and was appointed, in December 1841, chief justice of the Supreme Judicial Court by Governor Kent, to succeed Nathan Weston who succeeded Judge Whitman as a lawyer at New Gloucester when he removed to Portland. The latter office he held until 1848, when he resigned at the age of seventy-one years, having been a judge nearly twenty-seven years in all. His name as counsel appears in all of the Massachusetts State Reports until the separation, and after his first term in Congress the most important causes were intrusted to his care. As a judge of the Common Pleas, riding the western circuit, he was everywhere respected and honored as a wise, learned and upright judge. These qualities,combined with the confidence which the community had in him, that "he bore not the sword in vain," have given him a place in the judicial history of Maine unexcelled for painstaking care and sound common sense in the decision of causes. He felt at all times the full weight of the responsibility resting on him, and he was conscientious in the highest degree lest injustice or oppression might flow from his official acts. His opinions, to be found in Vols. XXI–XXIX, Maine Reports, are characterized by simplicity and directness of application. His exalted character and distinguished judicial services were justly recognized the same year, 1843, by his *alma mater* and Bowdoin College, in conferring upon him the degree of Doctor of Laws. He retained his residence in Portland until 1852, when he removed to his native place, and there lived in retirement and comfort until his death, at the age of eighty-nine. He was buried in Evergreen Cemetery, near Portland, surrounded by the graves of his immediate family.

The tributes he paid his ancestors in the Bridgewater speech, above referred to, picture many of his own traits of character. He tried to follow the golden rule as nearly as possible. Holding firmly to his opinions, he was tolerant and charitable towards others. He said in an oration before a Masonic lodge, of which he was a member, "If the omniscient eye of heaven can behold our multiplied transgressions, and yet restrain the arm of wrath and righteous indignation, how much more ought we, who are all subject to like infirmity, to be willing to forbear one toward another!" A more kindly man never lived. He would not speak ill of others nor listen to remarks of that kind from others. In the same oration he says, "There can be nothing more idle and wicked than

the disposition many possess to pull down the reputation of their neighbors." He was liberal in his religious views, but insisted upon upright conduct and purity of life. The writer was told the following incident of him by the member of the bar before mentioned. Being asked at dinner what he had done with a woman charged with the larceny of some bread and who had called upon him the night before at his house and told him of her necessities, confessing that she stole the bread to feed her starving, helpless children, he said, as the tears rolled down his cheeks: "I let her go."

He was slow of speech, but terse and to the point, as illustrated by his remark to the jury in a trial against Gen. A., accused of tortiously taking lumber belonging to another. Counsel requested that he should charge the jury that, if A. should be found guilty, then upon the question of damages, they should presume he took an average of both good and poor quality of lumber. He replied, "Yes, gentlemen, you may consider, whether a man who steals lumber would naturally take good lumber, or slabs."

He hated fraud and deceit. He delighted to drag the unclean monster from its hiding place and rid the temple of justice of its unsavory presence. Truthful himself, he expected others to be so. Among the last of the "old-school lawyers" in the State, after an incumbency of the judiciary extending over twenty-six and a half years, his retirement, when in possession of unimpaired, intellectual strength and vigor, was looked upon as a public loss and misfortune. He was no less popular than respected. As Lord Mansfield has beautifully said: "His popularity was that which follows, not that which is run after — that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means."

IN MEMORIAM.

RUDOLF VON GNEIST.

THE world owes much to Germany: she reared
Men of Titanic mould when other lands
Bore Dwarfs. Crowned in her might to-day she stands
A very queen of States, serene, revered.
And thou, great Soul, who late thy bark hath steered
From Earth's low marge to the Elysian sands,
Are not the least in her heroic bands.
Not thine a sword to make thy country feared,
But thine to lend a sapient mind to frame
The fabric of her laws both strong and well,—
A prouder meed no patriot could claim!
Thou wert not insular; a love of right
World-wide constrained thee here. Now perfect sight
Reveals thee Justice on her citadel.

CHARLES MORSE.

OTTAWA, CANADA.

THE MALTA WAR IN COURT.

MAINE has suffered and survived no less than eleven wars within her borders. Eight of these were bloody and destructive, and three were more or less farcical. The one under view in this article occurred in 1809. It arose from an attempt at accurate and equitable adjustment of lines in the Patent of the Plymouth Colony in Maine. The territory embraced in this patent was fifteen miles in width on each side of the Kennebec River, from Swan Island (just above the junction with the Androscoggin) to the great westward bend of the river. What land remained undisposed of in 1789 was in that year released by the General Court to the "Fifty Associates;" the condition being that they released their claim to all exterior lands, and quieted settlers within the limits.

Many settlers under the colony and under purchase from the Duke of York's territory adjoining on the east, together with squatters and purchasers of lots from the Indians at the eastern border, had mixed their lots up in a most irreconcilable manner; and the courts of Kennebec and Penobscot counties, from this time forth, for years, echoed with the voices of the rival claimants. To avoid threatened civil disorder, the government of the Commonwealth, in 1808, enacted a law called the Betterment Act, for the relief of mis-located residents. This measure, however, was not regarded by the settlers as adequate to the conditions; and secret associations were formed to prevent the service of precepts, and to drive away all surveyors. At Warren, in the county of Lincoln (now in Knox county), a military force was summoned to assist the sheriff in his duty; but the parties came to terms, and the escort was not required.

In Malta, adjoining the east line of Augusta, four miles from the Kennebec, lived Aaron Choate, who had agreed to purchase the lot he had been occupying; and three men, representing himself and the proprietors, were on September 8th, 1809, engaged in its survey. While the surveyors were fixing the topography of a brook, Choate walked a short distance ahead, when he was surprised by several armed men, in the disguise of Indians. A pistol was placed at his breast, and his silence ordered on pain of instant death.

The band then formed in line; and a few moments later, Paul Chadwick, of Malta, one of the chain-bearers, appeared in view. At the words from one of their number, "Fire low," three guns were discharged, and Chadwick fell. These savages then gathered about their victim, made taunting remarks, then departed. The wounded man was taken by his companions to a house in the vicinity, where he died two days later.

Choate and the victim had recognized three of the band, and the others were soon found out. They remained concealed in the woods, where they were fed by their friends, for a few days, but were finally persuaded by them to give themselves up. Accordingly, a week after the murder, all except one — who had absconded — appeared before a justice for examination. They were repentant, even to tears, and each confessed to have been present when Chadwick was shot. All were committed to wait the action of the grand jury at the next regular session of the court on the 3d of October.

Now that they were in jail, their friends began to regret their surrender, viewing with alarm the preparations for their trial, and the strength and strictness with which their place of confinement was guarded. Then rumors of an attempt at their rescue began to reach the authorities; and it was reported that a large number of armed men disguised as Indians had been seen in the woods between Augusta and Malta, who, it was stated, were preparing to rescue the prisoners, burn

the county buildings and the dwellings of such resident proprietors and their agents as they could find.

To repel the threatened incursion, a cannon from old Fort Western, on the east shore, was mounted on cart-wheels, loaded with musket-balls, and placed on the west shore, in a position to sweep the bridge. The day and night patrols were enlarged, and sentinels posted at exposed points; while alarmed citizens kept anxious watch at their dwellings, as court-day approached.

Various alarms had arisen, but no enemy appeared until the night of the 3d of October. About midnight, the sentinels at the east end of the bridge caught a man spying about the locality. Three of them were attempting to bear him away, when a party in Indian guise rushed down the hill, and not only rescued him, but made a prisoner of the officer in command. The insurgents were later ascertained to be about seventy in number. Alarm guns were fired, the court-house bell was rung, and in a very short time the light infantry was out, and the street filled with people. The uproar soon became general, for no one knew where the threatened conflagration might be started.

The insurgents, however, had retired to shelter; but all through the remainder of the night the authorities were engaged in issuing orders, and in sending messengers to the militia in the neighboring towns, summoning them to meet a large force of insurrectionists, arrayed in mimicry of the patriots in the Boston Tea-Party, but with purposes vastly more destructive and indefensible.

Several companies arrived during the next day, and on the 5th, six companies were in town. Ample guards were placed, and a field-piece commanded the entrance of the jail.

The eight accused men were arraigned, pleaded not guilty, and were bound over to a special term appointed to be holden by adjournment for the trial on the 16th of November following.

However popular and far-reaching the insurrection might have become, this prompt display of force quite checked its further manifestations; and the military companies which had so bravely marched up the hill, after a few days, one after another, were dismissed, and gaily marched down again. All these companies, however, alternated by twos, amounting to a hundred men, as guards at the county buildings and other assailable points about the town, until the end of the trial, on November 25th, when all danger had passed.

The counsel for the prisoners consisted of Prentiss Mellen, Samuel S. Wilde, Thomas Rice and Philip Leach, — the first of whom became the State's earliest chief-justice, and two or more known as authorities to students of provincial law. Solicitor-General Daniel Davis alone conducted the prosecution. Four judges, — Theodore Sedgwick, Samuel Sewall, George Thatcher and Isaac Parker, — were on the bench. Forty-four witnesses were examined, and the trial lasted ten days, including two occupied by the jury in their deliberations.

The Commonwealth attempted to prove "premeditated malice;" and the report of the trial certainly shows reasonable evidence in support; the wonder being that the malice was not extended in its effect to others of the surveying party. No hostility was shown to Choate, whom they had merely taken under control to prevent an alarm to the others; but fierce and bitter taunts were hurled at the prostrate victim, while the other two surveyors were permitted to escape; and the band departed without token of either fear or relenting.

An explanation of this action may be found in a statement which shortly became current, that the murdered man was one of a band associated under the name "Malta Indians," who were bound by an oath, written and signed with blood, to prevent sur-

veys and resist proprietors in enforcing claims to their lands; and because of this was regarded as a traitor deserving death, because of having violated his oath in the first particular.

The charge to the jury was made by the junior justice, Parker, whose summing up of the evidence appeared to leave no escape to the eight prisoners. After many hours of deliberation, the jury came into court and inquired whether, if they "were agreed as to some of the prisoners," but not "as to the rest," the verdict would be received as far as they were agreed. The court declined to receive a verdict unless it should include all the prisoners.

To the apprehension of the average juryman, this ruling does not quite fit the facts. In the first place, the victim had received only a bullet wound, from which he died, while only three guns were fired; second, of the nine assailants, only three carried guns, three being armed with pistols, and the remaining three bearing scythes bound on short poles. It was evident, therefore, that six who could be pointed out, and two who could not be pointed out, were not murderers, but accomplices only in the crime. The offence of the first three was different to that of the others. Further, there appears no reason why the entire eight, if discharged as not guilty of murder, should not have been held for a lesser crime. The ruling of the court, and its neglect in not ordering the prosecution of the offenders on another charge, virtually vindicated them not only from the murder, but from complicity therein. Neither was there any notable effort made thereafter to apprehend that one of the band who not only did not give himself up, but absconded previous to the surrender of the others, thus causing the inference that he knew himself to be the guilty person.

There is in the action of the court a suggestion that it regarded the murder as a secret-society penalty, — the act of a community, — as difficult to be fixed upon any one in particular as a railroad disaster, from bad condition of road or rolling stock, is to fix upon a whole corporation or a board of directors. In an admonition to the prisoners, also given by Judge Parker, the duties and the advantages of the citizens in a free commonwealth, and the most unfortunate condition of those who forfeit their rights, are set forth with admirable clearness, force and compactness.

This disturbance of the public peace induced the enactment of a statute making it a high crime for any person to disguise himself in the likeness of an Indian, or otherwise, with intent to molest a sheriff or surveyor in the discharge of his duties. So the judicial proceedings in this case, and the subsequent action of the General Court, afford an eminent example of "how not to do it" with dignity and the desired effect. Surely no reader will assert that the sway of Massachusetts in the District of Maine was not a mild one.

As to the Kennebec purchase, the violent among the settlers upon its lands were so impressed by these occurrences that there was no further forcible opposition to the legal readjustment of their boundaries.

In a few years, indeed, the inhabitants of Malta grew so much ashamed of the reputation of their town, that in 1820 they induced the first legislature of the State of Maine to change its name to "Gerry." Unfortunately, it sometimes became necessary to add the explanation, "formerly Malta;" and they found themselves in a degree still tied to the old disgrace. By another change, in 1822, the town became Windsor; so that they were able to mention it as "formerly Gerry" with entire equanimity, — for in doing this they at once recalled and condemned a disreputable political action in a neighboring State, while their own Malta stain lay buried in shadow.

GEORGE J. VARNEY.

LONDON LEGAL LETTER.

LONDON, Sept. 7, 1895.

INSTEAD of invoking the saints, the junior members of the bar feel at this season of the year much more like anathematizing them. Years ago, when it was the universal custom to observe as days of idleness all feast days and saints' days, the courts likewise refrained from work, and being to a certain extent identified, at least on their ecclesiastical side, with the church, the holidays were protracted to the extremest period of the saints' pleasure. Thus it has happened that out of the full term of the year the courts are closed for about four months, or more than one-third the time. The terms of court are still called by the names of the saints, or have other ecclesiastical designation, as "Hilary," "Easter," "Trinity," and "Michaelmas." At the end of the Trinity term the courts are absolutely closed for more than twelve weeks at a stretch — from the 12th of August this year until the first week in November. This is all well enough for the judges and for a few of the overworked queen's counsel; but for the average even fairly successful practitioner it means not only a period of enforced idleness, but an absolute deprivation of an opportunity to earn an income. Year after year litigants who have cases awaiting trial and lawyers who would be glad to go on with their work, protest against the wasteful extravagance of time involved in the "long vacation," but nothing comes of these protests. The inns of court are practically deserted, except for the groups of American tourists who wander through them, red-covered guide-books in hand, gazing up at the silent rooms where Blackstone wrote his Commentaries, or where Goldsmith made merry, or where Charles Lamb had his much-loved residence, or into the dining-hall of the Middle Temple, still standing in perfect preservation and in all the glory of its oak-carved decoration, where the Twelfth Night was performed under Shakespere's personal stage direction, and where Queen Elizabeth tripped the measures of the dance with the stately full-bottomed-wigged legal luminaries of her day. Even the law libraries, where students and text-book writers and reporters would be glad to work, are closed part of each day and wholly for some weeks. One judge, it is true, sits once each week for an hour or two to hear pressing motions, but even the Masters are absent, and so all pleadings and interlocutory proceedings are held in abeyance. This absolute blotting out of time is one of the abuses which young and ambitious lawyers are most vigorously insisting shall be abolished; but it unfortunately happens that those in whose hands is the remedy are those who most enjoy and are best able to afford the holiday, and who therefore cling to a privilege of which they assume they have earned the right to enjoy.

For two days just before the vacation, the Lord Justice of Appeal in one of the divisions of the High Court of Appeals had under consideration the interpretation of certain life insurance policies issued by the Equitable Life Assurance Society of the United States. These policies were in the form common to policies of a like nature where a husband insures his life for the benefit of his wife, and in case she predeceases him for the benefit of their children. In this case the husband, the wife and the children were all residents of England, and the policies were taken out in England through the local agent of the American company. The husband survived his wife, and the questions arose, (a) when the beneficial interest of the policy vested in the children, and (b) in what manner; in other words, did the children who were alive at the mother's death take the interest, or those who survived the father? And did such of the children as were entitled to the benefit of the policy take their benefit as joint tenants or tenants in common? The manner in which these propositions were discussed was remarkable for two things. First, the judges, all three of them, had a turn at criticising the drafting of the policy, and there was a unanimous opinion that it was about as poorly expressed an instrument as was possible under the circumstances. They found no difficulty in deciding that it was in reality two instruments within one — a contract of insurance between the husband and the company, and also a settlement by the husband upon the wife with remainder over to the children; and in this light it was discussed by the Chancery bar counsel on both sides and the Lords Justices themselves with an apparent relish of the subtleties of equity expressions and the refinements of technical phraseology which they imported into the document. The second remarkable feature of the proceedings was the fact that not an intimation was made by counsel that the Court of Appeals of New York had some time ago settled the very questions that were bothering the Court. The learned Queen's counsel for the plaintiff and his prompting junior had lying before them the New York Court of Appeals reports containing the cases of Whitehead *v.* The New York Life, The United States Trust Company *v.* The Mutual Benefit Life, and Walsh *v.* The Mutual Life Insurance Company, but they apparently lacked courage to draw the attention of an English court to these decisions. It is a pity that the opportunity to see what authority the Lords Justices of an English court of appeals would give to the decisions of the New York Court of Appeals was missed. The points in controversy were finally decided in accordance with the view the New York Court of Appeals have taken of them, but the local judges reached their conclusions by a widely different course of reasoning, in which views were intimated directly at variance to those expressed by the New York courts. This is unfortunate, for the American life insurance companies are becoming very popular in England, and sooner or later questions must arise which will have a widely different judicial interpretation in the two countries.

Every one on this side of the Atlantic who has any official or legal connection with the United States is constantly applied to for the collection of "funds in Chancery," which are supposed to be lodged in bank here to the order of the Lord Chancellor, and only awaiting rightful claimants in America. In the majority of cases the claim is a family

matter, and the tradition of it is handed down from one generation to another. It grows with the years in value and proportion, and looms up bigger and bigger in the haze which surrounds it. It is usually based upon the testimony of some long since deceased great-aunt or great-uncle, who is said to have described how some ancestor, desirous of remembering his relatives in America, and not knowing where they might be found, had the money put in Chancery for them, where it has lain all these years! Upon such children's stories as these are based demands whose persistence is only equalled by their unreasonableness. A request for a detailed statement as to where the ancestor died, his Christian name, the date when and the proceedings on which the money was paid into court, and other elementary essential facts is resented as an impertinence. The same vague statements are repeated and renewed offers are made of an increased contingent interest in the fund; which rarely is less than a million of dollars, and is more often a million sterling. Only a few weeks ago a claim was received here for money which was paid into a bank in London to the credit of the ancestors of the claimant in 1690 — a date five years earlier than that of the establishment of the Bank of England, and when traders and merchants used to lodge their money with the goldsmiths in Lombard Street.

Another correspondent stated that a great-uncle, when a lad, went upon a ship lying in some port in England, out of curiosity to see what a ship was like, and while inspecting the vessel it sailed for America. The involuntary passenger, who is said to have landed at Baltimore, appears to have had such an aversion to the ship that played this shabby trick upon him and to all ships in general that, when late in life he received word that his father in England had left him some money, he promptly destroyed the letter and the evidence of the legacy, fearing that if his children got word of it they might be tempted to cross the ocean! One of them, it seems, notwithstanding this precaution, found out the secret, and one of his remote descendants is now endeavoring to recover the money which, of course, is "in Chancery." Letters of similar import to this, and illustrating every phase of cupidity and credulity, are received by almost every post at the United States Embassy and the Consulate in London. Both the Ambassador and the Consul-General have been compelled to prepare a printed circular which they use as a general reply to these applications, and in which they state that it is extremely probable that there is no such fund as represented in existence, and requesting that no expense be incurred in the fruitless attempt to realize something out of it. In some instances the property over here consists of an estate belonging to some branch of a family which has numerous representatives in the United States.

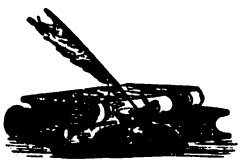
Lawyers perhaps are familiar with the incidents of the trial of two men, one of whom was a lawyer in good standing in the United States, and the other a colonel of a regiment in the Civil War, who were indicted for, and found guilty at the Old Bailey, of obtaining money under false pretenses. They had to come over to England to represent the heirs in America of an estate here. They kept the credulous claimants in the United States in constant expectation of the realization of an immense fortune. Meetings were held and assessments were levied and willingly paid, and the large sums thus realized were sent to England to furnish the agents with money to prosecute the claim. There was, of course, nothing in the claim for any one — except the agents, and the latter are now picking oakum at Pentonville. Notwithstanding this incident, a claim is now being pushed with unusual energy to the Antrim estate, or fund, which is supposed to have been left by an Earl of Antrim to a branch of the family which would seem to have emigrated *en bloc* to the United States. One correspondent gravely asserts that the fund amounts to £15,000,000, and that a meeting will shortly be held in the United States to raise money to employ a solicitor in London to collect the fund.

It is sincerely to be hoped that some man of courage in the legal profession will interfere to prevent innocent people from being defrauded in this way. For a few shillings it can be ascertained that there never was £15,000,000 at any one time in the Antrim family, and that no Lord Antrim ever left one one-hundredth part of this sum, or any part whatever, out of the family succession. The Antrims are an old Irish family, and their affairs have, it is probable, been managed for generations by the same firm of solicitors. These solicitors would not have the confidence of the family if they were not honest men, and being honest men, they will, by return post, assure any reputable correspondent that there is no shadow even of a foundation for the claim that is now being made.

Furthermore, the Supreme Court Fund rules of 1886 provide that on the first day of March in every third year, the paymaster shall prepare and publish a list of the accounts or funds in Chancery of all sums over £50, or $250. There is nothing in the list to the credit of any descendants of the Antrims. It is very appropriately stated in the last published list, "in order to remove misconception which appears to exist as to the magnitude of the funds (the amounts are not given), that of the balances standing to the credit of the accounts, one-half do not exceed £150, and only one-sixteenth exceed £1000. The average amount is about $1800, and there are but two which are as large as $75,000." It is a matter of regret that these facts cannot be widely known in the United States, and that those who persist in indulging in the delusion that they are entitled to inheritances in Great Britain cannot be persuaded to submit their claims to reputable lawyers before taking other steps. Honest advice on such pretensions would show that not one in ten thousand has any foundation.

STUFF GOWN.

The Lawyer's Easy Chair.



. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

THE LAW LIBRARIAN. — It would seem an appropriate retribution on one who has always believed that it would be the better for the Law if all the law reports of the last half century should be burned up and never reproduced, that he should be appointed a public law-librarian. Especially so, when that one has always cherished, if not a lively animosity, at least an ill-concealed impatience toward the genus librarian, founded on the observation that most of them seem to deem it their office to prevent the public from seeing the books. Yet this is exactly what has happened to the present writer. He is placed in charge of a law-library of some ten thousand volumes, and is informed that his first and chief duty is to increase its numbers very largely! (Publishers will please not all rush at once.) This to a person who believes that all the law ought to be found in four or five moderate-sized volumes! (Mr. Carter says it can all be found in four or five hundred.) It is not an Easy Chair, this librarian's chair. For once, the occupant begins to have a sympathy with Tite Barnacle, and to be disposed to say to the crowd of inquirers for things that he cannot tell them, "I say, you mustn't come here saying you want to know, you know." It is so very humiliating to be detected in knowing so little! It is pitiful, also, to look at these highly respectable old authorities, so much esteemed for so many years, and to reflect that they are "back numbers." The law-school graduate of last year never heard of Bacon's or Viner's Abridgement, and "wants to know" what "B. & P." or "Sch. & Lef." means. He demands a book about electricity, "trusts," or sales on margins. Sometimes an old gentleman from the country, who has made a motion to get ten dollars costs, inquires for "1 Code Rep. N. S.," not being aware that even that has lost its authority, because not even codes are permanent. But there are compensations in every employment. The law librarian may console himself with the reflection that his books do not tend to debase or demoralize the community. It is better to deal out books whose purpose it is to elucidate the principles of truth and justice, than trashy novels, flippant histories, and biographies of famous nobodies. In short, it is much better to be a law-librarian than

THE PUBLIC LIBRARIAN.

His books extend on every side,
And up and down the vistas wide
  His eye can take them in;
He does not love these books at all,
Their usefulness in big and small
  He counts as but a sin.

And all day long he stands to serve
The public with an aching nerve;
  He views them with disdain —
The student, with his huge round glasses,
The maiden fresh from high-school classes,
  With apathetic brain;

The sentimental woman lorn,
The farmer recent from his corn,
  The boy who thirsts for fun,
The graybeard with a patent-right,
The pedagogue from school at night,
  The fiction-gulping one.

They ask for histories, reports,
Accounts of turf and prize-ring sports,
  The census of the nation;
Philosophy and science, too,
The fresh romances not a few,
  Also "Degeneration."

"They call these books," he snarls, and throws
Them down in careless heaps and rows
  Before the ticket-holder;
He'd like to cast them at his head,
He wishes they might strike him dead,
  And with the reader moulder.

But now, as for the shrine of saint,
He seeks a spot whence sweet and faint
  A leathery smell exudes;
And there, behind the gilded wires,
For some loved rarity inquires,
  Which common gaze eludes.

He wishes Omar would return,
This vulgar mob of books to burn,
  While he, like Virgil's hero,
Would shoulder off this precious case
To some secluded private place,
  With temperature at zero.

And there in this seraglio
Of books not kept for public show,
  He'd feast his glowing eyes, —
Forgetting that these beauties rare,
Morocco-clad and passing fair,
  Are but the Sultan's prize.

But then a tantalizing sense
Invades expectancy intense,
And with extorted moan,
"Unhappy man!" he sighs, "condemned
To show such treasure, and to lend —
I keep, but cannot own."

"WHOLESOME VANITY."— Chief-Justice Bleckley defends his employment of this expression in his memorial of Judge Erskine, saying that it "was more carefully considered than any other in the whole composition," and "was absolutely essential to a complete and perfectly candid estimate." "While pride and vanity are different, they are not inconsistent. The first makes no appeal to the opinion of others; the second does. Erskine had both, and in him both were wholesome and respectable. You are the very man," he continues in a letter to the writer, "I should have chosen as a witness to the accuracy and just application of the phrase, and I feel a sore disappointment at your volunteering to testify for the 'other side.' But the most reliable experts sometimes break down." We succumb to the Chief-Justice's larger acquaintance with Judge Erskine, especially when he concedes that he "has the same sort and degree of vanity himself." That renders it "wholesome and respectable."

HARD ADJECTIVES. — Adverting to our remarks in our last issue we would by no means hold Judge Thompson responsible for Mr. Bishop's denunciation of the courts, but it reminds us of Mr. B's objurgations against the decision in People *v.* Baker, 76 N. Y. 78. He calls it "an absurd ruling," "made without reasoning, and evidently without thinking," "marvelous oversight," "mental oblivion"; and of the Wisconsin Cook case, which follows it, he declares that "the Wisconsin laws are commensurate in wickedness and foolishness with the power of the State." This is deliberately written of an exceedingly careful and elaborate opinion delivered by Judge Folger, and concurred in by all the other judges save one. We think the decision wrong, but such railing as this can produce no impression, except that the critic is too violent and prejudiced to form a just judgment. When one reads Mr. Jeremiah Travis's criticisms of the courts, it seems to him that the author has searched the dictionary for abusive phrases. This last author literally swore himself out of breath, and damned his own book. Mr. Travis is not a strong man; he is simply a violent man; but David Dudley Field was a strong man, and Messrs. Bishop and Thompson are strong men, and in all of them is lacking the tolerance of weaker men's opinions essential to the widest propagation of their own views.

WALWORTH'S STATURE. — Mr. W. L. Stone writes us that Walworth was not "small" nor "lean," as was asserted in the biographical sketch in this magazine. He thinks that he was about five feet ten inches tall. He admits, however, "that before he died he had shrunk somewhat," and that "he may have been lean in his last days." The biographer was speaking of him in his last days, when he presented the appearance described in the sketch. Men differ widely about the height of other men. We have seen Webster described as a man of medium height, which certainly he was not.

KENT'S CAREER. — In turning over the eighth volume of Humphrey's Tennessee Reports, recently, we found a very excellent obituary of Kent, written in 1847, in which it is said: "To him the credit certainly is due of having laid the foundation of a system of equity jurisprudence, not only in New York, but throughout the United States. The cases in Johnson's Chancery Reports are, in the first place, all reasoned out upon principle," etc. "And most unquestionably, no other decisions have exerted so marked an influence upon the legal mind of the United States, or are so universally recognized as authority." The biographer also says: "We consider Chancellor Kent as being one of the great lights and benefactors of this continent." There is less doubt of that than of his statement that he never had an enemy. It was undoubtedly true that he was "a bad listener in conversation." Although true that "he never had much taste for the contentions of political bodies," yet he was an acute and interested politician in a quiet way, and some of his surviving contemporaries believe that he was a retired potentiality in New York politics. Every young lawyer in this country should read this sketch, full of wisdom, temperate in tone, felicitously expressed, and learn therein the lesson of a great, albeit a noiseless career. How much better to be an oracle for ages than to roar (or bray, as the case may be) in the courts for a season, to the admiration of the open-mouthed, who come into the temple of justice mainly to get out of the cold!

ENTERPRISING PUBLISHERS. — One of the queerest examples of enterprise in law-book publishing which has come to our notice is the announcement, by the Edward Thompson Company, that they will issue a new edition of their "American and English Encyclopædia of Law," before the first is finished! They propose to give a new volume for the corresponding old one and five dollars! This is certainly an unprecedented attraction, and can be repeated indefinitely. In connection with this, though by no means on the same plane, is the announcement of the West Publishing Company of "The Century Digest," contain-

ing an abstract of all the American decisions for the century, taken from forty-six hundred volumes, and numbering half a million! Brethren, there is time to fly! The ferry facilities from Buffalo to Canada are ample. Let us escape from this *hellno librorum!*

NOTES OF CASES.

THE SIREN TURNTABLE. — In Walsh *v.* Fitchburg R. Co., 145 N. Y. 301; 27 L. R. A. 724, the New York Court of Appeals adhere to their doctrine, previously indicated, that children ride on railway turntables at their own risk; thus preferring the doctrine of Illinois, New Hampshire and Massachusetts to that of the United States Supreme Court and of a majority of the State courts which have passed upon the question. They hold that the owner of the machine does not "entice" adventurous youth to dare its giddy round, and that it is very different from the case of spreading tainted meat over traps to allure dogs. The decisions to this effect seem to us an illustration of what Charles Lamb called "imperfect sympathies." It is the most natural thing in the world that the small boy should essay a ride on a turntable, and it is very easy for the owner (of the turntable) to keep it locked, and not at all unreasonable to require him to do so. In the principal case, the machine was in an unfenced lot, near foot-paths which the public were permitted to use. With deference we dissent from the observation of the court, "It was not of the nature of a trap for the unwary." The frequency of this class of cases is a standing refutation of that argument. This class of cases is easily distinguishable from those which hold that an owner of land is not bound to fence a pond or a dangerous excavation thereon, as against an infant intruder, whom he does not invite, attract or suffer thereon. This is just now held by the Supreme Court of Nebraska, in Richards *v.* Connell, citing in support of it, Hargreaves *v.* Deacon, 25 Mich. 1; Klix *v.* Meinan, 68 Wis. 271; 60 Am. Rep. 854; Clark *v.* Manchester, 62 N. H. 578; Overholt *v.* Vieths, 93 Mo. 422; Gillespie *v.* McGowan, 100 Pa. St. 144; 45 Am. Rep. 365; Pierce *v.* Whitcomb, 48 Vt. 127; 21 Am. Rep. 120; McEachern *v.* Railroad Co., 150 Mass. 515; Gay *v.* Railway Co., 159 Mass. 238; 38 Am. St. Rep. 415; Beck *v.* Carter, 68 N. Y. 283; 23 Am. Rep. 175. And there is also a manifest distinction between this class of cases and that of young children straying on a railway track. See Gunn *v.* Ohio R. R. Co., 36 W. V. 165; 32 Am. St. Rep. 842, and cases there cited.

THE UNSPEAKABLE PLUMBER. — The plumber at all events is one who sets traps for the unwary, and he ought to be regulated; and so the New York Court of Appeals, in People *v.* Warden, etc., 144 N. Y. 529; 27 L. R. A., 718, have decided that a statute making it unlawful to do business as an employing or master plumber without a certificate of competency obtained from an examining board, and registration with the board of health, and requiring compliance with the regulations of both boards, but having no application to plumbers who do not employ others, is a constitutional exercise of the police power to protect health. The measure was defended as one of health and police by the court. Three of the seven judges, however, dissented, on the ground, as expressed by Peckham, J., that the measure "tends directly to the creation and fostering of a monopoly." So it does, in one sense, and so do law schools and medical colleges, but such monopolies are wholesome. A "civil service" plumber would be a good innovation. The majority opinion answers the argument about monopoly as follows: —

"Nor is it a ground of objection that, as the statute was intended to apply only to master or employing plumbers; the inference follows that a monopoly in the business is created or sanctioned. It may or may not have been wiser that the legislature should require examinations by and certificates from the examining boards in the case of every person engaged in the business of plumbing; but if the act is a step in the direction of something which will inure to the public health and comfort, that it does not go as far as it might is not a reason for invalidating it. I am able to see how this act may limit the number of master plumbers, and with great wisdom; but I am not able to see how any monopoly will necessarily follow. The purpose of the act is in the direction of limiting the business to those persons who will perform the work, presumably, with some regard to the public health and comfort, and it would be a misuse of language to speak of such provisions as creating, or even tending to create, a monopoly. As well might it be said that to compel physicians or druggists to take out licenses is a provision giving a monopoly of the particular business to those who become licensed. If the measure is not so obvious a precaution in the case of plumbers as in that of physicians or of druggists, is that a reason for condemning it, if it may reasonably be considered as some precaution? I think not, and I think the measure, as one relating to the general health of cities, is evident, and intended to be so, from the provisions of the act, which require the board of examiners to contain the chief examiner of the city sewers and the chief inspector of plumbing of the board of health; which require not only registration with the board of health, but that the business shall be conducted under rules and regulations prescribed by that board; and which authorize that body to cancel registrations for violations of rules and regulations for the plumbing and drainage of the city."

There is no trade in which so much deleterious and impudent robbery is transacted as in plumbing, and any attempt to regulate and restrain it should be fostered. The plumber's sins, like the doctor's mistakes, are "out of sight."

A RELIGIOUS USE. — The origin of the maxim, "Cleanliness is next to godliness" is unknown, but there is no doubt of its soundness, and the New York Court of Appeals have commended it to a religious society, in Health Department of the City of New York *v.* Rector, etc., of Trinity Church, 145 N. Y. 32; 27 L. R. A. 710, in which they hold that a statute requiring water to be furnished on each floor of every tenement house is a valid exercise of police power with respect to health, and also with respect to public safety regarding fires and their extinguishment. The horrors of the Trinity Church tenement houses are but little known, but they are almost as great as those of the prison ships of the Revolution, which lay and rotted with their human freight in New York harbor, and to the victims of which a sumptuous monument stands in Trinity Church-yard, directly opposite Pine Street (placed there to prevent the extension of that street through those grounds). At last the public authorities have done their duty in the premises in a small measure. The corporation consequently may have less money to spend on church construction and decoration, but there will be more human beings to be ministered unto. Judge Peckham, in the course of a long and powerful opinion (and by the way he is a good Episcopalian), observes among other things: —

"We may own our property absolutely, and yet it is subject to the proper exercise of the police power. We have surrendered, to that extent, our right to its unrestricted use. It must be so used as not improperly to cause harm to our neighbor, including in that description the public generally. There are sometimes necessary expenses which inevitably grow out of the use to which we may put our property, and which we must incur, either voluntarily, or else under the direction of the legislature, in order that the general health, safety, or welfare may be conserved. The legislature, in the exercise of this power, may direct that certain improvements shall be made in existing houses at the owners' expense, so that the health and safety of the occupants, and of the public through them, may be guarded. These exactions must be regarded as legal so long as they bear equally upon all members of the same class, and their cost does not exceed what may be termed one of the conditions upon which individual property is held. It must not be an unreasonable exaction, either with reference to its nature or its cost. Within this reasonable restriction, the power of the State may, by police regulations, so direct the use and enjoyment of the property of the citizen that it shall not prove pernicious to his neighbors, or to the public generally.

"Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner.

"The State, or its agent in enforcing its mandate, takes no property of the citizen when it simply directs the making of these improvements. As a result thereof, the individual is put to some expense in complying with the law, by paying mechanics or other laborers to do that which the law enjoins upon the owner; but, so long as the amount exacted is limited as stated, the property of the citizen has not been taken, in any constitutional sense, without due process of law. Instances are numerous of the passage of laws which entail expense on the part of those who must comply with them, and where such expense must be borne by them, without any hearing or compensation, because of the provisions of the law.

"Hand-rails to stairs, hoisting shafts to be inclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire escapes on the outside of certain factories, — all these were required by the legislature from such owner, and without any direct compensation to him for such expenditure. Has the legislature no right to enact laws such as this statute regarding factories, unless limited to factories to be thereafter built? Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health, as against all owners of such property, unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character, and to mistake the foundation upon which they are placed.

"Any one in a crowded city who desires to erect a building is subject at every turn, almost, to the exactions of the law in regard to provisions for health, for safety from fire, and for other purposes. He is not permitted to build of certain materials, within certain districts, because, though the materials may be inexpensive, they are inflammable; and he must build in a certain manner. Theaters and hotels are to be built in accordance with plans to be inspected and approved by the agents of the city; other public buildings, also, and private dwellings within certain districts are subject to the same supervision."

"And in carrying out all these various acts, the owner is subjected to an expense much greater than would have been necessary to have completed his building, if not compelled to complete it in the manner, of the materials, and under the circumstances prescribed by various acts of the legislature. And yet he has never had a hearing in any one of these cases, nor does he receive any compensation for the increased expense of his building, rendered necessary in order to comply with the police regulations. I do not see that the principle is substantially altered where the case is one of an existing building, and it is to be subjected to certain alterations for the purpose of rendering it either less exposed to the danger from fires, or its occupants more secure from disease. In both cases, the object must be within some of the acknowledged purposes of the police power and such purpose must be possible of accomplishment at some reasonable cost, regard being had to all the surrounding circumstances.

"Under the police power, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort and health of the public.

The court cited Commonwealth *v.* Roberts, 155 Mass. 281; 16 L. R. A. 400, holding that an act of the legislature, which provided that every building in Boston used as dwelling house, situated on a street in which there was a public sewer, should have sufficient water-closets connected therewith, was valid as to existing houses and applied in its penalties to their owners, if such houses continued without the closets after its passage.

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

TO THE EDITOR OF THE GREEN BAG.

Sir: In the August number of the GREEN BAG, in the contribution entitled, "Exterritoriality of Orientals in England," occur passages of which the following are samples: —

"But now, with the oblique light shed upon it by the Oriental mind, exterritoriality is rapidly becoming a license to seduce, a charter to kill if not to murder, and a monopoly to commit suicide without the inconveniences of a coroner's inquiry in prospect, besides furnishing a protection for the more everyday pastime of incurring debts and refusing to pay. The Chinese and Japanese Embassies have developed with perturbing facility into a veritable Alsatia, wherein the law applicable to common Englishmen may be contemned."

"The case of Oriental embassies, as has been shown, stands by itself. The exceeding extent of the modern privilege of exterritoriality arises from the fact that Europeans have not abused it. There is no such basis of experience in the case of Oriental embassies."

As one who has seen as well as read something of exterritoriality and its working, I feel bound to say that the contributor is thoroughly misinformed, and that the whole tone of the article, as well as the passages in question, are offensively and almost wantonly unjust. Not to mention minor criticisms, it is sufficient to say that the writer has just reversed the actual situation; that the abuses of exterritoriality are to be found mainly in the conduct of Occidentals; and that the teachings by example of the Occidentals in this matter can never be equalled by their Oriental pupils. From books alone your contributor might have learned of the charge of rape against the Russian consul at Philadelphia in 1816; of the notorious and long-standing abuse of exterritoriality in Morocco and other Turkish dominions by the system of "protected" natives falsely registered as belonging to the consular and diplomatic suites; of the flagrant abuse of the asylum in Chili by our Minister Egan, and elsewhere at other times. From other sources than books he might have learned of the general, if casual, abuse of exterritoriality in the Orient; of which a parallel to his own instances is found in the dangerous facility for law-breaking enjoyed by sailors from warships, and of which an analogous instance is found in the harbor of refuge accorded to Chinese thieves and other criminals on the peninsula of Kowloon, near Hongkong, owing to its having become British territory. As for the "everyday pastime of incurring debts and refusing to pay," the case may be cited of a European Secretary of Legation of the highest birth, who lived in luxury in an Oriental country and went home leaving creditors in the lurch to the extent of several thousands of dollars. As for "the license to seduce," and to commit other wrongs, it would be a day of disappointment (and perhaps of much-needed shame for us), were the records of the East and the West to be fully disclosed and compared. No experienced diplomatist would think of raising the issue.

I am, Sir, yours, etc.,

J. H. W.

LEGAL ANTIQUITIES.

PIPE in law is a roll in the Exchequer, called also the Great Roll. Pipe office is where the Clerk of the Pipe makes out leases of Crown Lands: he also makes up all the accounts of sheriffs. Spelman thinks it is so called because papers were kept in a large cask or pipe.

FACETIÆ.

BEFORE the Supreme Court of North Carolina, lately, a Mr. Ward, a young lawyer, was arguing a homestead appeal, and cited four or five cases as precedents. One of the court asked him if the principle stated was the point decided in those cases, or was it merely incidentally referred to, or *obiter dicta*. In entire good faith, and unconscious of humor, he replied, "Yes, your honor, it is the very point decided, though they go on and talk about one thing and another, as they usually do."

SOME years ago there was a prohibition election in Raleigh, N. C., and both sides claimed the influence of Col. T. C. Fuller (now Judge Fuller, of the United States Land Claims Court). Rev. Dr. Skinner, a leading divine, in conversation with Mr. Fraps, who kept a saloon, and who was a great admirer of Col. Fuller, told him that that gentleman endorsed the movement. Mr. Fraps demurred. Finally, Dr. Skinner stated that he had it direct from Col. Fuller himself! Mr. Fraps shook his head: "Ah, Doctor, he *talks* mit you, but he *drinks* mit me."

MR. B. F. MOORE, a distinguished lawyer in North Carolina, had a double, — Major D. G. MacRae, — who was something of a wag. As the latter was passing through the Capital Square in Raleigh, some years ago, a countryman met him and said, "Mr. Moore, I have come to pay that hundred dollars I owe you." "Very well," was the reply, "let us step in here and take a drink." Somewhat surprised, the debtor accepted the invitation. Then, after a few remarks about the crops, the countryman again pulled out his money to pay; but the supposed Mr. Moore waved his hand, and said, "Take another drink first." Then, after further talk about the weather and politics, the debtor again offered payment. Nothing would do, however, but "take another drink." This being accomplished, the countryman said he must go, and insisted peremptorily on paying over the money to "Mr. Moore." "See here," said MacRae, "do you still think I am Bat Moore?" "I *know* you are," said the man. "Well," said MacRae, "haven't I proved to you I am not? Did you ever know Mr. Moore to refuse to receive any money?" "No," said the man, "never!" "Well, did you ever know or hear of his treating anybody?" "Never, in all my born days;" and, musing, "I swear you *can't* be Mr. Moore, but who in h—l are you?"

SWIFT GALLOWAY, prosecuting for the State in Duplin County, N. C., had a case in which some of the witnesses swore that a certain hog was a *boar* and others a "barrow." Finally, he asked an old negro witness if he knew the difference, and what it was. "Sartinly, Marse Swift; when a he hog have *lost his manhood* he is a barrow."

NOTES.

WE commend the following to the consideration of our New Jersey brethren. It may give them an idea worth carrying out: —

A "combination atlas map of Trumbull County," published at Chicago, Ill., under the supervision of L. H. Evans, in the year 1874, tells a queer story of early frontier justice.

"The first trial tribunal was composed of a self-organized body of men, who tried and convicted a man for stealing from a fellow-boarder. He was convicted and sentenced to be divested of his apparel, tied to a tree, and subjected to the bites of mosquitoes for the period of an hour.

"It was soon discovered, however, that the man would have little or no blood left at the expiration of his term of punishment, and he was released at the end of the first half-hour. He was never known to steal again."

FROM Brierley Hill comes a good story: "It is a well-known provision of the law," says a local paper, "that a dog is entitled to bite one citizen free; but his owner is liable to be punished for the second taste his pet may take." Well, if the local paper says this is the law, let it pass. We thought otherwise. The other day a case came before two new magistrates in a provincial town, in which a man was summoned for keeping a savage dog. While in court, the dog showed every desire to clear the deck by snapping and yelping. In giving judgment, the chairman said, "although they could not convict, because there was no evidence that the dog had bitten anyone before, they considered the animal's conduct so bad *they should endorse his license.*" — *Law Notes*

LITERARY NOTES.

AMONG the "topics of the times" reviewed in the editorial department of the September REVIEW OF REVIEWS, the recent convention of the Catholic Total Abstinence Union in New York City, Russia's abolition of private saloons, the Atlanta Exposition, the dedication of the military park at Chickamauga, the Northfield Conference, the "New Puritanism" in politics, the massacres in China, the extent of the Liberal reverse in Great Britain, and the Cuban revolution receive extended treatment.

OF the manuscripts left unpublished by Robert Louis Stevenson at his death (not many, by the way), the first to reach the public is a collection of very original "Fables" in the September number of McCLURE'S MAGAZINE. One of them is a conversation between John Silver and "Cap'n" Smollett of "Treasure Island," which is as delicious in its way as anything those worthies do or say in "Treasure Island" itself. In the same number, Anthony Hope relates another adventure of the ever-charming Princess Osra, an encounter in the forests of Zenda with an attractive and most courteous highwayman. There is also a romantic tale of court intrigue, by Stanley J. Weyman, and a new Drumtochty story by Ian Maclaren, the author of "Beside the Bonnie Brier-Bush."

"WHY Women Do Not Want the Ballot" is thoughtfully discussed by the Rt. Rev. Wm. Croswell Doane, Bishop of Albany, in the September number of the NORTH AMERICAN REVIEW. This number also contains an exceedingly valuable paper styled "Trend of National Progress," by Prof. Robert H. Thurston, of Cornell University, in which the future progress of the United States is most happily outlined.

THE ATLANTIC MONTHLY for September contains the first installment of a three-part story, by Charles Egbert Craddock, entitled "The Mystery of Witch-Face Mountain." The second of Dr. John Fiske's historical papers has for a subject "John Smith in Virginia," in which he reopens vigorously the discussion in regard to this interesting character. Bradford Torrey contributes another Tennessee sketch, "Chickamauga," which will be of special interest in view of this summer's memorable gathering at Lookout Mountain. The paper in the August issue by James Schouler, upon "President Polk's Diary," is ably supplemented in this issue by "President Polk's Administration," by the same author. The usual installments of the two powerful serials now running will add interest to the issue.

FICTION and travel are the strong points of the September COSMOPOLITAN, which, by the way, illustrates better than any previous number the perfection of its plant for printing a magazine of the highest class. Conan Doyle, H. H. Boyesen, and Clark Russell are among the story-tellers. A well-known New York lawyer relates the story of "A Famous Crime," — the murder of Dr. Parkman by Professor Webster. A delightful sketch of "An English Country-House Party" is from the pen of Nina Larré Smith, — the house at which she visited being no less than the historic Abbotsford, still occupied by the direct descendants of Sir Walter Scott. "The Realm of the Wonderful" is descriptive of the strange forms of life discovered by science in the ocean's depths, and is superbly illustrated in a surprising and marvelous way by the author, who is a member of the Smithsonian staff. An article on Cuba is timely.

THE leading feature of THE BOSTONIAN for August is the giving up of sixty-eight pages to a very comprehensive condensation of the "History of Blue Lodge, Royal Arch, and Knight Templar Masonry in the United States," fully illustrated, with interior and exterior views of Boston's Masonic Lodge-rooms, and of many of the old buildings which have figured in the city's Masonic life, which cannot be found elsewhere, — such as the former Masonic Hall (afterwards the United States Court-House), which stood at the corner of Tremont Street and Temple Place, and the Winthrop House, which occupied the site where the Masonic Temple now stands, and which was burned in 1864.

MARK TWAIN contributes to the September HARPER'S MAGAZINE a paper in which he gives an account of some curious personal experiences in telepathy, or second-sight, or coincidence, or whatever it may be. These are in continuation of an account published in December, 1891, of some earlier experiences of the same sort which Mr. Clemens gave under the title "Mental Telegraphy."

THE success of a magazine serial dealing with contemporary American affairs has been abundantly demonstrated by the wide and permanent interest that has been aroused by President Andrews's "History of the Last Quarter Century in the United States," now running in SCRIBNER'S MAGAZINE. The September instalment includes episodes of such variety as the third-term contest of President Grant, Conkling's great feud with Garfield, the assassination of Garfield, the Star Route and Whiskey Ring frauds — all of which topics are illustrated with a unique series of pictures collected with great pains from authentic sources.

HELEN H. GARDENER'S summing up of the campaign of legislation on the protection of young girls—the so-called "age of consent" question—is one feature of the September ARENA that will be sure to attract the widest attention in the three States dealt with in this issue. She treats of the legislation secured, raising the age of protection in Colorado, Nebraska and Missouri, and the full reports of the proceedings will afford both those in favor of the movement and those opposed to it an opportunity to weigh the arguments pro and con.

THE CENTURY for September contains a new portrait of Henry Clay, accompanying a paper of family recollections collected by Miss Madeleine McDowell, a granddaughter of the statesman. Of this portrait, which was painted by Matthew Harris Jouett, Miss McDowell says: "It hung for many years in the home, near Lexington, of another of Mr. Clay's admirers. But in Kentucky, where the possession of the blue-grass land is a fruitful source of litigation, and of bitter and enduring enmities as well, even political sympathies were not always able to prevail against the strain. The inevitable lawsuit occurred, and the portrait was banished to the garret. Afterward it was given to a friend, who, on inquiring about it, was told that it should never again darken the walls where it had hung. This gentleman, before the humor of the owner should be changed, put the picture into his buggy, and drove with it to his home in a neighboring county."

BOOK NOTICES.

HISTORY OF THE LAW OF REAL PROPERTY IN NEW YORK. By ROBERT LUDLOW FOWLER. Baker, Voorhis & Co., New York, 1895. $3.00 net.

This work of Mr. Fowler is valuable not only as a legal treatise, but as an historical contribution upon a subject of exceeding interest. Beginning with the law of real property in New Netherland, the growth and development of the law in New York is traced down to and through the revised Statutes. New York lawyers will find the work of much *practical* value, and others cannot fail to be deeply interested in it.

AMERICAN ELECTRICAL CASES, Vol. III (1889–1892). Edited by WILLIAM W. MORRILL. Matthew Bender, Albany, N. Y., 1895. Law sheep, $6.00.

This volume brings the decisions covering the law of electricity almost down to the present time. We have heretofore commented on the value of this series to the profession, and the present volume has been prepared with the same care and discretion which characterized its predecessors. The selection of cases is admirable and the editor has faithfully performed his task.

HAND-BOOK OF THE LAW OF SALES. By FRANCIS B. TIFFANY. West Publishing Co., St. Paul, 1895. Law Sheep, $3.75.

HAND-BOOK OF INTERNATIONAL LAW. By CAPTAIN EDWIN F. GLEASON. West Publishing Co., St. Paul, 1895. Law sheep, $3.75.

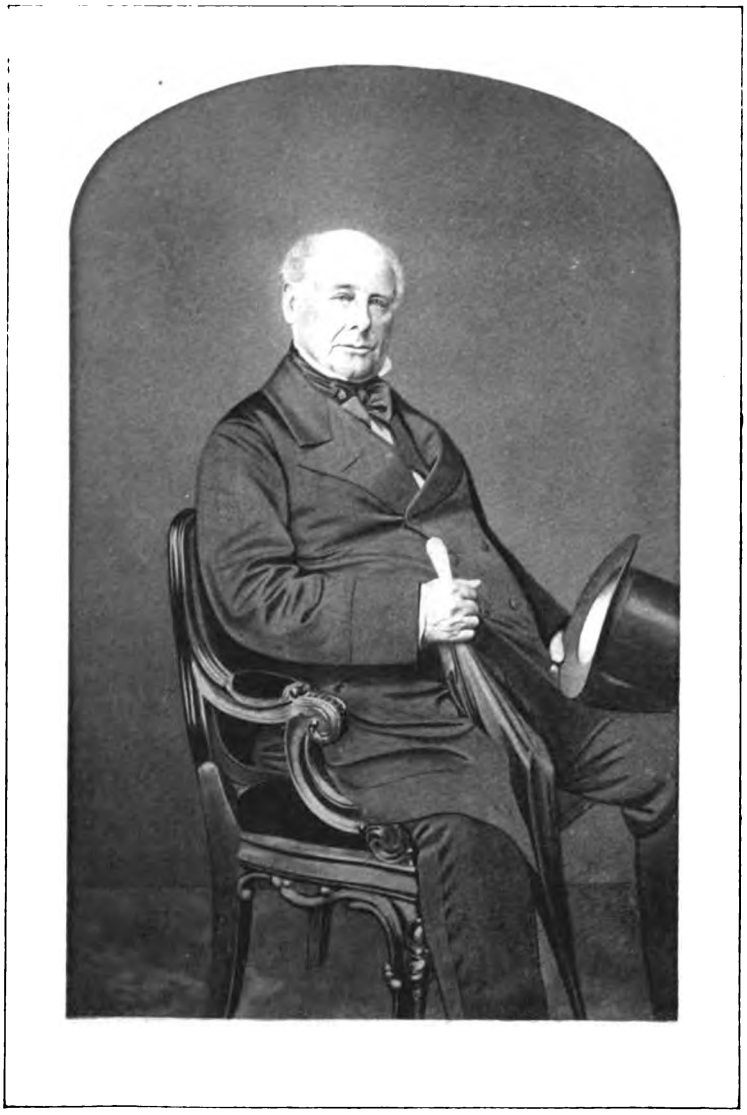
These two works are the latest issues in the "Horn Book Series" which the West Publishing Co. are publishing for students' use. Mr. Tiffany's volume on "Sales" seems to be admirably adapted for its purpose, and Captain Gleason gives a clear idea of the principles governing international law.

ROAD RIGHTS AND LIABILITIES OF WHEELMEN. By GEORGE B. CLEMENTSON. Callaghan & Co., Chicago, 1895. Law sheep, $1.50, *net.*

This is a very timely little work, and will prove valuable not only to the profession but to the vast army of bicyclists who have taken possession of our highways and byways. Mr. Clementson sets forth the rights and liabilities of this class of travelers very clearly and concisely, and with his book for a guide wheelmen will be fully posted as to their legal status. It is, we believe, the first work upon this important subject.

THE BREHON LAWS. A Legal Handbook. By LAWRENCE GINNELL of the Middle Temple. Imported by Charles Scribner's Sons. Cloth, $2.40.

The lover of legal antiquities will fairly revel in this book, for the Brehon (Irish) laws are old enough to satisfy the most exacting antiquarian, having reached their full proportions and maturity about the time that Alfred was reducing to order the scraps of elementary law he found existing amongst his people. Mr. Ginnell has collected a vast amount of interesting information in this volume and he communicates it in such a happy manner that the reader is fairly fascinated by his recital. We have not the space for such comment as we would be glad to make on the subject-matter of the book, but we heartily commend the work to everyone who is at all interested in the story of ancient law, and we assure them they will find it one of absorbing interest.



THOMAS C. HALIBURTON.

The Green Bag.

VOL. VII. NO. 11. BOSTON. NOVEMBER, 1895.

THOMAS CHANDLER HALIBURTON.

(SAM SLICK.)

BY J. A. CHISHOLM.

JUDGE HALIBURTON, popularly known as "Sam Slick," from the name of the principal character in the "Clockmaker" sketches, played a very important part in the history of Nova Scotia for a period of over thirty years. He figured in political, in legal, and in literary affairs, and in each sphere of action he acquired very considerable repute. The reputation which he won as a legislator is greater than his reputation as a lawyer and judge; and the success of his literary work far surpassed the utmost measure of his success at the bar, on the bench, in the legislature of his native Province, or in the House of Commons of England. It is indeed as the author of the "Sam Slick" papers, that his name is most likely to be long preserved. But it is in his capacity as lawyer, judge and politician that he will be most interesting to readers of THE GREEN BAG.

Thomas Chandler Haliburton was of Scottish descent, the Haliburtons being an old family with whom Sir Walter Scott was connected through his grandmother. Sir Walter compiled a work entitled "The Memorials of the Haliburtons" for private circulation. In the eighteenth century some members of the family emigrated to America and settled in New England. "Sam Slick's" grandfather, one of these emigrants, being a strong loyalist, removed from Boston to Windsor, N. S., about the time of the revolutionary war. His father, William Otis Haliburton, was a judge of the Court of Common Pleas in Nova Scotia — an inferior court which was abolished in 1841.

The subject of this sketch was born at Windsor, on December 17th, 1796. He entered King's College at Windsor at the early age of fourteen, and was graduated B. A. in 1815.

As a student he is said to have been very proficient in the classics.

After his graduation he devoted himself to the study of the law, and in 1820 he was called to the bar of Nova Scotia. He practiced his profession in the old town of Annapolis Royal. By his contemporaries he was considered a good lawyer; but the field in which he practiced was so restricted that small opportunity was given for the development of such legal talent as he might have possessed. As might be expected, the young lawyer took a warm interest in the political affairs of his country. Responsible government had not yet been established in Nova Scotia, and the Executive Council administered the public affairs with little or no regard for the wishes of the members of the popular or elective chamber. But, although the Assembly did not make and unmake administrations, it nevertheless exercised considerable influence over the public opinion of the Province, and it gathered to its walls many of the brightest minds of the colony. In the summer of 1826 elections were held throughout the Province, and Mr. Haliburton was returned as one of the members for the County of Annapolis.

He was a man of strong conservative instincts, utterly opposed to hasty and headlong change, but quite sensible of the necessity for reform where abuses existed. Although he was not one of the so-called reformers of his day, he nevertheless advocated measures of reform along safe and conservative lines, which conferred a great boon upon his countrymen. His prudence is well illustrated by his first speech in the Assembly—that on the customs bill. The customs imposts were collected at the time by the Imperial authorities, who paid the salaries of the officers. The right of the colony to wholly control the customs was asserted somewhat defiantly by some members of the Assembly. This procedure Mr. Haliburton opposed, and he advocated instead the appointment of a committee to present an address to His Majesty asking in moderate and courteous but not less effective language the adjustment of the customs difficulty in the manner desired by the colonists. Beamish Murdoch, Q.C., who was himself a member of the Assembly at the time, gives the following description of Mr. Haliburton as a speaker: —

"As an orator, his attitude and manner were extremely impressive, earnest and dignified; and although the strong propensity of his mind to wit and humor was often apparent, it seldom detracted from the seriousness of his language when the subject under discussion was important. Although he sometimes exhibited more *hauteur* in his tone than was agreeable, yet his wit was usually kind and playful. . . . . He was not remarkable for readiness of reply in debate; but when he had time to prepare his ideas and language, he was almost always sure to make an impression on his hearers."

In the session of 1827, an occasion arose which gave Mr. Haliburton an opportunity to display his splendid powers of declamation. A petition from the Roman Catholics of the Province was presented to the Assembly on the 12th of February, praying for the removal of the test oaths. A fortnight later the petition was taken into consideration, and a resolution in accordance with the prayer of the petition was submitted. The resolution was moved by Mr. Richard John Uniacke in a speech of singular beauty and strength, and was seconded by Mr. Haliburton. Mr. Murdoch speaks of this speech as the finest piece of declamation he had ever listened to; and it is said that the celebrated Joseph Howe, himself the greatest of Canadian orators, while detailed to report the speech, was so captivated that he had to lay down his pen. No verbatim report of this speech has been preserved, but the following extract from a synopsis of it is taken from a contemporary record, and will convey some idea of the effort: —

"In considering this question he should set out with stating that every man had a right to participate in the civil government of that country of which he was a member, without the imposition of any test oath, unless such restriction was necessary to the safety of that government; and if that was conceded, it would follow that these tests should be removed from the Catholics unless their necessity could be proved in respect of that body. He stated that the religion which they profess was called Catholic because it was at one time the universal religion of the Christian world, and that the bishop of Rome, from being the spiritual head of it, was called Pope, which signified father. Then, after tracing the origin and history of the temporal power to the time of Henry VIII, he said that in subsequent times it had been thought necessary to impose test oaths, lest the Catholics, who were the most numerous body, might restore the ancient order of things, and particularly as there was danger of a Catholic succession; but when the Stuart race became extinct, the test oaths should have been buried with the last of that unfortunate family. Whatever might be the effect of emancipation in Great Britain, here there was not the

slightest pretension for continuing restrictions; for if the whole house and all the council were Catholics, it would be impossible to alter the constitution — the governor was appointed by the King, and not by the people, and no act could pass without his consent. What was the reason that Protestants and Catholics in this country mingled in the same social circle and lived in such perfect harmony? How was it that the Catholic mourned his Protestant friend in death, whom he had loved in life — put his hand to the bier — followed his mortal remains to their last abode and mingled his tears with the dust that covered him, while in Great Britain there was evident hostility of feeling, and the cause must be sought in something beyond the mere difference of religion? Th estate of Ireland afforded a most melancholy spectacle: the Catholic, while he was bound in duty — while he was led by inclination, to support his priest, was compelled by law to pay tithes to the Protestant rector; there were churches without congregations —pastors without flocks, and bishops with immense revenues without any duty to perform; they must be something more or less than men to bear all this unmoved — they felt and they murmured; while on the other hand the Protestants kept up an incessant clamor against them that they were a bad people. The property of the Catholic church had passed into the hands of the Protestant clergy — the glebes — the tithes — the domains of the monasteries — who could behold those monasteries, still venerable in their ruins, without regret? The abodes of science — of charity, and hospitality, where the way-worn pilgrim and the weary traveler reposed their limbs and partook of the hospitable cheer; where the poor received their daily food, and in the gratitude of their hearts implored blessings on the good and pious men who fed them; where learning held its court, and science waved its torch amid the gloom of barbarity and ignorance.

"Allow me, Mr. Speaker, to stray, as I have often done in years gone by, for hours and for days amidst those ruins, and tell me (for you, too, have paused to view the desolate scene), did you not, as you passed through those tesselated courts and grass-grown pavements, catch the faint sounds of the slow and solemn march of the holy procession? Did you not seem to hear the evening chime fling its soft and melancholy music o'er the still sequestered vale, or hear the seraph choir pour its full tide of song through the long protracted aisle, or along the high and arched roof? Did not the mouldering column — the gothic arch — the riven wall and the ivied turret, while they drew the unbidden sigh at the work of the spoiler, claim the tribute of a tear to the memory of the great and good men who founded them?

"It is said that Catholics were unfriendly to civil liberty; but that, like many other aspersions cast upon them, was false. Who created *Magna Charta?* Who established judges, trial by jury, magistrates, sheriffs, etc.? Catholics! To that calumniated people we were indebted for all that we most boasted of. Were they not brave and loyal? Ask the verdant sods of Chrysler's farm. Ask Chateauguay, ask Queenstown Heights, and they will tell you they cover Catholic valor and Catholic loyalty — the heroes who fell in the cause of their country! Here, there was no cause of division, no property in dispute —their feelings had full scope. We found them good subjects and good friends. Friendship was natural to the heart of man; it was like the ivy that seeks the oak and clings to its stalk, and embraces its stem, and encircles its limbs in beautiful festoons and wild luxuriance, and aspires to its top, and waves its tendrils above it as a banner, in triumph of having conquered the King of the forest.

"Look at the township of Clare: — it was a beautiful sight: a whole people having the same customs, speaking the same lan-

guage, and uniting in the same religion. It was a sight worthy the admiration of men and the approbation of God. Look at their worthy pastor, the Abbe Segogne: see him at sunrise with his little flock around him, returning thanks to the giver of all good things; follow him to the bed of sickness — see him pouring the balm of consolation into the wounds of the afflicted; into his field where he was setting an example of industry to his people; into his closet, where he was instructing the innocence of youth; into his chapel, and you would see the savage, rushing from the wilderness with all his wild and ungovernable passions upon him, standing subdued and awed in the presence of the holy man! You would hear the Abbe tell the savage to discern God in the stillness and solitude of the forest — in the roar of the cataract — in the order and splendor of the planetary system — and in the diurnal change of night and day. That savage forgets not to thank his God that the white man has taught him the light of revelation in the dialect of the Indian.

"After giving a detailed account of the expulsion of the French Acadians in 1755, Mr. Haliburton said that he did not ask for the removal of the restrictions as a favor; he would not accept it from their commiseration: he demanded it from their justice. Every man who lays his hand on the New Testament, and says that is his book of faith, whether he be Catholic or Protestant, Churchman or Dissenter, Baptist or Methodist, however much we may differ in doctrinal points, he is my brother and I embrace him. We all travel by different roads to the same God. In that path which I pursue, should I meet a Catholic, I salute him; I journey with him; and when we shall arrive at the *flammantia limina mundi* — when that time shall come, as come it must; when the tongue that now speaks shall moulder and decay — when the lungs that now breathe the genial air of heaven shall refuse me their office — when these earthly vestments shall sink into the bosom of their mother earth, and be ready to mingle with the clods of the valley, I will, with that Catholic, take a longing, lingering, retrospective view. I will kneel with him; and instead of saying, in the words of the presumptuous Pharisee, "Thank God I am not like that papist," I will pray that, as kindred, we may be equally forgiven: that as brothers we may be both received."

That Mr. Haliburton would have been a permanent success as a politician, had he not adopted another career, cannot well be doubted. He had great aptitude for political affairs and enjoyed a large degree of popularity. But in 1829, he accepted the position of Chief Justice of the Court of Common Pleas for the midland division of Nova Scotia, and withdrew from the larger field for which his talents and education so well fitted him for useful service. He held the office of Chief Justice until the abolition of the court. His duties as judge of an inferior court were not such as called for any great legal abilities; and they were light enough to afford him sufficient leisure for the composition of some of his more famous works. When the Court of Common Pleas was abolished in 1841, Judge Haliburton was made a puisne judge of the Supreme Court, and held the latter position until 1856, when he resigned and removed to England.

As Judge of the Supreme Court his duties required him to preside on circuit throughout the Province and to sit with his brother judges at Halifax on the hearing of appeals and such other business as properly came before the Court in banco in the first instance. It is no injustice to the memory of this celebrated man to say that his work as a judge was not enduring. There are no great decisions of his to which we can point as land-marks in the development of our law. Nevertheless he did his work well, and was a long way off from failure. Bright, cultivated and versatile, he could not be

a failure. But he found literary work more congenial than the ceaseless search for precedents. About a dozen of his decisions have been reported, and they are all to be found in James' Nova Scotia Law Reports. A word about a few of them may not be out of place.

In the Easter term of 1854, the court had to deal with the construction of an insurance policy in the case of Creighton *v.* The Union Insurance Co. The reporter states that Judge Haliburton "delivered a long critical examination of the case, with reasons in extenso," the substance only of his reasons being given in the official report. The following extract is given to show how he approached the difficulties of the case in hand.

"I concur in the opinion expressed by his Lordship, the Chief Justice — not merely for the reasons assigned by him, but for some others of a different nature. I shall, therefore, in conformity with my usual practice, merely mention those additional principles which have operated on my mind. The Attorney-General stated that decided cases were now more liberally interpreted than formerly; he might have said that the law had of late been differently expounded. Mr. Justice Bliss seems to think that we are bound by the opinion of Sir James Mansfield, in Spitta *v.* Woodman. I beg leave to dissent from that proposition. The unconditional surrender of private judgment to decided cases has drawn down the approbrium of British statesmen on the study of the law; and it has been broadly asserted that its tendency is to cripple and confine the mind. Most of these remarks have more in them of flippancy than of truth. It does not follow that the study of the law limits the mind; but the mind may cramp itself by the mode in which it studies. If decided cases are immutable, and so considered by the Courts where they are decided, as well as in those of more limited jurisdiction, like our own, we commit the fatal error of surrendering up our judgments to those of other men. But I view the subject in a different light; and regard decided cases not as law — but evidence of law — or expositions of law. Englishmen boast of their common law as though it were peculiar to themselves; we, however, know that a common law extensively prevailed in Greece and Rome, and now has existence in every civilized country of Europe, in the United States, and the North American colonies. The law has been defined by an ancient author of great celebrity to be 'the decision and adoption of certain principles subsequently sanctioned and recognized by the Courts.'

"He then winds up by stating it to be 'the golden rule of reason.' Lord Coke calls it 'the right reason.'

"When Lord Thurlow was at the bar his practice was to take a case as he found it, and study it so inductively, till he reached his conclusion; when this was done he consulted Lord Kenyon — a great case man; and nothing proves more conclusively the value of decisions than the fact that in most instances he arrived at pretty much the same result as that set forth in the cases, although in a large number of instances his conclusions were sounder. Viewed in this light, the study of the law, so far from limiting, must enlarge the understanding. The common law is elastic, it is remarkable for its plasticity and adaption to all varieties of circumstances. In a new country like this — changing in its aspects, conditions, requirements, with every returning year; where new interests, new combinations, and new difficulties are perpetually arising, it is impossible to apply stringent rules with the same unvarying fixity that marks their applicability to the circumstances of older and more stable countries. How can the same commercial rules be applied to a sparsely populated country — designated only by its latitude and longitude and a few log huts — as apply to Gibraltar or Malta?"

In the case of Murdoch *v.* Pitts, he decided at the trial that a promise to pay "as soon as possible" took a case out of the statute without proof of the defendant's ability to pay. Steps were taken to set aside the verdict, and the other members of the court in banco held that the verdict should be set aside on the authority of the case of Tanner *v.* Smart, 6 B. & C. 603. Judge Haliburton in a dissenting judgment strongly combated the authority of the English case as applied to the case in hand, and the following quotation from his decision will be more interesting on account of the vigor of its rhetoric than on account of the soundness of its law: —

"There have been a host of irreconcilable decisions under the statute of limitations. The objects and principles of the statute seem to have been lost sight of by the courts previous to the case of Tanner *v.* Smart, which decides that a mere admission is not sufficient, but there must be an admission from which a promise may fairly and clearly be inferred. This decision was necessary from the previous unsettled state of the law; some of the decisions have held that any promise at all was sufficient to take a case out of the statute, and one on the other hand went the monstrous length of holding that a fraudulent man who admitted the justice of the claim, but declared that he would not pay it, should escape under the statute, which was only intended to shield a man who may have lost his receipt, as he would be very likely to have done after six years had elapsed, from paying his debt twice over; and to prevent the numerous cases of injustice which would arise from permitting parties to proceed without restriction for the recovery of stale and neglected claims. The colonial courts following implicitly these decisions, and thus surrendering their discretion and judgment to others, have been dragged through all these mutations.

"But, although the decision in Tanner *v.* Smart was necessary at the time, too much has been made of it, and, in fact, whenever it comes up we hear of nothing else. It is applied like Procrustes' bed. If a case is too large for it, a piece is cut off, and if too small, it is stretched to the requisite dimensions. But, giving to that case the whole force which is claimed, I do not consider that the evidence in this case comes within it.

"The construction to be put on the words used is a question for this Court, and if we tie ourselves down too closely to the case of Tanner *v.* Sharp, we are giving to it a legislative authority to which it is not entitled. My own opinion is that it may be called a *protrusive* decision, advancing far into the powers of legislation, and not so much explanatory of the statute as imposing to it additional conditions."

Shortly after his retirement from the bench he went to England. About that time an unseemly wrangle between himself and the provincial government arose in regard to his pension, and the matter was finally decided in his favor by the Privy Council. In 1859, he was returned to the English House of Commons, as Conservative member for the borough of Launceston, and he continued to represent that borough to the time of his death on August 27, 1865. That he failed of success in the Imperial Parliament was unexpected by his political patrons; but it should not have been surprising. It must be remembered that he was over sixty years of age when he entered the English Commons, that the conditions there were new to him, and that his experience in the Assembly of his native province was of only three years' duration. Indeed, we have a more recent instance where a Canadian public man of longer experience, and probably of greater capacity for public affairs, was translated from Canadian into English public life with results very disappointing to his friends.

As the most illustrious man of letters that Canada has so far produced, Judge Hali-

burton will be long remembered. His earliest work was a history of Nova Scotia, published in two volumes in 1829 by Joseph Howe. His accuracy as an historian has been attacked, and his account of the deportation of the Acadians in 1755, in which he denounced the act as harsh, has given rise to criticism from those who defend what even from their own point of view still remains a most cruel expedient. In 1835 he began the "Clockmaker" papers in Joseph Howe's newspaper, the "Nova Scotian," and they at once attracted attention by their inimitable humor. Among his other principal works are "Bubbles from Canada," "The Letter Bag of the Great Western," "The Attaché," "The Old Judge," "Wise Saws and Modern Instances," "Nature and Human Nature," "Rule and Mis-rule of the English in America," and "The Season Ticket." The limits of the present article will not allow, nor does it fall within its scope, to make any extended comment on the above works. A few years ago a Haliburton Society was formed at Windsor, N.S., and that Society has published a very excellent "study" of Haliburton and his literary works from the pen of Mr. F. Blake Crofton, of Halifax, N.S.

Judge Haliburton was twice married; first to Miss Neville, the daughter of an English military officer; and secondly to Mrs. Williams, widow of E. H. Williams, of Shrewsbury.

THE IMPRISONMENT OF DR. CORNELIUS HERZ.

THE imprisonment of Dr. Cornelius Herz deserves some attention for more reasons than one. On grounds of humanity, there is much to arrest attention in this strange spectacle, unusual in England, of a man dangerously ill imprisoned in his bedroom for nearly three years, without trial or opportunity of defense. But apart from the hardships of the individual, there is another aspect of the situation deserving to be regarded.

It is of course well known that the whole law and practice of extradition is the youngest of the brood of Justice. But one result of this, in connection with the Herz case, appears to escape observation. It is simply that every case which in any important particular leaves the path of mere routine, is bound to be a leading case, and set the fashion. The vast majority of the cases, with the exception of a few dozen, have arisen within the last twenty-five years. 1870 is practically the beginning of the practice. If the present deadlock be not mended in some way, it will be the settled rule in England that sick men, whom it is impossible to bring to trial, are to be kept under lock and key at the good pleasure of a foreign government. Knowing what we know of foreign governments less civilized than the French, it can hardly be said that this prospect is reassuring. The notions of foreign princes and potentates on the point of liberty of the mere private person are not always suited to English air.

The present question has arisen on the Franco-British Treaty of Extradition, but it may arise in some other case under the Treaty with Germany, with Russia, with any of the Great Powers. Its importance is therefore perfectly general, as all extradition treaties are formed on the same lines. The British Government agrees with the Government of some other state (usually civilized, but sometimes so by stretch of courtesy only) for the mutual surrender of criminals, or rather of accused persons, on requisition to be made in a prescribed manner. On receiving this foreign requisition, the British Government is empowered by statute to delegate the holding of a preliminary inquiry to a special magistrate: for England, a magistrate sitting at the Police Court in Bow Street. If the magistrate, on holding this inquiry, should be satisfied that a *prima facie* case has been made out against the accused — such a case as would warrant him in sending the accused for trial before a British jury — he is to order his surrender.

But, it may be asked, what is to prevent a foreign Government, distinguished by its tyrannical rule, from utilizing this procedure in order to get into its power its political opponents? The answer is that the Extradition Acts of Parliament which prescribe the procedure to be adopted by British courts, and the various extradition treaties, all contain provision to prevent extradition being misused in this way. Acts and treaties provide that political offenders are not to be surrendered, even though accused of ordinary crimes, if the magistrate who holds the preliminary investigation, or the Secretary of State for Foreign Affairs, is satisfied that the real object of the foreign Government is to punish for a political offense. Again, the Secretary of State has a controlling power over the whole process of surrender, and need not allow extradition in any case in which he thinks it should not be granted.

These rules have worked well enough in most cases, though, of course, failures on the part of the authorities on this side of the Channel to detect, or to hold proved, the

existence of political motive in the prosecution must inevitably occur. What the Herz case has conclusively established, apart from the difficulty of proving political motive in a case in which it notoriously exists, is the presence of two serious defects in the Extradition Acts and in the whole series of extradition treaties.

The defect in the Acts is due to the altogether indefensible restriction of the preliminary magisterial inquiry to the not very dignified precincts of Bow Street Police Court; even where the dangerous illness of the accused prevents his being brought within miles of London. The remedy for this obviously would be to allow the case to be investigated, with his consent, in his absence. The still more glaring defect in the extradition treaties is the absence of a provision requiring the foreign Government to withdraw its requisition when the dangerous illness of the accused has been proved to the satisfaction of the British Government. The invidious task should not be imposed on the Secretary of State of refusing to allow extradition in such cases: the foreign Government should be required to refrain from demanding it.

A bare enumeration of the facts of the case will show the absurdities and inconveniences, to say the least of it, of the working of the present system.

It is now two years and a half since Dr. Cornelius Herz was arrested at Bournemouth by the Scotland Yard authorities, at the instance of the French Government. He was accused of complicity in frauds, said to have been committed in connection with the Panama Canal enterprise. It now seems tolerably clear that, while much of the disaster which covered with grief the closing days of Ferdinand de Lesseps might fairly be attributable to mismanagement on the part of some one, the allegation of actual fraud has never been supported; nevertheless, such was the accusation. What followed? The arrest was effected early in 1893. Since then Dr. Cornelius Herz has been usually confined to his bed, and always to his room. The reality and the serious nature of his illness has been attested by Sir Richard Quain and other eminent British physicians. It is hardly credible, but it is true, that in the face of these well attested facts, and in the face of the repeated demands of this prisoner of British justice to have his case tried, it has not been tried, and he has not been released. A technical defect in a British Act of Parliament, and a most marvelous delicacy of feeling for the susceptibilities of French administrators — which would be hurt if our Foreign Office asked them to withdraw their requisition for surrender — has kept an invalid under arrest for the greater part of three years.

But it may be said, and with truth, "The French Government is a civilized Government. Why would they seek to persecute an innocent man?" This question is simple enough, but so is the answer. In the first place, no police, even the English, likes to give up its quarry. A case means, or may mean, promotion. French tribunals, it is whispered by French lawyers, are not anxious to surrender a case of which they have once been "*saisis*." Much more are policemen, inferior mortals to judges, touched here with the ardor of the chase. But more than this, a purely political motive comes into operation. None of the fleeting French ministries would like to face the odium of relinquishing the demand for the surrender of a "Panamaist" — or to incur the certainty of being accused of winking at the escape of a "*chequard*." Votes are the object in view. Enemies of a given minister, who themselves have no reason for believing Dr. Cornelius Herz more guilty than his acquitted companions, would jump very quickly at such a convenient stick with which to beat a minister.

His acquitted companions, be it noted, for here a startling fact confronts us: all the other persons accused along with Dr. Cor-

nelius Herz are now free, and reside in Paris or London. Some of them were convicted, in the heat of popular passion, seeking for some whole burnt-offering to be offered on the brink of the bottomless pit of Panama. But their release was ordered by the Court of Cassation, on June 15, 1893, on the ground that no legal justification existed for their conviction, and that they had been improperly tried.

It is another curious fact that in a decree of the 27th January, 1893, the President of the French Republic, and the Minister of Justice, while removing Dr. Cornelius Herz from his membership of the Legion of Honor, declared that the charge on which he was removed was barred by limitation under the French Codes, and therefore was one for which he could not be tried, if he were in France.

The ministry, however, was not content with proceeding by administrative decree. Some months after its issue, notwithstanding his absence through illness in a foreign territory, the prosecution of Dr. Herz was proceeded with in the French courts. This process, which seems strange to English eyes, could be availed of by his prosecutors in France, although not open to his defense in England. Within a few days of the issuing of a certificate already referred to, signed by Sir Richard Quain and other physicians in attendance on Dr. Herz, the French court convicted the absent man on the stated assumption that he was contumaciously abstaining from going to France. The court sentenced the accused, so summarily convicted, to five years' imprisonment — the highest term possible for the alleged offense. The court displayed its impartiality (already shown by its ignoring the certificate of the English physicians) by refusing to hear the advocate who appeared for Dr. Herz. His advocate challenged the jurisdiction of the court on the ground that at the time of the alleged offense his client was a grand officer of the Legion of Honor, and so subject only to a special tribunal. It is worth noting, that owing to a multitude of delays on the part of the prosecution, Dr. Herz's appeal against this sentence only came before the Court of Cassation in August, 1895. It was rejected on the unprecedented ground that, as Dr. Cornelius Herz was a foreigner, he did not enjoy the same privileges as a Frenchman would if the Frenchman were, like Dr. Herz, a grand officer of the Legion of Honor. This striking specimen of judicial interpretation seems to have surprised most French lawyers.

Meanwhile, some slight attention had been aroused in England. As a result of inquiries addressed to Ministers in the House of Commons it was announced in the first session of 1895 that a bill would be introduced to correct the Extradition Acts. It was understood that this bill would meet the case of Dr. Herz. But, in fact, it only provided for holding the magisterial inquiry out of London : it merely removed from Bow St. its peculiar privilege of being the seat of the Extradition Court. It did not provide for the holding of the preliminary magisterial inquiry in the absence of a sick prisoner, although he demanded it never so loudly. Obviously it could not touch the case of Dr. Herz.

The question now remains, — What steps can be taken to meet the evident failure of justice which has arisen, and must again arise, in cases of the illness of a prisoner whose surrender is demanded under treaty by a foreign Government. Another question, one of possibly greater urgency, is what is to be done for this untried prisoner who has been in confinement without trial for nearly three years ?

The first question suggests its own reply. For the safety of the future, the Extradition Acts should be amended by permitting the preliminary investigation to be held in the absence of the accused, if he is shown to be seriously ill, and if he demands that the investigation should be held in his absence.

Extradition treaties with France and other countries might be usefully amended by the inclusion as already suggested of a provision that the demand for surrender should be withdrawn on proof, satisfactory to the British government, that the prisoner is dangerously ill.

The second question, — What is to be done for the relief of Dr. Cornelius Herz ? — is one more of administration than of law. There is now no time for general legislation which would meet the concrete case. The only possibility of prompt action lies in the reserve powers of the Secretary of State for Foreign Affairs. On the ground that political motive is apparent throughout the proceedings, the Secretary can arrest the whole process of extradition. Here he will be within his strict right, as defined by the law of England as well as the law of nations. On the other hand, he is entitled, under the ordinary usage of diplomatic intercourse — herein, of course, the law of England is silent — to represent to the French Government the grave inconvenience attaching to the present position in which the Government of a free country — the home of constitutional liberty, is placed. That is, that the British Government is reduced to retaining for an indefinite period in prison a sick man who cannot be tried, and who, as untried, is presumably innocent.

Diplomatic remonstrance was recommended to the late Government by a former Solicitor-General. But should remonstrance be unavailing — and even a published request of a British ministry might not excuse or palliate in the eyes of the intelligent French elector the withdrawal of a charge against a "Panamaist" — then it will remain to be considered what proofs there are of political motive in the institution, or the continuance of the prosecution of Dr. Herz.

Is it really necessary to recite proof of a self-evident fact ? It is notorious that the Panama Canal scheme, itself originating quite as much in political as financial motives, has been in its fall as well as its rise identified with political and vote-seeking projects. The downfall of ministers — though, to be sure, that in France does not seem to require a cataclysm — the political death of party leaders, the fortunes of political journalists, all centred for years around the last dream of Ferdinand de Lesseps. It is of common knowledge that accusations of complicity with "Les Chequards" were made, and often untruly made, for political purposes. Common sense alone is sufficient to show that the persons truly or falsely supposed to be responsible for the loss of the untold millions taken from the pockets of a million French electors, and for the perhaps equally bitter loss of the glorious mirage of the profits of Panama, have to fear the votes of the elector as well as the process of the Ministry of Justice.

Again, to come to the question from a different standpoint, what can be the motive of the French demand for the surrender of this last of the accused ? The vindication of Justice ? But then we have the fact that the other defendants, of whom the accused was alleged to be an accomplice, were released two years ago, by the order of the highest tribunal in France.

A nervous anxiety to display to the elector the utmost conceivable vigor in prosecuting an accused Panamaist is visible not merely in persisting in the demand for the extradition of the accused Dr. Herz, but in the conduct of the prosecution in the French courts. The accused, kept in his bed by illness, is prosecuted in his absence. A certificate of that illness and of its serious nature, from English physicians of the highest standing, is summarily set aside. The severest possible penalty is demanded by the prosecution and is inflicted by the court.

A British Secretary of State for Foreign Affairs may very well admit the universally admitted, and put an end to this political persecution of a man who cannot be tried, but who can be and is imprisoned. By ex-

ercise of a wise discretion a real stain on the administration of justice in England can be removed. As has been truly pointed out in a memorial now being signed by members of the House of Commons, no treaty of extradition can be held to bind a Government to a course of conduct which it never contemplated.

The latest announcement in the House of Commons is that a new convention is being negotiated with the French Government, so as to allow the British Act of 1895, which authorizes the holding of a magisterial inquiry elsewhere than in Bow Street, to come into operation. It is not clear from the replies of the present Under-Secretary for Foreign Affairs whether the convention will modify the position of Dr. Herz. It is therefore well to recollect that the resource powers of the Secretary of State can always be fallen back upon.

M. J. F.

HENRY CLAY.

WILBUR LARREMORE.

NOT for their fruits alone, not for their deeds
We crown the patriot spirits of the past;
For one, whose sky with changes overcast,
Yet sought to pluck the flowers of hope as weeds,
And strove to stunt humanity in creeds,
This age that tastes the Future's promise vast,
And knows no word it says can be the last,
His own age in admiring love succeeds.

Faithful and pure; according to his light
He toiled to make a nation strong and blest;
The growing portent filled his heart with fright,
But still his great words calmed the nation's breast;
What though his dreams were vain beneath the sleight
Of destiny — he loved and did his best.

APPEALS TO THE HIGHEST COURT.

By George H. Westley.

THE student of ancient and mediæval jurisprudence will find no two phases of his subject of more fascinating interest than those of the trial by ordeal, and the appeal to the high court of Heaven against human injustice. With the former of these history has made us all more or less familiar. The trial by ordeal was an acknowledged institution of superstitious times. When two persons appeared before a judge with a case which he was unable to decide, he would remit the matter to the supreme court of Heaven. Then would follow one of those strange ceremonies. A familiar form was to present plaintiff and defendant each with a sword and let them fight it out, the winner of the duel being adjudged the winner of the case.

Another method was to have the accused plunge his arm into a cauldron of boiling oil, and still another, to offer him blessed bread which he was to swallow, after saying, "If I be guilty, may this bit of bread choke me."

We are told that Richardis, wife of Charles the Fat, in order to prove her innocence, had to walk in a waxed linen dress between two blazing fires. And again that the Empress Cunegunda, being charged with infidelity, was compelled to walk barefoot over red-hot ploughshares. The trial by ordeal appears to have arisen from the belief that God would defend the right, if need were, by a miracle.

With the second phase I have mentioned we are not so familiar. In olden times, when religious intolerance prevailed, and when might was right, and the weak were often overborne by the strong, it sometimes occurred that the victim of an unrighteous judge would, in righteous indignation, cry out for justice to the great Judge of all the earth. Instances of this nature are not rare, although they have not often been drawn from their obscurity and collected together.

One of the most striking appeals against human injustice was made in 1313, when, because of their wealth and power, but for no crime, the Templars were condemned by Pope Clement V and King Philip the Fair of France. Du Molay, the grand master of that order, was arrested and burnt alive. As he stood on his funeral pyre, he said in calm, clear tones, "Before heaven and earth, on the verge of death where the least falsehood bears like lead upon the soul, I protest that our sole guilt has been that we trusted the seductive words of the Pope and the King." Then raïsing his voice he cried, "Clement, iniquitous and cruel judge, I summon thee to meet me before the throne of God!" Some accounts say that he included Philip also. However, before a year had passed both the Pope and the King were dead.

A still more remarkable incident of this nature occurred in Gothland. It appears that a certain John Turson, being accused of a crime, was at once dragged before a magistrate. Although the man was not guilty, that worthy, who was found seated on horseback, condemned him to an immediate death. Turson protested his innocence, but finding his words in vain, he summoned his judge to appear with him before the judgment seat of God. As the executioner struck off Turson's head, the magistrate fell from his horse and broke his neck.

Knyghton; the old chronicler, tells us that a year after the death of Robert Grostête, Bishop of Lincoln, who had many a struggle with Pope Innocent IV, he, the dead bishop, appeared before his old enemy and said to him, "Stand up, wretched one,

and come to judgment!" As the Pope hesitated the ghostly bishop raised his pastoral crosier and struck Innocent on the breast, so that he died on the following day. This was in 1254.

The case of Nanning Koppezoon, who was executed by the governor of Holland in 1575, offers a striking illustration on this subject. We are told by Mr. Motley that this unfortunate man bore with perfect fortitude a series of incredible tortures. I need not describe these with all their sickening detail, it will suffice to suggest the brutal ingenuity of his persecutors if I simply mention one of them. A large vessel being inverted on his naked body, under it were placed a number of rats. Hot coals were then heaped upon the vessel until the rats, rendered furious by the heat, gnawed into the very bowels of the suffering victim in their agony to escape. When, after surviving these horrors, the wretched man was finally led to execution, Julian Epeszoon, the Calvinist minister, endeavored by loud praying to drown his voice, that the people might not rise with indignation. With his last breath the dying prisoner solemnly summoned the unworthy pastor to meet him within three days before the judgment seat on high. "It is a remarkable and authentic fact," continues Mr. Motley, "that the clergyman thus summoned went home pensively from the place of execution, sickened immediately and died on the appointed day."

About the middle of the eleventh century, Meinwerk, Bishop of Paderborn, was drawn into a quarrel with a certain monk who abused him with great violence and brought against him many unjust charges. Wearied out with vainly refuting these charges, the good Bishop at length said, "Well, let us appear together before the Judge of both, and let Him decide between us." Strangely enough on the day the bishop died, the monk died also.

When in 1651 Limerick was besieged by Ireton, Cromwell's commander, a large bribe was offered Terence O'Brien, Bishop of Emly, to exhort the people to surrender. This the Bishop refused, and when at length on the yielding of the city, he fell into the hands of Ireton, that stern Puritan at once sentenced him to death. Turning to the commander the prelate said, "I summon Ireton, the arch persecutor, to appear in eight days before the heavenly tribunal, to answer for his deeds of cruelty." The eighth day arrived and Ireton, stricken with the plague, was a corpse.

We may find several remarkable incidents of this sort no further back than the eighteenth century. Sophia Dorothea of Zelle, after being divorced from George I, retired to the castle of Ahlen where she lived in confinement for thirty-two years. Just before her death, in 1726, the recollection of her wrongs coming strongly upon her, she wrote a letter to the King denying the charges that had been made against her, and solemnly citing him to appear before the judgment seat of God, there to answer for his conduct towards her. Eight months later while George was riding to Hanover, this letter was thrown in at the coach window, and dropped in his lap. Reading it, he became so terrified by its contents, that he fell into a convulsion, and was taken from the coach a corpse.

But the most remarkable case of all I have reserved for the last. It occurred in Germany in 1703. It appears that in the church of Barlt there were two pastors, who differed widely in their religious opinions. Wattenbach was a man of very liberal views, while Hoesch was a severely orthodox Lutheran. Naturally the two could not get along together, and at length Hoesch, with the assistance of the provost Hahn, set about to have the obnoxious pastor deposed. It was a long and bitter fight, and it went through several stages until finally the case reached the royal court. Here on a charge the particulars of which are not given, Wattenbach

was tried, and sentenced to expulsion from his pastorate. When he heard this, he asked if there was any appeal from the decision. On being answered that there was none, he said solemnly, "I, John Caspar Wattenbach, refer my cause to Heaven. I cite the provost Hahn to appear this day twelve weeks, the Chancellor who has given judgment, to appear this day fourteen weeks, and my prosecutor, the fiscal officer, at the same time, and all my witnesses who can testify to my innocence to attend within a year and a day before the Divine tribunal." At these solemn words there fell upon the court a death-like stillness. The Chancellor was the first to break the silence, and he rebuked the speaker for his profane language. Wattenbach replied that the sentence of the court had destroyed his repute and cast him and his family into utter poverty. Having no other redress, he said, he was compelled to make this appeal. Leaving the court room shortly after, Wattenbach returned to Barlt, and removed his family from the parsonage. Sixteen days later he died.

The twelve weeks alloted to Provost Hahn expired on the 24th of June. The day was Sunday, and the provost preached on a passage from Luke 1, 57–80, that being the gospel for the day. He had never felt in better health or spirits in his life. In the afternoon he sent a message to the Chancellor, reminding him jokingly of Wattenbach's summons. Before the messenger returned he was taken with an apoplectic fit and in a few minutes he died.

Exactly two weeks later, their time having also elapsed, the Chancellor and the prosecutor passed away, and before the year and a day had gone by, every one of the witnesses summoned by Wattenbach to attest his innocence were dead.

Strange as this story is, it appears to be authentic. The provost Burchard who was present at Wattenbach's earlier trials, gives us the account of it, and the parish registers of Barlt certainly confirm many of his statements. If we could believe the death of Hahn to be a mere coincidence, it would of course be easy to account for the subsequent deaths on the score of nervous terror. But was it a coincidence?

THE SUPREME COURT OF MAINE.

II.

By Charles Hamlin.

ETHER SHEPLEY, the fourth Chief-Justice was a native of Groton, Mass., where he was born Nov. 2, 1789. He was the second son of John Shepley and Mary Gibson Thurlow. On his mother's side he was the grandson of Captain Thurlow of the Revolutionary Army.

The Shepleys came from Yorkshire, England, and their earliest representative appears at Salem, Mass., about 1637. In 1700 the name of John Sheple is found at Groton. Ether was his lineal descendant in the sixth degree. The race was sturdy and vigorous, and the family one of the best from which New England derives all that it reveres for character and ability. For many years the Shepleys were prominent in public affairs. Mr. Willis in his "Lawyers of Maine" says Ether's father was an orderly sergeant in a company in the Revolution, held several town offices, was a farmer, fond of reading and a man of general information.

Ether Shepley was fitted for college at Groton Academy under Caleb Butler, and having entered Dartmouth was graduated in 1811. Daniel Poor, the missionary, Professor Park of the Harvard Law School, and Amos Kendall, Postmaster-General, were among his classmates. For two years he read law in the office of Dudley Hubbard, at South Berwick, assisting that gentleman in his large collection business. Later he pursued his studies with Zabdiel B. Adams in Worcester county, and Solomon Strong in Hampshire. He began to practice at Saco in 1814, after his admission to the bar. He soon took the lead among the young practitioners and easily retained that position by his industry, close application and practical ability, all which served to give him a high social standing in the community. In 1819 he became interested in politics, the prominent question being that of the separation, and was chosen to represent Saco in the General Court, and member of the convention that drafted the Constitution of Maine. In February, 1821, he was appointed U. S. District Attorney and served with ability for twelve years, through Munroe's second term, the whole of Adams's, and the first four years of Jackson's administration.

In 1833, he was elected to the U. S. Senate as the successor of John Holmes, and proved to be an able representative, distinguishing himself as a supporter of President Jackson. The Democratic leaders in the Senate felt themselves unequal in debate to Clay and his followers who were allied with Calhoun; they welcomed the advent of a speaker like Mr. Shepley. Early as January, 1834, he made a three days' speech sustaining the President's removal of deposits, the all-exciting event of the time. "In the new senator," writes Gov. I. Washburn, Jr., "they found a Democrat of the strictest sect, a man who believed in the uses and functions of party, and of the merit that attached to an intelligent allegiance to party, and who was prepared to do manful battle for it." . . . "But he never permitted his action to be controlled by his party ties in opposition to his real convictions." . . . "His clear and logical mind would be satisfied only with the orderly marshalling of facts, and the sober and severe processes of dialectics. He participated but seldom in the general debates, and spoke only at considerable length on important and pressing questions."

His most cogent and thoroughly convinc-

ing speech in the Senate was on the French Spoliation Bill. Of the subject he was a complete master. Speaking of the indemnity due to our citizens from the United States for the wrongs which France admitted she inflicted on them, he uses the memorable words, "*Our government pocketed the consideration and repudiated the debt.*" In closing his speech, Dec. 22, 1834, on this Bill, his last sentence is "an apple of gold in a picture of silver." He said, "*Things are so rightly ordered here, that to do justice to all others is to serve ourselves best.*"

Congressional life, however, did not accord with his taste or training; and the State became the gainer when he accepted an appointment on the bench of the Supreme Judicial Court of Maine, tendered him by Gov. Dunlap in September, 1836, to fill a vacancy caused by the resignation of Judge Parris. His first term of service was at Bangor. It began about the end of October and lasted until late in December. He found the docket full to repletion with cases growing out of the eastern land speculations. Judge Nicholas Emery quaintly said "It needed to have its backbone broken." Judge Shepley did break it. He showed immediately that he was a power on the bench, which, although gracious and ever courteous, was not to be trifled with, and who was resolved "that the facts were to be elicited only after the rules of law." He held rigidly to the practice of the principle that justice was to be found in a faithful adherence to legal principles and rules. It was a frequent saying of his, "The law is the rule of decision, and the law is the justice of every case."

He became the successor, with the general concurrence of the bar and the public, of Chief-Justice Whitman, in 1848, upon the latter's resignation. His long experience as a jurist and judge, the fidelity and acuteness he had always exhibited, made his appointment an eminently fitting one. His learning, impartiality, decision, promptitude and ability are amply illustrated in the twenty-seven volumes of the Maine Reports, from the fourteenth to the fortieth, inclusive. His opinions are characterized with that clearness, directness, and force that no one can mistake the point he endeavors to establish.

He keenly enjoyed the excitement of a skilfully conducted trial and watched its movements with as keen a zest as that of the stoutest Roman in presence of the gladiatorial combats of the arena; but he never lost sight even for a moment, of the law and the justice involved in the contest.

Strongly attached to professional and judicial life, he would not permit any outside allurements to withdraw him from it, and resisted all solicitations to accept political positions under the general government. Not only did he decline the office of Attorney-General of the United States, but also that of Governor of Maine. As a judge he abstained from politics, nor would he give recommendations to his best friends for political office. His pastor, the Rev. Edward Y. Hincks, of the State Street Congregational Church, in Portland, and of which Judge Shepley was one of its founders, says in a sermon delivered Jan. 21, 1877, "He was an eminent member of a class of laymen who, during the past generation, adorned the Congregational churches of New England, — men of high station and eminent ability, who laid their gifts in humble devotion at their Master's feet. . . . He had the passionate love of righteousness which was the noblest element of the Puritan character. . . ."

There was no acerbity or asceticism about him. He was tender and lovable in the home-circle, loving young people, and to his pastor an ever kind and sympathizing friend. He was a wide but discriminating reader, keeping abreast with all the periodical literature, and specially interested in works on religion and theology. Books on philosophy, science, history and biography, as also fiction, occupied much of his time.

He took a deep interest in the cause of

education. For more than thirty-seven years he was a member of the Board of Trustees of Bowdoin College. He was an original and also an active and useful member of the Maine Historical Society, organized April 11, 1822. He was the first president of the Portland Natural History Society and remained such from 1843 to 1848. He received the degree of LL.D. from Colby University in 1842, and from Dartmouth in 1845.

When he retired from the bench in 1855, the Cumberland bar, voicing the general sentiment regarding him, adopted resolutions fitting the occasion and recognizing with the liveliest sensibilities the debt which it and the whole State owed to him for his long continued labors and services upon the bench, his eminent learning and ability, his unbending integrity, the untiring and conscientious devotion to duty with which he discharged all the functions of his elevated and responsible station, looking with pride to his judicial career marked by a dignity which ever commanded respect and by a learning which ever justified confidence.

He died January 15, 1877, full of honors and years at the house of his son Judge George F. Shepley, U. S. C. Court for the N. E. Circuit, in Portland. Just men carried him to his burial, attended by lawyers, physicians, clergymen, civic officials and crowds of citizens.

Of this sedate and sober-minded judge we would hardly expect much of humor and wit. Nothing of the kind has come down by way of tradition to the present generation; yet the reader will not fail to perceive a slight touch of grim humor in the following extract from his opinion in Pratt *v.* Leadbetter, 38 Maine, 17 : —

"Upon the construction of this will there have been, it is said, different opinions and doubts among members of the profession for thirty years. If it be so, it may not have been wholly without a precedent; for Lord Eldon commences his opinion in the case of the Earl of Radnor *v.* Shafto, 11 Ves. 453, with the remark: 'Having had doubts upon this will for twenty years, there can be no use in taking more time to consider it.'

"With the best light to be obtained by a more limited consideration and examination, the Court has come to a very satisfactory conclusion respecting the correct construction of the devise to Othniel Pratt."

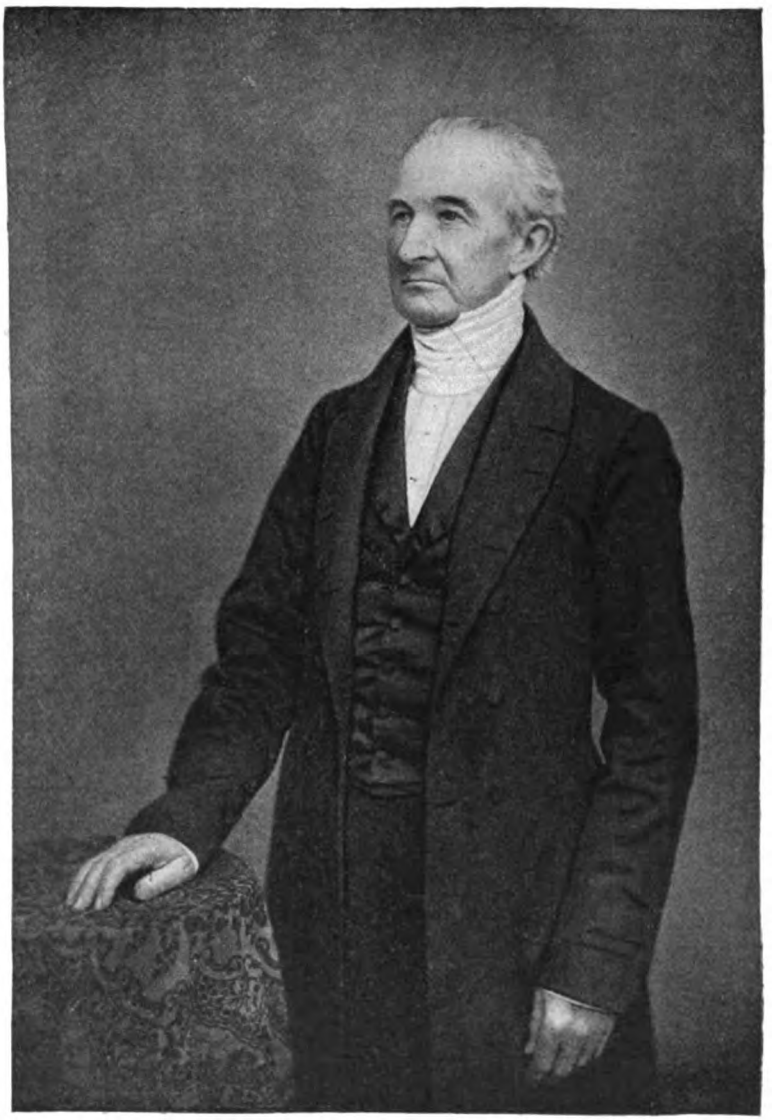
His associate on the bench, the late Judge Howard, says, "He had no taste for indulgences outside of his duties, not even for recreations so fascinating and usually esteemed so necessary to the health of body and mind. He appeared to need nothing of the kind. Unremitting labor in his high vocation gave him constant delight. In all his ways he had the inspiration of great faith, and the accomplishments that are born of it. He loved the law, conscientiously sought its distinctions, and gained them with liberal rewards."

We conclude with the following extracts from Judge Howard's eulogy, which give Chief Justice Shepley's true and exalted place in Maine's judiciary. "The mental powers of Judge Shepley were vigorous and strong, and his intellectual vision very clear. He saw as with a light ahead, the solution of seemingly abstruse problems, with broad distinctions, often not readily perceived by others. If he was sometimes apparently positive in his manner and opinions, it was because he had great confidence in his own matured reasonings and conclusions. His will was sustained by an energy that never flagged in the accomplishment of his duties.

"Learned broadly in law and equity, as much in the spirit as in the letter, he applied his great knowledge with matchless skill and force to the work before him; for he estimated largely the value of human pursuits by their bearing upon human rights and interests. His independence and impartiality were always refreshing. . . .

"His decisions will stand the severest judicial tests; and it is believed that time will but deepen the paths bravely marked out by him in the advance of jurisprudence. . . .

"No judge was ever more conscientious in maintaining that the faithful observance and administration of laws are essential to the character and stability of government, and the happiness of mankind. He had a genius for knowing and doing with all his might. Heaven endowed him with this spirit, and bestowed upon him the faculty to give it effect."



ETHER SHEPLEY.

His last public service was in 1856, to revise the laws of Maine, under a resolve of the legislature passed April 1 of that year, and which required him to make his report

in the following November. This he accomplished, and it was embodied in the Revised Statutes of 1857. . . .

JOHN SEARLE TENNEY, the fifth Chief-Justice, was born in Rowley, now Byfield, Massachusetts, January 21, 1793. His preliminary studies were pursued at the celebrated Dummer Academy in Byfield. He graduated at Bowdoin College with the highest honors in 1816, being distinguished in the Greek classics. After graduation he had charge of the Academy in Warren about nine months, and he then entered upon the study of the law in the office of Thomas Bond at Hallowell. Upon being admitted to the bar he settled in 1820 at Norridgewock, the shire-town of Somerset County, where he ever after lived. For twenty years he pursued a successful practice and established a high reputation for his sound knowledge and skill. It was not until he had practised some ten or twelve years that he acquired reputation as an advocate ; and according to tradition was forced into making an argument by the stratagem of a friend, the late Timothy Boutelle of Waterville, who knowing him well and having confidence in his ability, arranged to have him manage a case in 1832, in which Hon. Peleg Sprague, then a Senator in Congress and one of the most eloquent men in the country, was opposing counsel. The case was closely contested, as might well be supposed ; but Judge Tenney was successful. He at once took a high stand as an advocate as well as a sound lawyer. As a speaker he was not distinguished for the graces of oratory either in manner or matter. Still, he was ready and fluent, with a good command of language. His arguments were specimens of close, compact logic, as well as clear and forcible statements of his cause, and he never failed to secure the attention of the court and jury. His standard of professional honor and integrity was so high that it admitted of no dereliction whatever from perfect rectitude. His clients were sure, not only of his entire fidelity, but that his best ability would be exerted in their behalf. But his zeal for them, great as it was, did not for a moment lead him to forget the respect due to himself or the fidelity due to the court. A contemporary and fellow-townsman says of him that he possessed one characteristic in a pre-eminent degree, that is, the extreme carefulness with which he examined a client's case before advising him to run the hazard of a lawsuit; every source of information he caused to be explored, and every point thoroughly investigated, and so he came to the trial of a case fully prepared for every contingency. He developed his cases admirably to the jury in examining his witnesses, and in his arguments would gather his facts together and rolling them into a ball hurl them at his adversary with resistless and crushing force. "He was a four-masted schooner among the common coasters," says another leader of the bar, well known for his felicitous power of description. He never lost his self-possession through excitement, nor suffered his reason to become obscured by passion. Judge Danforth, an Associate Justice of the Supreme Court and a student in his office says: "During a close observation of his practice for many years, I never, to my recollection, saw him in anger but once. That was caused by an opposing counselor repudiating an agreement he had fairly made. The scene which followed I shall never forget . . . He certainly learned to his cost, that however courteous Judge Tenney might be, he had in store weapons of keener edge and sharper point to be used when occasion demanded."

He acted with the Whig party and was once its nominee for Congress, when that party was in the minority, but was defeated, although running largely ahead of his ticket. He was elected to the Legislature in 1837, and gained a wide reputation for a speech

delivered in the House, upon the question of a contested seat, which was decisive of the case. In October, 1841, he was appointed an Associate Justice of the Supreme Judicial Court, succeeding Judge Nicholas Emery, an appointment entirely unsolicited on his part, — a voluntary offering to his fitness for the place.

To employ the words of Judge Danforth again, and we know of none more authoritative: "Into this position he carried the same sterling, unflinching integrity, the same nice sense of honor that had characterized his professional life. Here, too, was exhibited that same self-possession, the same patience under trying and difficult duties, by which he had been hitherto distinguished. His courtesy toward the members of the bar never failed. In his courtesy, however, he never forgot his dignity, or rather that never forgot itself. His dignity needed no continual watching lest it might become soiled unawares. It was natural to the man, — a part of his very being, existing within him, the result of native force, and an innate sense of the right and proper, ever present, regulating and controlling all his conduct without effort, and almost unconsciously to himself. This true dignity Judge Tenney possessed, or rather it possessed him in an eminent degree as was manifest on all occasions. . . . In his opinions upon questions of law, he manifested the same conscientious carefulness, the same accurate thought and painstaking labor that was devoted to all his duties. The style of his composition was not always lucid, his sentences were occasionally involved and sometimes heavy, — but the thought was always well digested, the logic clear, strong and conclusive. His opinions bore the marks of much labor, and were never hastily thrown off, nor laid aside until the subject matter was exhausted."

JOHN SEARLE TENNEY.

His opinions may be found extending from volume twenty to volume fifty-two of the Maine Reports, and treating a wide variety of subjects, they extend through a space of time much in excess of the average judicial life. He was reappointed in 1848 and in 1855 succeeded Ether Shepley as Chief-Justice. In 1862, he closed his judicial career of twenty-one years full of honors, with the ermine unsullied and enjoying the respect of his associates, the members of the bar, and the people of the State.

He served as a State Senator in 1863 and 1864 and then retired from public life to enjoy that social ease and comfort which he had so richly earned. In private life he was genial and affable to all. His conversational powers were great, while, at the same time, he had the happy faculty of drawing from others whatever stores of knowledge they possessed. He never under-rated his interlocutor. While easy in his intercourse with all men, recog-

nizing no inferior and no superior, he was noticeable for his appearance. His frame was massive; his figure imposing; his face handsome and majestic, betokened the student by the full eye, beardless chin and high forehead. His honors and dignity impressed all alike but never overawed even the youngest. He appeared young down to the close of his public life.

In 1849 he was made a trustee of Bowdoin College. In 1850 he was appointed Lecturer on Medical Jurisprudence at the same College, performing the duties for nearly fifteen years. The same year he received from his Alma Mater the degree of LL. D.

He died at Norridgewock, August 23, 1869. At the following September term of the Supreme Judicial Court, the bar of Somerset County, Danforth, J., presiding, attended memorial exercises in honor of his death and presented resolutions fitting to the occasion. They declare that his eminent learning, his power of analysis, his sound and solid judgment, and his clear and accurate discrimination were equalled only by the breadth and comprehensiveness of his intellect, and by the purity of his character as a magistrate and citizen. Judge Danforth followed with a eulogy which will remain as a perpetual memorial and touching tribute to the virtues of his honored and revered friend and teacher. All of his associates upon the bench have passed away and but a few of his contemporaries remain at the bar. By them he is remembered with affection and great respect. It is his written opinions, however, which evidence his knowledge of the law and strength as a judge. They are characterized by strength rather than by ease of composition and by soundness of conclusion than rapidity of reaching results. To the profession they are a living source of authority, adding harmony to the growth of the law.

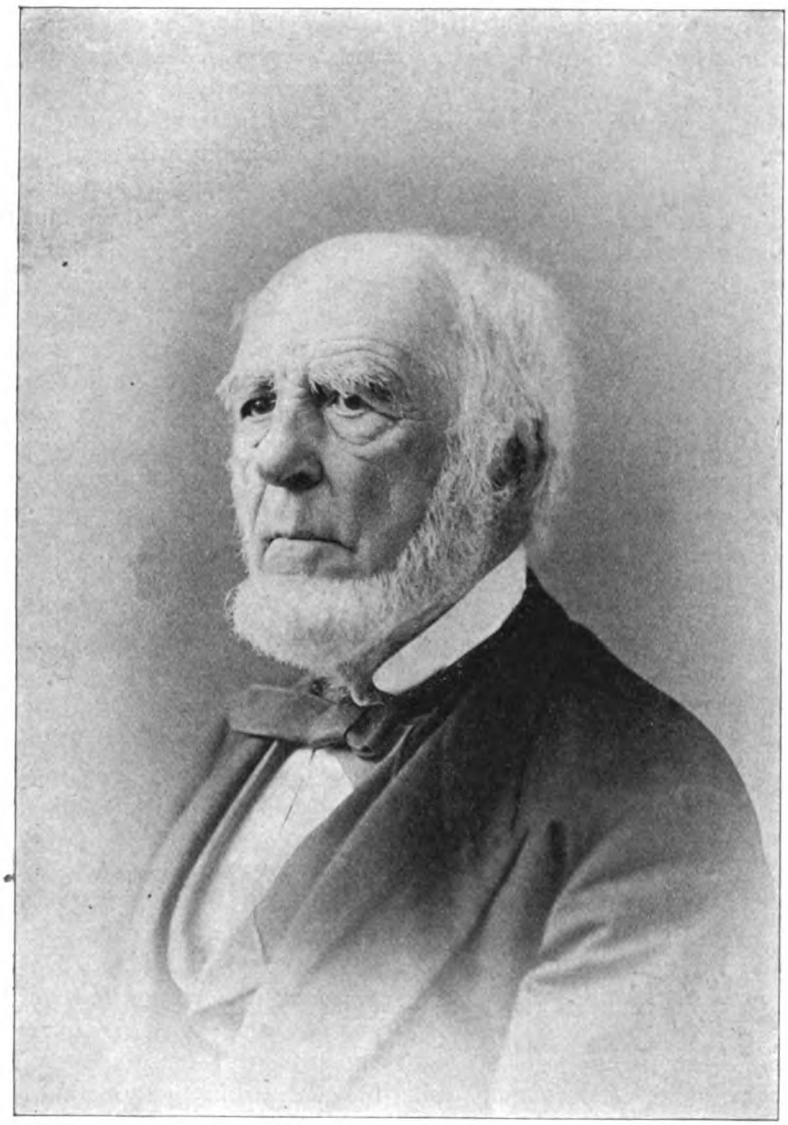
To the younger members of the bar who practiced before him, his majestic form, bland countenance and almost paternal manner coupled with his great and distinguishing love of justice and long, successful life upon the bench, will ever constitute a beau-ideal of the "good judge."

JOHN APPLETON, the sixth Chief-Justice, was born at New Ipswich, N.H., July 12, 1804; was graduated at Bowdoin College in 1822; was admitted to the bar in 1826; appointed on the bench of the Supreme Judicial Court in 1852; became Chief-Justice in 1862, and retired at the close of his sixth appointment in 1883, having been at the bar twenty-six years, and a member of the bench thirty-one years,—an active professional life of fifty-seven years in all.

If we look beneath this brief summary of an unusually long legal and judicial life, we shall find it filled up with events full of interest and labors rendering it noteworthy in annals of the law.

John Appleton was well born. He came of an ancestry whose lineage carries us back to Norman ancestors, of knightly rank in feudal ages, then appearing later on in the person of Samuel Appleton as a Puritan immigrant, a "godly, noble, enterprising exponent of civil and religious liberty," taking the Freeman's oath May 25, 1636, in the colony of Massachusetts. He died in 1670, at Rowley, leaving a son bearing his name, who served with the rank of major in King Philip's war, and conspicuous also in political affairs. Under the leadership of Samuel and John Appleton the town of Ipswich voted, in reference to the order of Governor Sir Edmund Andros: "That considering said act has infringed upon our liberty, as it is contrary to the acts of His Majesty, by violating the statute law of the land, which declares that no taxation shall be laid unless with the consent of the people; they do therefore vote first, that they will not choose a commissioner, and decide that the Selectmen shall not lay such a tax till it is determined on by the people." This has been

well called the Declaration of Independence in embryo, although it happened in the preceding century. Sir Edmund Andros was deposed during the English Revolution of 1688, and Major Appleton had the stern satisfaction of handing Andros into the boat which conveyed the crest-fallen tyrant to the castle. Major Samuel Appleton died in great honor in the year 1696. His third son was Major Isaac Appleton who died in 1747. Isaac was born in 1664, at Ipswich, and married Priscilla Baker, a granddaughter of Lieutenant-Governor Symonds, whose wife was a daughter of Governor Winthrop. Isaac Appleton, second, was born in 1704, at Ipswich, and married Elizabeth Sawyer of Wells, Maine. He was the father of ten children. Of these, Francis, who settled at



JOHN APPLETON.

New Ipswich, N. H., was the second. He was born in 1732, and married a lady named Hubbard, by whom he became the father of four children, of whom John was the third. John Appleton married Elizabeth Peabody, by whom he was the father of an only son, the future Chief-Justice of Maine.

Judge Appleton's mother died when he was only four years old, and he was left with an only sister thus early in life to the care of others. After passing through the common schools and academy of his native town he entered Bowdoin College of which his uncle, the Rev. Jesse Appleton, was president and was graduated in the class of 1822, when only eighteen years old. In his college course he laid deep the foundation of his knowledge of the classics, especially the Latin from which his frequent and felicitous quotations, both oral and written, are noticeable.

He began the study of law in the office of George F. Farley, at Groton, Mass., and afterwards continued it at Alfred, the shire-town of York County, Maine, under the instructions of his relative, Nathan Dane Appleton. He was admitted, in 1826, to the bar at Amherst, N. H., shortly after he arrived at his majority. He began the legal practice, the same year, at Dixmont, Penobscot County, Maine, and after a few months removed to Sebec, Piscataquis County, where he resided six years. Here the young lawyer did not find the time weighing heavily on him for want of occupation, although it was a sparsely settled town and business could not have been pressing, for he had early acquired the habit of close study and was a most diligent reader of all that relates to the profession of the law, especially of those writers who sought, like Bentham, to discard its excrescences and useless absurdities.

Removing to the city of Bangor in 1832, which ever after remained his home, he formed a partnership, with his future brother-in-law, Hon. Elisha H. Allen, under the name of Allen & Appleton, and entered at once into an extensive practice. This firm continued until Mr. Allen was elected to Congress in 1840. Mr. Allen subsequently became Chancellor of the Sandwich Islands and Minister of Hawaii to the United States.

Subsequently he had for partners John B. Hill and his cousin Moses L. Appleton, the latter remaining with him until 1852, when Judge Appleton was appointed to the bench.

Their clientage was unusually large,—hundreds of suits in each term being intrusted to their care. On account of the insolvency of the times, collections were made then largely by suits, but fees were small. "In respect of experience and multiform legal knowledge," as the Judge once naïvely said, "it was largely remunerative." The research and activity which it stimulated, placed them in the very fore-front of the legal fraternity.

What the advocate should be in the mind of this able lawyer he tells us in a beautiful tribute to the memory of one of his associates upon the Maine Bench, Hon. Edward Kent, in which he unconsciously has given us a pen-picture of himself. He says: "As an advocate, he was earnest, fluent, a thorough master of the facts to be discussed, omitted nothing which could conduce to the result sought to be attained. Judicious, frank and open, scorning all artifice and concealment despising all trickery, he addressed himself to the merits of his cause, and to the calm judgment of the jury. His commanding presence, the recognized purity of his life and the integrity of his character, gave force and strength to an argument in itself forcible and strong without the added weight of those great accessories." Judge Appleton "was (at that time) the leading advocate in this section of the State," says Mr. Franklin A. Wilson, of the Penobscot Bar, whose discriminating judgment rarely fails in such matters; and he further adds that: "He was in the full vigor and prime of life, graceful in motion, eloquent in speech, persuasive and successful; and to my youthful mind

he seemed to be pre-eminent in a bar which contained lawyers of such ability and learning as Edward Kent and Jonas Cutting, both of whom were afterwards associated with Chief-Justice Appleton upon the bench of the Supreme Judicial Court of Maine. . . . His services were in demand upon one side or the other of almost every case tried in court at that time."

As all these elements of temperament, training and character enter into the foundation and success of his judicial career in after-life, and to enable us to still better appreciate them, we will quote the words of another, couched with deeper analytical power and written by an acknowledged master of the subject, — an active practitioner before him and his associate on the bench for upwards of ten years, — his present successor, Chief-Justice Peters : —

"His management of causes was reliable, safe and successful. He was deeply interested in the work in hand. The court-room seemed a home to him, and the trial of a cause an apparent delight. Possessing then, as ever afterwards, fine physical health, his powers of both mental and bodily endurance were simply marvelous. He would pass from case to case, entering upon one trial with the same zeal and vigor he had just expended upon another, whether his previous efforts had been attended with victory or defeat. He did not forget that a battle well prepared is half won, and he was a master of the principle of promptness to the end of his life. He was active in both the preparation and the execution of business. I should doubt if he ever asked for the continuance or postponement of a case in court for his own personal convenience. . . .

"He was distinguished for his preparation of the law of a case, as well as of its facts, and his opponents learned to be on the look-out against his assaults and surprises. He continued the same studious, active, attentive and successful lawyer until he exchanged his duties at the bar for those of the bench. . . . There were distinguished lawyers and advocates in this bar at that time . . . . . , but no one of them possessed a better professional aptitude or had attained a better professional fame than John Appleton."

The bench is what the bar chooses to make it. This tireless, hard-worked lawyer did not forget what he owed the profession in this respect. The two fundamental reforms which he largely assisted in bringing about are those relating to the abolition of the District Court and the removal of the disability of parties as witnesses in their own cases. Notwithstanding the great eminence he acquired as a judge, I think he took nearly, if not fully, as much satisfaction to himself in seeing his advanced views adopted by the legislature. While at the bar he moved and promoted the plan of consolidating the District and Supreme Judicial Courts, by abolishing the one and concentrating in the other the jurisdiction belonging to both; also consolidating into three districts the law court which sat in each county. He was chairman of a commission appointed by the legislature to consider and report a plan, and drafted the act by which the present system was established in 1852. Of these labors he has said, since he retired from the bench: "The delays incidental to and resulting from two Courts with appeals to and exceptions from one to the other, led to the entire transference of the jurisdiction of the District to that of the Supreme Court, with a saving of the delay, expense and vexation incident to protracted litigation; so that I think it may be truly said that there is no State in New England where a judgment may be obtained so speedily and with so little expense as in this good State of ours, when parties and counsel desire it."

At the time (1883) when he thus spoke there were only 950 actions pending on the docket of the Supreme Court, whereas a few years after he began practice at Bangor (1837) there were 1,484 actions on the

docket of that Court, and 3,512 actions on the docket of the District Court. While he modestly attributes the result as due to the prosperity of the times, the community at large did not fail to see that it was largely due to the reform he had brought about in the manner indicated.

The rules of evidence engaged his attention much earlier. In 1833 he began writing upon this subject to the "Jurist," and his articles were collected and published, in 1860, at Philadelphia, in "Appleton on Evidence," by Johnson & Co. In it will be found the arguments and discussions which finally led to the change by which parties to causes, both civil and criminal, are admitted to testify in their own behalf. This rule now prevails, with some modifications, in all the courts of the country, both State and National; and the credit of the same is due to Chief Justice Appleton, more than any other one man.

It must not be supposed that so important a change did not encounter opposition. On the contrary, the hostility was active and lively. It was not adopted generally until time and experience in Maine and England had proved it to be wise and salutary. As illustrating this opposition, the following incident told by the Judge himself will be interesting :—

"But the Bar were not alone smitten with the terror of change. Many years ago I sent to the editor of the 'North American Review'—a learned professor of the leading University in this continent, a review of Greenleaf's treatise on evidence, criticising the work, and advocating the general principle that all who can by any of the organs of sense perceive and perceiving can make known their perceptions to others should be received as witnesses to make known such perceptions, leaving their force and effect to the tribunal, whose duty it might be to judge of the trustworthiness of testimony. The article was sent back as dangerous and inflammatory in its character, with the courteous and complimentary suggestion on the part of the professor that he should as soon think of turning a mad bull loose in a crockery shop as aid in spreading such heresies. But it was published in another review where the editor was less timorous. Some of the cracked earthen-ware in the shop has been demolished, more should be—the china is safe.

"The article was not without its effect. Read and concurred in by Mr. David Dudley Field, the chairman of the committee of codification, it was communicated to his associates, by whom its leading principles were adopted and incorporated in the statutes of New York."

He was appointed to the bench of the Supreme Court, May 11, 1852. Maine was then a Democratic State, and the appointment was given to him, then in the minority or Whig party.

During his thirty-one years' service on the bench, it may be said he had no friendships and no enmities. He endeavored to mete out impartial justice; protecting the young and inexperienced in his beginnings, and giving to the veteran experienced in forensic strife no more than his just rights. He shrank from no labor, nor evaded any responsibility. It is easy now to see that he would bring to the bench the same industry that marked his life at the bar. And such was the fact. This talent, almost amounting to genius, enabled him with an extraordinary, quick intellect to dispatch easily a large amount of business. He carried the same degree of zeal into his written opinions; and there, aided with a masterly knowledge of authorities, he was able to dispose of law cases with promptness. His motto in this respect was "*Nulla dies sine linea*." Buffon says "the style is the man"; so his written opinions often resemble himself in clear and forcible expressions, rising at times to a spontaneous grace of composition.

This together with their wide range of topics, will be found in the following cases,

all treating important questions which excited great public interest: Donahoe *v.* Richards, 38 Maine, 379 (1854), in which the court hold that a school committee are invested with quasi-judicial powers and not subject to revision by the court when honestly and fairly used.

Opinions of the Justices, 44 Maine, 521 (1857), relating to the case of Dred Scott. Judge Appleton wrote a separate answer containing a masterly grasp of the law, history and research of authorities. His fame as a jurist might well rest alone upon this single opinion as a good example of the breadth of his learning, ready application of authorities, and soundness of judgment.

A leading case often cited in other States is Allen *v.* Jay, 60 Maine, 124 (1872). It holds that towns, as municipal corporations, are not constitutionally authorized to loan their credit to individuals to engage in manufacturing, or other private business.

Another important case, involving the taxing power, is State *v.* Me. Cent. R. R. Co., 66 Maine, 488 (1877). The defendant corporation claimed that it was exempted from taxation under a consolidation act, but the court decided otherwise; holding in its opinion that a surrender of the taxing power by the State can be established only by the most clear and explicit language. The student of history will find these opinions are landmarks in the growth of American jurisprudence. The last named case was affirmed by the United States Supreme Court on an appeal, and is reported in 6 Otto, 499.

While there is never any acerbity or want of true judicial dignity in his written opinions, there is an occasional light and harmless touch of playful humor to be found in them, and by means of which the practitioner can instantly recall the point decided. It is the overflow of the full mind and a genial temper. "Almost all who sign as surety," says the Judge in Mayo *v.* Hutchinson, 57 Maine, 547, "have the occasion to remember the proverb of Solomon: 'He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure.' But they are nevertheless held liable upon their contracts, otherwise there would be no smarting, and the proverb would fail." In overruling a faulty plea in abatement tendered by two defendants who used interchangeably the singular pronoun "he" with the plural "they," he concludes with the scriptural injunction, "Let him who thinketh that he standeth beware lest he falleth." He disliked tobacco, but appreciated the *uses* of the cigar. In an action upon a receipt to the sheriff who had attached some fragrant Havanas and which were not forthcoming to be sold on execution, he remarks, as if glad they no longer existed: "The five thousand Spanish cigars were sold; each had accomplished its destiny,

'tenuesque recessit
Consumpta in ventos.'"

He never showed temper or irritability. He was a model in this respect. Nor was he ever wanting in true courage. His life was a daily proof that he possessed a moral courage of the highest degree. He trained himself to look upon the best side of men at all times, thus no record remains of words sharp and caustic only for their wit. Yet he could give and take a good joke. We give a few illustrations: Said a merchant to the Judge, "This bankrupt law is robbing our firm of thousands of dollars." "Oh no! neighbor Jones!" replied the Judge, "it is the insolvency of your debtors." During an intermission of the law-court, just after the long and somewhat tedious pauper case of Alton *v.* Lagrange, the Chief-Justice turned to his associate on the bench, Judge Kent, and remarked, "I think the pauper in this case, Rand, was once a client of mine." "And that is the reason probably why he is a pauper now," quickly added Mr. Justice Kent.

A master in chancery once asked his opinion of the reasonableness of a cer-

tain lawyer's account for services rendered in a case. The lawyer was noted for his knowledge of all the fee table and his claim was objected to as being excessive. With a twinkle in his eye the Judge answered, "Well! I think Brother C, is *reliable* in his charges."

His definition of the "independent" in politics is too good to be lost. He defined them thus: "They are the kind of politicians who go with you when you do not need them, but are sure to be against you when you want them."

No sketch of this great man would be perfect without some reference to another trait in his character, his kindness to young men of the bar. He will always be remembered with affection for this endearing characteristic. A beautiful tribute to his memory, in this respect, may be found in a letter of Hon. W. P. Frye, United States Senator, 83d volume, Maine Reports, page 600.

Upon retiring from the bench in September, 1883, he was tendered a reception and dinner by the Penobscot Bar which was also attended by distinguished members from other parts of the State. The speeches then made and his reply were touching and eloquent,—a fitting finale to his long and successful life.

Besides his active judicial duties he was constant in attendance as a trustee of Bowdoin College, by which institution he was given the degree of LL.D.

He was a regular attendant and supporter of the Unitarian church and a loyal adherent to the preaching of Rev. Dr. Hedge, Professors Allen and Everett, and their successors.

He passed the remainder of his life, at home and among friends, enjoying the rich fruitage of an old age respected by the world and loved by all.

Upon his death, which occurred February 7, 1891, memorial exercises were held before the full bench, June term following, at Bangor. They were marked with eulogies both fitting and eloquent. These with a beautiful, able and touching response by Chief Justice Peters will be found published in the eighty-third volume of the Maine Reports.

JOHN ANDREW PETERS, the seventh and present Chief Justice, was born 9th of October, 1822, at Ellsworth, Hancock County, Maine. He is the second son of Andrew and Sally (Jordan) Peters, and comes of Revolutionary ancestry. One of them, Andrew Peters, was a major in Clinton's Brigade, in the battle of Long Island, August 27, 1776. His maternal grandfather, Melatiah Jordan, was a prominent citizen and was appointed Collector of Frenchman's Bay District, August 4, 1789, about four months after the government was inaugurated under the Constitution. His commission was signed by George Washington, President, and countersigned by Thomas Jefferson, Secretary of State. He continued under that commission until he died, December, 1818. Commissions of that kind, up to 1825 when the law was changed, continued during life or good behavior. He was highly beloved for kindness of heart, sociability, and genial suavity of manners which, with a character for strict integrity, endeared him to all who knew him.

His paternal grandfather, John, of Bluehill, was a land surveyor. He was intrusted by the Commonwealth of Massachusetts with difficult and important services in the District of Maine, which he discharged with accuracy and ability. Among the services was that of the original lotting of townships in eastern Maine, his assistants being his sons, John, Jr., and James Peters, and his son-in-law, Reuben Dodge. The lines thus run remain undisturbed to this day.

The father, Andrew, like others of his race, was a merchant dealing in lumber, mills and shipping. He was a man of commanding figure, of fine regular features de-

noting a natural repose, somewhat grave deportment and noted in all his transactions for his readiness of decision, honesty and fidelity. The mother was of a lively temperament, good nature and quick sensibility. These qualities, with a fine sense of humor and ready sympathy, were ever apparent. Mirthful and fond of wit, she had the faculty of drawing the same qualities from others.

JOHN ANDREW PETERS.

His aptitude as a scholar decided his parents to give the son a liberal education. He was accordingly put to school at Gorham Academy, where he fitted for Yale, graduating there in 1842 with high honors. The title of his graduating part at Yale was "The Profession of Politics," and was a statesmanlike production. Having decided to enter the legal profession he took a course at the

Harvard Law School and thus came to the bar, being admitted in August, 1844, at Ellsworth, fully prepared and equipped for an active and highly successful practice which soon followed upon his removal to Bangor the same year.

To his chosen profession, which he loved, possessing a keen, critical and judicial judgment, and a wide and accurate knowledge of the law, he added the habit of industry. He was thus able, with a good legal mind and an instinctive knowledge of men, to command the confidence of courts and clients from the beginning. He was quickly recognized as a very able lawyer and duly appreciated for those qualities by which he has become conspicuous. Judged by the results accomplished, the verdicts won and judgments in law cases rendered in his favor, I should say, after an active practice of nearly thirty years, that he was *facile princeps*. At the beginning of his practice he was a partner for a short time with the late Judge Hathaway; and for the five years before going upon the bench himself, his partner was Franklin A. Wilson, Esq.

His management of the trial of a case was natural, simple and easily understood by the jury. He always brought out the facts in their historical and logical order; rarely ever calling witnesses in rebuttal, he grouped his evidence with a master's hand and passed from point to point with the unbroken phalanx of a well-ordered battle. It was a pleasure to witness him trying a case. There was nothing dull or commonplace in it. He led the column, and the spectator soon became aware that, although like Phillips he possessed the "*ars celare artem*," yet he was the principal actor. I have seen him in a ten days' trial, opposed by numerous counsel, single-handed holding his sway over the jury almost without intermission, their eyes bent on him with only an occasional glance upon the witnesses. Perhaps this is only saying that, according to an admitted test of ability, he is the best examiner of witnesses that I have ever seen; but there was no weariness or loss of interest in it. His cross-examination was the perfection of skill and legal ability. If his opponent's case had a weak spot he was sure to find it when he came to cross-examine, — sometimes to the merriment of the court and jury. Cases were thus sometimes turned into victory or defeat. I recall an instance. In Prentiss *v.* Shaw, an action of trespass for an assault and battery, the plaintiff, who had been ridden on a rail, claimed large damages for a dislocated hip. An eminent surgeon testified in his favor, sustaining the claim of dislocation, after a *post injuriam* examination of the leg. The defense seemed hopeless; but a few questions adroitly put to the honest doctor by Mr. Peters, soon elicited the fact from the witness that he had treated dislocations caused by rheumatism and the opinion that this case might possibly have occurred from the same cause. It was a famous case in its day. The jury gave the plaintiff a verdict amounting to a sum equal to only a trifle more than the value of a single day's work.

His arguments were always strong, logical, clear, forcible, and replete with incidents and illustrations appealing to the good sense of the jury. He has a fund of maxims and anecdotes from Shakespeare to Poor Richard's Almanac, to which references serve to lighten the task of listening; and draws explanations from all sources. Distinguishing the testimony of one brother from that of another, one being fat the other lean, he concluded with the quaint remark, "One is the son of the father, the other is son of the mother." As the parents were known to the jury, the remark was significant. He did not seek criminal defenses, but would never permit a person to go undefended when he believed him to be innocent. An old client of his was indicted in the United States District Court, sitting at Bangor, for selling liquor without a license. It was in the early days of enforcement of the internal revenue

law, when the statute made one sale *prima facie* evidence of the offense. Without offering a single witness in defense, he placed his reliance upon the jury. The complainant had shown himself to be an informer, and that was all the counsel for the defendant cared to know. He denounced the witness with hot and fiery words as sordid, detestable, corrupt and thoroughly unreliable. For half an hour he poured out his contempt upon the case in language that astonished all by its burning eloquence, and withering scorn. His face was illuminated with the intensity of his action; his eyes were filled with the glow of strife. Suddenly stopping, his voice vibrating with emotion, he said: "Gentlemen: my soul is stirred from its very depths with the meanness of this creature in the semblance of a man. Yet it pains me to be compelled to speak unkindly even of him, for I love my fellow-man. *But would you believe him?*" The scene was dramatic and never to be forgotten. The jury returned a verdict of acquittal, hardly leaving their seats after the closing argument of the District Attorney and a charge by the Court strongly in favor of a conviction. I doubt if any other defense would have prevailed. Certainly his argument was widely different from his usual methods in which his playful wit is used to the delight of all without giving pain to any one.

Adhering strictly to the practice of his profession, he was soon retained in all the important causes pending in Penobscot and Hancock Counties, covering all branches of law and equity. Some are noted for the magnitude of the verdicts that he won, like Boody *v.* Goddard, and Dwinel *v.* Veazie. In the latter case there were three trials, the verdicts aggregating more than twenty thousand dollars.

In the meantime the personal popularity and following which so eminent an advocate engendered became a potent factor in politics. Although a Whig, he was the unanimous choice of the Union party and by it elected to the Maine Senate two successive terms in 1862 and 3. The next year, 1864, he was chosen by a large majority a member of the House, where he took an active part in the debates. Among them was one upon the removal of the capitol from Augusta to Portland. He led the opposition with his usual success, in a speech which attracted wide attention for the ability displayed and capacity to handle subjects outside the legal forum. He was elected Attorney-General of the State by the Legislature for the years 1864–5 and 6, and performed the duties satisfactorily. Having thus entered upon a public and political life, his election to Congress followed with ease and certainty as the choice of the Republican party. He was first elected in 1866 to the Fortieth Congress, and served upon the Committees on Patents and Public Expenditures. His second election was in 1868 to the Forty-first Congress. His third election was in 1870 to the Forty-second Congress, serving upon the Committee on the Judiciary and as chairman of the Joint Committee on the Congressional Library. It would be difficult to single out a member during these six years who had greater personal influence. Good natured, humorous and imperturbable, nothing obstructed his pathway to success whenever he advocated the passage of some desirable measure.

The following incident related to the writer by General Garfield in 1876 will illustrate this: "Observing an aged lady dressed in deep mourning who, sitting in the gallery, was a constant attendant upon the daily sessions of the House, the Judge learned by inquiry that she was interested in a private Bill for a pension. After an examination that disclosed it was meritorious, and needed but one thing, a champion, he called it up from the calendar, and by a few words of explanation and personal appeal obtained unanimous consent for its consideration without a report from the committee; and it was instantly put upon its passage under a sus-

pension of the rules. Then followed a scene in the House, the like of which has never before nor since been witnessed. Stepping down from his seat, the Judge paused in front of the Speaker, and waving his hand in the air towards the gallery where the claimant sat, he exclaimed: '*There, old* woman! You have got your bill!' The astonishment of the House and the merriment which followed, can be imagined better than described."

He introduced and procured the adoption of the statute, then prevailing in Maine, by which parties are permitted to testify in their own cases. His previous experience as Attorney-General readily supplied him with ample arguments to overcome all opposition to this new feature of National legislation. His eulogy upon Senator Fessenden was highly appreciated by a full House, and placed him in the estimation of associates, like Bingham, Blaine and Garfield, in the front rank of able orators.

The following epitome is found in Blaine's "Twenty Years of Congress," Vol. 2, page 290: "Another marked character came from New England, John A. Peters, of Maine, a graduate of Yale, a man of ability, of humor, of learning in the law. He had enjoyed the advantage of a successful career at the bar and was, by long training and indeed by instinct devoted to his profession. In his six years' service in the House he acquired among his fellow-members a personal popularity and personal influence rarely surpassed in Congressional experience. He made no long speeches and was not frequently on the floor, but when he rose he spoke forcibly, aptly, attractively, and with that unerring sense of justice which always carried him to the right side of a question, with unmistakable influence upon the best judgment of the house." And Mr. Blaine adds: "Since his retirement from Congress his career on the Supreme Bench of Maine, and more recently as its Chief-Justice, has given roundness and completeness to a character whose integrity, generosity, and candor have attracted not only the confidence and respect of an entire State, but the devoted attachment of a continually enlarging circle of friends."

Enthusiastically sustained by his constituents, to whom he rendered a constant and growing usefulness as a Congressman, he never was content to give up his chosen profession. He therefore declined another election. In May, 1873, he was appointed an Associate Justice of the Supreme Court of the State, his fitness being recognized by universal consent and approbation.

Judge Peters has presided twenty-two years on the Maine bench, serving half of the time as Chief-Justice. To summarize, it may be said he has worked hard all his life; he has made his own way in the world against constant competition; he obtained a great place at the bar; he went into politics and became a strong figure in the House of Representatives; he has won the prizes of his profession, ending with the greatest of all, the Chief-Justiceship. This is great praise, yet justly due and fairly won. It is slight, however, compared with the grand service to the State rendered by him as "the good judge." Of this service I will speak sparingly now. The book is not closed. If younger readers desire a description of the good judge drawn by the hand of a master, consummate in delineation, let them read the address by Mr. Choate on the judicial tenure in the Massachusetts Constitutional Convention of 1853. It is there that they will find the reasons and the causes why the whole community turn to Judge Peters with unvarying respect, veneration and love. To analyze a little in detail, I would say, he has always been famous for that alertness of mind which is to a lawyer a most useful quality. He grasps a new subject, or new set of facts, or a new proposition, at once, and turns readily from one to another. Intricate matters become plain when he expounds them. His exposition of law and

fact to the jury leaves nothing to be desired in point of clearness and comprehension. He has a mind as transparent as a sheet of plate glass. It is achromatic, and whatever is seen through it is seen in its true light, and free from prismatic hues. He is something more than a judge; he has a judicial mind, and has moderation and common sense, and the power of seeing both sides. The result is, he is trusted. He has, withal, the confidence of his associates on the bench and of the community. To be believed to be such is the crown of success, as Mr. Choate has well said.

To his abundant learning, his unquestioned ability and integrity, and his genial manners I should add the possession of a rare tact in conducting a trial. "By this," said his predecessor, Chief Justice Appleton, "his adverse rulings are made more satisfactory to the losing party than the favorable ones of anybody else to the winning party."

In his wise and firm administration of the "whole learning of the law" he has made it his business not to suffer justice to the litigant, that unvarying goal, to be overcome by any technicality. His love of equity has, however, never been a morbid sentiment leading to a blind sacrifice of the principles of law, resembling in this, as in many other respects, that lovable character, Chief Justice Mellen.

Of his written opinions, it may be said that they are valuable acquisitions to all branches of the law by reason of their strength, soundness and depth of research. Nothing issues from his pen that is not finished and perfect. Like polished gems they shed light upon whatever they touch.

His style of writing is always strong, clear and accurate in statement. He possesses an ease which, with an exquisite touch, renders ordinary common-place things and characters interesting from their truth of the description. At times he rises above the level of the cold judicial style. A good example of this, and of his predominating love of justice, is found in Gross *v.* Rice, 71 Maine, 241, which holds that a statute is unconstitutional that requires, "No convict shall be discharged from the State prison until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for any violation of the rules and regulations of the prison."

From the opinion by Judge Peters I make an extract: "Although the process authorized by the statute and prison rules for prison discipline may be ever so just and humane, yet so far as punishment was imposed after (not during) sentence, it was not *the* process, nor the due process of law demanded by the constitution. . . . What we do say is, that under a sentence of four years a prisoner cannot be held longer than four years; that all punishments must be inflicted upon a convict during his term, and neither directly nor indirectly afterwards. . . . The common law requires that the punishment of persons convicted of crime shall be definite and certain. *Praemunire* was an exception, as for that offense a convict could be imprisoned during the pleasure of the king. The sentence must inform the convict as to the kind and duration of his imprisonment. This is too clear to need authority or argument. . . But if this statute is constitutional, then there can be no definite sentences awarded. The will of the warden would in effect control the maximum duration. It is plainly to be seen that, in this way, the warden could extend a punishment indefinitely. If he can prolong a sentence a day, he can a week, or a month, or even for years. And that too for transgressions not of an aggravated character. . . .

"What a wide field this idea of such unlimited power over a convict opens into! How uncertain and varying would be the results! How much would be made to depend upon the good or bad judgment of a warden! How much upon the whim or ca-

price, the passions and temper, not only of the warden, but of his agents and servants and employees. It is not an answer, that an appeal lies from the warden to the overseers. The convict is in no position to make an appeal. 'Bondage is hoarse, and may not speak aloud' says the great poet.". . .

The law of water and water-courses forms a large body of the decisions of the Maine court. I hazard but little in saying that no state has furnished a superior line of authority, or been more often quoted by other courts. A new question arose upon this branch of the law in Pearson *v.* Rolfe, 76 Maine, 380. I refer to the opinion of Chief-Justice Peters as exhibiting his strong handling of the subject in a manner that has forever settled the principle in this state. The question relates to the rights of navigation and riparian owners. The decision holds that whenever logs cannot be driven over a particular portion of a fresh-water river above the ebb and flow of the tide, while in its natural condition, such portion of the river is not at such times navigable or floatable ; and the use of the water at such time and place, so far as he needs the same for his own purposes, belongs exclusively to the riparian proprietor, who in this case was the mill owner and had erected a dam.

But I must forbear from further citations of his opinions as being foreign to the purpose of the present article. Of his charges to the jury, the reader will find some selections in Drew *v.* Hagerty, 81 Maine, 231, which will richly repay a careful study of the law in *causa mortis* and *inter vivos* gifts.

I have alluded to his ease and perspicuity of style ; there is, besides, an individuality that stamps it wholly as his own ; a happy faculty of condensation at the conclusion of a sentence, or an idea, that, like the Goddess of Liberty on the American coins, fits it for circulation. His opinions are studded with them like jewels. They are live epigrams. Speaking of a description in a deed, claimed to be void for uncertainty, he says, "It is not a roving half-acre." Of an early English Act, he says, "Its meaning is greater than its words." Again, "Easements are of flexible adaptation," and of accepting a charter, "Late events show the earlier intention." "They were appropriators and not owners," he thus calls the claimants of property under tax-titles. Of an amended declaration he remarks, "It was a skeleton bare, it is now the skeleton clothed." And occasionally we find a pithy idea thus expressed, "There are but few strictly and purely legal presumptions."

These are but indications of Bacon's "full mind." There is also the "ready man." His conversation and speeches for fifty years are replete with wit, humor and mirthfulness. In the presidential campaign of 1864 he said : "If McClellan couldn't take Richmond making Washington his base, you may safely swear he will never take Washington, making Richmond his base."

In the fusion campaign of 1855 that elected Samuel Wells governor, he addressed a large gathering at night when his fellow citizens rallied *en masse* with torch-lights in the street. Upon being introduced he bowed and began with, "Fellow Democrats." But at that moment a sudden gust of wind extinguished the torches. It became inky dark. For an instant it was very still. Peters might have been astonished ; but he wasn't. He began again. "Fellow Democrats," he shouted. "The wind has blown out our lights. It is so dark that I cannot see my hands before my eyes. I cannot see you, fellow Democrats, but I know you are all here. *I can smell you.*"

He never carries into social life the anxieties of his position and duties, or any trace of them. One who should meet him for the first time, and who did not know him, would be sure to think he belonged to the leisure class. He has always had easy and leisurely manners, and a way of meeting mere acquaintances as if they were friends, yet with simplicity and with no affectation.

He received his commission as Chief Justice August 29, 1883. The degree of LL.D. was conferred upon him by Colby University in 1884, by Bowdoin College in 1885, and by Yale in 1893. In 1891 he was elected a trustee of Bowdoin College.

No sketch of Chief-Justice Peters would be complete without reference to his after-dinner speeches. No matter what the occasion, whether it be a bar gathering, or a meeting of Bowdoin or Yale alumni, his presence is always the forerunner of the most enjoyable hour of the feast. His mirth and good-natured humor never fail to bring down the house with uproarious applause. He has the happy faculty of utilizing the occasion with thought appropriate to the time, while his talk is unstudied and mixed with wit and jest which captivate and entrance his listeners. He never says anything that wounds the feelings of others and at the same time he is audacious in puncturing shams and all kinds of pretense. The presence of grave college-presidents, his dignified associates on the bench and sober and solemn members of the bar, does not deter him, for they all enjoy the fun and join in the laughter that will break out in spite of themselves.

These speeches have never been reported. They are as unreportable as the bubbles of champagne, the delicious flavor of Chateau Yquem, or the flash of diamonds and the songs of birds. Even if it were possible to reproduce his words, there would be still wanting their setting with the occasion, and over all the speaker himself, beaming, debonair, bland — the inspiration of the hour.

CASSIUS ON CÆSAR'S DEATH.

By Benj. F. Burnham.

Brutus: Cassius, go you into the other street, and part the numbers. Those that will hear me speak, let them stay here; those that will follow Cassius, go with him; and public reasons shall be rendered of Cæsar's death. — Julius Cæsar: Act III, Scene 2.

Friends! Romans! Nobler title hath no man
Than that which hails him citizen of Rome.
Are you not patriots all? I know ye are.
But if, too fondly proud, I'm self-deceived,
And there stand here a single human form
That shrines a heart not throbbing with Rome's weal,
Let such one close his ears and slink away,
Whiles I, with this poor tremulous voice,
Yet with most honest purpose do protest
My solemn yearning that in this grave hour
We think no thought, precipitate no deed,
That is not offspring of brave reason's throes.

Pain hath a wholesome office. Giddy Joy
Deranges oft the mind's glad mustered force.
In mourning mood the soul is at her best.
Serenely then doth Sympathy enthrone
Sweet Charity upon the judgment seat.

My candid brother, if thy good right hand
Become, through reckless, overgrasping use,
Diseased, — offensive past medicament, —
But ere insidious poison pulsing on,
Enleavens dire destruction through thy frame,
Some surgeons with unflinching nerve confront,
Pounce on the inflated nuisance, cut it off,
And then, with burning cautery applied
Along the quivering, expiating flesh,
Arrest the covert intercourse of death,
Are not those faithful fortitudes thy friends?

So were our trusty senators convened
In conclave o'er the body politic;
And searching with unshrinking scrutiny
A member boasted to be Rome's right hand,
Detected subtle symptoms moribund
In its disordered, unrestrained outreach
Usurping functions of the corporate whole.

To amputate that hand incurable
Was a most grievous duty to be done;
But its behest the hero statesmen heard,
Albeit bemoaned they the exigency.
No less they cherished all the memories
Of that hand's ministrations to the State;
No less they listened to the whisperings
Of private friendship's gratitude and grace;
But louder came to patriot ears the call
Of country. So the consequent response.

There needs no prescience to forecast the doom
Of commonwealth whenever government
Becomes not by and for the people all. —
Lo, Brutus now holds forth in yonder street!
Go we and listen, for methinks he saith
He loved not Cæsar less but Rome the more.

LONDON LEGAL LETTER.

LONDON, Oct. 2, 1895.

AN incident of what may very properly be called the silly season — that long hiatus in domestic life when the urban denizens leave their comfortable homes for uncomfortable lodgings at the seaside, when the law courts are hermetically sealed, when the theatre audiences are made up of country cousins, and even staid, respectable and leading newspapers open their columns to lengthy communications on such trivialities as "The Age of Love," — illustrates the differences between the customs of the English and American people, and the law which has grown up in the two countries out of these divergent customs. The other day it was announced that Mrs. Langtry had lost £40,000, a cool $200,000 worth of jewels. She had gone abroad, and before doing so had deposited a box containing these jewels with her bankers. A few days thereafter a messenger appeared at the bank with what purported to be an order from Mrs. Langtry requesting the delivery to him of the jewels. The bank gave them up, and it was not until weeks had elapsed, and Mrs. Langtry had returned to town, that it was discovered that the order was a forgery. It had been very cleverly executed upon a sheet of note paper which had either been purloined from Mrs. Langtry's writing-table or made in exact imitation of that used by Mrs. Langtry and bearing her address engraved thereon. In America, it is fair to presume, there would be a grave question as to the responsibility of the bank. Here its exemption from liability arouses no controversy, except perhaps among laymen. The loss will unquestionably fall upon Mrs. Langtry; and that her legal advisers appreciate this is evident from the fact that they are making diligent efforts to recover the valuables and that Mrs. Langtry is offering a reward of £500 for such information as will lead to the conviction of the offender. Banks in England and banks in America are very different institutions, and are governed by widely dissimilar laws. The American bank is purely and simply a moneyed institution, and deals in nothing but cash and its representatives. Here even the modern joint-stock banks preserve some of the features of the old-fashioned family banking firms, and receive into their custody the valuables of their clients of whatsoever nature, just as two hundred and fifty years ago the banks of that time were accustomed to nightly take their coin and currency to the Goldsmiths Company for safe keeping. This part of the business of the modern bank is rarely charged for, particularly where the customer maintains a satisfactory balance to his credit; and thus Mrs. Langtry's bankers escape liability on the ground that, being gratuitious or "naked" bailees, they are not chargeable with ordinary negligence, but only with gross negligence. The leading case (Giblin *v.* McMullin, L. R. 2 P. C. 317) goes much further even than Mrs. Langtry's. There a customer deposited his strong box, containing securities, with his bankers, who received nothing for their services, he himself retaining the key. Certain debentures were abstracted by the cashier; and it was held by the Privy Council that as there was no proof of gross negligence the bank was not liable. Such gratuitous bailment by banks is not customary in the United States, the convenient and impregnable safe deposit institutions being resorted to for the sake of greater safety. But it is not only in this respect that the banking customs and the laws of the two countries widely differ.

Here if A gives B an open cheque payable to B or his order the bank upon which it is drawn will pay the cheque without making the slightest inquiry as to the identity of B. It suffices if the paying teller is satisfied of the genuineness of the drawer's signature. Of course if the drawer's signature is forged and the bank cashes the cheque, the bank is responsible to the drawer; but there its liability rests. The present Bills of Exchange Act provides that "where a banker upon whom a cheque is drawn pays it in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority." And the act makes this remarkable definition of what is meant by "good faith" in the preceding sentence: "A thing is deemed to be done in good faith within the meaning of this act where it is in fact done honestly, whether it is done negligently or not." This, standing alone, would seem to be a startling and monstrous perversion of the law in favor of the banker; but it is not as bad as it looks. The same Bills of Exchange Acts provide a way by which the drawer of a cheque may effectually protect himself if he desires to do so, and that is by "crossing" his cheque "generally" or "specially." The cheque is crossed "generally" when two parallel lines, usually about an inch apart, are drawn across the face of the cheque; thus crossed the cheque will not be paid across the counter of a bank, but only through the clearing house. The "specially" crossed cheque is one upon which and within the crossed lines the name of a particular bank is written. When thus crossed the cheque can be paid only to the bank thus designated. Then, the law says, provision has been made by which the drawer of a cheque may protect himself; and if he fails to avail himself of this protection, but issues "open" or uncrossed cheques, he must take the responsibility, and not the bank. This custom thus sanctioned by law works admirably and to a greater degree of convenience to the public than the American system, where, before a payee of a cheque may get it cashed, he must be known to the cashier or be vouched for — often to the extent of the voucher having to add his name to that of the endorsement of the payee, and incurring thereby an unpleasant responsibility.

And in connection with Mrs. Langtry is another bit of gossip which is, or should be of interest to American lawyers. It is announced that, having acquired a domicile in California, she intends to obtain in that State a decree of divorce against her husband on the ground of his desertion of her and failure to support her. Such a decree, based upon such grounds, would, for reasons which are apparent

to the public, be a travesty on justice, and would tend to still further lessen, if possible, the estimation in which American divorce decrees are held in England. So much has been said about the anomalous character of divorce legislation in the Western States and the ease with which divorces may be obtained, that the subject is looked upon as exhausted and the evil one that must, perhaps on account of its iniquity, be left to work out its own remedy. But there is one feature of the subject to which, it is submitted, attention has not been drawn, and that is the responsibility of the judges who preside over the courts in which these facile divorces are granted. It seems to be naturally assumed by them that if the technical rules of procedure are complied with they have no option but to grant the decree. Such an exercise, or rather failure of exercise, of a judge's prerogative is beyond the comprehension of an English lawyer. To him a judge is a judge in the broadest meaning that can be given to the word. The function of the judge of any one of the English courts, from the High Court to the pettiest magistrate, is to administer justice — and not merely to see that certain technical rules of practice are complied with. If the judges of the courts in those States which have become most notorious for the looseness of their divorce practice could be induced to take this view of their functions, the evil would be greatly lessened if not altogether done away with. An illustration of how the system works at present and why the English people have a contempt for divorce practice in America has recently occurred here. In 1881 one John Reid McAllister married, in a suburb of London. Two years afterwards he went to Omaha, leaving his wife to follow him when he had made the necessary arrangements for her home there. He sent her money sufficient for her support, and then, after having been in America a little over a year, wrote to his wife to join him. She packed her trunks, in which were a number of articles made by her own hands for his wear, and was about to sail when she received a cablegram, "Don't sail. Am leaving Omaha." From that time until 1891 she never heard from him, and then through a third person she received a copy of a decree of a divorce which had been granted to him in June, 1888, by the "District Court of the Third Judicial District of Omaha for Douglas County, the Hon. Eleazer Wakeley, one of the judges, presiding." The decree, as usual, recites that the court finds that "due notice of the filing and pending of the petition was given to the defendant according to law and she has failed to answer or demur to said petition. And that said parties were married as set forth on the petition and that the plaintiff has been wilfully abandoned by the defendant, without just cause, for the term of two years prior to the filing of the petition, and that the defendant has committed adultery with one Mr. Roland as alleged in the petition."

It is of course unnecessary to say that there is not a word of truth, except as to the marriage, in any allegation of this recital. The wife, as a matter of fact, resided during the whole period of her husband's absence, first with his mother and then with her own father. The mother-in-law's house was on the same street and nearly opposite the house where Mrs. McAllister's father has now been residing for nearly seventeen years. The address of the wife was constantly known to the husband. The Mr. Roland whom it is conjectured the decree refers to, is a physician who attended the wife during the fatal illness of a child who was born two days after the father left for Omaha. This physician, in all, paid three visits to the wife, and some one was in the room on each occasion, and the wife has never seen him on any other occasion. The details of this story are possibly no more striking than those of numerous other tales of a similar character which might be cited, and they are mentioned now only to draw attention to what is considered in this country a scandalous dereliction of duty on the part of the judge who pronounced the decree. It may be admitted that the proceedings were regular on their face. The return of the sheriff undoubtedly showed that the defendant could not be found, and an order of publication was doubtless obtained. Then the plaintiff gave such evidence as he had been instructed was sufficient to entitle him to a decree, and the decree was pronounced. But, it is submitted, this is not in accordance with the spirit of the law, no matter how closely it adheres to the letter. It was unquestionably the duty of the judge, particularly as the proceedings were undefended, to see that justice was administered, and that no advantage was taken of the absent defendant. The statutes of Nebraska (Sec. 1428) provide that suits for divorce shall be conducted in the same manner as other suits in courts of equity. They further provide (Sec. 1456) that no decree of divorce shall be made solely on the declarations, confessions or admissions of the parties, but the court shall in all cases require other satisfactory evidence of the facts alleged in the petition.

In this case proof should have been required that the plaintiff had used every reasonable endeavor to inform the defendant of the filing and pending of the petition, and satisfactory evidence, other than that of the plaintiff, that the wife had deserted her husband and of her alleged adultery. The consequence of the miscarriage of the laws of Nebraska, under color of which this fraud was perpetrated, are most deplorable. The decree will not be recognized here, where the wife is still bound by the marriage. By a wise provision of the statutes of Nebraska the decree of divorce may be set aside at any time on the ground of fraud. In this case the second wife whom the plaintiff has since married would be nothing more than his mistress, his children would be illegitimate and he would be liable to a criminal prosecution for bigamy.

The GREEN BAG is regularly read by hundreds of judges in whose hands are the power of divorce under laws which render such perversions of justice as is here outlined possible. Is it too much to hope that some of them may determine to pursue such a course henceforth as will make a repetition of the McAllister case, or the occurrence of a Langtry case, impossible within their jurisdiction?

STUFF GOWN.

The Lawyer's Easy Chair.

. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

UP TO SNUFF.— Lord Chief Justice Russell certainly is, as we glean from a report in the London "Law Journal" of a meeting of the Hardwicke Society, at which there was a notable attendance of big-wigs. The account says: "During the evening Mr. Edward Atkin, senior member of the committee, made an informal presentation of a silver snuff-box to the president, as the representative of the society. The box is to be known as 'the Russell Snuff-box,' and is intended to commemorate the elevation of Lord Russell of Killowen to the dignity of Lord Chief-Justice of England. It was subscribed for by members of the society." The president then proposed the health of "Our Guest," the Lord Chief Justice, and invited him "to take the first pinch of snuff from the Russell snuff-box, which his lordship did amid loud cheers." Then his lordship responded felicitously, saying among other things: "The little incident with which the speech of the president concluded peculiarly gratified him. It flattered one of his weaknesses. The days were gone by when a snuff-box was considered part of the necessary equipage of a gentleman. The lines —

> 'Sir Plume, of amber snuff-box justly vain,
> And the nice conduct of a clouded cane,'

were a relic of the past. Still, the handling of a snuff-box was eminently judicial. It had a soothing effect upon the mind; it was a mode of occupying one's self and distracting one's self when M'Call, and Crump, and Lawson Walton were making their most brilliant points. He really regretted to know that that habit of snuff-taking had fallen almost into complete desuetude at the Bar. He remembered Sir James Bacon telling him, on one occasion, that when he was a junior, there was not a single man in the court, from the judge on the bench to the usher, who did not carry a snuff-box, and he ended by saying, 'Here I am, the only man left with a snuff-box.'" Lucky Q. C.'s to be thus named by his lordship! Good for a great many retainers, one would say, and a much better advertisement than to be "named" by the Speaker. In speaking of things that had been done by the famous society he said: "It passed resolutions of sympathy with that great Republic of the West whose honored representative was there that night in the presence of his old and highly esteemed friend, Mr. Bayard; and it patted the people of the United States upon the back when they re-elected that distinguished man and great character, Abraham Lincoln, as President of that country." The health of our minister being drunk, Mr. Bayard, "who was most cordially received, responded." We and the old folks seem to be growing very chummy. Snuff-taking in this country has fallen into "innocuous desuetude," except in some of the southern States, where the inhabitants practice "snuff-dipping," which consists, we believe, in dipping a stick in snuff and prodding the gums with it. We doubt that there is a snuff-box on the Supreme Court bench. But it is pleasant to read of these friendly proceedings, and to take snuff with a friend is more agreeable for some than to take a cigar with him; and it is certainly much more cleanly than to take a chew with him. The ability to take snuff without sneezing, however, is probably one of the lost arts. Mr. Moore, in his recent history of "The American Congress," says of a time about three-quarters of a century ago: "It was the custom in both houses of Congress to have great silver urns, filled with the choicest and most fragrant 'Maccaboy' and 'Old Scotch' snuff, placed where the members could help themselves freely to the nose-titillating pulverized tobacco. Snuff-taking was then a very common habit with the congressmen, and it was no unusual thing to see a speaker, who was pouring out words of eloquence on the floor of the House or the Senate, stop suddenly, walk over to the snuff-urn, fill his nose, sneeze two or three times, flourish a bandanna handkerchief, and then walk back to his place and resume his remarks. Some of the old members had considerable reputation as graceful snuff-takers. Mr. Macon, who presided over the Senate so long, took snuff with such perfection that he was admired by all the senators; and Mr. Clay, who imitated the French, was not far behind him in grace and polished ease."

THE NEGRO'S RIGHTS. — There has been recent occasion to find a little fault in these columns with Noah Brooks for some utterances against Charles Sumner; and now comes Mr. E. H. Bristow, defending Chief Justice Taney against the charge attributed by Mr. Brooks, that he decided that "the negro has no rights which the white man is bound to respect." It is familiar history to lawyers that the Chief-Justice did not make that statement as an expression of his own opinion, but as the result of a historical review of the opinions of a former time; and as such it was eminently correct. We hardly think that Mr. Brooks isopen to the charge of mis-statement or misconstruction in this instance. What he said was that the Chief-Justice made "his decision to the effect that the negro has no rights that a white man is bound to respect." The decision was to that effect, and the North so construed it, for it decided that under the laws of Missouri the negro was not a citizen and could not wage his suit in court. This is probably all that Mr. Brooks intended to convey. Taney, it is said, did not approve of slavery; he emancipated his own slaves. There is no expression in his famous opinion indicating his approval of the system. He merely states the facts and the legal deductions which seemed inevitable to him. Undoubtedly he sincerely thought that a decision the other way would precipitate disunion and war. But such a decision could not have had that effect more distinctly than the one made. It is not on the face of the opinion that one finds anything dishonorable or immoral, but in the secret history of it, as exposed by Mr. Justice Curtis and recorded by his biographer, Mr. Ticknor, there is shown an evident want of candor and fair dealing on the part of the Chief-Justice, which was resorted to in order to lug in the question of citizenship. But after all, there was no more log-rolling than in the Dartmouth College case, and the affair has turned out as God meant it should. It is due to the Chief Justice to point out that he did not use the expression in question as his own view, and to Mr. Brooks that the latter did not allege that the Chief-Justice did.

LIBEL BY MONUMENT. — Is there such a thing? Our friend Appleton Morgan thinks so, for he sends us, with a suggestion to that effect, a copy of an inscription from a stone in the old burying-ground at Brimfield, Mass., which runs as follows: "Mr. Ezra Wood died 6 November 1812, aged 20. His death was occasioned by a blow of a stone on the head from the hand of Hiram Stebbins, maliciously thrown at him." Then comes a stanza, alleging that "His Saviour called him home,"—as he did Stephen, it appears. No doubt this was a libel, unless it could be justified. It is a wonder that the allegation was not of a "rock," for stones were commonly called "rocks" in old New England, and generally they were "heaved," *à la* the Trojan heroes. But no fault should be found with this monument, — it is only giving stone for stone.

LORD JUSTICE BOWEN. — The London "Law Journal" gives a copy of the Latin inscription on a marble tablet placed by the Benchers in the vestibule of the chapel of Lincoln's Inn. It seems rather late in the day to put epitaphs in Latin (especially when it must necessarily be somewhat hoggish) instead of English, which will probably outlive Latin; and it seems especially inappropriate to do so in the case of one whose chief, if not his only fame, will rest on his translation of the first six Æneids into English verse! At least the Benchers might well have made some allusion to this elegant performance in the Latin epitaph. But perhaps they thought the translation sacrilegious.

A NEW LEGAL RELATIONSHIP. — "Law-Book News" speaks of Mr. Charles F. Beach, Jr., as "author, or at least god-father, of many legal treatises." This is not strictly accurate. He is their father-in-law. The slur on Mr. Beach is undeserved. His books are good, whether he did all the work himself or not. Raphael did not always paint the whole of a picture; but he designed it, and he and his pupils executed it.

"CURRENT EVENTS OF INTEREST TO LAWYERS AND LAW-STUDENTS." — Under this head, the very comely and readable "The Law-Students' Helper," of Detroit, announces that "July 7th — A daughter is born to the President and Mrs. Cleveland."

NOTES OF CASES.

THE HUSBAND — SEDUCER. — In Kroessin *v.* Keller, 27 L. R. A. 685, the Minnesota Supreme Court hold that a married woman cannot maintain an action of crim. con. against another woman, in the absence of proof that the husband was enticed away, or induced to abandon or desert his wife. The Court distinguish the class of cases, of which Westlake *v.* Westlake, 34 Ohio St. 621; 32 Am. Rep. 397, is the pioneer, and which has been so generally followed, on the ground that it was a case of desertion induced by the defendant. The Court admit that the New Hampshire and Indiana cases warrant the plaintiff's contention. The decision in the principal case is based on the notion that "such actions would seem to be better calculated to inflict pain upon the inno-

cent members of the families of the parties than to secure redress to the persons injured. The power to bring such actions would furnish wives with the means of inflicting untold misery upon others, with little hope of redress for themselves." This seems to us little short of puerile.

"THE GOLD CURE." — Are the courts growing more tender of drunken adults than of sober infants? It would seem so from Mayor *v.* Keeley Institute, Maryland, 27 L. R. A. 646, which holds that a statute authorizing any habitual drunkard to be sent for treatment and cure to an institution within the State maintained for such persons, at the expense of the county or city of his residence, if neither he nor his petitioning kin is financially able to incur the expense, does not make an unconstitutional use of money raised by taxation. Here is paternalism for you. Truly "the devil lays pillows for drunken men to fall on." The court observe: —

"If the legislature has authority, which we do not question, to treat habitual drunkards as a class of citizens who are entitled to be restrained or medically cared for by placing them in institutions for treatment, it would naturally follow that in so far as the law applies to the citizens of Baltimore, the expense of the treatment of its habitual drunkards ought reasonably to be borne by it. It was held, as already stated in the *Regents' Case*, *supra*, that the government 'has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises.' It is one of the gravest conditions of the century in which we live, and of which legislators have been compelled to make observation, that the victims of the excessive use of alcoholic stimulants, narcotics, etc., have grown to be legion, not of healthy, robust manhood, but of broken, debauched, and decrepit men, against whom and for whom, as a class, public sentiment has a right to appeal to the legislature for protection. Lord Bacon has said, 'That all the crimes on earth do not destroy so many of the human race, nor alienate so much property, as drunkenness.' Mr. Justice Harlan, delivering the opinion of the court in Mugler *v.* Kansas, 123 U. S. 623, says: 'There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are in some degree, at least, traceable to this evil.' Mr. Tiedeman, in his work on the Limitation of Police Powers, says: 'It is the policy of some States, notably New York, to establish asylums for the inebriate, where habitual drunkards are received and subjected to a course of medical treatment, which is calculated to effect a cure of the disease of drinking, as it is claimed to be. A large part of human suffering is the almost direct result of drunkenness, and it is certainly to the interest of society to reduce this evil as much as possible. The establishment and maintenance of inebriate asylums can, therefore, be lawfully undertaken by the State.'"

This is well, but it would seem better to suppress the sale of intoxicants than to try to mend up the sufferers; better to stamp out the origins of the disease than to endeavor to cure the patient.

ACCIDENT — VOLUNTARY EXPOSURE TO DANGER. — The most impudent class of persons in the community are insurers against accident, and the most bare-faced and impudent contention they ever made in the courts is to be found in Hess *v.* Van Auken, New York Common Pleas, in a late number of the Miscellaneous Reports.

A cashier of a bank went to a saw-mill to get some boards cut of a certain length for the bank. He stayed during the cutting, and slipping on a concealed block on the floor, fell against a circular saw and his hand was cut off at the wrist. The insurers contended that he had "voluntarily exposed" himself to the danger, but the court could not see it. Judge Bookstaver observed that the respondent's "contention seemed to be that the plaintiff walked into the mill and cut off his hand." The respondent also had the impudence to request the trial judge to charge that he was "operating the saw" when hurt.

PAYMENT OF WAGES. — In re House Bill No. 1230, 28 L. R. A. 344, the Massachusetts judges answer the legislature, on requirement of their opinion, that a statute requiring manufacturers to pay wages of their employees weekly, although applying to individuals as well as to corporations, is valid under the Constitution which authorizes legislation over "all manner of wholesome and reasonable orders, laws, statutes and ordinances," "for the good and welfare of the commonwealth," and makes no express provision for freedom of contracting. This is probably the first time that such legislation has been upheld in respect to individuals. The Court say:

"It is well known that in some of the States of this country legislation similar to that proposed has been held unconstitutional by the courts, sometimes on the ground that it is partial in its character, but more frequently on the ground that it interferes with what is called the liberty of contract, which, it is said, either as a privilege or as property, is secured to the inhabitants of a State by its constitution, or by the Constitution of the United States. In some of these decisions a distinction has been suggested or made between the rights of natural persons and the rights of corporations, and such legislation has been deemed valid with respect to corporations whose charters were subject to alteration, amendment, or repeal by the legislature, or which, being foreign corporations, were permitted to do business in the state under such conditions as

the legislature might impose, while the legislation has been deemed void with respect to natural persons. Some recent decisions on this subject are the following: Leep *v.* St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L. R. A. 264; State *v.* Peel Splint Coal Co. 36 W. Va. 802, 17 L. R. A. 385; Hancock *v.* Yaden, 121 Ind. 366, 6 L. R. A. 576; State *v.* Brown & S. Mfg. Co. 18 R. I. —, 17 L. R. A. 856; Shaffer *v.* Union Min. Co. of Alleghany County, 55 Md. 74; Tilt *v.* People (Ill.; Feb. 1795) 40 N. E. Rep. 462."

The judges cite their recent holding that a law forbidding the employment of women, although adult, more than ten hours a day, is valid; and this too we believe stands alone, at least in relation to individual employers. (Com. *v.* Hamilton Man. Co. 120 Mass. 383.) The way in which the court gets around the argument that a woman has a right to work as many hours as she chooses seems to us a quibble. The Court concede that she has, but say that the law in question merely forbids her employment by *any single employer* for more than ten hours! The advantages of a police and health bill which forbids a woman to work more than ten hours a day for a particular employer, but allows her to work, say, six hours more for another employer on the same day, are not obvious. We regard the opinion as unsound. Adult and sane people have a natural right to contract without leave of any constitutional permission. If A is willing to work for monthly payments he certainly ought to be allowed to do so, and if he is not willing he can stop. The argument that the law is valid because it is wholesome is not very convincing, for a law compelling men to go to church and to vote would be wholesome, but it would not be valid. We do not see that the peculiar language of the Constitution gives the legislature any wider power of law-making than under ordinary constitutions, but it certainly is an implied power, under any constitution, that the legislature may make wholesome and reasonable laws for the good and welfare of the commonwealth. But we do not think it "reasonable" to enact that a housewife shall pay her cook, or a farmer his haying-hand every week. It is not necessary, for the employee has a simple remedy — he can quit. It is not reasonable, for it makes a uniform rule that may not be convenient for many, and is inquisitorial when applied to all. The Court say: "We know of no reason derived from the Constitution of the commonwealth or of the United States why there should be a distinction made in respect to such legislation between corporations and persons engaged in manufacturing, when both do the same kind of business." The Constitution may not point out any distinction, but there is one in the nature of things. The legislature has an arbitrary right to regulate the conduct of corporations, which are its creatures, and exist only by its will, unless it has failed to reserve such right, but it has no such corresponding right in respect to individuals. We find an inconsistency between the reasoning of this opinion and that in Com. *v.* Perry, 155 Mass. 117; 14 L. R. A. 325, which disapproved a law forbidding an employer to deduct wages of weavers for bad work. In that case the prohibition in the Federal Constitution of laws impairing the obligation of contracts was recognized, but in the opinion in question it seems to be ignored because there is no similar provision in the Massachusetts Constitution. In the Perry case the court characterized the right assailed by the statute as "an interference with the right to make reasonable and proper contracts in conducting a legitimate business," and derived that right from the constitutional guaranty of the right of "acquiring, possessing and protecting property." It might well be that a manufacturer could not pay his employees weekly, and the requirement that he should would break up his business and prevent him from acquiring property.

REASONS FOR DISCHARGE OF EMPLOYEE.—In Georgia, in 1891, a statute was passed requiring incorporated railroad, telegraph and express companies to give to discharged employees or agents the reasons for their discharge when removed, under penalty of $5,000 for refusal to comply, to be recovered by the party aggrieved. This law has been declared invalid in Wallace *v.* Georgia etc. Ry. Co. 22 Southeastern Rep. 579. The Court wrote no opinion, but in its official syllabus observed:

"Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law."

The New York Law Journal points out that this is analogous to the decision of the Missouri Supreme Court, in State *v.* Julow, 31 Southeastern Rep. 781, holding void a statute which assumed to prohibit employers from dismissing servants on account of their membership in labor unions. Under the Massachusetts opinion above cited, we do not see why both these statutes would not have been upheld as for the "good and welfare" of the State. Constitutional provisions for "general welfare" are very elastic and have always been fruitful of discussion.

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

"THE GREEN BAG."

To the Editor of the "Green Bag."

As a contribution to the curiosities of legal practice in the "wild and woolly West," I send you the following two incidents which have happened within my knowledge and which I can vouch for as true.

A few years ago, a thriving city of the second class in Kansas found it necessary to raise a loan of $50,000. At a meeting of the council to arrange details, the question was discussed as to the rate of interest the bonds should draw. Some were in favor of five per cent, while others urged that the rate should be five and a half, in order to secure bigger money on the sale of the bonds. During the proceedings the city attorney advised the council that the proposed bonds must bear not less than six per cent, and gave as his reason that such was the legal rate of interest prescribed by statute.

The same attorney, in defending a case against his city, demurred to the petition as follows: —

"—— ——

Plaintiff
vs.
The City of ——
Defendant.

In the District Court of
—— County, Kansas.

And now comes said defendant and demurs to the petition of plaintiff, herein filed, on the ground that said petition does not set forth facts sufficient to constitute a cause of action. —— ——

City Attorney for Defendant, the City of ——.

State of Kansas,
County of ——, SS.

The City of —— by —— —— its attorney being duly sworn, says that the statements made in the foregoing demurrer are true as he verily believes.——

City Attorney for Defendant, the City of ——.

Sworn and subscribed, etc."

There are as many good lawyers in Kansas to the square inch as in any other State in the Union, but — there are others. N.

LEGAL ANTIQUITIES.

THE Court of Star Chamber seems to have been, or pretended to be, a careful guardian of private morals; for it desired the principals of the Inns of Court and Chancery not to suffer the gentleman students to be out of their houses after six o'clock at night "without very great and necessary causes, nor to wear any kind of weapon." And we read of the Earl of Surrey, Thomas Wyatt, and young Pickering, being summoned for breaking windows, and eating flesh in Lent; all were committed to the Tower, but soon discharged.

FACETIÆ.

SIR HENRY HAWKINS has a reputation as a witty judge. Recently a prisoner pleaded guilty of larceny, and then withdrew the plea, and declared himself to be innocent. The case was tried, and the jury acquitted him. Then said Sir Henry Hawkins:—

"Prisoner, a few minutes ago you said you were a thief. Now the jury say you are a liar. Consequently, you are discharged."

A LAWYER, residing in the North of England, and noted for his laconic style of expression, sent the following terse and witty note to a refractory client, who would not succumb to his reiterated demands for the payment of his bill. "Sir, if you pay the enclosed you will oblige me. If you do not, I shall oblige you."

A CERTAIN lawyer in Mobile, Alabama, always identifies himself squarely with his clients. In stating a damage case lately he said: "We got on the Dauphin Street car down town and when we reached Bayou Street signalled to the conductor to let us off, as we lived near there. He paid no attention to us and we attempted to get off. It so happened that we slipped and our leg was caught by a wheel and crushed. *The fact is we were somewhat drunk at the time.*"

A STORY is told of one of her Majesty's judges who is as remarkable for the quickness of his eyes and ears as for the keenness of his intellect. The other day a stranger in court, espying a friend, addressed him in a stage whisper with: —

"Halloa, old man! I haven't seen you lately, Are you all right?"

The remark was hardly heard beyond the nearest bystanders, and there was, consequently considerable bewilderment among those engaged in the case before the court when the judge looking up from his notes, observed:

"If the old man is all right, he had better go outside and say so."

"SUPPOSE a witness, that you yourself had called in a case, failed to testify as you believed he would, and, in fact testified the other way, what would you say?" asked an examiner.

Various emotions passed over the face of the student, who, at last, taking in the enormity of the treachery of the witness, cried out indignantly, "I should say it was misplaced confidence!"

— *N. Y. Law Journal.*

AT Ithaca, New York, a number of years ago, a prominent citizen was under arrest for the violation of the excise law. The case had been put over once or twice and it was discovered on the opening of the Court that the plaintiff's attorney was not ready to go on nor was he in Court. The District Attorney arose and moved that the case be dismissed. Hardly had he made the motion for dismissal, when a voice was heard, "I second the motion, Mr. Judge." The one who had so energetically seconded the motion of dismissal was no other than the eccentric defendant in the suit.

ONE of the ablest and most brilliant lawyers at the York County (Maine) Bar was John Holmes of Alfred who was widely known for his wit and sarcasm. An opportunity was seldom lost by him of exhibiting his opponent in a ridiculous position. An instance of this kind occurred while a member of the Senate of the United States, in the discussion on Nullification. Mr. Tyler of Virginia, afterwards President, alluded to a satirical remark of John Randolph, in which that gentleman had some time before designated certain active politicians as partners under the firm name of "James Madison, Felix Grundy, John Holmes and the Devil," and asked Mr. Holmes with the view of making a severe cut, what had become of that celebrated firm. Mr. Holmes immediately sprang to his feet, and said, "Mr. President, I will tell the gentleman what has become of that firm: the first member is dead, and the second has gone into retirement, and the last has gone to the Nullifiers, and is now electioneering among the gentleman's constituents! and thus the partnership is legally dissolved." The laugh produced on the occasion was wholly at the expense of Mr. Tyler.

JUDGE WILLIAM E. CLARKE of Marengo County, Alabama, is a man of marked individuality, and conducted the court in the Mobile circuit with promptness and decision. During one of the many trials of a famous insurance case in Mobile, some years ago, a juror was objected to as *an agnostic*. He was excused at the request of both sides. At recess for dinner, a juror going down the steps with the Judge said that he had observed a man was excused because an agnostic, and asked, "What is an agnostic, Judge?" Judge Clarke took the matter under advisement for a moment, and then replied sententiously, "An agnostic *is a d—d fool!*" In some theological quarters this definition would probably be accepted as strictly correct.

NOTES.

IT is seldom that locality disintegrates crime, but a New York penal statute now makes shaving the beard on Sunday on one side of the Brooklyn Bridge a penal while it is allowable on the other side. Why it should be unnecessary for one citizen to employ a tonsorial artist in one place during church time but necessary for another citizen is a question soon to be considered by an appellate judge. A Brooklyn barber was caught "red handed" by the police while lathering a customer on a Sunday morning and haled before a justice of the peace, who said "this is indeed a barber-ous statute, but I must enforce it with a small fine. But, Mr. Policeman, hereafter don't ar-

rest the barber until he has completed the shaving. The latter's offence will be no greater after he has used the razor than it was while he was only employing soap and brush."

THE following anecdote bears upon the thin partition dividing from illegality the proneness of some judges to impress on juries their opinion upon facts.

Half a century ago, in New York City, James J. Roosevelt was, as justice of the Supreme Court, about to charge in Oyer and Terminer, a jury who had been listening to evidence against a man indicted for poisoning his wife. He thus began his address: "I am hardly fitted by my feelings to calmly submit the case: these have been so wrought up by the evidence describing this wretched man sitting hypocritically by the bedside of his wife, cheering her with words of comfort, while feeding her with poisoned soup."

The Justice had only ended this opening sentence when the accused's counsel, James T. Brady, a more intrepid and alert defender than whom New York never knew, arose. "I beg pardon, your Honor for interruption, but I must object to your assuming at the outset that my client fed poison to his wife. We have disputed that there was poison in the soup." "Quite right," returned the Justice; "you do so contend, but I believe the evidence to the contrary. However, gentlemen, don't be influenced by my opinion on the matter, for that is wholly within your province." This of course killed exception. But the manner of the Judge was so pathetic that the jury convicted.

THE lawyers in the Wyoming legislature are to a man advocates of further extending suffrage to women. But they are met by frontier laymen with speeches of which the following from a Laramie newspaper is a fair specimen: —

"I think women were made to *obey* men. They generally promise to obey, at any rate; and I think you had better either abolish this Female Suffrage act, or *get up a new marriage ceremony to fit it.*"

"It ain't no party question, this bill ain't. *I* wouldn't let it come up in that shape. *I* would know better than that. This woman suffrage business will sap the foundation of society. Women can't engage in politics without losin' her virtue. It won't do her no good anyhow. She can't earn a dollar no easier than half a dollar if she does vote.

"No woman ain't got no right to set on a jury unless she is a man, and every lawyer knows it, and I don't bleeve it anyhow. I don't think women juries has been a success here in Wyomin'. They watch the face of the judge too much when the lawyer is addressin' 'em. That shows they ain't fit for juries in my way of thinkin'. I don't bleeve she's fit for't nohow. Wot right has she got on a jury nohow?"

THE word culprit is often mistakenly used by counsel and judges, as made convertible with the word prisoner or accused, whereas, in its origin, it is synonymous with convict through confession. In early Norman times the minutes of the criminal court were kept by the clerks in French. The pleas to indictments were entered either "culpable" or "non-culpable." If the former, the clerk made this entry, "cul," short for full word of plea, adding the word "prêt," French for ready, and together signifying on the record, guilty and ready for sentence. The minutes showed many enterings of culpret written hastily as one word. In time the "e" changed into an "i" and a culprit was known as a guilty man ready for punishment. The word *culpable* appears upon the minutes of French magistrates and courts, as also the word *prêt*, to this day.

EXAMINATIONS into the mental position and surroundings of jurors summoned in New York City for criminal trials in order to answer challenges for cause or to the favor are permitted by judges to become so liberally exhaustive that recently counsel for defense in a pending *cause célèbre* asked a candidate for the jury-box, "What constituted your breakfast this morning?" Objection was made by prosecuting counsel, and the judge called upon the questioning lawyer to show the relevancy of his query. "I am informed," said the latter, "that this juror is in the habit of eating pork-chops for breakfast, a most bilious food, and I cannot trust the life or liberty of a client to a man whose brain may be vitiated by the influence of bile." The judge, however, allowed the question for what it was worth, when the juror answered, "I ate three pork-chops for my breakfast, and these always agree with me. I know

many hoggish men who do not eat pork." He became admitted to the jury box, and was the only one who voted for acquittal in the challenger's favor, and procured disagreement. The verdict of the spectators to the prisoner seemed to be, "Saved by pork-chops."

LITERARY NOTES.

AN article in the October REVIEW OF REVIEWS by Percy R. Meggy, Secretary to the New South Wales Civil Service Inquiry Commission, throws light from the antipodes on some of the difficulties of the ever-present Civil Service problem.

DR. HENRY SMITH WILLIAMS writing of "Politics and the Insane" in the NORTH AMERICAN REVIEW for October, emphatically declaims against the prevalent custom of allowing partisan politics to enter into the management of asylums where the dependent insane are cared for.

IN an article at once crisp and solid, Fred. Perry Powers discusses in LIPPINCOTT'S MAGAZINE for October "Ethics and Economics," and shows that the world's business must of necessity be conducted on business principles, and that considerations of philanthropy and sentiment, while of value in their proper place, are secondary, not primary. This paper is well fitted to prick some popular delusions.

IN the October POPULAR SCIENCE MONTHLY Herbert Spencer shows in his paper on "Professional Institutions" how the man of science and the philosopher are derived from the priest. The oldest science, astronomy, was first employed to fix the times for religious rites. The root of mathematical science can also be traced down to the ancient priestly vocation.

AMONG the articles and stories announced for the November number of HARPER'S MAGAZINE are "A Pilgrim on the Gila," by Owen Wister, a longer tale of the West than he has hitherto written; a paper by W. D. Howells on "Literary Boston Thirty Years Ago;" a description of his involuntary exile at a Central American port by Richard Harding Davis, called "Out of the World at Corinth;" and short stories by Harriet Prescott Spofford, Brander Matthews, and Julian Ralph.

SCRIBNER'S MAGAZINE for October contains the first adequate account that has been published of the University of Chicago. Its author, Robert Herrick, is one of the Faculty. Having been a Harvard man, he is able to contrast the oldest and the youngest university. This article is a most effective account of the actual university life that has been created out of nothing in three short years. The reader will realize that a tremendous educational force has grown beyond doubt of success in the middle of the continent, and that it is dealing with a class of students, men and women, and with social conditions that are seldom met with in Eastern universities. Mr. Orson Lowell has made a remarkable series of pictures from life to illustrate this article.

THE fiction of the October CENTURY consists of the closing chapters of Marion Crawford's dramatic novel "Casa Braccio," with a remarkable scene in St. Peter's at Rome, where two of his characters are accidentally locked in for the night. Mr. George A. Hibbard contributes a social sketch on a popular theme, entitled "An Earlier Manner," and Mrs. McEnery Stuart a very laughable sketch entitled "Sonny's Schoolin'," of particular interest to parents and educators; and there are three other brief and vivid stories by George Wharton Edwards in his series "The Rivalries of Long and Short Codiac."

EX-GOV. JAMES M. ASHLEY contributes a timely paper to the October ARENA entitled "Should the Supreme Court be Re-organized?" Gov. Ashley's paper will be read with great interest. The same issue also contains a startling paper by A. R. Barrett, an Ex-Government Examiner for Failed Banks, entitled "The Era of Fraud." It should lead to prompt action, looking toward protecting the people from unscrupulous guardians of their funds.

THE October ATLANTIC MONTHLY is rich in good fiction. Mrs. Ward's powerful serial, "A Singular Life," is concluded. There is a further installment of Gilbert Parker's "Seats of the Mighty," which increases in interest with each succeeding issue. Further chapters of Charles Egbert Craddock's "Mystery of Witch-Face Mountain" also appear. One of the most striking contributions is another Japanese study by Lafcadio Hearn, entitled "The Genius of Japanese Civilization." The third of Mr. Peabody's papers, "An Architect's Vacation," tells of "The Venetian Day."

BOOK NOTICES.

LAW.

A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS; embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant. By James Schouler, LL.D. FIFTH EDITION. Little, Brown & Co., Boston, 1895. Law Sheep, $6.00.

IT is now twenty-five years since the first edition of this work of Mr. Schouler made its appearance. The treatise was at once recognized as the standard authority upon the law of Domestic Relations and later editions have only served to strengthen its claim upon the profession as the leading work upon the subject. The present edition brings this law down to the present year. It is discouraging to learn from the author that the law of Husband and Wife is even more chaotic than it was twenty-five years ago, but Mr Schouler, so far as possible, brings order out of this chaos, and furnishes a clear and comprehensive analysis of the law as administered in England and the United States at the present day.

A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS as in force in England and the United States. By Causten Brown. FIFTH EDITION. Little, Brown & Co., Boston, 1895. $6.00 *net.*

THIS is another work which has long been esteemed by Bench and Bar as authoritative upon the subject of which it treats. There is no treatise better known to the legal profession, and this new edition will be heartily welcomed. Some nineteen hundred cases have been added and the text has been carefully revised.

A TREATISE ON THE LAW RELATING TO ELECTRICITY. By Simon G. Croswell. Little, Brown & Co., Boston, 1895. Law Sheep, $6.00 *net.*

A connection for some years with the Law Department of the Thomson-Houston and General Electric Companies, suggested to Mr. Croswell the idea of writing this treatise, there being no work upon the subject fully adapted to the needs of corporations and the profession. The varied uses of electricity have given rise to much litigation, and our courts have been called upon to decide many important and novel questions arising therefrom, and numerous statutes have been passed regulating their introduction and operation. In this work Mr. Croswell has collected in an orderly arrangement, all the laws relating to electricity, except the Patent Law Cases, and gives to the practicing lawyer a thoroughly reliable and comprehensive text book, which will fully meet his needs. Prominent among the subjects included in the treatise are the nature and qualities of the various franchises necessary for electric lines and the mode of acquiring them, including the important federal franchise of telegraph companies; the liability of electrical companies for negligence in the construction and maintenance of their lines and machinery; the municipal ownership of electric light plants; the placing of wires underground; the conflicting rights of electric railways and telephones in the same highways, etc.; there are also important chapters on the taxation of electric companies and on electric railway accidents.

LAW OF NATURALIZATION IN THE UNITED STATES OF AMERICA and of other Countries. By PRENTISS WEBSTER. Little, Brown & Co., 1895. $4.00 *net.*

Mr. Webster gives us in this volume a clear and concise exposition of the laws governing the naturalization of aliens in the United States and in other countries. It is a subject of legal as well as polical importance, and one which, so far at least as the United States are concerned, calls for sober reflection on the part of our citizens. Mr. Webster leaves his readers, by comparisons, to draw their own conclusions concerning the present condition of things, and suggest the remedies, if any, which should be applied.

MISCELLANEOUS.

A SINGULAR LIFE. By Elizabeth Stuart Phelps. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth, $1.25.

Mrs. Phelps (Ward) has never written anything better than this story of "A Singular Life." It is a work which appeals to the best in one's nature and one which strikes a telling blow at dogma and bigotry. Emanuel Bayard, a young divinity student, is refused ordination by a Congregational Council on account of his so-called heretical views, and finds his life work as a self-constituted preacher and teacher among the lowest classes in a seaport town. Patiently and lovingly he labors among them, and so endears himself to the rough fishermen that they come to reverence and almost worship him. Just as his work is crowned with more success than he had ever dared to hope for, comes his death, a violent one, at the hands of the liquor interest, to which he had given offense by destroying the traffic. "One of the summer people, a stranger in the town, strolling on the beach that day . . . asked what that extraordinary display of the

signs of public mourning meant. An Italian, standing near by, made answer,— "The Christman is dead." The story is feelingly told, and will add largely to the author's reputation.

THE WISE WOMAN. A novel. By Clara Louise Burnham. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth, $1.25.

The Wise Woman is a delightful old lady who seems to be the confidant of all who are in trouble or perplexity, and who has the happy faculty of straightening matters out to the satisfaction of those concerned. The story is quite an interesting one and will serve to pleasantly while away a leisure hour.

THE VILLAGE WATCH-TOWER. By Kate Douglas Wiggin. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth, $1.25.

Six stories make up the contents of this volume, all of them told in Mrs. Wiggin's inimitable manner. Pathos and humor are skilfully blended. Nothing could be more touching than "The Fore-room Rug," while "The Eventful Trip of the Midnight Cry" is brimful of genuine humor. No one, Miss Jewett, perhaps, excepted, can depict New England life and character as does Mrs. Wiggin, and there is a charm and freshness in all she writes which endears her to her readers.

THE LIFE OF NANCY. By Sarah Orne Jewett. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth, $1.25.

Several of the stories which make up this volume have already appeared in print, but they are all worthy of preservation in book form. Miss Jewett is a story-teller *par excellence*, and her readers are indebted to her for many an enjoyable hour. "The Life of Nancy" will add to their debt of gratitude, for it contains some of the best things she has yet written.

A MADEIRA PARTY. By S. Weir Mitchell. The Century Co., New York, 1895. Leather, $1.00.

This dainty little volume, the latest issue in the "Thumbnail Series," contains a sketch and a story, neither of which has been heretofore published. In the sketch, which gives the title to the book, Dr. Mitchell quaintly narrates the history of Madeira wine, through the lips of a party of Philadelphia *gourmets*. "A Little More Burgundy," the story which follows the sketch, is a thrilling tale of the French Revolution, and is something quite different from anything Dr. Mitchell has heretofore favored us with. The volume is a delight to the eye and its contents furnish the reader with a rare treat.

THE COMING OF THEODORA. By Eliza Orne White. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth, $1.25.

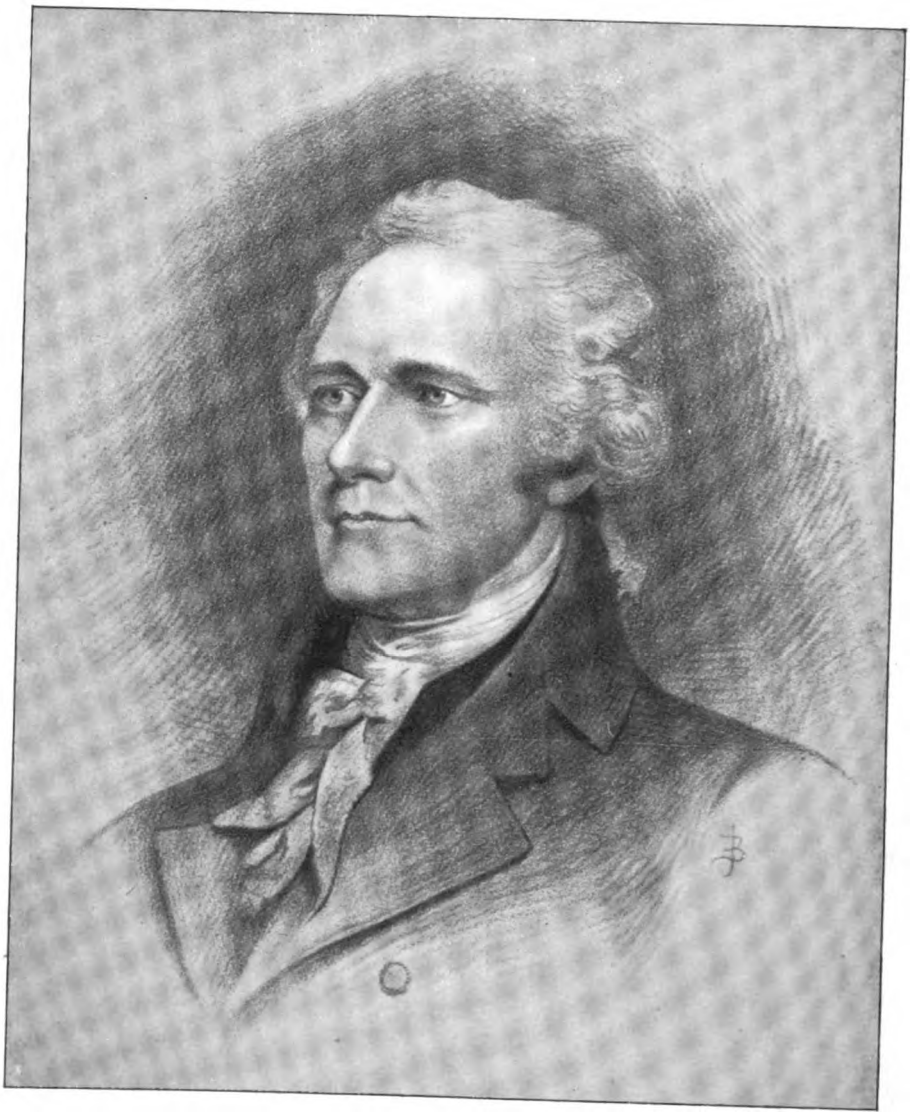
There is one thing to be said in praise of Miss White's stories, the tone of all she writes is perfectly healthful and wholesome. "The Coming of Theodora" is a simple story of home life, told in a simple and unpretentious manner. A sister gives up her vocation to enter her brother's house as a member of the family because she feels that she is really needed, and then, of course, finds that she and her brother's wife cannot get along amicably, and so finally goes back to her duties as a teacher. There is a love episode in Theodora's life which comes to naught, and this is the only incident outside a rather humdrum existence. Out of these slight materials Miss White has made a very readable story.

CLARENCE. By Bret Harte. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth, $1.25.

This is a story of absorbing interest. A husband who espouses the Union cause in the Civil War, and a wife who becomes a spy in the interests of the South are the central figures. Dramatic incidents and situations abound and the reader's attention is held to the very end. The book is one of the best Bret Harte has yet written.

FROM JERUSALEM TO NICÆA. The Church in the first three centuries. By Philip Stafford Moxom. Roberts Brothers, Boston, 1895. Cloth, $1.50.

The eight lectures contained in this book were delivered by Dr. Moxom under the auspices of the Lowell Institute, in Boston during the past winter. They contain, described in an interesting, scholarly manner, the story of the rise of the Christian Church during the first three centuries of its existence. The lay reader will find much that is valuable and instructive in this volume, and the pulpit will benefit by a careful perusal. Church history is a subject that neither minister nor laymen are generally well versed in, but by Dr. Moxom's aid they have an opportunity to familiarize themselves with the early years of the Christian Church without wading through the voluminous and sometimes not easily obtainable church histories. Dr. Moxom's style is delightful, and it is a pleasure to receive information from so interesting a teacher.



A Hamilton

The Green Bag.

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ALEXANDER HAMILTON THE LAWYER.

BY A. OAKEY HALL.

SKETCHES innumerable and several biographies of Alexander Hamilton have made his statesmanship familiar to the American people. George Ticknor Curtis's History of the Constitution; Hamilton's Life, by one of his sons, issued in 1840; and a recent volume by the late Chief-Justice George Shea of New York, entitled "The Life and Epoch of Alexander Hamilton," may in such connection be notably referred to. Bancroft and Hildreth in their respective histories of the United States and Lossing in his Pictorial Field-book of the Revolution have further commemorated Colonel Alexander Hamilton as aide-de-camp on General Washington's staff during the colonial war with Great Britain. But neither his biographers nor the historians have fully sketched Alexander Hamilton the lawyer, or made other than cursory allusions to his professional existence. It is the intention of this article to attempt to supply that deficiency and to dwell mainly upon those incidents of his life that bear upon his long unconscious preparation for his very brief yet illustrious career as a lawyer during the last twenty-two years of his mortality.

He was born eleven days after the new year of 1757 began; when George Washington, twenty-five years old, was a surveyor, as unconscious of his future greatness as was Ulysses S. Grant when tanning skins in Illinois. The father, James Hamilton — a Scotchman — emigrated while a bachelor to a West India island as a merchant, where he married a French Huguenot widow who imparted her beauty, grace and sweetness of temper to Alexander, her youngest son; while the latter inherited Scotch tenacity of purpose, thrift, and a fine constitution from his sire. The mother died while Alexander was a child, and he thus missed juvenile attrition with her marked intellectual attainments; and her father was a carefully educated French physician. Alexander's life battle began early, for when he was only thirteen years old, the French war brought to his father such business reverses as compelled the boy to enter as a clerk the store of Nicholas Cruger, whose descendants now live in New York City, opulent and socially distinguished. Alexander's education had been limited; yet he had not altogether required teachers, for he early evinced a thirst for knowledge that was not only assuaged by the few books that came in his way, but by an early developed power of observation and thought. He was forced to that proper study of mankind which becomes more valuable to the lawyer than ready accession to books. At fourteen years of age Hamilton was found as restless and ambitious as if he were a Yankee boy. The proof lies in this extract from a letter that he wrote to a young comrade who had emigrated to New York City: —

"Dear Ned: I confess a weakness. My ambition is so prevalent that I contemn the grovelling condition of a clerk to which my fortune condemns me, and would willingly risk my life, though not my character, to exalt my station."

That juvenile letter, by its choice of Saxon words, seems to show that he had undoubt-

edly made acquaintance with Rasselas and the Spectator. In all his after life of marvelous fecundity with his pen, his style was Addisonian, and his rhetoric rich with Johnsonian purity of language devoid of turgidity or pomposity of expression. But although under aspirations he did "contemn the grovelling condition of a clerk," he so conscientiously mastered its details and duties as to be left, not yet fifteen years old, in sole control of the business when Mr. Cruger, his employer, voyaged to the American colonies for a short commercial visit. But Hamilton's faculties so attracted the attention of maternal relatives who were possessed of means, that they raised pecuniary supplies for him, and sent him to the American colonies furnished with letters from his employer and the rector of the island parish. He landed at Boston; and but that his recommendations were addressed to New Yorkers he might have become an ally of Otis, Quincy and Adams instead of becoming a patriot comrade with Morris and Livingston.

Arrived in New York, he determined to enter a college, and after attending a preparatory school at Elizabethtown, he tried Princeton College, where he proposed to the astonished faculty to be accepted with the understanding that, if he could by extra reading thereafter jump a class, such procedure would be allowed. The college rules forbade such a revolutionary course; and so Princeton lost the opportunity of placing on its catalogue the name of Hamilton beside the names of the Dayton, Ogden, and Frelinghuysen of that era. But King's College, now Columbia, was more complaisant; and with the above understanding he there matriculated and found himself a collegemate with that "Dear Ned" to whom he had addressed his discontent and strivings. With some of the blood of his maternal grandfather, the physician, in his veins, he not only underwent the collegiate course, but attended its medical lectures; and with a possible eye to following his grandsire's profession. But the echo of the first few words of the Aeneid of Virgil lingered in his ears, "Arma virumque cano"; and when the Sons of Liberty invited the clever collegian of seventeen to join them, he thought not of becoming a surgeon to care for the wounded in the approaching conflict, but of fighting among the wounded. He was an orator without knowing that he had the gift of persuasion or the capacity to become eloquent. But he addressed a meeting of patriots in the Fields, the site of New York's City Hall Park, with such effect that the assemblage marveled at the youth and ability of the young West Indian of the neighboring college. He wrote anonymous articles in the patriot newspaper, and issued an anonymous pamphlet endorsing the cries of rebellion that were borne westward from Boston. In time it became known that the young patriot orator of the Fields was this American Junius. War was sounding at the doors of the college. It had to close. While was whispered *leges silent*, he answered the cry of *inter arma*; and raised an artillery company while exchanging the college curriculum for lessons from an European military emigré in engineering and artillery practice. When a British fleet appeared off New York harbor and began operations that in the end were summed up in the bon-mot, "Lord Howe he came in; and lord! how he went out," Hamilton, not yet of age, began that military career which every American generation thoroughly knows. A career that made him spectator of the Battle of Long Island; a participant in the affairs on Haarlem Heights and at White Plains in a brief campaign that won him the acquaintance and admiration of Washington, whom he accompanied on the march to Trenton, where he became aide-de-camp and private secretary to the Commander-in-Chief; and with a brief intermission continued in that service until at Yorktown he heard an American band triumphantly play the Yankee Doodle that an English band had

derisively played some years previously at Concord and Lexington.

That intermission was the result of an incident little known, but which illustrates the tenacity of purpose and quickness of action that were peculiar to Hamilton, and which forms one of the very few littlenesses in Washington's life. It seems that on one occasion the Commander-in-Chief being at a headquarters house, and in an upper story of it, despatched an orderly to Aide-de-camp Hamilton, bidding him come up stairs for sudden duty. Lafayette was met on the stairs coming down as Hamilton was going up. The former had recently arrived and had taken a fancy to the latter that culminated in an historic friendship. They passed a few moments in conversation and parted. The meeting detained Hamilton, and at the head of the stairs, as he reached it, stood Washington, who made a petulant remark to Hamilton, saying (as was his account long afterward to his son John C.), "Col. Hamilton, this delay to my message is inexcusable." The tone was resented on the spot, and Hamilton perhaps too warmly retorted with a verbal resignation, retraced his steps, and retired to the camp where was the regiment of which he was yet colonel. The proverbial mildness of Washington almost immediately returned, and he sent to Hamilton a brother comrade as peace-maker. The lover's quarrel was soon made up, and like the proverbial lover's quarrel led to stronger affiliations. Well may one contemplating the incident — to which perhaps a Napoleon or a Wellington would have given a less pleasant termination under similar circumstances — recall the lines of Tom Moore: —

"Alas, how light a cause may move
Dissensions between hearts that love:
Hearts that the world had tried
And sorrow but more closely tied;
That stood the storm when waves were rough
Yet in a sunny hour fall off."

Perhaps it was the after sorrows soon following the temporary estrangement that closer tied the hearts of Washington and Hamilton.

After his participation in the victory at Yorktown, and while negotiations for peace progressed, he determined to leave the profession of arms and to grasp the mightier pen as a lawyer. He had in 1780 married an accomplished daughter of General Philip Schuyler. The union was a purely love-match. There was already, when peace came, a first-born; and the young father felt not only need of occupation but of support. To himself insensibly, while a West Indian clerk he had been a student of commercial law; while in the army he necessarily became a student of the law of nations. He was always a student of human nature. What wonder, therefore, that in only four months' time he fitted himself for examination as an attorney of the Supreme Court of the state of New York; signing its roll in a July and in the following October acquiring, the dignity of counselor. He at once stepped into an almost phenomenal practice, especially attracting commercial clients, and those having claims against the expiring Continental government. The fame of his college oratory now revived for the thirty-year-old lawyer with his clear, elegant and affluent style of speech and his commanding manner. Of that, and of his personnel at this time, there is of record a pen-picture made by his sister-in-law, Mrs. Catharine Van Rensselaer Cochrane: "He had a small, lithe figure, instinct with life. He stood erect and was steady in gait. His presence was military without the intolerable accuracy of a martinet. His address was graceful and nervous; as indicating the beauty, activity and energy of his mind. He had a bright, ruddy complexion, light-colored hair, a mouth infinite in expression, its sweet smile being most observable and much spoken of, eyes lustrous with deep meaning on glancing with quick, canny pleasantry; and the whole countenance decidedly Scottish in form and expression. His political ene-

mies regretted the irresistible charm of his manner and conversation, and that correct sense of what is appropriate to occasion and its object which as an attribute we call good taste. A mood of engrossing thought would often come upon him even while he trod the streets, when his pace would become slow, his head would be bent slowly downward, and with hands joined together behind him, his lips, as he wended his way, would move in apparent concert with the thoughts moving in his mind." With such a picture in view we may perfectly recall Hamilton as he stood in the corridor of the court-house awaiting his call to the bar or when trying his first case.

It may be digressively interesting to note that the son and namesake, Alexander Hamilton, Jr., was during the fifties a leading member of the New York bar; and so far as comparison with old prints and personal descriptions could go, was a perfect duplicate in face, size and bearing, of his illustrious sire. At the same time he could be often seen in the court-rooms beside another lawyer of note who was known to be a natural son of Aaron Burr, and to resemble the latter most exactly, as well as to have inherited all his shrewdness. Both have long since joined the majority.

The first case above referred to came for him in the minor court of the city, held by the Mayor, and known as Mayor's Court. It had jurisdiction under the colonial charter given to the Duke of York's city; and quite anomalously, although an inferior court, it took jurisdiction of actions in ejectment. His client was a Tory merchant who had quitted New York for England in company with so many Tory refugees whom the traditional ceremonies of New York's Evacuation Day annually bring to mind. He was retained against a widow tenant whom the Attorney-General of the day defended. Hamilton's appearance on the side of wealth and power against a woman, as his debut, has in it no hint of romance; but doubtless his retainer came because the circumstances of the action would infuse unpopularity into a jury-box, and as policy the retainer was best given to an undoubted and favored patriot.

There were no reports of cases in that tentative era of courts of law to tell of his success in the action; and only tradition handed down from his compeers,—notably by James Kent through his son William, whom many graduates of Harvard Law School during the professorship of the latter can recall. Similar traditions tell the later generations that Alexander Hamilton did not want for retainers; and that clients flocked to his modest chambers in Garden Street. His practice was somewhat interrupted by his election to the expiring Continental Congress. But neither his professional nor public duties kept him from an industry with his pen. He early, with John Jay and William Morris, recognized that federal government was on the cards of American destiny; and he began to argue in the newspapers for a union of states, not as a confederacy, but in a National Republic. No lawyer, or even law student, needs to be reminded how earnestly and zealously Hamilton worked to bring about a convention of the states, "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence and promote the general welfare." Nor to be reminded how, after he had composed and drafted the preamble to the Constitution, from which the foregoing is quoted, and while the instrument was pending for approbation and adoption, he penned the letters that posterity reads in the volume of The Federalist. Respecting that preamble: When once called to account for its tautology in the expression "to form a more perfect union," and when asked if perfection itself could bear the comparative word "more," Hamilton retorted by pleading Shakespeare for the necessity sometimes of a double superlative, and quoting the line from the tragedy of Julius Cæsar, "most unkindest cut of all."

When the Colonial Commander-in-Chief became the National Chief, the old aide-de-camp became, as it were, a civilian aide, as Secretary of the Treasury, and took his facile pen into the cabinet, to accentuate a President's message, to indite a marvelous funding scheme, to outline the first protective tariff, and to draft a currency scheme that still attracts the admiration of that financial world which, although ever quarrelling within itself, has no jealousy of Hamilton's fiscal plans.

Was he not in all these matters really studying and practising the art of the conveyancer, who in Hamilton's day and generation was placed at the head of the profession, even beyond the barrister? Through all his career, whether as clerk studying *lex mercatoria* or the law of charter-party, of prizes and prize money, and of the then callow insurance law; or whether practically studying the law of war and international codes; the rights and wrongs of personal liberty and of government under the Constitution, was not Hamilton — what no earnest lawyer ever ceases to be — a law-student?

When, quitting public life at the national capital, he returned to New York, it was to pick up the dropped threads of legal practice, and with them work the loom of litigation. Of this resumption of legal pursuits it is recorded in the memoirs of Talleyrand, who during his exile in America became intimate with and an admirer of Hamilton, that walking late one night apast the small brick house in Garden Street, where Hamilton had resumed his law chambers, Talleyrand saw Hamilton's shadow on the office curtain, busily working at his desk. On the next day he remarked, "Last night I saw one of the wonders of the world, — a man laboring at midnight for the support of his family, who had made the fortune of a nation."

His reputation as a lawyer had now become commensurate with his fame as soldier and statesman; for it was to him that, when John Jay, the first Chief-Justice, retired to diplomacy, the vacant post was offered. That high post which fell for only one year to puisne Justice John Rutledge, of South Carolina, and next to Oliver Ellsworth, of Connecticut, for six years, who made way for the American Mansfield, John Marshall. But Hamilton declined the appointment, feeling that as a jurist his forte was the bar and not the bench. Although he never entered the court as judge, yet for years he seemed part of the court, for every incumbent of that post had occasion at each succeeding term to construe the constitutional work of the man who declined that office. Although never a judge, he lives under judicial decisions as a creator of constitutional law within every volume of the reports of the Supreme Court.

But early in this century the Reporter came into duty in the New York courts, and his collation of cases show Hamilton busily engaged before bench and jury, and oftentimes meeting at the bar Aaron Burr, his very opposite in integrity, rectitude and loyalty, and in freedom from chicanery. Veterans of that period have left on record that it was not alone jealousy politically of Hamilton that inspired Burr's deadly hatred, but also jealousy of him at the bar.

There is fortunately preserved an eulogy of Hamilton the lawyer, made by his early contemporary at the bar, James Kent, who in 1836, when Chancellor, in the course of an oration made before the Law Association of New York, said, "Among his brethren Hamilton was indisputably pre-eminent. He at once rose to the loftiest professional eminence by his profound penetration, his power of analysis, the comprehensive grasp and strength of his understanding, and the frankness, firmness and integrity of his character. In reference to his associates, we may say of him as was said of Papinian, *omnes longo post se intervallo reliquerit.* I have always regarded Mr. Hamilton's argument, near the close of his life, in the cele-

brated libel case of Crosswell, as his greatest forensic effort. The subject of grave and lofty import related to the liberty of the press, and to the right of a jury in a criminal case to determine the law as well as the fact. He never in any other of his cases at the bar commanded higher reverence for his principles or equal admiration of the power and pathos of his eloquence. I also heard him in our mutual youth, in January, 1785, when for the first time I attended a term of the New York Supreme Court, and saw and heard then, in an interesting case brought to a hearing, how he commanded great attention by his powers of argument and oratory. Hamilton was then at the age of twenty-seven. He rose with firmness and dignity, and during two hours was fluent, argumentative, ardent, and accompanied with great emphasis of manner and expression. His speech was marked for a searching analysis of the case, — he was resisting a motion for a new trial made as against evidence where Hamilton at *nisi prius* had obtained a verdict rather by the force of his character and the charm of his eloquence than by preponderance of proof."

Of the *nisi prius* case, out of which arose the argument just referred to, which was ejectment for a large tract of land on the upper Hudson River, his son John C. Hamilton found a trial brief among his father's papers. On its margin, as doubtless written in a spirit of raillery while his opponent (the afterwards Chancellor Livingston) was summing up, appear in Hamilton's characteristic copper-plate style of hand-writing, these sentences: "Recipe for obtaining good title in ejectment: two or three void patents, several old ex-parte surveys, one or two acts of usurpation acquiesced in for a time but afterwards proved such. Mix well with half a dozen scriptural allusions, some ghosts, fairies, elves, hobgoblins and a *quantum suff.* of eloquence."

Hamilton's manuscripts and even his signature, oddly shows that he omitted to cross his "t's" and dot his "i's." Doubtless he contracted this habit when a boyish clerk. But whether the omission was from economy of time or caprice is unknown.

When on one occasion Charles Sumner in the Senate claimed Alexander Hamilton as an anti-slavery man, he was sharply called down by a Southern senator, who begged his authority. The Massachusetts senator sent out to the Congressional Library for the second volume of Hamilton's biography by his son, and read from it how, at the close of the last century, Hamilton founded in New York a Manumission Society for slaves, and obtained the signature of Lafayette to its roll as an honorary member. Also how he never would own a slave, but having hired one as a servant and finding that the master was about to sell the negro, Hamilton bought the slave and immediately manumitted him, but retained him in his service on wages.

In the illustrated volume that was published half a century ago entitled "Homes of American Statesmen," appears a sketch of the celebrated Hamilton country place on the Hudson River Turnpike, running northward from the suburban village of Bloomingdale on New York Island. The site would be about where One Hundred and Thirty-third Street of New York City now runs. The avenue leading from the road to the house — a double one of the olden style, fronted with Doric pillars — was dotted with thirteen poplar trees — the prized tree of the land of his French ancestry on his mother's side — that Hamilton himself had set out, one for each state of the Union. Only a year ago, when the Metropolitan march of realty for investment began to despoil the old Hamilton acres, those trees were purchased in their grand old age by a patriotic ex-congressman, and at much expense and care were uprooted and borne for re-erection elsewhere.

Hamilton's library in this mansion overlooked the Hudson River and the romantic

recesses of Weehawken, that, once an Indian wigwam-ground, nestled beneath the beginning of the Palisades; and often when there writing he could have seen, at an oblique angle to the northward, the very spot where in the duel he met his death at the pistol of Aaron Burr. That tragedy has been so dramatically narrated by James Parton in his life of Burr, that no other pen is bold enough to engage in any new account of it. No lawyer versed at examining evidence can peruse that account, or indeed any reliable narrative of the duel given by Hamilton's contemporaries, without arriving at the conclusion that, so far as goes the malice aforethought which is necessary to the old common law definition of murder, Aaron Burr, in adroitly compassing the quarrel or in preparing the challenge, premeditated the murder of Alexander Hamilton — that demoniacal preamble to his after-crimes of endeavoring to snatch the presidency from Thomas Jefferson by an electoral trick, and of treason to his native country.

Whenever Alexander Hamilton is mentioned in the presence of any member of the bar, and is commented upon, as he most generally is, as alone soldier and statesman, let him not omit to proudly exclaim, "Hamilton was also a member of my profession and an honor to it."

But really, no American can contemplate Alexander Hamilton without applying to him the couplet of Dryden that he paraphrased from Juvenal's third satire:—

> "A man so various that he seemed to be
> Not one, but all mankind's epitome."

LEGAL REMINISCENCES.

By L. E. Chittenden.

XI.

I CANNOT comprehend why anybody should care for a continuance of these "Reminiscences," but so long as, like Oliver Twist, your readers are *asking for more*, perhaps I shall run less risk in going on with them than in inquiring too closely why anybody calls for them. On one point I wish to take the readers of the Green Bag into confidence. I have no imagination — I cannot invent, and when the springs of memory are dry my pen must be laid aside. I supposed they were exhausted long ago. But after a rest they again show some activity, and here are some of the long-buried facts they have recently brought to light.

Longer ago than I care to name, one of our best Vermont judges was invited to one of our cities to become the counsel of a large corporation. It was not the increased compensation, but his increasing years, and the difficulty of reaching his numerous posts of duty which led him to accept the invitation and decline a re-election. We parted from him with regret, for he was a model judge who would have honored the highest court in the Republic. There was great difficulty too, in selecting his successor. We were agreed upon our brother who possessed the most legal learning. He was a fearful special pleader — the one who had made life a burden to his antagonist in Moss *v.* Hindes, mentioned in these reminiscences. But he was the mildest-mannered man at the bar. Would he be able to maintain the dignity of his court and enforce order and obedience upon brow-beating lawyers and their brass-fronted clients? This was a serious question, but we took the risk and he was elected.

He relieved all our doubts in the first case in equity which came before him. A corporation had for many years managed the steamboats on Lake Champlain to the entire satisfaction of the public. It was their claim that they had never lost or injured a passenger, and the cleanliness, discipline and comfort of their steamboats, under Captain Dick Sherman and his associates, were known as widely as the natural beauty of the route, and put much money into the treasury of the corporation.

One season, at the opening of navigation, it became known that this corporation had fallen under the control of Wall-street speculators — that the old officers were to be discharged, and the steamboats were to be run for the last dollar that could be squeezed out of them. A lawless imitator of Commodore Vanderbilt, without his common sense, was made president of the corporation. He did not care for contracts, courts, or newspapers, and as for the public — "let the public be d—d." His exactions were so great that after one season the money was subscribed, a new and faster steamboat was built, her command was given to an old and favorite captain, and she was made ready to run in opposition to the old company as soon as navigation opened.

The president of the old company did not propose to have his profitable monopoly broken up by an opposition. Under some pretense that he had bought some of the new company stock, he sent a powerful steamer with a gang of ruffians, which made fast to the new one and in spite of the resistance made by her officers and crew, took possession and towed her out of the jurisdiction into another state.

It then transpired that the captain of the new steamer, anticipating this act of piracy,

had filed his petition in equity before the new judge and secured an order against the lawless president commanding him to refrain from any interference with the new steamboat, except under a proper judicial order, and this injunction had been properly served upon him. He took the responsibility of seizing the boat in violation of the injunction.

Upon an affidavit of the fact of the seizure and removal, the judge notified the president to shew cause why he should not be dealt with. This notice was also disregarded, and then the sheriff was ordered by the judge to arrest the president and bring him *forthwith* into the judicial presence.

The president came with an array of counsel and followers that filled the court-room. The judge listened to their clamor for a few minutes and then commanded silence. When quiet was restored he addressed the leading counsel for the respondent. "Mr. S.," he asked, "what answer do you make to the petitioner's affidavits of the service of the injunction order and the seizure and removal of the steamer?"

"We have a most conclusive answer," the counsel replied. "We have bought and own the steamboat and removed her because she was our property."

"Did you know of the injunction order?" asked the judge.

"We did, and I advised that it be disregarded for I knew"— He was about to say that the judge would not have granted it if he had known the facts, when the judge interposed —

"That will do, Mr. S.," said the judge, "you will please be seated while I prepare an order," in tones so gentle that they were almost effeminate.

"But we protest against any order! we are here to show cause against it!" exclaimed the counsel.

"You must resume your seat, Mr. S., or the sheriff must take you in charge. The court is engaged and cannot hear you now," came from the judge in the same gentle tones.

The counsel thought it prudent to subside — his client began to look anxious and started for the door. "The presence of the respondent and his counsel is necessary," said the judge. "The sheriff will take both into custody!" Both took their seats. The judge directed the clerk to enter an order in the case. "This order," he said, "directs the sheriff to arrest the respondent who ordered the steamboat removed and the counsel who advised him to violate the injunction, and confine them in the county jail, without bail, until the steamboat is brought back to the place from which, and surrendered to the parties from whose possession she was taken. When that is done the court will hear any questions that may arise. Until the *status quo* is restored, the parties cannot be heard."

They were immediately arrested. The judge would not even hear an application for a few hours' delay in which to bring back the vessel. It was only when others interfered and begged him not to subject an old lawyer to the indignity of incarceration, that a short delay of their actual commitment was secured.

The steamboat was returned and for two seasons ran her brilliant career of competition. The gentle-spoken judge was annually re-elected until he was made governor of the state. I never heard any subsequent doubt suggested of his ability to maintain the dignity of the judiciary or enforce obedience to his orders. I never heard that the enterprise of violating one of his injunctions was tried a second time.

A question in hydraulics once promised to disturb our judicial peace, and but for an accidental observation of an old-time judge, might have cost the State much money. The river system of our State was a Providential arrangement for the beauty of its landscape and the salubrity of its climate. Rills from ten thousand mountain springs united in a brook, which, increasing as it dashed over falls and down rocky precipices,

aerating its waters to perfect purity, became a river, fertilizing rich intervales as it flowed quietly to its discharge in the western lake or eastern larger river. Dams erected at the greater falls gathered the waters into a flume, whence they furnished power for the mills which served so many and such useful purposes.

The building of these dams was a terror to the owners of farms abutting on the river above, who claimed that their obstruction *set back* the water so that it submerged their low lands for so long a time that the newly-planted seed was destroyed, the lands made wet and cold, and their fertility was ultimately exhausted. Actions to recover damages for the injury were commenced, and one of them came to trial before Judge B—— and a jury.

The plaintiff proved his case not only by abutting owners, but by disinterested witnesses, who gave positive evidence that the waters were set back farther and submerged the low lands for a much longer period since the erection of the dam, than ever previously, within human memory. The witnesses were men of integrity who testified to what they believed was the truth. The defense was, that by actual measurement, the lowest point on the plaintiff's farm was ninety feet higher than the top of the dam, between which and the farm of the plaintiff there were several perpendicular falls. This fact did not convince the plaintiff or his witnesses, whose testimony was strengthened by that of two experts in hydraulic science, who testified and made complicated arguments to show that the waters acted just in that way in obedience to natural and inevitable laws. They rejected with scorn the admission that after a freshet, the waters might be drawn off somewhat more slowly, and insisted that the obstruction was transmitted through the ultimate particles of the water, far up the stream and theoretically to its head.

The judge listened to all this evidence with patience and judicial gravity. But when the defense was about to commence its rebutting evidence, he asked,—

"Will your evidence occupy much time, brother B.?"

"We have about twenty witnesses," the counsel replied, "but I hope to have a consultation at the intermission for dinner when we may decide not to call some of them."

"Then we will take an adjournment now," said the judge without a ripple on his solemn face, "to give the counsel time to consider how many witnesses it will require to satisfy this jury *that water will not run up-hill!*"

The stone from David's sling was not more fatal to the Philistine giant, than this observation to the plaintiff's case. Counsellor B—— saw that his antagonist was paralyzed, and called only one witness. The judge submitted the case to the jury under a charge so fair that it was not open to exception, and the finding of the jury, which ended the case and all others of its kind was, *that water does not run up-hill!*

Questions in hydrostatics are sometimes very difficult of solution. I think there are readers of the GREEN BAG who will remember how one of them disturbed the peace of a party of guests at a famous hostelry in the White Mountains some years ago, who were accustomed after dinner to assemble on the broad piazza to discuss and decide questions in moral, political and natural science. They had decided that fossils were not created in the rocks in their fossil form, but were the remains of animals that once lived, when a guest quietly asked whether in a wave there was any lateral movement or only a vertical one, of the particles of water? On this question the discussion was at first earnest and animated and the company was about equally divided in numbers. Then each side, in order to confound the other, sent to the city for the books in which such questions were discussed. But when they arrived it was found that the authorities were divided about as equally as the company. Then it was agreed to settle the question by actual

experiment and the whole party went in procession to the lake to see. Light chips of wood were strewn over the surface, a big stone dropped in and the waves were produced. The waves moved outward fast enough, but the chips only danced up and down. Then the supporters of the lateral movement said that experiment was not fair, and pointed to the waves caused by the wind which floated the chips ashore — to which the adverse party replied that that was the effect of the wind and not of the waves.

After many days' discussion and the loss of much temper, the question was referred to the mover, who was a hydraulic engineer of reputation. He said "*he didn't know;* if he had known, he would not have asked the question."

I do not know whether in that company the question was ever decided. I left it in the full tide of a heated discussion with all the gentlemen for disputants and all the lady guests for auditors. The incident was another evidence of the wisdom of the fathers who founded our Republic and made our constitutions, whose opinion it was that there was no better way of deciding a disputed question of fact than to submit it to a jury of the vicinage, under the charge of a competent, disinterested and impartial judge.

THE GREAT INDIA-RUBBER CASE.

By Andrew Dutcher.

WHILE Daniel Webster was justly called the "Great Expounder" of Constitutional law in this country, and by his services in both Houses of Congress and as Secretary of State, was recognized throughout this country and in Europe as a leading statesman of his time, his ability, although not so conspicuous to the public, was equally shown by his forensic efforts at the bar.

Among the many noted cases in which he was engaged, and one of the most important, and the last that he argued, was that of Charles Goodyear against Horace H. Day, at Trenton, New Jersey, in March, 1852.

The writer, then a young lawyer residing at Trenton, was naturally much interested in hearing legal arguments of eminent counsel, and the opportunity enjoyed in this case, and the incidents occurring during the trial, are remembered with more distinctness, and are more indelibly impressed upon his mind, than any other trial that he ever attended or is likely to witness again; and the time of a young lawyer is not easily employed more profitably, than in attending such legal contests and listening to such arguments.

The action was in equity and was brought in the United States Circuit Court for the District of New Jersey by Charles Goodyear, against Horace H. Day, for infringement of the plaintiff's patents and for an injunction and accounting, and by a decision in the plaintiff's favor, settled the validity of his patents.

The case was argued before Mr. Justice Grier of the U. S. Supreme Court, and Hon. Philemon Dickerson, U. S. District Judge for New Jersey.

The four counsel who argued the cause were James T. Brady and Daniel Webster for Goodyear, and Rufus Choate and Francis B. Cutting for Day. Edward N. Dickerson, then an ambitious and rising young patent lawyer, was attorney of record for Goodyear.

Besides those named, there were many prominent lawyers connected with the case. Among them were Mr. Staples, Mr. Van

Winkle and Mr. Stoughton of New York, and others in Massachusetts, Rhode Island, Philadelphia and other places. It may be no exaggeration to say that a stronger array of legal talent was never engaged in a single case between private parties in this country, and at the head of all confessedly stood Daniel Webster.

The case excited great interest, not only at Trenton, but throughout the State and in other parts of the country, especially in New York and the eastern cities, principally on account of its great importance to the India-rubber manufacturing interests.

The distinguished counsel engaged attracted members of the bar and many others from the localities named, the greatest desire being to see and hear Mr. Webster.

The Court opened in the State Supreme Court Rooms, at the State House, which were then used for holding the United States Court; but those rooms not being arranged for many spectators, when the hearing was begun, the Court adjourned to the County Court House, where the commodious Court Room would accommodate a large audience and it was densely packed during the trial.

A rather amusing incident occurred before the hearing of the case was commenced. In some preliminary skirmishing on the part of the defense, a reply became necessary on behalf of the complainant. His attorney and counsel named were sitting by the side of a long table, Mr. Dickerson in front nearest the Court, Mr. Brady behind him, and Mr. Webster back of the latter. Mr. Webster and Mr. Dickerson both rose simultaneously to speak, but Mr. Dickerson's voice was first heard. He had not seen Mr. Webster rise and Mr. Brady immediately pulled him down and told him that Mr. Webster would reply. Mr. Dickerson apologized profusely to Mr. Webster, but the latter, who had become seated, was evidently angry at what he considered a usurpation of his province by Mr. Dickerson, would not rise again, and the exhibition of anger he showed and the withering look he gave Mr. Dickerson, was beyond description and was doubtless remembered by the latter. Mr. Brady replied for his side, and probably smoothed the matter over, as during the progress of the trial afterwards harmony seemed to prevail and the incident apparently forgotten, or at least overlooked by the senior counsel.

The argument of the four counsel occupied eight days, each one consuming about two, Mr. Webster being slightly the shortest.

Mr. Brady opened for the complainant (plaintiff) and presented that side of the case with his usual great ability. His argument showed that he was thoroughly familiar with the facts appearing in the volumes of printed evidence containing in the aggregate over 4000 pages; that he understood the law pertaining to patents and the points involved, in short, that he had thoroughly mastered the case, and was able to present it to the court in the most convincing manner in behalf of his client. While referring to the testimony and commenting upon it, Judge Grier reminded him that he need only refer the court to such parts of the evidence as were important to determine the case, and said that the court could not be expected to read it all, as they would never have time to do it, but if counsel would call the attention of the court to the material points in it, and inform the court in about what part of the library it could be found, whether in the north, south, east or west side, they would endeavor to look it up during the summer and consider it.

Mr. Brady was followed by Mr. Choate for the defendant. Owing to his position as a public man, his well-known ability as a lawyer, and his high reputation for eloquence and great command of language, by his facility to use and know when to apply all the words in the dictionary, he attracted more attention and curiosity to see and hear

than any of the counsel except Mr. Webster.

His argument was mainly upon the power of a court of Equity to grant a perpetual injunction in a patent case without first having the question of infringement determined by a jury. He insisted that it could not be done, and in support of his position cited elaborately from the English practice and decisions, and taking the ground that the United States courts in equity had no greater equity powers than the English courts had at the adoption of the Constitution, no additional powers in that respect having been conferred upon the courts by Congress. His argument was eloquent and exhaustive, instructive and interesting, and showed great research and learning. It was presented with all the ingenuity the distinguished lawyer and orator possessed, and in the choicest and most expressive language. It seemed too learned and refined to be fully appreciated by the unprofessional spectators, and it also evidently failed to convince or seriously impress the court, as was shown by remarks made by Judge Grier and questions asked by him during the discussion.

The remainder of Mr. Choate's argument was mostly of a pathetic character, endeavoring to make Day a martyr in attempting to show how he had suffered by Goodyear's treatment, and although expressed with all the eloquence and pathos the great orator was capable of, he did not seem to make much impression, and was so neatly turned by Mr. Webster, that whatever effect it had produced was dissipated, and general sympathy was changed to Goodyear.

Mr. Choate was followed by Mr. Cutting, who made the closing argument for the defendant. He went more into the facts of the case and endeavored to sustain Day's claims on the merits. His argument showed careful preparation, familiarity with the facts and thorough knowledge of patent law. He carefully analyzed the evidence, skillfully applied the law, reasoned ingeniously, and on the whole his argument was doubtless as able as could be made on that side, but did not make the impression on the memory that the others did. Mr. Cutting was not much known in Trenton, and not having been in public life like Webster and Choate, did not attract the attention they did, nor to the extent that Mr. Brady did, the latter having several times appeared in the courts of New Jersey, was better known at Trenton and throughout the State.

After Mr. Cutting concluded, Mr. Webster commenced the closing argument for Goodyear. It was known that he was to speak that day, and the great numbers present not only from Trenton and other parts of New Jersey and elsewhere, especially from New York, showed that he was the great attraction at the trial.

The large court-room was packed to its utmost capacity, and it is safe to say that never before or since contained within its walls so many distinguished legal lights as were in attendance, and it is doubtful whether any trial in this country ever drew together more lawyers than were then present.

It seemed that the whole bar of New Jersey, including most of the judges of the higher courts, the state officers and members of the Legislature then in session, came to hear the great expounder who confessedly stood at the head of the American Bar.

Mr. Webster's argument is in print, and it would be superfluous to review it here. Only a few points in it in connection with incidents that occurred during its delivery will be noticed. It is no disparagement of the other eminent counsel to say Mr. Webster was greatest of all. Brady was clear, strong and exhaustive, Choate learned, brilliant, witty and pathetic, Cutting logical, thorough and evidently made the best that could be done with his side, but Webster seemed to combine the qualities of all the others.

He had the subtlety of Bacon, without his craftiness, and the powers of Demos-

thenes without his vehemence or apparent studied eloquence to convince. His mind was as liquid as water, changing with ease from the most profound reasoning and searching analysis to the sarcastic and humorous, and from the most bitter invective veiled in mild language to the most affecting pathos.

No one can do justice to a description of Mr. Webster without having seen and heard him on a great question which brought out all his versatile powers, and after hearing him when he was over seventy years of age, in the last case and one of the most celebrated he was ever engaged in, the writer confesses his inability to do him justice. His commanding figure, fine physique, large head, deep-set, large, lustrous eyes and altogether strongly-marked, expressive features, and his powerful, sonorous and flexible voice, at once commanded attention, but it was his mental power and great intellectual strength brought into full play on a great subject that seemed to overshadow all his other qualities. His manner of speaking was deliberate, was void of vehemence, without much gesticulation, but apparently just enough to emphasize every point made. While his action was not remarkably graceful, it was always appropriate and impressive, and free from any of the arts often used by orators to captivate an audience. He never hesitated for a word, but seemed to get the right one every time. This was illustrated when others were describing what Goodyear claimed, Webster interrupted and said it was the "invention," that covered the whole.

A United States Senator who was in the Senate during Mr. Webster's last five years there, and present during this argument, told the writer that when he heard Mr. Webster talk on ordinary occasions he did not seem above the general range of senators, and it was only on great questions and subjects that his powers were brought out, and it always seemed that they were never exhausted, but if the occasion required he could be still stronger. He said he never had an idea what power there was in a man until he heard Webster's reply to Daniel S. Dickerson who charged him with corruption in settling the northeastern boundary question when Secretary of State under Tyler. He said the whole Senate sat aghast as if they expected some thunder-clap to break in their midst.

When Mr. Webster came to Trenton, it was said that he knew very little of the case, and that he picked it up and arranged his argument from Mr. Brady's comprehensive and exhaustive opening, and from consultations and close application with his associates before the other side closed.

The arrangement of his argument, as well as the matter of it, shows how thoroughly he had mastered the case, how skillfully he arranged his points and how ably he applied his great legal knowledge.

His allusion to Goodyear's sufferings and the devotion of his wife, in the early part of his argument, brought tears to many in the court-room, and set a sympathetic current in favor of Goodyear, and followed by his effective reply to Choate's effort to gain sympthy for Day, won the case for the former so far as the audience was concerned.

By the long labor and difficult and protracted experiments of Goodyear in perfecting his inventions, he became greatly impoverished and so involved in debt that he was confined in the debtors' prison in Boston.

Mr. Webster depicted most graphically the poverty, reproach and suffering which Goodyear underwent, in his intelligent, patient, persevering efforts to produce in the manufacture of rubber a new and useful result, for a period of ten years; he said, "It would be painful to speak of his extreme want — the destitution of his family, half clad, he picking up with his own hands, little billets of wood from the wayside to warm the household — suffering reproach — not harsh reproach, for no one could bestow

that upon him — receiving indignation and ridicule from his friends," and after all, writing in a good spirit and cheerful vein, an affecting letter from the debtors' jail in Boston.

In speaking on this matter further of Goodyear, he continued as follows: "He says it is as good a lodging as he may expect this side the grave; he hopes his friends will come and see him on the subject of India Rubber Manufacture; and then he spoke of his family and of his wife. He had but two objects, his family and his discovery. In all his distress and in all his trials, she was willing to participate in his sufferings, and endure everything, and hope everything; she was willing to go to prison if it was necessary, when he went to prison; she was willing to share with him everything, and that was his only solace.

"May it please your Honors, there is nothing upon the earth that can compare with the attachment of a wife; no creature who for the object of her love is so indomitable, so persevering, so ready to suffer and to die. Under the most depressing circumstances, woman's weakness becomes fearless courage; all her shrinking and sinking passes away, and her spirit acquires the firmness of marble, adamantine firmness, when circumstances drive her to put forth all her energies under the inspiration of her affection."

While depicting Goodyear's sufferings and making the beautiful allusion to the devotion of his wife, Mr. Webster had the advantage of Goodyear's presence in his wasted appearance, bent form and with his white locks, which added to the effect in his favor, while Day, younger, robust with his apparent thrift, was not calculated by his appearance to gain favor with the spectators.

Mr. Webster reviewed the material parts of the testimony very thoroughly and dissected that of the defense with great care and ability, showing its fallacies, contradictions and want of credibility in the most conclusive manner. Among the witnesses on that side whose testimony was considered by the defense important in their favor, was that of Richard Collins of Baltimore, who claimed that as far back as 1833 he had invented the same thing in regard to vulcanizing rubber that Goodyear claimed by his invention.

Mr. Webster's ability, sarcasm, ridicule and humor were used effectively in dissecting Collins' testimony and showing its worthlessness.

After pursuing him at some length, Judge Grier interrupted him and said: "Mr. Webster you need not trouble yourself further with the testimony of Richard Collins." The learned Judge said further, that he had tried a great many patent cases and he had never tried one but some *feller* had come forward and sworn that he had invented the same thing in some garret in Boston, New York, Philadelphia, New Orleans or Baltimore and lately all those *fellers* came from Baltimore, and that counsel need not trouble himself with any such testimony as the court would not pay any attention to it.

Mr. Webster in his usual impressive manner said "I am very much obliged to your Honor for I wish to abbreviate my labors in this case, as well as those of your Honor. It seems to be your Honor's opinion that I may let Mr. Collins go, and I propose to send Mr. Elisha Pratt and Mr. Stoddard to bear him company on his way. I shall say no more about them."

Mr. Webster's powers of invective were shown in unexceptionable language in commenting on Day's course, showing the latter's inconsistencies, his falsehoods and attempts to defraud Goodyear by every device that his fertile mind could produce.

It did not seem that anything more scathing and severe could be said, and the full force and effect of what was said can be appreciated only by hearing Mr. Webster's voice and seeing his manner and the expression of his face. No written description can do justice to the occasion.

All that has been stated in regard to this great argument gives a very meagre view of its strength and brilliancy. It was crowned throughout by the most profound reasoning and correct application of the law, and the highest encomium that can be placed upon it is, that it was Websterian from beginning to end.

It was the last legal argument he made and was a fitting close to his great and brilliant professional career.

At the commencement of Mr. Webster's argument he said, "if I should detain the Court by the part which I have to perform in this discussion, for any great length of time, I hope the Court will believe that what I have to say is long only because I have not had time to make it short."

His close was as follows: "I have now gone through this case, and it may seem that I have done so too much at length. I find my apology in the importance of some of the topics it involved. I have to express my thanks, in common with the other gentlemen on both sides of this cause, for the kindness and indulgence awarded me by your Honors. I feel how many obligations I am under in this respect. And as this is the first time that I have presented myself professionally in the State of New Jersey, and as I have cultivated a very long acquaintance with the good people of this State, more intimately than with those of any other State, with the exception of that in which I have so long lived, and as I have great regard for them, I am not willing to leave this performance of my duty, and to leave the State, without congratulating the citizens of New Jersey, with the certainty, that while this tribunal shall continue to be constituted as it now is constituted, the administration here of the laws of the United States will be such as to secure all the people in the full enjoyment of their constitutional and political rights and to give them that happiness so felicitously expressed in the wish of Lord Coke 'of living always under the protection of the law and the gladsome light of Jurisprudence.'"

It may be said by some who chance to read this article, that for an account of the incidents of the great trial, there is too much of Webster in it. If such is the case, the only excuse offered is because at the time he seemed to tower above the others, and made the most lasting impression on the mind of the writer, of what constitutes the model lawyer.

While the others were all eminent in their profession, and presented the case with great ability, it seemed that in all the qualities that make what is called a first-class "all around lawyer" Mr. Brady came nearest to Mr. Webster, although he had not the eloquence and brilliancy of Mr. Choate, nor did he excel in the close reasoning powers of Mr. Cutting.

The manner in which the whole case was conducted, was a model to follow. The dignified courtesy of the court, the respectful manner of the counsel to the court and towards each other, in short the whole conduct of the trial, was calculated to impress a young lawyer with the highest type of a lawyer and of professional ethics, which might be profitably imitated, and, in the conduct of a trial, observed by our courts and members of the bar at the present time to a much greater extent than now exists.

THE SUPREME COURT OF MAINE.

III.

By Charles Hamlin.

CHARLES WESLEY WALTON, the senior associate justice both in years and term of service, was born at Mexico, Oxford County, Maine, December 9, 1819. He is the son of Artemas G. and Abigail (Stevens) Walton, and their third child and only son. His early education, besides the little acquired in the common school of those days, scanty enough at the best, was fourteen years in a printing-office at Dover, New Hampshire, and Paris, Maine, and in Boston. He was thus bred a printer, and it was there that he got a taste for study and knowledge that, like Franklin, led to a desire to improve his condition in life. Accordingly he began the study of law, was a student in the office of the late Isaac Randall, of Dixfield, and having been admitted to the Bar in 1843, was his partner for a while. Besides practicing law he served in all of the town offices, clerk, moderator, agent, selectman, collector, treasurer and school committee. As a school teacher his seven years' experience well fitted him for the duties of the latter office, while the practical acquaintance he obtained of town business in all of them became useful to him both at the bar and on the bench. It must not be supposed that he found the profession lucrative in those times, for he desired to be elected clerk of courts, the income and emoluments of which were tempting; but fortunately for him he was defeated in the election, and so his talents were not buried in a merely clerical place. He was soon after, in 1847, made county attorney, and served as such four years. His ability and success at the Bar brought him in due time the desired results, and demanded a wider field for practice, and he therefore removed to Auburn, Androscoggin County, in 1855, and again became county attorney in 1857. In 1860 he was elected to the Thirty-seventh Congress, succeeding Hon. John J. Perry. He was placed upon the committee of private land-claims as a recognition of his standing as a lawyer. After serving in Congress something more than a year, he accepted an appointment to the bench of the Supreme Judicial Court, May 14, 1862. This appointment, made by Governor Washburn, has been continued without interruption to the present time, a judicial life of more than thirty-three years, and in excess of any other judge who has presided in this court. During this long term of service on the bench, Judge Walton has had as associates, who no longer live, Chief Justices Tenney and Appleton, Associate Justices Rice, Cutting, Davis, Goodenow, Kent, Dickerson, Fox, Barrows, Danforth, Tapley, Virgin and Libbey.

To have made himself one of the ablest lawyers in the State, to have gained a seat on the floor of Congress, and to have won and retained the confidence and respect of his associates on the bench, many of whom have a national reputation, would seem to have filled the measure of the printer boy's ambition; but a true estimate of his place in the history of the Maine Bench shows something more — a strong judge, of marked individuality, and one who has given positive additions, and of permanent value, to the body and growth of the law. And an inquiry into the source and cause of Judge Walton's exalted judicial position will prove interesting. It is not what is called a liberal or college education, however desirable it may be as regards success in the world, that gives a man the confidence and favor of the community, or advancement to posts

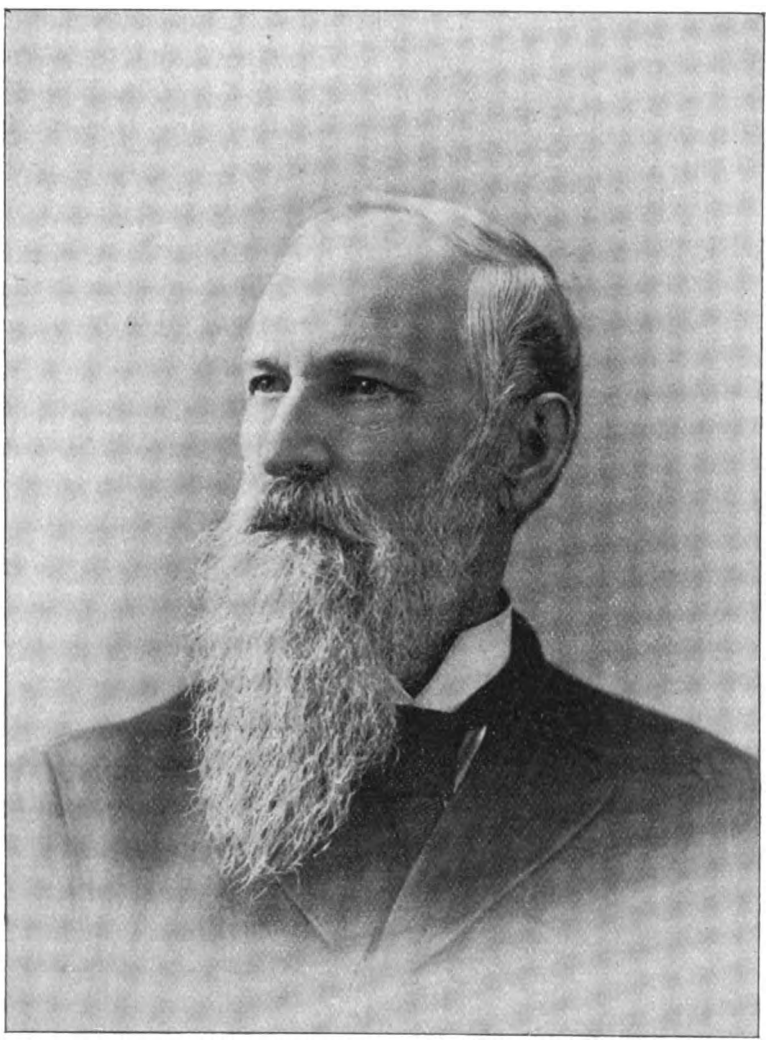
of honor. It is native talent, reliability, perseverance, and an indomitable will that bring him to high places. A contest continually goes on, especially in this country, between an academic and self-education — the education that comes from without and the education that comes from within.[1] Over-education has a tendency to dissipate, scatter the strength of intellect, and the much cultivated youth, although holding high rank in the scale of proficiency and amount of knowledge, is liable on entering his professional life to continue to lean rather than to lead, and so take a secondary place in the struggle for distinction. On the other hand, the independent youth without external advantages, brought up in the school of stern necessities, whose life is a continued contest with difficulties, such an one, from the habit of self-reliance, becomes more competent to direct others, and to wear more easily offices of trust and responsibility.[2] It is remarkable how many of our distinguished men have been self-educated, or at least without college education. Franklin was a philosopher, Lincoln a statesman, Patrick Henry an orator, but not by the grace of classical education. In this field of wholesome competition between the well-taught and the self-taught; between advantages on the one side and energy on the other; between early development under assistance, and slow maturity under difficulties — a condition that need not be regretted — it is easy to perceive from which school Judge Walton was graduated. It is obvious, too, that such an education has been useful, because it was simple, limited, practicable, acceptable, and adapted to his wants, and brought home to his particular case by *subdivision* and *selection*, or, to use the words of Sir Arthur Helps, "by working in a well-worn groove." He has ever devoted himself entirely to the business of his office, nor suffered his time and attention to be distracted by other pursuits. Then add to all these things that he is industrious, firm, prompt, frank, self-possessed, and not given to wasting his dignity by an over-refined delicacy that often weakens and seldom adds to the usefulness of a judge.

When Judge Walton went upon the bench, admission to the Bar could be obtained by the production of a certificate of good moral character from the municipal officers, and the payment of twenty dollars into the county treasury. This was a great change from the previous conditions that required not less than three years' study with some reputable attorney and counselor, followed by a rigid examination. It was of this change that Judge Cutting spoke, when in Simmons *v.* Jacobs, 52 Maine, 156, he said with his inimitable sarcasm: "We do not impeach the omnipotence of the Legislature for creating attorneys, as the world was created out of nothing." A loose state of practice then prevailed among some attorneys thus admitted to the Bar, and it is not strange that to the orderly and methodical young judge it proved to be irksome and unbearable. He began at once to remedy the situation. It was not an easy or agreeable task, but in the end he succeeded by the use of suggestions, advice and admonition. His own promptness naturally led him to prefer ready lawyers, and those of resource who followed his suggestions. Says one of them after nearly thirty years' experience: "He is at once the best judge for young lawyers, who pay him the deference he deserves, and the most patient to show them and tell them, direct the issue and keep them in line, that I ever saw; while those that are opinionated, pert, and think they must evade his questions and not observe his advice, have found difficulty in practicing before him."

To know the Judge at his best requires

[1] Bigelow, Limits of Education.

[2] Lord Jeffrey, in his review of Franklin's Works (Edinburgh Review, 1806), makes the following remarks: "Regular education, we think, is unfavorable to vigor or originality of understanding."



CHARLES W. WALTON.

some familiarity with his written opinions, beginning with the case of Wills *v.* Greely, 50 Maine, 78, and extending through thirty-six volumes. They are all marked with one quality, clearness and brevity of statement. Not a waste word can be found in one of them. As has been said of Tacitus: "The love of brevity distinguishes him from all other writers. . . . and was, perhaps, carried farther by that constant habit of close thinking which could seize the principal idea and discard all unnecessary appendages." But the criticism made of Tacitus' writings is not true of the Judge,— that "one continued strain of studied brevity fatigues the ear and tires the reader by an unvaried and disgusting monotony." The late Judge Libbey, speaking of his terseness, in which he thought he excelled all other judges, said he admired it because he prized lucidity above all other qualities, both in speech and writing.

In making a selection of his opinions, which are recognized for their learning and ability, as well as extensively cited and followed in other courts, mention of the following cases will suffice the present purpose: Wyman *v.* Brown, 50 Maine, 139, holding that an estate of free-hold may commence *in futuro*; State *v.* Wright, 53 Maine, 328, deciding that jurors are not judges of the law as well as of the facts; Smith *v.* Morrill, 54 Maine, 48, relating to blank indorsements of promissory notes, and the admissibility of evidence to explain them; Hatch *v.* Atkinson, 56 Maine, 324, showing the necessity of delivery in cases of a gift, *donatio causa mortis*, and a much quoted decision; Goddard *v.* Grand Trunk Railway, 57 Maine, 202, asserting and vindicating the doctrine of punitive damages. The simple reading of these few cases, taken at random, will demonstrate how this learned judge has devoted a life to the study of fundamental principles which in the end will irresistibly control in the administration of the law. The intrinsic value of these cases, now become precedents of authority, is enhanced when it is remembered that a great deal of force is added to them by having a man of force and likelihood behind them. It must not, however, be supposed that the Judge has entirely confined himself to "volumes which you must count by hundreds, by thousands; filling libraries, exacting long labors, the labors of a lifetime, abstracted from business, from politics." His practical knowedge of business is of daily use and leads inevitably to sound conclusions, without reliance upon legal precedents alone, as in the case of the Franklin Co. *v.* Lewiston Institution for Savings, 68 Maine, 43, in which he lays down the safe and conservative rule that savings banks cannot purchase stock in another corporation on credit by giving its note therefor.

For the benefit of the current reader, the following extract from the case of Townshend *v.* Howard, 86 Maine, 288, is produced to exhibit the terseness of his opinions already alluded to:—

"Walton, J. The question is whether a will made by the late George H. Townshend was afterwards legally revoked. We think it was. A will can be revoked in whole or in part, by cancellation or obliteration. R. S., c. 74, § 3. To cancel is to cross out. To obliterate is to blot out. The former leaves the words legible. The latter leaves the words illegible. By either method a will can be revoked in whole or in part. If that which is essential to the validity of the whole will is cancelled or obliterated, *animo revocandi*, the whole will is revoked. If only a single clause is so cancelled or obliterated, then that clause only is revoked. And such cancellations or obliterations are as effectual when made with a pencil as when made with a pen." His pithy remark in Greenleaf *v.* Grounder, 84 Maine, 51, needs no explanation. "And the fact that the witness was not called at the former trial, and that, so far as appears, no search was made for him, or

efforts made to procure his testimony, confirm us in the belief that his testimony is not true, and that it is *newly invented, not newly discovered.*" In the same volume, at p. 592, is the opinion in Grotton *v.* Glidden, an action of trespass for assault and battery. The Saxon words in the following portion of the opinion will not be easily matched in any of the reports:—

"In the present case, the evidence shows that the plaintiff and the defendant had been on unfriendly terms for many years. The defendant had fastened upon the plaintiff the name of 'Hog Back,' and had expressed great satisfaction on learning that the latter was about to move out of the neighborhood. The plaintiff had called the defendant a hypocrite in religion, and expressed a long-felt desire to punch his head. They met in the highway, and the result was, first an altercation and then a fight, each one being as ready and as willing to enter into the fight as the other. The plaintiff got the worst of it. The defendant testified that he escaped with no other damage than a torn shirt-collar. The plaintiff went home with two black eyes, a scratched face, a bruised head, a lame back, and a kick on the lower part of his abdomen, which caused him to pass bloody urine. Surely if the defendant escapes with a verdict against him of only fifty dollars, he may think himself lucky. His plea of 'self defence' makes quite as feeble an impression on the court as it seems to have made on the jury."

He has never drawn a dissenting opinion. He generally succeeds in convincing those opposed to him unless he becomes convinced himself of error. His manuscript is the delight of the reporter and the joy of the printer. It is clear and plainly written as copper-plate, and the rules of the composing-room never forgotten. This will be better appreciated when it is stated that all his opinions are carefully copied by himself from the original for the use of the reporter and printer.

Biographies are pleasant reading, especially those of great judges which are filled with the incidents of court life, relieving its monotony and tedium with flashes of wit and humor which reveal the agreeable side of the stern judge. It is to be regretted that more of such incidents in the life of Judge Walton have not been preserved, for his life abounds in them. Here is the monograph of a shrewd, observing juryman:—

"Judge Walton at seventy-four is right in his prime. His ear is quick, his eye is keen. He runs the whole show so quietly that nobody seems to know that he is the moving spirit. He finds time to read the newspapers while court is sitting. When he is reading the papers he sometimes says to a witness without looking up, 'You need not answer.'

"He has the dignity that becomes a judge of the Supreme Judicial Court of Maine, but he sometimes enlivens dull proceedings by sallies of wit and humor. He talks to the boys in the bar just as a big, good-natured boy would talk to a group of little youngsters. When he says to the lawyers, 'proceed,' or 'stop,' or says 'gentlemen of the jury,' the tones of his deep voice are musical, and what he says is expressed in the clearest-cut English. The clerk's desk is in front of the judge's seat, and the bar is in front of the clerk's desk. The bar is not that kind of a bar that Tom Watson said was in the basement of both ends of the capitol at Washington, but is a pen for the lawyers, where they have their books, writing materials, chairs and table. When two of 'em get to disputing, a word from the judge quiets the disputants. The rest all grin and the proceedings go on."

How "proceedings go on" sometimes when attorneys are absent is thus told by the daily scribe of the press:—

"Judge Walton is on the bench of the Supreme Court here this term, which is the same as saying that more good things have been said from that bench this week than

will be heard there from the end of the present term until Judge Walton returns to the Portland court-room again.

"Tuesday, when the work of assigning cases was in progress, a case was called with which Hon. A. A. Strout is connected, and the opposing attorney said: 'If it please the court, Brother Strout is fishing.'

"The court looked grave, and another attorney said: 'He's after a bear.'

"'I suppose,' said the court, 'that you mean that he is on his vacation.'

"'Yes, your Honor.'

"'This matter of a vacation has grown up within the past few years,' said the court. 'We didn't know the meaning of the word vacation a few years ago. I can understand that some people may take a vacation, but I do not understand how it is that professional people can do it. How doctors and lawyers and ministers can go off, leaving their professional business to look after itself, I am not able to comprehend."

"The case was continued, however, and Mr. Strout's interests will not suffer because of the fact that he is off fishing, with strong designs on a bear."

And the same writer tells how the Judge talks upon the relations of the press to the court: —

"Wednesday morning, after the cases were disposed of and all motions heard, Judge Walton looked at the reporters and astonished them by saying, 'Now, gentlemen of the press, can I do anything for you?'

"'No, your honor,' replied one of the scribes, feeling that something must be said.

"Then the court proceeded to give the reporters a very bright, if sometimes sharp, lecture on their duties as the court looked at the matter, and of what ought and what ought not to be printed.

"Then, half relenting, Judge Walton closed by saying, 'Well, I know you are all in competition and while you'll applaud me, you'll all go out and keep on in your present ways. You have to give the public what the public wants to read.'

"There are few brighter men in this State than Judge Walton, and there is certainly no more upright and honored judge on the bench."

A pure, grim humor sometimes pervades his replies. He had imposed sentence upon a criminal convicted of a flagrant offense, who was well along in years and infirm in health. The sentence seemed severe to members of the Bar present. One of them, on account of his prominence, feeling on easy terms with the court, said to the Judge that the sentence was manifestly too long. "He won't live a quarter of the time." "Well," replied Judge Walton, "I don't want to be too severe. I will change it and make it for life, if you say so."

One time in the lobby an ornamental member of the Bar, in order to show that his professional income was very large, was stating to some legal brethren, and his conversation being partially directed to Judge Walton, "It seems rather a large story to tell, but my expenses are six thousand dollars a year; it costs me that much to live." The Judge replied instantly, "Brother S., it is too much; I wouldn't pay it; it isn't worth it."

Nothing pleases the Judge more than direct, truthful answers to his questions. Sam F. was drawn to serve on the grand jury, and desiring much to get excused, procured his friends and members of the Bar to intervene for him, but without success. As a last resort he applied to the Court himself. The Judge inquired what his business was and what reasons he had for being excused. Sam naïvely told him he was steward of the Commodore Club, at Moose Pond, and that he had been obliged to leave a party of its members, who had just arrived from Boston, in order to be present in court. To the surprise of all

present, the Judge began to ask about the club, its efforts to re-stock the pond with fish, and finally asked, "Are they having a good time?" Said honest Sam, "Yes, they be." Then said Judge Walton, "I'll excuse you till the next term. I wish I could be there myself."

The following pen-portrait is appended for the reader's benefit, sketched during the Judge's late session in York County:—

"A man tall and spare, five feet and eleven inches perhaps, erect and dignified carriage, high, bold frontal development, thin gray locks, carefully combed, a long, narrow, iron-gray whisker and moustache, dark blue eyes, rather small, sallow complexion, and large, knotty hands. Dressed in priestly black with coat of the regulation Prince Albert pattern, his costume is complete with a high standing collar and four-in-hand black tie. In the examination of books, documents, etc., a pair of spectacles lend added dignity to his rather pleasant features, and when upon the street a high silk hat of extreme glossiness adds not a little to the judicial whole of the man."

In 1885 he was honored with a degree of LL.D., by Bowdoin College.

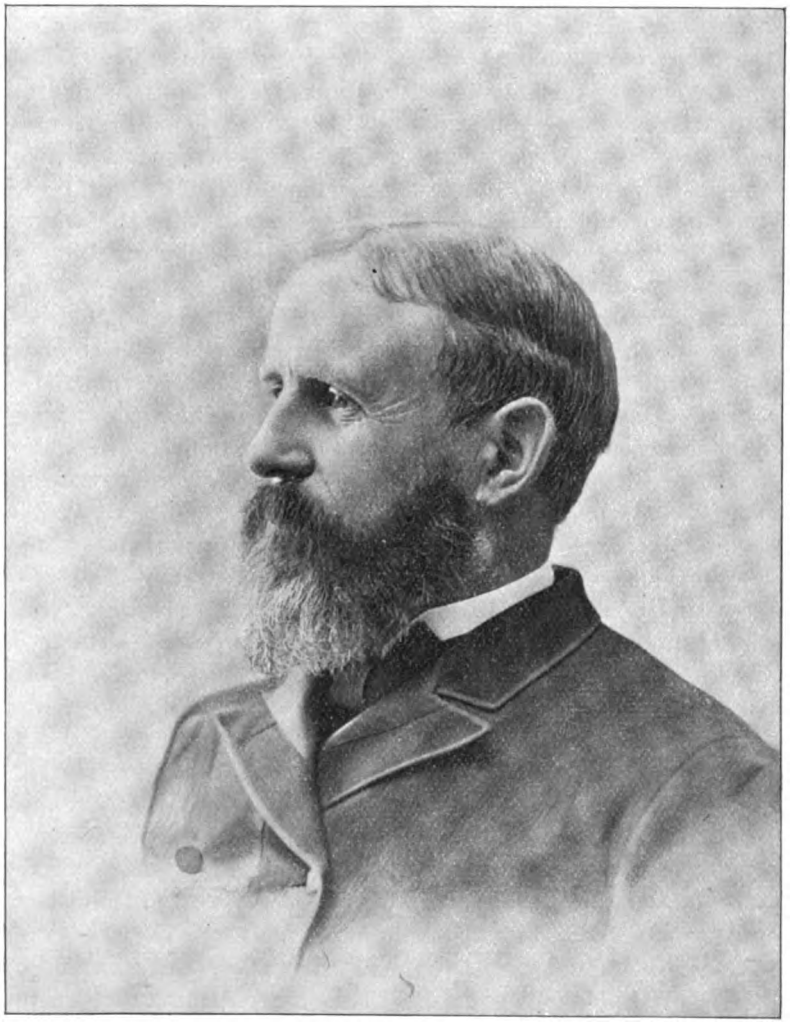
LUCILIUS ALONZO EMERY, the second associate justice, was born at Carmel, Penobscot County, Maine, July 27, 1840. He is the only son and first-born of James and Eliza (Wing) Emery. His father removed to Hampden in 1850 and was prominent as a merchant, ship-builder and town officer. On his mother's side the family is noted for their love of intellectual pursuits and for longevity. Having fitted for college at Hampden Academy, he entered Bowdoin College, where he was graduated in 1861, with a class distinguished for its members becoming eminent as college presidents, professors, soldiers and lawyers. He began reading law with Hon. A. W. Paine, Bangor, an old, distinguished practitioner, and was admitted to the Penobscot Bar in August, 1863. In the following October he opened an office in Ellsworth, Hancock County, where he has ever since resided. His sound legal attainments and ability in the trial of cases were soon recognized, for he was elected county attorney in 1866, and before the expiration of his term, in 1868, he was invited by Hon. Eugene Hale, then entered upon a Congressional career, to become his partner. This partnership lasted fifteen years and was dissolved only by the promotion of Judge Emery to the bench of the Supreme Judicial Court. Besides a fine practice, in the meantime he was a member of the Maine Senate in 1874–75, and in 1876 was elected attorney-general of the State by the Legislature, and serving the State as such the next succeeding three years. He was again elected, in 1880, to the State Senate, and during the session of 1881–82 served as chairman of the joint committee on the judiciary, the leading committee in the Legislature. In the fall of 1883, he was so generally recommended by the Bar of the State, that Governor Robie appointed him an associate justice. His appointment bears date October 5, 1883, thus succeeding Judge Peters, who had become the Chief-Justice. In 1889 he was elected professor of medical jurisprudence in the Maine Medical School at Bowdoin College, a chair formerly filled by Chief-Justice Tenney and the late Judge Charles W. Goddard.

His legislative labors and experience are notable for his efforts to ameliorate and simplify the law and to extend the equity powers of the court. His extensive practice had well fitted him, and he had the rare courage, for a lawyer, to attempt and carry through the changes which seemed to him to be required. During his first year in the Senate, he procured the enactment of a bill permitting the amendment of writs to cure the misjoinder or nonjoinder of plaintiffs. It remains a part of the permanent legislation of the State, and is embodied in R. S.,

c. 82, § 11. At the same session he advocated, as member of the judiciary committee, giving the court full equity powers, which it now has (R. S., c. 77, § 6, clause xi). At the following session in 1875, he carried through the Senate a bill to abolish imprisonment for debt. The bill was defeated in the House, where it was presumed that so humane legislation would be most popular, but ten years later imprisonment for debt was abolished almost without opposition. His favorite measure was thus vindicated, — he then being, perhaps, a little in advance of the times. When chairman of the Senate judiciary committee in 1881, he was largely instrumental in framing and carrying through the Legislature the Equity Procedure Act, to make proceedings in equity more simple, speedy and effective. The great change, found in R. S., c. 77, § 10 *et seq.*, was this: Under the old system each justice of the court was only a master in chancery, and the only chancellor was the law court. Under the new system each justice is a chancellor, and can make final decrees. The law court thus becomes only a court of appeals. The new Chancery Rules adopted by the court at the May Term, in 1890, to carry into effect this new statute with a subsequent revision, were framed by Mr. Justice Emery, and his associate Mr. Justice Haskell. During his term of office as attorney-general he conducted the prosecution of two important and celebrated cases, one civil and the other criminal. The first is a railroad tax case under the name of State *v.* Maine Central R. R. Co., reported in 66 Maine, 488. A statute imposing a state tax on railroad franchises had been passed, and it was resisted by the older railroads. He brought suit against the Maine Central in the State Court to recover the tax assessed upon the company, and the action was sustained by the court in an elaborate opinion by Chief-Justice Appleton, already alluded to in the sketch of that judge, *ante*, p. 510, as one of his leading opinions. The case was removed by the railroad company on writ of error to the United States Supreme Court, which court also sustained the action and the claim of the State. It is reported in 96 U. S. 499, The statute was a new one, and the case a leading case. Attorney-General Emery was the pioneer counsel. The other case, the trial of Edward M. Smith at Ellsworth, for murder, before Peters, J., was a remarkable one. The murder was a shocking tragedy, and the whole community was interested in the trial, which lasted fourteen days, the evidence being wholly circumstantial and consisting of a large number of circumstances of great variety.

The crime was committed in a house occupied by Mr. Trim, his daughter, and a little grand-daughter, in a country district, in Bucksport. The house was discovered on fire in the early hours of the morning, and was burned to the ground. It was found that Mr. Trim and his daughter had been murdered, and the house fired to burn their bodies, thus concealing, for a time, the real cause of their death. The defendant was convicted after an able and almost indomitable defense. The Attorney-General was highly commended for his prosecution of the case in behalf of the State.

It will thus be seen that Judge Emery went upon the bench well fitted by his education, practice and experience to make an honorable career for himself as well as render good service to the State. His ambition lay in this direction, and he brought with him, besides, a disposition for unremitting labor so necessary to the judicial office. His ideal of the judicial functions and responsibilities is high and dignified. Himself personally polite and a lover of correct deportment, he encourages their practice by others, since politeness and good deportment render the administration of law easier, enhance its usefulness, and add weight and influence to the respect that is due to the court. He believes the law grows, and with it should



LUCILIUS A. EMERY.

grow dignity in its practice. Those who do not respect themselves and the public position they occupy are less likely to attain a successful administration of their office. He has made a close study of the habits and customs that prevail in other and foreign courts, and has observed the ease and comfort of some English courts, such as arise from the single daily session, and the use of the gown. As regards the latter, if not the former, I do not doubt that his associates during the long, heated terms of the law court in hot weather, would often gladly agree with him to adopt them. He is social and agreeable, fond of his friends and "their adoption tried," and pleasant in his manners while presiding on the bench. He never shows temper. His rulings in the progress of a trial are prompt and fearless. His charges to the jury are clear and ample, the issues well defined, and the jury are unerringly brought to the point at issue between the parties without intrenching upon their province to find the facts. It must not be supposed, however, that he is devoid of feeling or interest, for nothing escapes his observation. Holding the scales of justice evenly balanced, it is his calm judgment and reason that are his sole guides. He is commended by able lawyers with extensive jury practice for his method of addressing the jury, which he has adopted after much reflection and inflexibly adheres to. Hence exceptions to his rulings and directions to the jury embody only legal propositions for revision by the full bench.

Believing the law is a science he is a diligent reader of all that pertains to it. While administering the "whole learning of the law," he does not hesitate to favor its reform when his judgment and his experience concur in the change. Some of his best service to the State, before going upon the bench, was his advocating the act giving the court full equity powers. That service he has since supplemented by sitting as chancellor and in his written opinions in equity causes, reference to which are made below.

He never indulges in levity or repartee on the bench. With him the trial of a case is serious business, requiring thoughtful attention of all concerned, — himself attending only to the "trepidations of the balance," that "justice to the parties shall be administered freely and without sale, completely and without denial, promptly and without delay." When occasion calls for reproof it is generally in the form of a suggestion; when addressed to the whole bar it is more pointed and direct. In a recent term at Auburn, while hearing petitions for divorce, and which he does not grant without good and sufficient cause, he remarked to the bar: "You can't expect much from me on the ground of failure to support. You better prove desertion." The court was no false prophet. Only one attorney relied on that clause, and he didn't get his client untied. During the proceedings the Judge complained that they didn't have witnesses enough. "I see you have gotten into the habit of bringing only one witness," he remarked to the assemblage of lawyers. "Well," said one, "different judges differ. We have usually had two." "Well," said Judge Emery, "put me down for three."

It is universally admitted that Judge Emery writes good opinions. His reputation as a jurist might safely be measured by this part of his work, for he has certainly done his full share. They cover a wide field, embracing many and different branches of law and equity. His style is simple and natural, readily understood, and the process of reasoning easily followed. He begins with a comprehensive summary of the facts, then follows the statement of the issues, and lastly his conclusions and the reasons for them. His statement of the case rarely leaves anything for the reporter of decisions to do in the preparation of the case for the book beyond the head-note. He does not cite many decisions, and frequently none at all.

In making a selection of his opinions that have become permanent both for ability and importance, I think the general reader will find the following cases amply sustain his judicial reputation. Eames *v.* Savage, 77 Maine, 212, discussing constitutional law and deciding that executions against towns may be issued against and levied upon the goods and chattels of their inhabitants, and held to be due process of law. Andrews *v.* King, 77 Maine, 224, was a petition for certiorari to quash the proceedings of the mayor and aldermen of Portland in removing the city marshal from his office. The opinion discusses and decides the nature, powers and procedure of special courts in such cases, holding that a hearing by the aldermen alone, the mayor being required to sit on the hearing, is not sufficient, even if by the officer's consent. Boston & Maine Railroad *v.* County Commissioners, 79 Maine, 386, vindicating and sustaining the application of the police power of the State in requiring railroads to build and maintain townways and highways, within the limits of a railroad location, where the way crosses the track at grade, although the railroad charter provides that it is not to be altered, amended or repealed. Ayer *v.* W. Un. Tel. Co., 79 Maine, 493, holding that the rule requiring telegraphic messages to be repeated at the expense of the sender as a stipulation against the company's mistakes is void, being against public policy.

McPherson *v.* Hayward, 81 Maine, 329, deals with the redemption of an equitable mortgage and is his first published decision upon this branch of the law after full equity powers had been conferred on the court. The case was ably argued by counsel for both parties, and subordinate questions of laches and parties are considered by the court. Thorndike *v.* Camden, 82 Maine, 39, defines the powers of towns over money in their treasury, and discusses the duties of assessors and collectors of taxes. Symonds *v.* Jones, 82 Maine, 302, contains an extensive exposition of trade-marks and labels, and their transfer and use. Boston & Maine Railroad *v.* Small, 85 Maine, 462, contains a pointed criticism of Six Carpenters' Case, 8 Coke, 146. A much considered case is Warren *v.* Westbrook M'fg. Co., 86 Maine, 32, treating of the partition of waters by a court of equity, where there are two natural channels in a river caused by an island.

While not much given to athletics and out-door life, he employs his leisure in social pursuits and with the best authors, keeping himself abreast with the times in all that relates to his chosen profession and current literature. His favorite studies are history and philosophy. He has been a diligent reader of the history of the law, and is a disciple of Sir Henry Maine. Mill and Spencer may be found on his table by the daily caller.

His favorite author among the novelists is Thackeray, while he is also fond of Scott, Kingsley, and Lever. His writings do not disclose familiarity with the poets other than Shakespeare and Milton.

Inclining to conservatism in politics, as lawyers are apt to be, and well grounded as a strict Orthodox in his religious views, he seems content in his judical office, its responsibilities and dignity.

The third associate justice, ENOCH FOSTER, of Bethel, Oxford County, was born at Newry in that county, May 10, 1839. He is the youngest child of Enoch and Persis Foster. The Foster families came from England and first settled in Rowley, Mass., but his ancestors settled in Andover of that State and came from there to Maine.

His father, whose name he bears, was a large and prosperous farmer. The home of his boyhood, situate on the direct route from Bethel to Umbagog Lake, a noted resort for fish and game, recalls the oft-repeated allusion to the resemblance of this part of Oxford County to European mountain scenery, and to which is applied the name of American Switzerland. To the west and north are the White Mountains and other

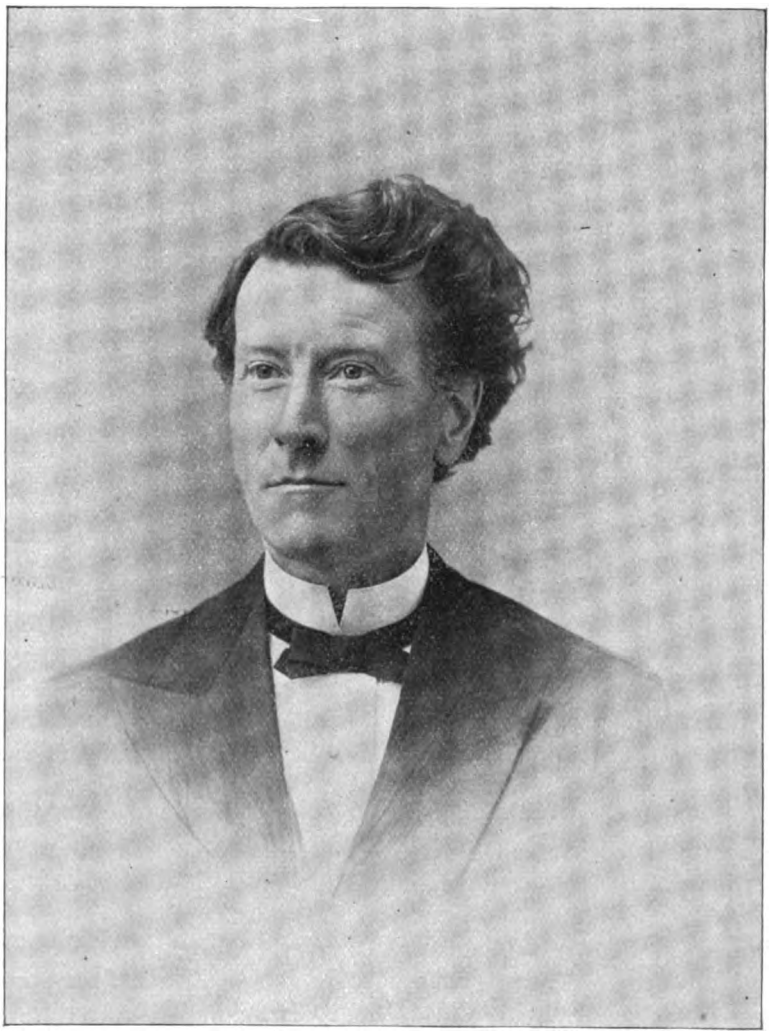
lofty summits between which flows the Androscoggin River with its many tributaries. Nature there is on a grand scale. It required hardy and brave pioneers and settlers to subdue the unbroken forests and convert into rich intervales the dense and tangled undergrowth where now rich meadows make the homes of their thrifty dwellers. It is the birthplace of strong and independent men, — the Grovers, Kimballs, Twitchells and Chapmans, who have become prominent as soldiers, teachers, legislators, physicians, lawyers, and merchants. Cuvier Grover was a most reliable brigadier-general in the Army of the Potomac and division commander under Sheridan in the Shenandoah Valley; Lafayette, the first representative in Congress and then senator from Oregon; and Talleyrand, a distinguished professor in Delaware. The Twitchells were also soldiers. Two of them, A. S. and Major A. B. Twitchell, served with credit in the Seventh Maine Battery. The Kimballs and Chapmans were also soldiers and merchants. Robert A. Chapman, of Bethel, was distinguished for his standing as a merchant and business man, — qualities inherited by his descendants, — and for his fine address and impressive manners.

When the farmer's boy had outgrown the common school, he went to Gould's Academy in the adjoining town of Bethel, where, under the tuition of Prof. N. T. True, an inspiring teacher and remembered for his memoriter instruction in Latin and Greek, he fitted for college. He made rapid progress, for he was a good scholar, and taught in the public schools. He entered Bowdoin College in 1860, having as class-mates who have attained distinction in the law,— Frederick H. Appleton of Bangor, James McKeen of the New York Bar, Charles F. Libby of Portland, and Joseph Bennett of the Boston Bar. Prof. Chas. Jewett of Long Island College Hospital, Brooklyn, N. Y., and John C. Harkness, President of Delaware State Normal University, were members of his class and distinguished men. His class, which was graduated in 1864 with thirty-three members, furnished seventeen for the military service in the civil war of the rebellion, among them Lieut. Foster, who was mustered December 13, 1861, into Co. H of the 13th Maine Regiment of Infantry, as second lieutenant. This regiment became a part of General Butler's command in taking New Orleans, and served in the Department of the Gulf. He was promoted first lieutenant, and also served as provost-marshal under General Banks. Upon his own application he was relieved from the latter position in order to take part in the Red River campaign.

When he returned from the war, he began the study of the law in the office of Hon. Reuben Foster, in Waterville, Kennebec County, and completed his course of study at the Albany Law School, where he took his degree, and began practice in 1865 at Bethel.

His position at the bar was sure and solid. His ability and reliability were soon recognized, for in 1867 he was elected county attorney for three years, after which he was re-elected and continued in that office until he took his seat in the Maine Senate in January, 1874. He was re-elected to the Senate the following year, after which he devoted himself to his profession until March 24, 1884, when he was first appointed Associate Justice of the Supreme Judicial Court, succeeding Hon. W. G. Barrows, who declined a reappointment. In the Senate he was chairman of the committee on legal affairs, and advocated, among other measures, a change in the system of taxation of railroads and telegraph companies.

During the ten years of practice before his promotion to the bench, he had a goodly clientage, and he appeared upon one side or the other of nearly all the important cases in his county. His success at the bar depended on strong and not showy quali-



ENOCH FOSTER.

ties. He gained the confidence of the jury by the soundness of his presentation of a case rather than by attempting a display of brilliancy. Although often opposed by able men, some of them distinguished as brilliant advocates and quick to seize upon the weak places in an adversary's position, it was found that Mr. Foster was generally successful with the jury. His individuality, which is marked and strong, added to an iron will, made a great impression upon the common people. As an illustration of this power, an amusing story is told of a Newry juryman in a case in which Judge Foster was counsel and attorney for one of the parties. When the jury retired at the close of the charge, the foreman called for a ballot, and stated that the question, on which they were to vote, was whether the verdict should be for the plaintiff or the defendant. Thereupon the Newry juryman jumped up and said that "he didn't know what they meant by plaintiff and defendant, but he was for Enoch Foster every time."

As may readily be believed, the Judge was an effective campaign speaker. I think there are few men in his county who accomplished more than he in political meetings. He argued, as he did to a jury, with power and feeling, and this was supplemented by the earnestness of his convictions and the faith that the community had in the man.

As often happens with men who succeed in the serious affairs of life and present a staid and sober mien, a closer acquaintance will develop a lighter side, disclosing a keen sense of the ludicrous, which breaks out, on suitable occasions, into droll humor. This is true of Judge Foster, who has a droll sort of humor that is very taking. He will entertain in a delightful way a group of friends with a quaint Jonathan-like style, but its effect is as largely in his manner as anything. According to the rule of the standard critic, he never laughs at his own stories, and were it not for the twinkle of his eye or the premonitory smile on his lip, no one would suspect the coming joke and mirthful incident with which you will be delighted. He rarely indulges in wit, for that comes from a heart that may be hard as rock, and cold as ice. His light vein is pure humor, the sunlight of a warm, kind heart, and it can come from no other. It has been truly said that, "wit never caused a tear of sympathy since the world was made." Humor cheers and charms. Sheridan was a wit, Lincoln was a humorist. Simple and unaffected in his manners, he is agreeable to all. On the bench there is no effort to maintain a dignity otherwise than is natural and desirable in the judicial office. His charges to the jury are full and elaborate, taking them from point to point in a logical order that facilitates their understanding. As his instructions are carefully considered and well prepared, there is nothing of partiality or haste in them. The contentions of each side are fully stated and the jury are assisted in the application of the rules of law with such care and minuteness that they cannot misunderstand their duty.

During his eleven years of judicial life, Judge Foster has drawn an unusually large number of opinions upon important questions. The ability and sound judgment evidenced in them constitute his high rank as a jurist. A few of them, and which are now relied on as leading cases and frequently cited in our own and other courts, will be briefly noticed.

Lockwood Co. *v.* Lawrence, 77 Maine, 297, was a case in which it is held that nuisances and injuries affecting waters, including the obstruction, diversion or pollution of streams, afford sufficient ground for equitable interference, on the ground of restraining irreparable mischief. It arose from the defendants, acting independently of each other, casting their saw-mill refuse into the river above the plaintiff's cotton-mill, which commingled and united into one indistinguishable mass, filled the plaintiff's pond, raceways and wheels, thereby stopping the

wheels and preventing its mill from running and operating. As will be seen, the contest was between textile mills on the one hand, a comparatively new industry, and lumber manufacturers, an old business, on the other hand. Many objections were raised to the maintenance of the plaintiff's bill, but they were all met and disposed of in the opinion, which reviews the authorities at length and gave the plaintiff the relief sought for. As an authority upon the questions raised and discussed, it received general commendation and recognition.

Wormell *v.* Me. Cent. R. R. Co., 79 Maine, 397, discusses the question of contributory negligence of a servant, and holds that he cannot recover damages of the master where want of due care on his part contributed to the injury, even if in the performance of duties outside his regular employment. It was the case of a workman in car-shops who was in the yard, shackling cars by direction of the foreman. The opinion holds that it was a case where it required no special skill or training to foresee that injury would result, the causes being open to observation; also that it is a question for the court to determine whether there is sufficient evidence of due care on the part of the plaintiff to sustain a verdict in his favor; and that evidence so slight as not to have legal weight is insufficient.

Warren *v.* Kelley, 80 Maine, 512, involved the consideration of both admiralty and constitutional law. It was a case where it was sought to uphold the rights of parties who had furnished *repairs* of a domestic vessel to enforce their lien therefor in the State court under a State statute. The opinion discusses and treats at length the embarrassing and conflicting decisions upon the question of admiralty jurisdiction in such cases, and holds that it is exclusively in the Federal court, thus pronouncing our statute to be unconstitutional. And this part of the statute has been accordingly repealed. The case was ably argued by counsel for both parties, the plaintiff, who obtained a verdict, by Mr. Wiswell, and the defendant by Mr. Putnam, both of whom have since gone upon the bench, one a member of this court and the other of the Circuit Court of Appeals. The case concludes with a statement of the rule of damages in actions of trespass and its modifying exceptions, for which it is often cited by counsel.

Phinney *v.* Phinney, 81 Maine, 450, is another constitutional question, relating to the obligation of contracts as affected by subsequent legislation, and the court, in the opinion drawn by Judge Foster, held the act of the Legislature was unconstitutional. The case arose upon a bill in equity, under an Act of 1887, by a creditor who sought to realize a judgment out of his debtor's equity of redemption in a mortgage given in 1875 for the support of the mortgagee. The object of the bill was to enable the creditor, pending proceedings for foreclosure, to step in, postpone the time for the expiration of the right of redemption, and enable him by fulfilling such requirements as the court might impose, to hold the property by virtue of his attachment. The statute provided that "pending such proceedings, the right of redemption shall not expire by any attempted foreclosure of such mortgage." But the opinion meets this statute provision, so far as it applied to mortgages in existence at the date of the act, in the following clear language: "While a State may, to a certain extent, and within proper bounds, regulate the remedy, yet if by subsequent enactment it so changes the nature and extent of existing remedies as to materially impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests.". . . "The constitutional prohibition secures from attack not merely the contract itself, but all the essential incidents which render it valuable and enable its owner to enforce it."

Libby *v.* Tobey, 82 Maine, 397, recalls the era of mining companies in Maine, fifteen years ago, when a new Eldorado dawned upon the vision of every owner of a sheep-pasture or other rocky spot of land or ledge. In eastern Maine, Blue Hill, Sullivan, Gouldsborough and Deer Isle were found to possess veins and deposits of copper and silver, and active operations in mining were begun and carried on. Corporations with capital running into many thousand dollars were formed under the State law, and shares of stock could be found in the hands of nearly everybody. Speculation in mineral rights ran rife, and fortunes (on paper) were easily made. When the bubble burst and investors found their fortunes had vanished like a vision in the night, and melted like a palace of snow, there arose the troublesome question of their liabilities as stockholders to creditors who had obtained judgments against these corporations and were seeking to enforce them against individual stockholders. This question was a difficult and perplexing one to the legal fraternity because it had become complicated by changes in the statute from time to time. In the case cited, it received at the hands of Judge Foster a careful consideration, and the conclusions which he arrived at are so clearly demonstrated and the result so satisfactory that his opinion has become the settled law of the State. He holds that the individual liability of the stockholders for the debts of the corporation is created solely by statute, and it is to be strictly construed as between the shareholder and creditor, since there is, at common law, no contract, express or implied, between them. As an interpretation and judicial construction of corporation law, the opinion contains the decisions of other cognate and collateral questions which arose for determination in the case.

In the same volume, at page 472, will be found his opinion in the case of State *v.* Stain and Cromwell, most carefully considered, and concurred in by every member of the court. The unbiased reader will find here the true and real merits of the trial of the murderers of treasurer Barron, stated and discussed in a convincing manner. The respondents were convicted upon two classes of evidence, confessions and their identification and presence at Dexter on two previous occasions the year before, and in and about the bank building on the day when the murder was committed. Of these two classes of evidence examined and weighed by Judge Foster with his well-known and pains-taking care, he says: " . . . While not in any sense dependent upon each other, [they] are nevertheless in a most remarkable and striking degree in all their essential particulars entirely consistent, and in harmony with each other." The case is notable from the fact that ten years had elapsed after the crime before the murderers were convicted, and in the meantime the theory of suicide had taken possession of the minds of people in the town of Dexter, where the crime was committed,—a thing still persisted in by some, although proven to be unsustained by the facts. Recent attempts to procure a pardon of the convicts has reopened a discussion of the case, and in this connection one recalls the remark of Wilkie Collins in his "Rogue's Life," that the person who first gets his version of an affair out upon the public will generally be believed. It was in this manner, through the press, that one of the counsel who defended these men conducted his defense both before and during the progress of the case. The public mind was thus preoccupied before it even knew what the testimony of the State was.

In Bulger *v.* Eden, 82 Maine, 352, will be found an interesting comparison of authorities bearing upon the frequent contests in the court over the liabilities of municipal corporations for the torts or negligent acts of their officers. The opinion clearly defines the well-known distinction which exists between their acts as public officers, on the

one hand, and as agents of the town on the other hand; and has become practically a *vade mecum* for the active practitioner.

In Libby *v.* Me. Cent. R. R. Co., 85 Maine, 34, the plaintiff, a postal clerk, recovered a verdict of $9558, for injuries received by the wrecking of the train on which he was employed, and which ran into a wash-out caused by a sudden and violent storm and flood. The plaintiff rested his case on the defendant's negligence, both for improper construction and maintenance of a culvert and want of proper inspection. These questions, including the law regulating the relation between the passenger and common carrier, are fully reviewed with references to many decided cases in the American and English courts. Judge Foster's opinion, sustaining the verdict for $6000, holds upon the facts that: "Under circumstances of more than ordinary peril, the company should inspect its line with more than ordinary promptitude, particularly those portions which are the most liable to injury by storm or flood. The greater the peril, the greater the vigilance demanded."

Judge Foster has written many other opinions for the court in personal injury cases, but the following, in Mundle *v.* Hill Mfg. Co., must suffice for the present purpose of showing the reader his familiarity with, and clear statement of, this branch of the law of torts. The plaintiff in this case recovered a verdict for injuries to her foot. While walking across the mill floor in the dressing-room, where she was employed, she stuck a splinter into her foot, causing a painful wound of long duration. The defective condition of the floor was not denied, but it appeared that the plaintiff knew its condition and did not make any complaint or request for its repair. Under these facts the opinion treats and discusses the principles of the law which apply to voluntarily assuming risks, and holds that where the employee has full knowledge and appreciation of the danger to which he is exposed and consents to serve in the way and manner in which the business is conducted, he has no legal ground of complaint, even if reasonable precautions have been neglected by the employer, and an injury has been received. The distinction between contributory negligence and voluntarily assuming risks, not always observed in such cases, is carefully drawn and well defined in the case.

Peabody *v.* Maguire, 79 Maine, 572 (sales), Green *v.* Jones, 76 Maine, 563 (specific performance), and Owen *v.* Roberts, 81 Maine, 439 (insolvency as affecting attachments by foreign creditors) are, among others opinions of the Judge, frequently cited.

Those who are acquainted with his opinions characterize them as sound and strong in judgment, inclining to fullness, with good power of statement. His style is natural, lucid, accurate and well sustained, and he moves with a good vocabulary without attempting to be ornate. Not given to prolixity, he sometimes and when necessary discusses decided cases in the reports in a manner reminding one of the essay style, which delights the searcher for law by his analysis and comparison and at the same time makes him a favorite of the young lawyers.

There is a noticeable ease in these discussions of decided cases. It arises from diligent study, a tenacious memory of all that he reads, and a good system of annotation to which he has adhered from the beginning.

His manuscript is neat and perfect, and reminds one of Lavater's saying: "Individual handwriting is inimitable — the emanation of the mind."

Although he did not complete his college course, by reason of his entering the military service, his *alma mater* did not fail to recognize his worth and merit and conferred on him the usual degree at the graduation

of his class. In 1893 he was elected a member of the board of overseers.

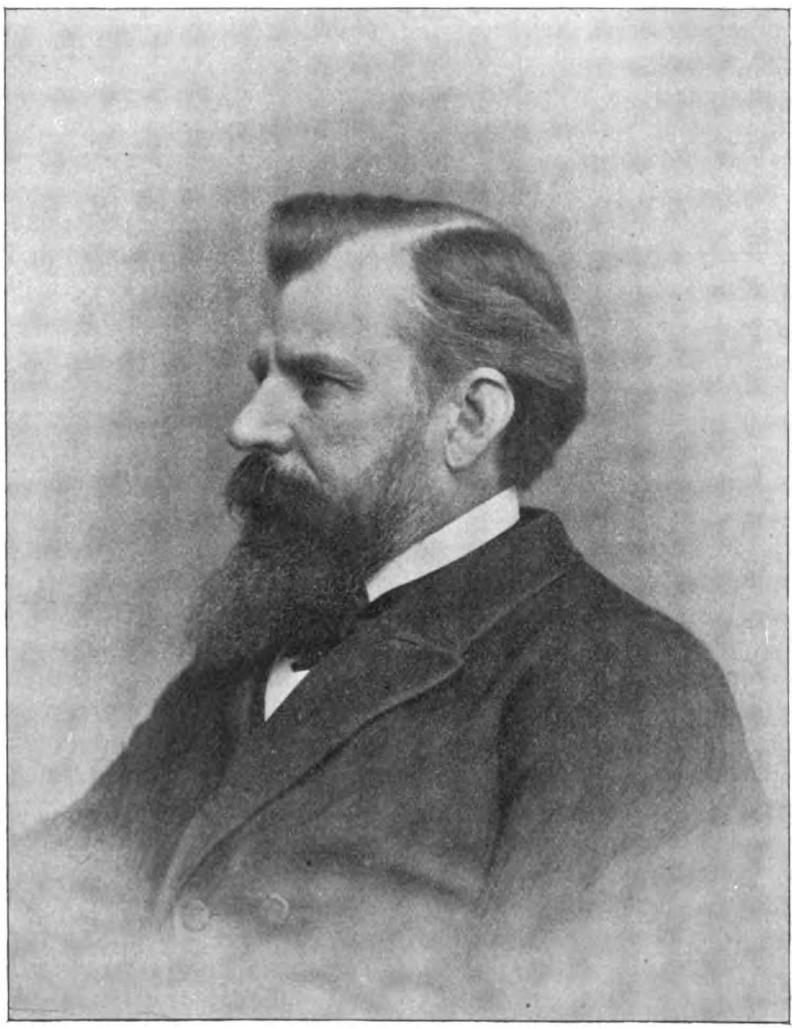
THOMAS HAWES HASKELL, the fourth associate justice, was born in New Gloucester, Maine, on the 18th of May, 1842. He is the youngest son of Peter and Betsey (Hawes) Haskell, and was reared as a farmer's boy. His paternal ancestors were Welshmen: two brothers of whom immigrated to Cape Ann from Wales. Some of their descendants settled in New Gloucester before the Revolution. Peter Haskell's mother, Salome Parsons, was the daughter of Col. Isaac Parsons of New Gloucester and a sister of the mother of Peleg W. and Theophilus Chandler, well known Boston lawyers. Col. Parsons was an own cousin of Chief-Justice Parsons, and removed from Gloucester, Mass., to New Gloucester, Maine, then a frontier town, about 1760.

Judge Haskell's mother was the daughter of Capt. Thomas and Betsey (Whitman) Hawes of Welfleet. She and Chief-Justice Whitman (*ante* p. 470) were the only children of Josiah Whitman of Bridgewater, Mass., who died while they were young.

Judge Haskell fitted to enter Bowdoin College in 1862, but instead entered the 25th Maine Regiment of Infantry, Col. Francis Fessenden, and served as a non-commissioned officer with his regiment in Virginia. It was a nine months' regiment, and after his discharge, in the summer of 1863, he entered the office of Judge Morrill, of Auburn, Androscoggin County, as a student at law. He was admitted to the Bar of that county, in 1865. For a time he remained with his instructor, but moved to Portland in 1866, where he has ever since resided, and continued an active practice of his profession until called to the bench, March 31, 1884, succeeding Hon. Joseph W. Symonds, who had resigned. He has held no political office outside the line of his profession, except as a member of the city council of Portland. He served as county attorney for a part of a term, in 1870, being appointed by the court to fill a vacancy, and again in 1878; and was appointed to the office by the Governor in 1879, serving until the expiration of the term. He was also a commissioner of the Circuit Court of the United States. He was for a time the law partner of the late Judge Goddard of the Superior Court for Cumberland County, and of Hon. W. W. Thomas, Jr., late our Minister to Sweden, and of Hon. Nathan Webb at the time he was appointed United States District Judge for Maine in 1882.

In 1881 he was appointed by Governor Plaisted upon a commission to investigate abuses in the Reform School. He made a separate report that was full and exhaustive; and he drew and secured the passage of the law, approved March 15, 1883, c. 250, now governing that institution, establishing regulations for the prevention of abuses, establishing a mechanical school, and providing for a woman visitor and also a letter-box for the boys where they can deposit letters without scrutiny of the officers of the school.

He early developed in the profession an aptitude for pleadings, and became proficient and successful in the branches of the law relating to admiralty, corporations, bankruptcy, criminal and commercial law. "Don't do too much for your boys," said a shrewd merchant, "if you expect them to make anything of themselves." No doubt, confidence and self-reliance come largely in that way, but the successful lawyer must have a fearless and independent spirit to build upon; and I found that was the case with Judge Haskell the first time that I saw him. It was when I was holding a bankrupt court as register in a neighboring city, he appeared in opposition to a very able lawyer, skilled in all the tactics that long practice affords, who sought to protect a preferential mortgage. The proceedings before me consisted in taking examinations of witnesses



THOMAS H. HASKELL.

by Judge Haskell, who readily succeeded in laying the foundation for vacating the preference, notwithstanding the interruptions, bluster and threats of his antagonist. I could but admire his coolness and courage, for older lawyers and even judges dreaded to encounter this member of the Bar. As the proceedings lasted several days the young lawyer was put upon his mettle, but he came off triumphant, for his antagonist yielded in the end and complimented him in an unusual degree. It gave him also an enviable reputation, that only time generally affords. He was a good lawyer and gained the confidence of those who were associated with him as counsel and client, for ability, integrity and industry, — qualities all and each of which are necessary to create and hold the esteem of the Bar, upon whose recommendation he was promoted to the bench. He has fine powers of observation and is well informed in other things outside his profession. In this respect he exceeds the average professional man. He is many-sided, and would have succeeded well as a naturalist, bank president or manager and financier of a corporation. He loves a fine horse or a bit of intricate machinery. Inventive and ingenious, without mechanical training, he could both plan and build a house with enough closets and bow-windows to satisfy any woman.

To these powers add a methodical and critical faculty developed, strengthened and broadened and you have the qualities of mind which are readily seen in the way he has built his library, both law and miscellaneous. While on the one hand you cannot find there a single useless volume, many of which will gather in lawyers' book-cases, on the other hand, there are rare and original editions and some valuable for their previous ownership, attested by the autographs of Simon Greenleaf and others distinguished in the profession. He has a good combined selection of American and English books for every-day use, and his private library has been brought together in the same choice and orderly method.

He has good taste in all the details of book-making, as will be seen in Haskell's Reports of Fox's Decisions in the United States District Court for the District of Maine, which he prepared and edited in 1887-8. His tasteful execution of a reporter's work in these two volumes gave him the credit of a connoisseur for skill and ability, and myself a good excuse, when I began my duties as reporter of decisions of this court, to call upon him for advice and information, which he always accorded in a friendly and helpful way. These two volumes of Haskell's Reports, work which he did after he went upon the bench, are not exceeded by any reports, that I have seen, for aptness and precision in the head-notes. Grasping the salient points of each case, they have the happy medium between over-conciseness and prolixity that commends a volume of reports to the busy lawyer, and is thus a vast saving of time. In his prefatory note he modestly claims that he has only endeavored to verify citations and quotations, to guard against all errors of the press, and says: "I only desire that my work may be charitably received and prove valuable to my professional brethren."

During the fifteen years that Judge Fox presided in the United States Court, it is well known that he exacted great promptness in the practitioner at the bar of his court. As he said of his predecessor, Judge Ware, "He always sat *velis levatis*"; and the habit of industry and readiness which he there acquired, Judge Haskell brought with him to the bench of this court.

Besides the usual *nisi prius* terms of court held by him, he began at once after his appointment upon law cases. His first opinion, Berry *v.* Titus, 76 Maine, 285, was announced June 2, 1884. This case, treating of review, exceptions and practice, was followed in quick succession by five others in the same volume, Parsons *v.* Clark, p.

476 (riparian owners); Pendergrass *v.* York Mfg. Co., p. 509 (nonsuit); Turner *v.* Hallowell Sav. Institution, p. 527 (wills); Atwater *v.* Sawyer, p. 539 (inn-holders), and Burgess *v.* Stevens, p. 559 (mortgages, foreclosure).

His opinions in the next ten volumes (77-87) are of the usual variety to be found in courts of common law also having equity jurisdiction, and the topics are those that are of daily occurrence, in and out of court.

One of his best considered and most important cases, which first came to my hands as reporter, appears in the eighty-first volume at page 538. It is Weeks, Ptr. for Mandamus *v.* Smith, to compel the Secretary of State to restore to his office the "Medical Registration Act" of 1887, as an act regularly approved and in force as a public law. After the passage of the bill by the Legislature it was vetoed by the Governor, whose veto was sustained. It was claimed, however, by the petitioner, that it had been approved by the Governor and had become a law and was deposited in the Secretary's office before he had vetoed it. The bill was passed to be enacted March 17, as appeared by the certificate of the presiding officer of each house of the Legislature. Upon it was also indorsed a certificate of the Secretary of State of the same date: "Returned to the Senate by the Governor. Signature refused. Failed of passage over his veto." Above this certificate appeared these words: "Approved, March 16, 1887," and the signature of the Governor, with a heavy line in ink drawn through the March 16, and the name of the Governor.

It became an interesting question at the outset whether the records in the Secretary's office were subject to be controlled by parol evidence. The opinion holds that they cannot thus be overturned; and that when they are fair upon their faces, showing no infirmity that would invalidate the record if not explained, they are conclusive of what they purport to be. This result is reached from a full examination of the authorities, both American and English, and from which is also adduced the decision that it is a judicial question, whether an act of the Legislature has been constitutionally passed, to be decided by the Bench from an understanding of public matters, regardless of plea or proof. This case was ably argued by eminent counsel, and the court dismissed the petition, having decided that the act never became a law. This case is quoted by the Supreme Court of the United States in its decision on the McKinley Bill, and its doctrine approved. See Field *v.* Clark, 143, U. S., 677.

The eighty-second volume contains more than his share of cases, and three that help make the book valuable. Allen *v.* Maine Central Railroad, page 111, is an admirable opinion for its power of statement, terseness of style and plain application of the law in cases of contributory negligence.

James *v.* Wood, page 173, treats of the illegal capture of game. Hutchins *v.* Ford, page 363, finds the Judge at home upon a familiar topic, marine insurance and barratry, in which he holds that a policy written by the Portland Lloyds covers barratry of the mariners, but not of the master when the insured is an owner of the vessel. The opinion is full, covering each point raised, amply fortified with decided cases, and although requiring labor and research, shows an easy handling of the subject, as might be expected. He was one of the committee of judges who formed the equity rules published in this volume. Of his fifteen opinions in the eighty-third volume, one, Webster *v.* Tuttle, page 271, treats of constitutional law and the quieting of land titles; Morrill *v.* Everett, page 290, the redemption of land sold on execution, is a well-wrought, finished application of equity law and collateral questions arising in the suit; and Bank *v.* Maxfield, page 576, discusses commercial paper and the right of national banks to take mortgages.

The eighty-fourth volume contains thirteen opinions upon as many different branches of the law. The first is Plummer *v.* Jones, page 58, which decides when various sections of the "Registration Act" of 1891 went into effect. The opinion quotes some quaint selections from Coke and Plowden well fitting to the subject. Auburn *v.* Paul, page 212, relates to the oft-recurring questions of taxation and constitutional objections arising in them. Breckenridge *v.* Lewis, page 349, holds that one who entrusts his signature to another for commercial use, that is, to have some business obligation written over it, becomes holden on a promissory note fraudulently written by the person so entrusted with it, and negotiated to an innocent holder. Ela *v.* Ela, page 423, declares that probate procedure should be conducted upon the rules of broadest equity when the statute does not prevent; and was a wholesome application of the doctrine in this case.

The eighty-fifth volume contains the work of a busy year. Among his twenty-four cases in this book there is Donnell *v.* Wylie, page 143, a good statement of the rule relating to voluntary unexecuted promises; Hurd *v.* Bickford, page 217, vindicating an original vendor's right to reclaim property purchased by fraud, although the last vendee is ignorant of the fraud,—a question about which courts differ; Attorney-General *v.* Newell, page 273 (*quo warranto*, elections and false returns); Hewett *v.* Co. Com., page 308 (*certiorari*, and the practice therein); Hazen *v.* Wright, page 314 (real actions and effect of a plea of *nul disseizin*); Paris *v.* Norway Water Co., page 330, solving a question of taxation of water-pipes as real estate in the town where they are laid.

Volume eighty-six, containing twenty-five opinions, still maintains the usual variety of topics. Some of them, noticeable for their intrinsic interest, are White *v.* Mooers, page 62 (specific performance); Barron *v.* Burrell, page 66 (creditor's bill to compel payment of unpaid stock); State *v.* Edwards, page 102 (constitutional law, tolls of grist-mills); Pease *v.* Burrows, page 153 (a peculiar case of libel in which it is held that the court may, in its discretion, permit the cross-examination of a witness to show mental illusion; yet it is not evidence of the facts so stated, and the jury are to be so instructed); Bettinson *v.* Lowery, page 218, (what judgment should be entered in replevin when the writ is quashed); Holt *v.* Knowlton, page 456 (when contracts are to be governed by the laws of Maine, but formulated in another State); Sawyer *v.* Long, page 541 (chattel mortgages as affecting after-acquired property). This volume closes with a report of his decision in the matter of the estate of John B. Brown.

The decision was not appealed to the law court, but passed into judgment upon the conclusions found by the Judge sitting as chancellor.

His strongest opinion in this volume, I think, is the case of Morey *v.* Milliken, page 464. The law relating to preferences in insolvency and bankruptcy and the decisions slumbering in many reports, are deftly brought together in so felicitous a summary that it will not fail to become a generally cited authority hereafter. His analysis of the testimony is clear and satisfactory, copious and convincing. The case came to the law court on a bill of exceptions with a statement of facts. Under the practice prevailing in Maine, such findings of facts are not subject to review in the law court; and one might think that a judge who has devoted so much time to questions of practice, where the tendency is to restrict and not amplify remedies, becoming narrow and technical instead of being fond of justice in spite of technicalities, would have found difficulties in his way that would prevent a decision on the true merits of the case, and which turned on the question whether the creditors, in the case at bar, at the time they received security upon an existing debt from

their debtor, had reasonable cause to believe he was insolvent. The opinion holds that they had express notice by a letter which brought the security to their hands, and disposes of the technical objection above alluded to by the plain rule, that when but one inference only can be drawn from the facts of the case, it is a matter of law.

Of his opinions, and only a few cursory glances are attempted here, it may be truly said that they disclose force, diligence and vivacity. There is nothing feigned in them; on the contrary they possess a genuineness of his own, hearty, and sometimes idiomatic way, based on the primary virtue of justice and the courage to be just. He has an alert mind. "He is one of the quickest," says a well-known Federal judge, "to see the point upon which a case turns." His style reminds one at times of the old English judges, and almost rivalling in brevity his associate, Mr. Justice Walton. Eight lines in the case of Hart *v.* McLellan, 80 Maine, 95, will show this: "Haskell, J. Assumpsit against the indorser of a negotiable promissory note payable at a place certain. A careful consideration of the evidence fails to show legal notice to the defendant of the dishonor of the note. The notice seasonably mailed was not addressed to a post-office in the city of the defendant's residence, nor, as the authorities cited by defendant's counsel clearly show, was reasonable diligence used to ascertain the defendant's proper address. Judgment for defendant." Then, again, when the opinion is full and copious with authorities, it broadens and deepens like a New England brook before it joins the bay, coming from pure springs, dashing down over the hill-side to join the vast ocean of the live law.

Speaking of cruel and abusive treatment in Holyoke *v.* Holyoke, 78 Maine, 404, as a cause for divorce, he says: "This phrase does not necessarily imply physical violence, thought it may include it. Words and deportment may work injury as deplorable as violence to the person. 'I will speak daggers to her, but use none,' says Shakespeare. Temperament and character so widely differ, that conduct cruel to one, might scarcely annoy a more callous nature. Having in mind the sacred character of the marital relation, and its influence on the happiness and purity of society, as well as upon individuals, not overlooking considerations that may not be freely discussed, each particular case must be judged of by its own particular facts and circumstances.

"Divorce should not be a panacea for the infelicities of married life; if disappointment, suffering, and sorrow even be incident to that relation, they must be endured. The marriage yoke, by mutual forbearance, must be worn, even thought it rides unevenly, and has becomes burdensome withal. Public policy requires that it should be so. Remove the allurements of divorce at pleasure, and husbands and wives will the more zealously strive to even the burdens and vexations of life, and soften by mutual accommodation so as to enjoy their marriage relation.

"Deplorable as it is, from the infirmities of human nature, cases occur where a wilful disregard of marital duty, by act or word, either works, or threatens injury so serious, that a continuance of cohabitation in marriage cannot be permitted with safety to the personal welfare and health of the injured party. Both a sound body and a sound mind are required to constitute health. Whatever treatment is proved in such particular case to seriously impair, or to seriously threaten to impair either, is like a withering blast, and endangers life, limb, or health, and constitutes the (6) cause for divorce in the act of 1885. Such is the weight of authority."

His familiarity with decided cases gives him the power of selecting the best materials and cases; and he loves to give credit to attorneys who furnish full and orderly briefs. Without "an almost ignominious love of detail," as Sir Arthur Helps says, he sees all

there is in a case, and counsel find it so in their practice before him. The curious reader will find an apt illustration of this in Rockland *v.* Farnsworth, 86 Maine, page 534, a tax suit.

A love of order and system, combined with industry, enable him to turn off his judicial labors with ease; and when he returns at night to his home, the cares of office do not follow him. Rather indifferent to fame, he would be among the last to adopt Benvenuto Cellini's advice, "that all men after they have reached forty should write down their own lives"; nor is it difficult for the believer in heredity to see how his favorite judge has become, to use at military phrase, "a chief of staff" of the court in the midst of his varied usefulness on the bench.

He received the degree of Master of Arts from Bowdoin College in 1894.

A WAGER ABOUT NAPOLEON THAT DIVIDED THE SUPREME COURT OF PENNSYLVANIA.

WELL nigh universal as is the attention at present paid to everything Napoleonic, it can be easily demonstrated by reference to the records of his own times, that during the life of the great Corsican, Americans entertained a no less keen interest in his fate than they now do in his history. Indicative of this fact is the *cause célèbre* in the annals of Pennsylvania jurisprudence known as Phillips *v.* Ives, decided in 1828, found in the first volume of Rawle's Reports. The case was appealed from the District Court of Philadelphia to the Supreme Court of Pennsylvania, having been brought by Phillips against Ives to recover the amount of a wager, the terms of which had been reduced to writing and were as follows: —

"May 14th, 1821. This day Stephen Ives bet one hundred dollars to fifty dollars with John Phillips, that Napoleon Bonaparte will, at or before the expiration of two years from the above date, be removed or escape from the Island of St. Helena. It is understood between the parties that if Bonaparte should die within the above period of two years, and on the Island of St. Helena, Mr. Ives loses the bet.

(Signed) Stephen Ives.
John Phillips.

This bet is made in the presence of
John F. Swift."

As the reader knows, when the paper was signed, Napoleon had been dead for more than a week, but the transmission of news was then too slow to prevent Ives from making a public test of his faith in the ex-emperor's good fortune and in his ability to escape from the cage of his British captors. The genius that compelled the whole force of the British Empire to play turnkey against him, and to spy his actual presence in Longwood at least once every twenty-four hours, secured admiration in Ives sufficiently enthusiastic and faithful to have enrolled him among "the old guard." However willing he was to stake heavy odds to prove his confidence in a living hero, Ives refused to pay a wager made after death had already taken from him any possibility of winning it.

Phillips was inclined to play Shylock, and asked the law to give him the money nominated in the bond, and a jury gave it to him, but the lower court divided over the matter and, notwithstanding the verdict, gave judgment against Phillips, whereupon he appealed to the Supreme Court of the State. At the argument before the final tribunal Phillips was represented by Josiah Randall, father of Hon. Samuel J. Randall, late Speaker of

the House of Representatives. Mr. Randall cited two English cases, both decided before the Revolution, and consequently binding precedents in Pennsylvania, and relied on them to govern the action of the court. In one of them, that of Andrews *v.* Herne, decided in 1662, upon a wager of twenty pounds to twenty shillings, made six months before the Restoration, that Charles Stuart, who was then in exilé, would be king of England within twelve months, the court held such a wager recoverable at law, and gave judgment for the plaintiff. The conduct of these parties involved high treason to the *de facto* government, and consequences far more grave to all interested than any that could arise to the United States by reason of the wager concerning Bonaparte. The other case, which was intended to meet the objection arising from Bonaparte's death prior to placing the bet, was that of the Earl of March against Pigott, decided by Lord Mansfield in 1771. There plaintiff and defendant agreed at New Market, after dinner, to run the life of Sir William Codrington against Mr. Pigott's father (as the phrase went), wagering sixteen hundred guineas to five hundred that Codrington Sr. would outlive Pigott Sr. The latter had died at two o'clock in the morning of the very day on which the bet was made, but this fact was not known to the parties. The Court decided that Lord March should win the bet and have the five hundred guineas.

P. A. Browne, Esq., who appeared for Ives and who was a distinguished lawyer, the author of Browne's Reports, opened argument against the wager with these two canonical cases commanding his forensic battery. He sought to outflank them by dwelling on the immorality and demoralizing tendency of wagers, and claimed that this particular one was void because it interfered with the feelings and interest of a third person. In the course of his remarks he averred that the agreement between the parties to the suit before the court had an international phase in its possible results, and was an encouragement to one of the parties to do an act that might lead to war between the United States and the powers of Europe. He declared that many schemes, some of them deeply laid and well arranged, had been formed to carry off Napoleon from St. Helena, which were not put into effect merely because they had not received his sanction.

The Supreme Court of Pennsylvania, in a weak opinion by Judge Huston, in which he was joined by two others of its five judges, and which was dissented from by Chief-Justice Gibson and Justice Smith, declared that the court below, in not permitting Phillips to reap the fruits of his prudent wager, was right, and laid down the principle that no wager concerning a human being could be recovered in any court of justice.

This case is also of present interest from its having been in part the foundation of the law that designates the purchase of stock on margin as a gambling transaction, and one that brokers cannot enforce against their customers by process of law, it having been relied upon by the Supreme Court of Pennsylvania in Brua's Appeal, decided in 1867, when they laid down the above principle much complained of to-day by the Stock Exchange.

OWEN B. JENKINS.

THE OPENING OF PARLIAMENT.

SKETCHED BY A PARLIAMENTARY JOURNALIST.

THE opening of Parliament by the Queen is one of the most brilliant and impressive spectacles in the world; and even when performed by Royal Commission it is —though, naturally, shorn of much of its splendor by the absence of the sovereign —a stately and interesting ceremony.

Parliament is summoned in the name of the sovereign, but really by the cabinet. A proclamation signed by the Queen is published in the "London Gazette"—the official organ of the Government—calling together the lords, spiritual and temporal, and the representatives of the people, for the transaction of divers urgent and important business in the Palace of Westminster on a certain day. Tuesday or Thursday is usually chosen; and two o'clock is always the hour fixed for the opening ceremony. In the morning, the extensive cellars beneath the Houses of Parliament are searched by a number of Yeomen of the Guards, or the Guards of the Tower of London, clad in their quaint and picturesque uniforms.

This searching of the cellars originated after the attempt of Guy Fawkes to blow up the two Houses and their members in the days of James I; and such is the unwillingness of Parliament to part with any of its ceremonies, which, though now useless for their original purpose, give a charm to its proceedings, that this custom has survived for nearly three centuries, and will probably last as long as Parliament itself. The members of the House of Commons begin to assemble about nine o'clock. They are obliged to come down thus early in order to secure seats in the Chamber, for, curiously enough, it accommodates only about half of the 670 members of the House.

A member secures a seat by placing his hat upon it. But, according to the rules and regulations of the House, it must be his real working hat, and not a colorless substitute. This means that if a member were to bring a second hat with him, and were to leave the House for a walk in the streets, he would forfeit all right to the seat on which he had placed the other hat. Members must, therefore, stay about the precincts of the House, no matter how early they may have made their appearance; but this they can do very comfortably, having at Westminster all the advantages of a first-class club, dining-rooms, tea-rooms, smoking-rooms, library, bath-rooms and a large staff of attendants. The only members of the House who have not to fight for seats are ministers, for whom the Treasury Bench, or the front bench near the table and to the right of the Speaker, is reserved; and ex-ministers, who occupy what is called the Front Opposition Bench, at the opposite side of the table and, therefore, to the left of the Speaker.

As two o'clock approaches, a most imposing array of shining silk hats, with just a slight sprinkling of low hats and soft felts, is seen on the benches on each side of the House, while the members are gathered together in groups, irrespective of party, chatting, joking and laughing, relating their experiences during the recess, or discussing political prospects of the session. Suddenly the animated buzz of conversation in the chamber is stilled by cries of: "Way for the Speaker! Way for the Speaker!" which resound in stentorian tones through the lobbies outside; and the cry is followed by a rush of members to their places. The benches are now thronged, and members respectfully stand uncovered to receive the Speaker.

Arrayed in a flowing silk gown, knee-breeches, silk stockings, shoes with silver buckles, on his head a huge wig, with wings that fall down at each side over his should-

ers, and carrying his three-cornered hat in his right hand, the Speaker — attended by his chaplain in a Geneva gown, and the Sergeant-at-arms, in court or levée dress, a sword by his side, and carrying the huge bronze mace on his right shoulder — marches slowly and solemnly up the floor of the Chamber, and as he approaches the chair which he is to occupy, he makes it three low obeisances.

Prayers are then recited by the chaplain, the members still standing and facing the Speaker; but, at a particular passage in the service, they all turn round and face the wall. Service over, the chaplain retreats down the floor, with his face to the Speaker, to whom he bows at every few steps of his retrograde movement, till he finally disappears through the glass swing doors of the Chamber.

The Chamber is now crowded with members. In single file they pass the Chair, and shake hands with the Speaker. But before half the members have tendered their greetings to the Speaker, a cry again resounds through the lobby outside. This time it is "Black Rod! Way for Black Rod!" It puts an end to the shaking of the Speaker's hand, for the members at once return to their seats. "Black Rod," however, would not appear to be a welcomed visitor to the House of Commons if one judged merely by the reception accorded him. The moment the shout of "Way for Black Rod," reaches the Sergeant-at-Arms, he springs from his chair, rushes to the open door, slams it with a most inhospitable bang right in the face of the approaching "Black Rod," and securely locks and bolts it.

It was certainly a narrow squeak — a moment more and "Black Rod" would have been down on the Chamber, horse, foot, and artillery. Members, however, do not look in the least alarmed; and to tell the truth they do not need to be affrighted. The House of Commons is full of odd ways, peculiarities, and traditions; and as "Black Rod" is the messenger of the Upper Chamber, this ceremony of slamming the door in his face is the immemorial way in which the Commons show their independence of the Lords.

By this time the Sergeant-at-Arms is peering through a grating in the the door out into the lobby. Presently three faint knocks are heard at the door. The knocks are intended to indicate that "Black Rod" requests admission to the House of Commons, and does not demand it as a right. In response to this humble summons, the doors are flung wide open by the Sergeant-at-Arms, at a signal from the Speaker, and in walks "Black Rod."

His mission on the present occasion is to summon the Commons to the House of Lords to hear the Queen's speech. He marches up the floor, making three low bows to the Chair, and on reaching the table delivers his message to the Speaker, while all the members are on their feet with heads uncovered, as a mark of respect to the sovereign. Should Parliament be opened by the Queen in person, "Black Rod" says: "Mr. Speaker, the Queen commands this honorable House to attend Her Majesty immediately in the House of Peers"; but in the absence of the Queen, the summons comes from the Lords Commissioners; "Black Rod" softens the "command" to a "desire."

"Black Rod" then retreats backwards down the floor, and it is only when he reaches the door that he turns his back on the Commons. The Speaker, attended by the Sergeant-at-Arms bearing the mace on his shoulder, and accompanied by the members in a mass behind, follows "Black Rod" out through the lobbies to the Bar of the House of Lords.

When the Queen opens Parliament in person, the spectacle in the Upper Chamber is very brilliant; and so keen is the desire of the Commons to witness the ceremony, that they hustle and jostle and shoulder each other, and press closely on the heels of the Speaker, in their eagerness to secure good

places in the very limited space allotted to them in the House of Lords.

At the opening of Parliament by the Queen in 1851, Mr. Joseph Hume complained in the House of Commons that he had been roughly treated in the Upper Chamber during the ceremony. "I neither saw the Queen nor heard her voice," said he, plaintively. "I was crushed into a corner; my head was knocked against a post, and I might have been much injured if a stout member, to whom I am much obliged, had not come to my assistance."

On another occasion a member had his coat torn and his shoulder dislocated during the scrimmage.

When the Sovereign is present, the spectacle in the House of Lords is full of color and ablaze with jewels. The Queen sits on the throne, a magnificent oaken chair, richly carved and raised on a crimson dais at the end of the chamber. She wears a miniature crown of diamonds round a white cap, from which long white streamers depend at each side. The robe of state, a long, sweeping, ermine cloak, is thrown loosely over her shoulders, so as not to hide the broad blue ribbon and the star of the Order of the Garter, which she wears over her customary black dress, the splendid necklace of diamonds, and the flashing Koh-i-noor on her breast.

The Prince of Wales in his robes sits on a chair to the right of the throne, while grouped around are the officers of state in scarlet and gold. The crimson benches are crowded with the peers in their scarlet robes, with the bishops in their black, flowing robes and lawn sleeves of liberal amplitude; and the galleries around are bright with the fair faces, the variegated dresses, the diamonds and flowers of peeresses and other ladies of high degree. This brilliant picture is magnificently framed by the dark oak panelling of the chamber.

The speech, which, written by the prime minister and approved by the cabinet, gives a forecast of the business of the session, is usually read by the sovereign, or by the Lord Chancellor, at her command.

When Her Majesty is absent the most conspicuous figures in the ceremony are five personages sitting all in a row on a bench beneath the throne, and wearing scarlet robes trimmed with white fur, and black three-cornered hats. The center figure is the Lord Chancellor, the president of the House of Lords; and the four others are the Lords High Commissioners, who are appointed by the Queen to act on her behalf when she does not open Parliament in person. The Clerk of Parliament, by which title the chief clerk in the House of Lords is designated — a gentleman robed in gown and wig like a barrister in a court of justice — reads the Royal Commission, a huge piece of parchment liberally spotted with red sealing-wax, which is the royal authority for the opening of Parliament. Then the Lord Chancellor, still retaining his seat, his head covered by his curious black hat, reads "The Queen's Speech," and Parliament is opened.

The Speaker and the members of the House of Commons troop back again to their own chamber. The Speaker takes the chair, bows to the assembly, and without a word disappears from the House. The Commons assemble again at four o'clock; the Speaker reads the Queen's speech; an address in answer to the speech is moved and seconded by two members of the party in office; and a debate ensues in which the policy of the government is criticised by the opposition, and defended by the ministerialists.

OLD WORLD TRIALS.

XII.

SWINFEN *v.* SWINFEN.

THE case of Swinfen *v.* Swinfen possesses so much intrinsic and extrinsic interest that I shall deal with it in some detail.

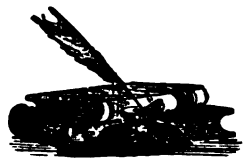
The plaintiff, Mrs. Patience Swinfen, propounded the will of her father-in-law under which she took estates worth about £60,000. The will was disputed by the heir-at-law, Frederick Hay Swinfen, and in July, 1855, the master of the rolls directed an issue to try its validity. The issue came on for trial at the Gafford Assizes, before Mr. Justice Crenwell and a jury, in March, 1856. Sir Frederick Thesiger was leading counsel for the plaintiff, Sir Alexander Cockburn, then attorney-general, represented the defendant. At the close of the first day of the trial negotiations for an arrangement took place between Thesiger and Cockburn, and ultimately the following terms were finally agreed upon and embodied in a memorandum: —

"Terms of compromise. Juror to be withdrawn. Estate to be conveyed by plaintiff at law to defendant in fee, free of incumbrance if any, erected since the death of Samuel Swinfen (the testator) such conveyance to date from Michaelmas 1855. Defendant to secure to plaintiff an annuity on her life on the estate of £1000 a year. . . . . Plaintiff's costs as between attorney and client not exceeding £1250 to be paid by defendant. Power to either party to make this agreement a rule of court. In event of any question arising on the above terms, the same to be referred to Sir Frederick Thesiger and the Attorney-General. The house and grounds to be occupied by plaintiff without payment of rent till Michaelmas next." This memorandum was embodied in an order of *nisi prius* which was afterwards made a rule of court. It may well be doubted whether any compromise before or since has given rise to such a crop of litigation. The negotiations had been entered into in consequence of an observation made by the learned judge as to the course that the case seemed to be taking, and were conducted and concluded in the absence of the plaintiff. The plaintiff did not, however, on her return repudiate the compromise that had been arrived at. Soon afterwards Mrs. Swinfen seems to have determined upon a different line of action. She refused to execute the compromise, and the Court of Common Pleas declined, on a technical ground, to order her attachment for the refusal. The Court of Chancery, "following the law," refused to enforce it on a bill for specific performance; a new trial of the issue was directed. Mrs. Swinfen obtained a verdict, which was upheld on appeal, and the Swinfen estates came into her possession and power at last. Now for this happy issue she was, and indeed admitted herself to be, largely indebted to the energy and ability of Mr. Charles Raun Kennedy, barrister at law, whose acquaintance she had made in April, 1856, and who acted for her in all the proceedings subsequent to the refusal of the Court of Common Pleas to order an attachment. A warm friendship sprang up between counsel and client. Mr. Kennedy had taken no fees for his services except such as were paid by way of costs by Mrs. Swinfen's opponents. In May, 1859, however, he thought it time to make some provision for the future, and induced Mrs. Swinfen to convey the estate recovered in the litigation, to himself in fee, subject to her own life-interest and other charges. The draft of this deed was prepared by Mr. Kennedy, but it was engrossed by a separate solicitor selected by Mrs. Swinfen, who, in

the course of a long interview, fully explained to her its nature and effect. It appears that Mrs. Swinfen had also repeatedly and in unequivocal terms expressed her intention of giving Mr. Kennedy £20,000 when she came into her estates. Before this promise was fulfilled, Mrs. Swinfen, who had been a widow since 1854, gave herself in marriage to one Charles Wilsone Brown. Mr. Kennedy then sought to enforce payment of his long-promised outstanding fee. But the court held that no binding contract could be founded on a promise to pay a barrister for his services — a doctrine with which the case of Kennedy *v.* Brown is now in legal minds inseparably associated. The next scene in the play was the filing of a bill by Charles Wilsone Brown and Patience, his wife, to set aside the deed of May, 1859, and here again Mr. Kennedy was unsuccessful. The Master of the Rolls, Sir John Romilly, held (1) that the influence arising from the relation between the parties still subsisted strongly at the date of the deed, and therefore that the transaction could not stand as a gift; (2) that theprevious promises of Mrs. Swinfen to pay Kennedy £20,000 for his services were insufficient to support the deed founded on contract; and (3) that the deed could not be upheld as having been executed in the fair performance of a moral obligation. Brown *v.* Kennedy is a case not less important than Kennedy *v.* Brown. So far Mrs. Swinfen had won all along the line, but an action which she raised against Sir Frederick Thesiger—then Lord Chelmsford — (Swinfen *v.* Lord Chelmsford) for having exceeded his authority as counsel, was dismissed, and the immunity of English barristers was settled on the principles afterwards affirmed and amplified in Strauss *v.* Francis (1866, L. R. 12 B. 379) and Munster *v.* Lamb (49 Law Times, 252).

LEX.

The Lawyer's Easy Chair.



. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

MARSHAL NEY. — Although Dr. Owens seems to have given credulity a rest during the past season, yet midsummer was not suffered to go by without some madness, and so the public have been called upon to believe that Marshal Ney was not executed by the Bourbons after Waterloo, but escaped to this country and died in North Carolina, in 1846, in the order of pedagogy. This is a very ingenious tale, and not too improbable for belief by the people who take stock in the Bacon business. Substantially told, it is as follows: when the Marshal was led out to be shot, he whispered to the firing-party, "Aim high." Contrary to all custom, their pieces had not been handed to them ready-loaded, but they had been permitted to load them, and so they humanely omitted the bullets. (Ney's caution was therefore superfluous.) At the explosion he fell and pressed upon his breast a theatrical preparation to simulate blood. If his body was examined, the surgeon must have been in the plot, and so must the burying party, for he mounted a fast horse and rode eighty miles that night, took ship for this country and settled in North Carolina. To disarm inquiry (?) he took the name of Peter S. Ney. He set at work to qualify himself as a school teacher, and passed the rest of his life in that vocation, in which he was very successful. He had a remarkable knowledge of Napoleon and his campaigns. He was a remarkably skillful swordsman. He fainted (not feinted) away on hearing of Napoleon's death, and afterwards tried to commit suicide. He looked upon the wine when it was red, more or less. He was recognized on several occasions, but prevailed on those persons to depart on their own recognizance and keep their counsel. On his deathbed he declared that he was Marshal Ney. He had prepared a memoir of his life and adventures, but it has disappeared, which is an unfortunate oversight.

It is said that after Louis Napoleon came to power the Marshal's coffin was opened and discovered to be empty. The reason given for his secrecy was his fear that if the Bourbons learned of the fraud, they would confiscate his property, which had been allowed to descend to his family. He asserted that it was agreed between Napoleon and himself, on the first abdication, that the former should return to France when the time was ripe. It is difficult to reconcile this with Ney's hesitation about going over to Napoleon, and with Napoleon's hesitation about employing Ney in the Waterloo campaign, which he did not overcome until the very eve of Quatre Bras, two days before the great battle.

Ney was the son of a cooper, and his early education had been narrow, and yet this person is represented as having become a liberal scholar and an effective teacher. Why this engaging story has been kept so still all the years before and since the pedagogue's death is not explained. In short, the tale is not more plausible than Archbishop Whately's contention that Napoleon never lived. We feel moved to try our own hand at these matters, and to suggest that Napoleon did not die at St. Helena, but was brought back alive in the pageant of 1840, having at the time of his pretended death been given a sleeping potion (*à la* Juliet), which should prove potent unless his body was exposed to the air. We discover ourselves believing this already. How else can one account for the perfect preservation of the great man's remains when his coffin was opened just previous to the removal to France nineteen years later? He was only in a trance, natural or artificial, accidental or designed, and this being granted, the rest is easy as winking. Really we must work this up. To be sure, it will be a little difficult to account for his inaction during the Crimean war, and we must assume that he was really dead in 1870, for if he had been alive the army never would have been penned up in Metz or Sedan, nor have surrendered so tamely. But how we would have liked to see him pitted against that paper-strategist, von Moltke! Yet how do we account for Peter's tale, assuming that it has been truthfully reported? Why, on the safe old theory that he allowed his imagination to run riot when he had dallied long with the wine-cup. There is a kind of poetical balance effected by the story, for as the world was once assured of a lost Bourbon up in Canada, so now it is treated to a lost Bonapartist down in Carolina. Let one cancel the other.

COOPER AS A LITIGANT. — Owing to Mark Twain, James Fenimore Cooper is enjoying a late resurrection. Comment on his career is not exactly a current topic, but it may pass as a "preserved" current. Mark Twain makes merry over Leatherstocking's marvelous skill in hitting the painted head of a nail at the distance of a hundred yards, with a rifle ball, and attributes to him the ocular properties which Sam Weller disclaimed in court on the Bardell-Pickwick trial. But it is indisputable that there are now and always have been plenty of marksmen who could hit anything that they can see, at that distance; and now comes Mr. Seymour Van Santwood, a lawyer of Troy, N. Y., who testifies, in the "Troy Times," that he knows by experiment, that he can see a white-painted ordinary nail-head at that distance, although he modestly admits that he could not hit it.

Despite Mark Twain, Leatherstocking will long remain "one of the prize-men in fiction," as Thackeray called him. In that famous death-scene of Colonel Newcome, so much cited and admired, where the Colonel exclaims, "Adsum!" Thackeray unquestionably cribbed from Cooper, who had previously made Leatherstocking, in the death-scene in "The Prairie," exclaim "Here!" The resemblance is too close to have been accidental, and Thackeray was always a devout admirer of Cooper's work.

It is not generally known by this generation who know not James, that he was one of the sturdiest litigants who ever flourished in the State of New York. He was continually suing the newspapers for intemperate criticisms of his novels and his "Naval History," and of himself under guise of such criticisms. It must be admitted that the criticisms in question were very savage, and that the newspapers in his time were fully as violent and partisan as they now are; but it is apparent that Cooper had not learned the art of regarding such criticisms as good advertisements, and submitting to them if not welcoming them, as the later writers have done (always excepting Charles Reade), on account of the enhanced sales which they never fail to bring to their literary wares. Cooper's slander or libel suits are reported in no less than five volumes of New York reports, and they afford amusing reading. In Cooper *v.* Greeley and McElrath, 1 Denio, 347 (1845), the novelist sued the proprietors of the "New York Tribune," for stating that he would not be likely to bring a libel suit, which he had begun against them, to trial "in New York, for we are known here, nor in Otsego, *for he is known there.*" The court held this last expression libellous on demurrer. The original libel suit, as we infer from this report, grew out of still another libel suit, which he had brought against Thurlow Weed, and which was tried at Fonda, which Weed had tried to postpone on account of illness in his family, which resulted in an inquest and judgment for $400, and in relation to which the "Tribune" people had said playfully: "Knowing what we positively did and do of the severe illness of the wife of Mr. Weed, and the dangerous state of his eldest daughter, at the time of the Fonda trials in question — the jokes attempted to be cut by Fenimore over their condition, his talk of the story growing up from one girl to the mother and three or four daughters, his fun about their probably having the Asiatic cholera among them, or some other contagious disease, etc., etc. — however it may have sounded to others, did seem to us rather inhu — hallo there! We had like to put our foot right into it again, after all our tuition." The "Tribune" people, in their plea in this case, averred that Cooper, being known to the inhabitants of Otsego, had acquired "the reputation of a proud, captious, censorious, arbitrary, dogmatical, malicious, illiberal, revengeful, and litigious man," and was "in bad repute" there, and that was all they meant by the words sued for! Seward appeared for the defendants. Those were the days when the philosopher Greeley, the humanitarian Seward, and the party manager Weed were very friendly and harmonious, loving one another's friends and hating one another's enemies. Jewett, J., required nine pages of print to convince himself and the court that the publication was libellous.

It seems that Cooper had brought separate suits against the proprietors and the editors of the "Evening Journal," for the libel referred to above, for in 2 Howard's Practice Reports, 40, is reported an unsuccessful motion to consolidate them. On this motion the famous Nicholas Hill, Junior, appeared as counsel for Cooper, and Marcus T. Reynolds for Weed. R. Cooper was Cooper's attorney.

In 1840, was reported the case of Cooper *v.* Barber, 24 Wendell, 105. The defendant, as editor of the "Otsego Republican," had published an article from the "Chenango Telegraph," averring that "This gentleman, not satisfied with having drawn down upon his head universal contempt from abroad, has done the same thing for himself at Cooperstown, where he resides." Barber added some remarks of his own about a controversy between Cooper and some other Cooperstowners in relation to Three-Mile Point, a piece of land projecting into Otsego Lake. There was a verdict for plaintiff, and the Supreme Court now denied a new trial. Here Bronson, J., observed: "Good morals, as well as the law, forbid that the addition of some truth should be deemed a palliation of the wrong of publishing a libel." The European contempt referred to probably grew out of Cooper's patriotic Naval History.

In 1840, in Cooper *v.* Stone, 24 Wendell, 434, we find the report of a libel suit against the editor of the "New York Commercial Advertiser," for criticisms

on the Naval History and "Home as Found," on account of Cooper's apologies for the conduct of Captain Elliott, who flunked in the Battle of Lake Erie. The article in question was a trenchant piece of writing. It accused the historian of a disregard of justice and propriety, represented him as infatuated with vanity, mad with passion, and the sympathetic apologist of another stigmatized with ingratitude and perfidy, and charged him with publishing as true, statements and evidence falsified and encomiums retracted; "deliberately penning an untrue account of the battle," as the court say. The declaration was held good on demurrer, the matter in question not being privileged. On this argument the family appeared as counsel — R. Cooper, and the plaintiff *in pro. per.* Of counsel for the defendant was Marshall J. Bidwell, a celebrated New York City lawyer, a Canadian refugee. Mr. Stone in this article charged that Cooper was "his own worst enemy," "remained in the cock-pit rather than to go aloft," and had "well nigh made shipwreck of his reputation as a writer." The court said, "This is the first attempt to try the question of privilege by a demurrer to the declaration."

We infer that Cooper recovered three hundred dollars in this action, for in the court of errors, in Stone *v.* Cooper, 2 Denio, 293, is reported an appeal from an award of arbitrators for that amount, in regard to which Stone had published in the "New York Spectator" the following: —

"Mr. J. Fenimore Cooper need not be so fidgety in his anxiety to finger the cash to be paid by us toward his support. It will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall Street for shaving purposes before that period. Wait patiently. There will be no locksmith necessary to get at the ready." For this Cooper sued, alleging that the reference to the locksmith intended a disgraceful charge of breaking a lock to get at money on execution against Andrew M. Barber, the defendant in the first suit above mentioned. This clause was thrown out by the court, but Cooper had a verdict of $250, which Cowen upheld. This was reversed by the court of errors, fifteen to five, the chancellor writing with the majority, and the court holding that "shaving," in the sense of buying existing securities at a larger rate of discount than the lawful interest, "is a legitmate and legal business," practiced by "respectable brokers in Wall Street," and therefore nothing illegal, immoral, or disgraceful was charged. Four senators delivered concurring opinions. But Barlow, senator, wrote on the other side, declaring that "One who has justly acquired the reputation of a shaver is universally regarded with dislike and suspicion by all well balanced minds and in all well regulated communities." In this case Walworth gives a learned history of usury. On this argument the great Joshua A. Spencer appeared for Stone. What became of the action after this we cannot trace in the reports.

These Cooper cases have been regarded as leading cases in New York, and have been much cited; as for example in More *v.* James Gordon Bennett, 48 N. Y., 472. It is recorded that Cooper had Stone indicted in Otsego County for libel, and that the defendant was acquitted. On this trial, parts of the book in question, "Home as Found," were read to the jury, and it was thought that this settled the issue against Cooper.

As has been shown, Cooper was a gritty litigant, and on the whole it is apparent that he had good cause for going to law. We do not know that he had received a legal education, although he acted as his own counsel on some of his trials, but as he was a fogy of the strictest order, he not only opposed the march of modern improvement toward his own village — fighting off the railroads all his life — but he was a zealous hater of law reform, and in one of his last trashy novels, "The Ways of the Hour," he roundly abused the New York code of procedure, trial by jury and the popular election of judges. He deemed trial by jury unfit for a democracy. The plot of this novel, which involved a murder trial, is grotesque, and shows a laughable ignorance of legal principles and procedure and a considerable want of common sense. Although Cooper idealized the American Indian, he did not like the "Anti-Rent Indians," being an aristocratic landlord, and he denounces them heartily in one of his tales. Cooper was not so good a lawyer as Gerrit Smith, another great New York landholder, and a famous abolitionist, who defended the "Jerry Rescuers," and in that case delivered, as Judge Marvin informed the writer, one of the most superb legal arguments to which he ever listened.

NOTES OF CASES.

LARCENY — BRINGING GOODS INTO STATE. — "The glorious uncertainty of the common law" is well illustrated by the decisions upon the question whether a person may be indicted for larceny committed by bringing into the State goods which he has stolen in another State. The common law doctrine was that one could not be indicted in one country for larceny committed by bringing into that country goods which he had stolen in another, and this has been held in Virginia to apply as between the States of the Union. Strouther *v.* Com., 22 Southeast. Rep. 252, stress is laid on the fact that a sufficient remedy is provided by extradition. Some of the States have provided for the case by statute. Disa-

greeing with this doctrine are Stanley *v.* State, 24 Ohio St. 166; 15 Am. Rep. 604; State *v.* Ellis, 11 Vermont, 650; State *v.* Underwood, 49 Me. 181; Watson *v.* State, 36 Miss. 593; State *v.* Johnson, 2 Oreg. 115; State *v.* Bennett, 14 Iowa, 479; Ferrell *v.* Com., 1 Duvall, 150; Com, *v.* White, 123 Mass. 430; 25 Am. Rep. 116; Worthington *v.* State, 58 Md. 403; 42 Am. Rep. 338; Powell *v.* State, 52 Wis., 217; State *v.* Newman, 9 Nev. 48; 16 Am. Rep. 3; People *v.* Williams, 24 Mich. 164. On the other hand, agreeing with the Virginia case are Lee *v.* State, 66 Ga. 203; 37 Am. Rep. 67; People *v.* Gardner, 2 Johns. 477; State *v.* LeBlanch, 2 Vroom, 82; Simmons *v.* Com., 5 Binney, Pa. 617; State *v.* Brown, 1 Haywood (N. C.), 100; Simpson *v.* State, 4 Humph (Tenn.), 456; Beall *v.* State, 15 Ind. 378; State *v.* Reonnals, 14 La. Am. 298. So here we have arrayed the States — or all of them which we have discovered — twelve adjudging the act larceny, and nine that it is not. The theory upon which the Virginia doctrine is maintained is clearly announced in the Maryland case above, namely, that although a thief may not be punished in one State for a larceny committed in another, yet if he brings the stolen goods into the former State, he may be punished as for "a new larceny." This is a very shadowy distinction. The only real larceny is in the foreign State. Certainly the thief does not "take and carry away the goods of another" in the second State, for he brings them into that State with himself. We think the Virginia decision is right, and that the doctrine of constructive and fresh larceny is unsound.

"KINDERGARTEN." — In Sinnott *v.* Colomber, California Supreme Court, 28 L. R. A. 594, it was held that the court would take judicial notice of the meaning of this word, observing: —

"We think we may take judicial cognizance of its significance, as the supreme court of Colorado has apparently done. *Re Kindergarten Schools*, 18 Colo. 234, 19 L. R. A. 469. Thus informed, we find that the term 'kindergarten' (meaning literally 'a garden of children') was devised by Friedrich W. A. Froebel, German philosopher and educator, to apply to a system which he elaborated for the instruction of children of very tender years. 'Children's garden' ought to be taken in its allegorical sense. The child is a plant, the school is a garden, and Froebel calls teachers 'gardeners of children.' Compayré, History of Pedagogy, § 537, Payne's translation. 'He saw that the child's inborn desire for activity manifests itself in play, and that children love to play together. His system, therefore, guides this inclination into organized movement, and invests the games (unknown to the child) with an ethical and educational value, teaching, besides physical exercises, the habits of discipline, self-control, harmonious action and purpose, together with some definite lesson of fact.' Sennenschein's Cyclopaedia of Education, p. 169."

BICYCLES. — In Thompson *v.* Dodge, Minnesota Supreme Court, 28 L. R. A. 608, it was held that a person driving a horse has no rights in the highway superior to those of one riding a bicycle. The court said: —

"In the use of a public highway, there are certain rights of the road which must be observed by all persons, and a violation of those rights constitutes actionable negligence. A bicycle is a vehicle used now very extensively for convenience, recreation, pleasure, and business, and the riding of one upon the public highway in the ordinary manner as is now done is neither unlawful nor prohibited, and they cannot be banished because they were not ancient vehicles, and used in the Garden of Eden by Adam and Eve."

So in Pennsylvania recently a wheelman recovered for the destruction of his wheel which he left standing against the curbstone, and which a heavy wagon ran over.

"INFLAMMATORY." — This was the adjective applied by Mr. Clair, of Nebraska, an attorney, to a charge made by Judge Scott to a grand jury, on a motion to quash an indictment. The Judge considered the dignity of the court infringed and undertook to punish Mr. Scott for contempt of court. The matter went to the Supreme Court, and it was there held (40 Neb. 534) that the adjective was well deserved and that the attorney should go Scott free. The charge was on the subject of bribery, and was a red-hot one, and wound up with the following explosion of rhetorical rockets: —

"A little well directed effort on your part, as grand jurors, in the direction here indicated, would doubtless open up a field into which a stone could not be thrown without hitting a criminal. You should see to it that the stone is thrown, and thrown hard. You owe it to yourselves, the people whom you represent in your present service, and to your sworn obligations to make that effort, and to make it with such an uncompromising zeal that hereafter a mark more indelible than that put upon Cain shall be stamped upon their foreheads, marking them as 'ticket of leave men' and moral blisters upon the body politic. There comes up from the people a command for a forward march all along the line of your duty. You should give heed to that cry, for it comes from a patient and long-suffering endurance which has at last reached its limit."

The court cited definitions of "inflammatory" from Webster's Dictionary, and concluded that it was "an impassioned appeal, if not indeed express direction, to the grand jury to present, by indictment, certain persons not named, but who are assumed to be guilty of the crime of bribery. In that sense, if not inflammatory, it is at least what, in the science of medicine, is denominated heroic treatment." Judge Scott meant well, but erred through that which Talleyrand so much deprecated — zeal. We congratulate Mr. Clair on his pluck. He is Young-man-not-afraid-of-the-Judge.

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LEGAL ANTIQUITIES.

THE German laws refer to cases in which a a woman might demand justice of a man personally in the lists, and not only are instances on record in which this was done, as in a case at Berne, in 1228, in which the woman was the victor, but it was of sufficiently frequent occurrence to have an established mode of procedure, which is preserved to us in all its details by illuminated manuscripts of the period. The chances between such unequal adversaries were adjusted by placing the man up to navel in a pit three feet wide, tying his left hand behind his back, and arming him only with a club, while his fair opponent had the free use of her limbs, and was furnished with a stone as large as the fist, or weighing from one to five pounds, fastened in a piece of stuff. In certain cases the man was provided with three clubs. If in delivering a blow he touched the earth with hand or arm, he forfeited one of the clubs; if this happened thrice his last weapon was gone, he was adjudged defeated, and the woman could order his execution. On the other hand, the woman was similarly furnished with three weapons. If she struck the man while he was disarmed she forfeited one, and with the loss of the third she was at his mercy, and was liable to be buried alive.

FACETIÆ.

"I HEARD a report," said a witness in a celebrated case. "Never mind what reports you heard," interrupted the lawyer. "State only what you know." "But it was the report of a gun," remarked the witness, whereat Bench and Bar laughed without reproval.

AT a late term of Emanuel County court, Ga., a lawyer had been absent from the court-room, as he feared, beyond his leave. As he hastened back he inquired of an old negro who was leaning against the gate: "Uncle, can you tell me what case they are trying now?" Whereupon, the

darkey answered, "It's one o' dem cases of delicious mischuff." The lawyer hurried on, to find the court engaged in trying a man for alleged bigamy.

A LIQUOR case was on trial, and one of the officers who had made the raid testified that a number of bottles were found on the premises.

"What was in the bottles?" asked the judge of the witness.

"Liquor, your honor."

"What kind of liquor?"

"I don't know, sir."

"Didn't you taste it or smell of it?"

"Both, your honor."

"What! do you mean to say that you are not a judge of liquor?"

"No, sir; I'm not a judge; I'm only a policeman."

The witness was excused from answering any further questions.

JOSEPH H. CHOATE is an expert in handling two-edged-sword repartee. His skill is such that he seldom meets one who is able to hold his own with him. He met his match not long ago while trying a case before the Surrogate.

An old woman was being questioned by him about how the testator had looked when he made a remark to her about some relatives.

"Now, how can I remember. He's been dead two years," she replied testily.

"Is your memory so poor that you can't remember two years back?" continued Choate. The old woman was silent and Choate asked: "Did he look, when he spoke, anything like me?"

"Seems to me he did have the same sort of a vacant look!" snapped the witness with fire in her eyes. The court-room was convulsed, and Choate had no further questions.

AT a certain assize held recently in the south of England, the jury could not agree, and were locked up.

After a long and animated discussion, a division was taken, when ten were found to be for conviction and two for acquittal.

Another long and acrimonious debate followed, and eventually a big, burly farmer, who was leading the majority, went over to the diminutive individual, who, with a companion, formed the minority, and, assuming his most aggressive attitude, said, "Now, then, are you two going to give in?"

"No!" defiantly replied the small man.

"Very well," was the answer; "then us ten will!" And they did!

NOTES.

ACCIDENT of birth has played an important part in destiny in all ages, but never more pointedly than in the case of Sir William Scott (Lord Stowell), the great admiralty judge. His mother — wife of John Scott, a coal-fitter in Newcastle-upon-Tyne — was near confinement in 1745, when the Stuart Pretender was marching towards London from Edinborough, taking Newcastle in his way, and intending to besiege it. It was deemed best to remove Mrs. Scott, but her modest residence was in a narrow lane, between which and the river ran the town wall, the gates of which were closed and fortified. The expectant mother, being placed in a basket, was hoisted over the wall into a boat that ferried her over to the other side, which was County Durham. Two days thereafter the future jurist was born — a twin, with a sister. He always jocularly said that through the brief voyage he was born for admiralty. When he became adolescent, although returned to Newcastle, a scholarship in Corpus Christi college at Oxford, that belonged to Durham, fell vacant, and having been born there he became eligible for the appointment, and, on his father's application, received it. There he laid the foundation for his learning and consequent rise, which enabled him to aid his younger brother, who became Lord Eldon.

IN 1844 it occurred to the New Orleans electors that a judge of its Commercial Court ought to be a merchant, and they therefore elected George Strawbridge, who had emigrated thither from Philadelphia to engage in commerce. In suits relating to promissory notes, bills, charter parties and insurance he made an excellent judge, but with the abstruseness of law he had no affiliation. An important case of garnishment under the civil

code came before him, in which for various suitors the eloquent Sergeant S. Prentiss, the poet-lawyer Richard H. Wilde, Judah P. Benjamin, and John Slidell were engaged. Facts were admitted, but each argued questions of legal construction. On the fifth day of arguments one of the counsel paused a moment and said, "And now I ask your Honor's particular attention to my next part." Judge Strawbridge looked wearily at him and said in a disconsolate voice, "Oh, don't appeal to me yet, for all of you have been out of my depth ever since the first day." "Then our filed briefs can become diving-bells for your comprehension," returned the witty Prentiss.

THE New Orleans incident may recall an anecdote furnished by Lord Brougham about Lord Chief Justice Ellenborough. Several conveyancers were making tedious technical arguments before him, when, late in the day, one, referring to an interlocutory remark of the Judge, said, "Is it your lordship's pleasure to hear us on that point?" and the latter answered, "Pardon me, but we have no pleasure whatever in the argument."

THE following extracts from a petition for the foreclosure of a mortgage recently filed in a Nebraska court deserves a place in the GREEN BAG'S collection of legal curiosities:

"The defendants —— and ——, nor any other person, has not paid the amount secured by said mortgage, as required by the conditions thereof, *whereby said mortgage deed has become obsolete.*"

"Thus the plaintiff therefore prays that the plaintiff may foreclose the following, and collect the remaining of their interest in said mortgaged premises, and that said premises may be sold according to law and out of the *proceedings* thereof this cross-petitioner may be paid the amount adjudged to be due him on said note and mortgage."

"That the defendants —— and —— be adjudged to pay in deficiency the amount which may remain *after paying of said debt,* and such other relief as may be just and equitable."

MR. KERR, whose annotations of Blackstone in bracketed additions to the text are so convenient and valuable, while Recorder of London hearing a contest of band performers for wages, was bothered by one set of musicians speaking of themselves as violin players, when another set called themselves musicianers. He therefore asked the Attorney — the father of the present eminent solicitor, Sir George Lewis — "What, if any, difference is there between a fiddler and a musicianer?" "Precisely that," answered Lewis, "which exists between bagpipes and 'the Dorian Mood,' referred to by Milton in his Paradise Lost, 'of flutes and soft recorders.'" Recorder Kerr smiled at the punning compliment and remained unusually "soft" during the remainder of the case.

LITERARY NOTES.

THE complete novel in the November issue of LIPPINCOTT'S, "In Sight of the Goddess," by Harriet Riddle Davis, deals with life at the Capital. The principal characters are a member of the cabinet, his daughter, and his private secretary, who might also be called society manager for the family; the action is chiefly between the two last. The tale is written with abundant local knowledge and striking ability.

THE leading article in THE BOSTONIAN for November is on "Football at Harvard College," written by R. Robert Dundee, of whom it may be said that he "knows whereof he writes." Other features of interest are, "Recollections of Ex-Governor Alexander H. Rice," "Memories of the Past," "The Old Salt House," "Indian Summer," one or two remarkably good stories, etc., etc.

WITH the November number THE ARENA closes its sixth year, and for the coming year announces a reduction from five dollars to three dollars in its subscription prices. The magazine has come to be a great power in the cause of progress and reform, and no thinking man can fail to appreciate its merits. Among the important contributions of this issue is a very suggestive paper by Prof. George D. Herron on "The Sociality of the Religion of Jesus"; Senator J. T. Morgan, who is recognized as one of the ablest thinkers in our Senate on international questions and constitutional problems, discusses the Silver Question; Ex-Governor James M. Ashley, an old-time Republican, congressman and governor, writes on "The Impending Political Advance"; Prof. Frank Parsons, of the Boston University School of Law, contributes a masterly paper on Municipal Lighting.

PRESIDENT ANDREWS' installment of contemporary history, "The Plumed Knight and His Joust," in the November SCRIBNER'S MAGAZINE, is a most vivid and dramatic presentation of the chief events of the years of Blaine's greatest popularity, including the famous Mulligan letter scandal and the exciting Blaine-Cleveland campaign. As part of the record of the time, this installment also includes the thrilling Arctic story of the rescue of Greely. The illustrations of the number are even more profuse than they have usually been of late, and the contributing artists are among the best.

APPROPRIATE to the election season, the November CENTURY gives attention to the "Issues of 1896." The space is divided between two of the younger public men of national fame, who have won reputation as writers, speakers, and faithful executors of public trusts. The Hon. Theodore Roosevelt offers a Republican view of the issues of the coming Presidential contest, and Ex-Governor William E. Russell, of Massachusetts, describes the situation from a Democratic standpoint. Prof. James Bryce, the English Liberal, presents a forcible statement of "The Armenian Question." He appeals with considerable feeling for the aid of public opinion in America in the interest of the persecuted Christians suffering from Turkish brutality. In the "Open Letters" department, the Duke of Westminster, the Conservative leader and philanthropist, briefly appeals to the American public on the same lines.

THE ATLANTIC MONTHLY for November contains among other features three short stories of exceptional quality: "In Harvest Time," by A. M. Ewell, "The Apparition of Gran'ther Hill," by Rowland E. Robinson, and "The Face of Death," by L. Dougall. There also is an installment of Gilbert Parker's serial "The Seats of the Mighty," and Charles Egbert Craddock's "The Mystery of Witch-Face Mountain" is concluded.

A SERIES of papers on the "Principles of Taxation," by Hon. David A. Wells, begins in the November POPULAR SCIENCE MONTHLY. Being based on the wide study which Mr. Wells has given to this subject and his experience as chairman of the U. S. Revenue Commission of 1865-'66, Special Commissioner of Revenue, later as chairman of a commission for revising the tax laws of the State of New York, and in other like positions, this series promises to be the most important contribution to the solution of pressing financial problems that has appeared in many years.

THE Christmas HARPER'S MAGAZINE is a beautifully illustrated and varied number. It contains the opening chapters of a new novel by William Black, called "Briseis," illustrated by W. T. Smedley. Mr. Caspar W. Whitney also begins the recital of his adventures in the unexplored Northwest in pursuit of big game. Poultney Bigelow's history of "The German Struggle for Liberty" and the "Personal Recollections of Joan of Arc" are continued. There is a farce by W. D. Howells, and short stories are contributed by Brander Matthews, Kate Douglas Wiggin, Thomas Wharton, and Katherine S. MacQuoid.

THE publishers of LITTELL'S LIVING AGE announce a reduction in the price of that unique eclectic from eight dollars to six dollars a year; the change to take effect with the first of the new year. THE LIVING AGE, now nearing the close of its fifty-second year, has ever been the faithful mirror of the times, reflecting only that which was highest and best and most desirable in the whole field of literature. It has received the commendations of the highest literary authorities, the most distinguished statesmen, the brightest men and women of the country, and has proven a source of instruction and entertainment to many thousands.

WITH the November number MCCLURE'S MAGAZINE commences the publication of a new Life of Abraham Lincoln which promises to be unique in many ways.

It is to contain a complete series of the portraits of Lincoln, over forty in number, more than twice as many as have appeared in any previous biography, and including many important portraits that have never before been published.

BOOK NOTICES.

LAW.

THE ANNUAL OF THE LAW OF REAL PROPERTY. Edited by TILGHMAN E. BALLARD and EMERSON E. BALLARD, Volume III, 1894. The Ballard Publishing Co., Crawfordsville, Ind., 1895. Law sheep. $6.50.

This volume is prepared on the same general plan as those which have preceded it, and covers every real estate case reported during the year 1894. We have commended the series in noticing earlier volumes. The Messrs. Ballard are doing a real service to the profession in collecting and so admirably indexing the yearly decisions upon this important subject.

THE CONSTITUTION OF THE UNITED STATES at the End of the First Century. By GEORGE S. BOUTWELL. D. C. Heath & Co., Boston, 1895. Cloth. $3.50.

In this volume Ex-Governor Boutwell of Massachusetts, has gathered and set forth in a concise form the substance of the leading decisions of the Supreme Court of the United States, upon all the constitutional questions upon which it has passed up to the present time. The work is one of great value not only to the legal profession, but to the general pubiic.

THE AMERICAN DIGEST (Annual, 1895). A digest of all the decisions of all the United States Courts, the Courts of Last Resort of all the States and Territories and the Intermediate Courts of New York State, Pennsylvania, Ohio, Illinois, Kansas, Missouri, Texas and Colorado, United States Court of Claims, Court of Appeals and Supreme Court of the District of Columbia, etc., from Sept. 1, 1894, to August 31, 1895. West Publishing Co., St. Paul, Minn. 1895. Law sheep. $8.00 *net.*

The profession generally will agree that the West Publishing Company know how to make a digest, and if we must have these ponderous tomes thrust upon us year after year, it is fortunate that their preparation is in such competent hands. The present volume of some 2700 pages is in every respect what a digest should be and is indispensable to every lawyer.

MISCELLANEOUS.

A GENTLEMAN VAGABOND and some others. By F. HOPKINSON SMITH. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

Several short sketches, all of them written in the author's best vein, make up the contents of this volume. Mr. Smith is a remarkable writer, and as a delineator of character is unequaled. Nothing could be better than his portrayal of Major Slocomb, the "gentleman vagabond," in the opening story. The gem of the collection is, perhaps, "John Sanders, laborer," a touching story of the sacrifice of a life for a poor little dog.

DOROTHY AND ANTON. By A. G. PLYMPTON. Roberts Brothers, Boston, 1895. Cloth. $1.00.

Miss Plympton writes delightfully for children, and this story of "Dorothy and Anton" is one of her best. It is intended as a sequel to "Dear Daughter Dorothy," although it is complete in itself. Dorothy is a sweet little creature, with a heart full of love and sympathy for others. And in this story she brings happiness into at least two lives.

MR. RABBIT AT HOME. By JOEL CHANDLER HARRIS. Illustrated by Oliver Herford. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $2.00.

Every child who has read "Little Mr. Thimblefinger and his Queer Country" will be eager to possess "Mr. Rabbit at Home," which is a sequel to that delightful book. Buster John, Sweetest Susan and Drusilla again revisit the queer country and are regaled by Mr. Thimblefinger, Mr. Rabbit and others with a number of fascinating stories. These stories all have the charm of novelty, and are written in Mr. Harris's inimitable style. No better book could be found for a Christmas gift for the little ones.

A QUESTION OF FAITH. By L. DOUGALL. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.25.

A man's faith in a woman put to the test and found wanting is the key-note to this story. While we are inclined to sympathize with the young man whose curiosity led him to inquire into the reasons of the nocturnal wanderings of his lady-love, and her meetings with a strange man, and who refused to be wholly satisfied with her evasive answers, the young lady herself seemed to find his doubts inexcusable and dismissed him. The story is interesting, but is by no means equal to "Beggars All," which made the author famous.

THROUGH FOREST AND PLAIN. By ASHMORE RUSSAN and FREDERICK BOYLE. Illustrated. Roberts Brothers, Boston, 1895.

Every boy who reads this book will fully endorse the opinion of one youngster who, after devouring its pages, exclaimed "It is just splendid!" The thrilling adventures and hair-breadth escapes of a party of botanists in Central America are graphically described, and at the same time a vast amount of valuable botanical information is imparted in an interesting manner. The book is a capital one for children in every respect, and will make an acceptable Christmas gift.

JOEL: A Boy of Galilee. By ANNIE FELLOWS JOHNSTON. Illustrated by Victor A. Searles. Roberts Brothers, Boston, 1895. Cloth. $1.50.

The memorable events in the life of Christ are made the basis of this story. Joel, a lame lad of Capernaum, is a witness of the marvelous doings of the Saviour and becomes his follower and disciple. The narrative is interesting, and the book well adapted for Sunday reading.

A JOLLY GOOD SUMMER. By MARY P. WELLS SMITH. Roberts Brothers, Boston, 1895. Cloth. $1.25.

This story will be welcomed by the young people, especially by those who have read "Jolly Good Times To-day." Amy Strong and her little friends continue their interesting and amusing doings, and have about as "jolly" times as can be imagined. It is an excellent book for Christmas gift to either boys or girls.

THE NIMBLE DOLLAR, with other stories. By CHARLES MINER THOMPSON. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth.

This is a capital book for boys. Every one of the stories is brimful of fun, and each is so good that it is hard telling which is the best. The boy must be hard to please who will not find a feast of real enjoyment in every page of this volume.

MUNICIPAL GOVERNMENT IN CONTINENTAL EUROPE. By ALBERT SHAW. The Century Co., New York, 1895. Cloth. $2.00.

The present general interest in the subject of municipal reform in this country has led to the study of methods of administration that obtain in the cities of the Old World. Many of the problems that confront American law-makers have been met and mastered in European cities, and it is recognized that many valuable lessons can be drawn from the experiences of Glasgow, Paris, Berlin, and other progressive municipalities. Dr. Albert Shaw's study of "Municipal Government in Great Britain" is already passing into its third edition, and now it is supplemented by the present volume, which carries the inquiry to the leading Continental cities. Dr. Shaw gives the foremost place in his book to Paris, "the typical modern city," believing that a knowledge of its affairs is essential to an intelligent survey of municipal progress on the Continent. "Whether one goes to the Low Countries and Scandinavia, to Switzerland and Italy, or to Germany and Austria-Hungary," says Dr. Shaw, "he finds evidences on all hands of the abounding influence that the modern Paris has exerted upon the outward forms of European cities." While the author has explained carefully and at length the structure and working of the municipal machinery of the cities he has chosen, he has made it no less essentially a part of his task to describe the transformation of street-systems, and the measures by which death-rates have been reduced. The appendices of the volume give the budgets of Paris and Berlin, and the French Municipal Code. An exhaustive index adds to the usefulness of the work.

GOOSTIE. By M. CARRIE HYDE. Roberts Brothers, Boston, 1895. 50 cts.

A touching story of a boy's love for his baby brother. Too poor to provide for him, he leaves the little one at the door of a rich family by whom he is taken in and cared for. The two brothers meet constantly during the ensuing years, but the older does not divulge his relationship until he has won a name and fame for himself. The story is charmingly written and will delight both old and young.

THIS GOODLY FRAME, THE EARTH. By FRANCIS TIFFANY. Houghton, Mifflin & Co., Boston and New York, 1895. Cloth. $1.50.

This interesting work is something more than the ordinary book of travel. The author does not content himself with a mere description of the daily program of the traveler, but gives the reader his impressions of scenes, incidents and persons in a journey which included Japan, China, India, Egypt, Palestine and Greece. The book is fascinatingly written and will delight all who are fortunate enough to read it.

STANDISH OF STANDISH, a Story of the Pilgrims. By JANE GOODWIN AUSTIN; with photogravure illustrations from designs by Frank T. Merrill. Two volumes. Cloth. Houghton, Mifflin & Co., Boston and New York, 1895.

This charming story of the Pilgrim Colony and its hero, Myles Standish, derives an added interest from the beautiful holiday attire in which it now appears. Everything which the printer's and engraver's art can accomplish has been employed to make it attractive. The binding is exquisitely dainty and the illustrations are artistic gems.

BOOKS RECEIVED.

INTRODUCTION TO AMERICAN LAW. By TIMOTHY WALKER, LL.D. Little, Brown and Co., Boston.

NEGLIGENCE OF IMPOSED DUTIES, CARRIERS OF FREIGHT. By CHARLES A. RAY, LL.D. Lawyer's Co-operative Publishing Co., Rochester, N.Y.

A TREATISE ON THE LAW OF FORMER ADJUDICATION. By JOHN M. VAN FLEET. Two vols. The Bowen-Merrill Co., Indianapolis.

A TREATISE ON THE LAW OF REAL PROPERTY. By JAMES M. KERR. Three vols. Banks and Bros., New York and Albany.