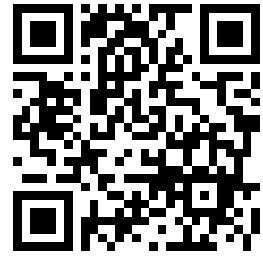

The green bag

Horace Williams Fuller, Thomas Tileston Baldwin, Sydney Russell Wrightington, Arthur Weightman Spencer

THE GREEN BAG

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VOLUME IX

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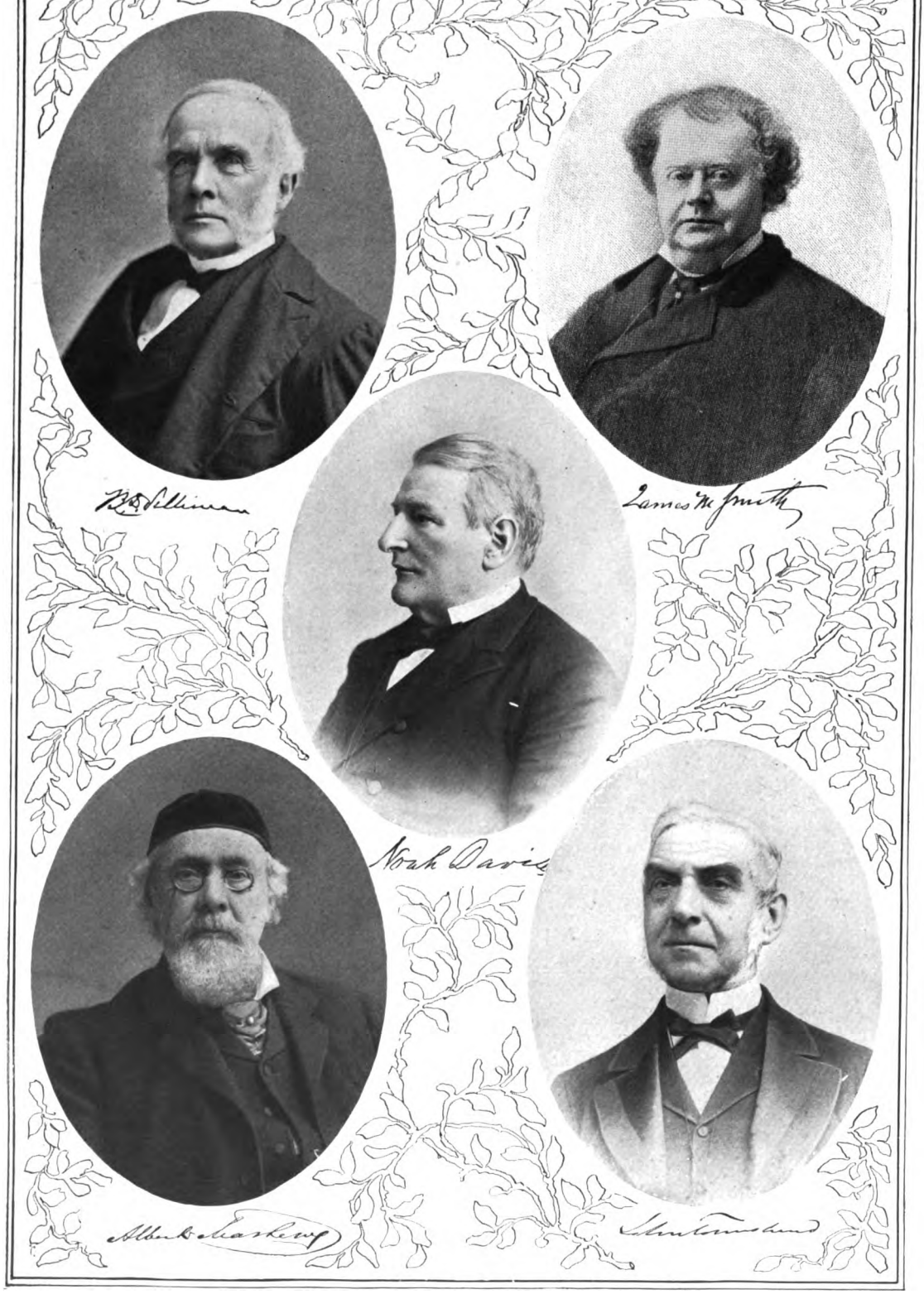
INDEX TO PORTRAITS.

INDEX TO VOLUME IX.

CASES REVIEWED.

Habit, 552; Stewart *v.* Swift (Ga.), Animal Defamation, 135; Stottenwerk *v.* State (Ala.), Yearling, 134; Swart *v.* Rickard (N. Y.), Prowl, 133; Tebbe *v.* Smith (Cal.), An Arcadian Election, 42; Townsend *v.* State (Ind.), Waste of Natural Gas, 412; Tracy *v.* People (Ill.), Dying Deciarations, 238; Tucker *v.* Henniker (N. H.), New Trial on Account of Comments of Counsel, 458; Uhl *v.* Commonwealth (Va.), Coercion of Wife, 85; Urban *v.* Helmick (Wash.), Animal Defamation, 135; Utitchum *v.* State (Ga.), New Trial on Account of Comments of Counsel, 458; Vellers *v.* Mousley (Ind.), Animal Defamation, 135; Wadsworth *v.* Marshall (Me.), Definitions, 86; Wagener *v.* Bill (N. Y.), Coercion of Wife, 85; Weble *v.* U. S. M. Acc. Association (N. Y.), Exhumation, 365; Webster *v.* Hillsdale Co. (Mich.), Unhealthy Jail, 551; White *v.* Oakes (Me.), 40; White *v.* Sullivan Co. Comm'rs (Ind.), Unhealthy Jail, 551; Will *v.* Paige, "Person," 502; Williams *v.* Adams (Mass.), Unhealthy Jail, 551; Williams *v.* B. E. R. Co. (N. Y.), New Trial on Account of Comments of Counsel, 458; Williamson *v.* Williamson (Eng.), Connivance, 364; Wilson *v.* Runyon, Animal Defamation, 135; Wood *v.* Penn. R. Co. (Pa.), Proximate Cause, 502; Yale *v.* Curtiss (N. Y.), Promise to Marry, 235.



The Green Bag.

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A QUINTETTE OF LEGAL NESTORS.

BY A. OAKEY HALL.

THE longevity of judges is as remarkable a fact as is the average old age of actors and actresses; but while the longevity of the latter has been often remarked and commented upon, when considering the irregular hours kept in their profession, the longevity appertaining to the average judicial officer is not widely known even to many members of the legal profession. A search, however, in biographical encyclopædias soon ascertains the truth of the last-named assertion. We have only for a marked instance to regard Justice Stephen J. Field, now an octogenarian, and who on the eve of his fourscore penned his masterly, if subtle, opinion in the income tax case. Or to regard at least three of the highest justices of England now on its bench who are entitled on request to retire on account of old age. New Yorkers recall Chancellor Kent dying at the age of eighty-four, Judge Denio at eighty, and Justice Samuel Nelson at eighty, after he had occupied the bench successively during a half century. Bostonians can recall Chief-Justice Samuel Shaw, who died also aged eighty, and Justice Story, who, after mingling arduous judicial duties with incessant toil as a prolific legal author, lived to within four years of the Biblical span of life. Lawyers calling the roll of Federal Chief Justices will recall Marshall, also dying at the age of eighty — a mystic number that for judicial age, it would seem; and also Taney at eighty-seven years, and would not forget Justice McLean at seventy-six. Louisiana lawyers mention that great civilian Francis Xavier Martin, who died as their Chief Justice at eighty-four years. English Q.C.'s would refer to Lord Stowell at ninety-four and his brother Eldon at eighty-seven, Mansfield at eighty-eight, Erskine and Thurlow at seventy-four each, and Brougham at the same age with Stowell: of whom he had written, "His opinions as collected in a volume after his death ought to form part of every classical library of English eloquence or even of our national history." Readers of the GREEN BAG can doubtless readily estimate further instances of judicial longevity at their various residential localities.

Just now at the New York bar move in full physical and mental vigor five members — two of them ex-judges — who are conspicuous for longevity; wherefore I call them in my references to them a quintette of legal Nestors. I might have made a sextette by including Charles P. Daly had not his life and services been already sketched in the GREEN BAG for November, 1894.

These five are Benjamin D. Silliman, Noah Davis, James M. Smith, John Townshend and Albert Mathews. They are not only acting jurisconsults in their chambers, but make appearances at *nisi prius* and *in banco*. All of them are above seventy-six years and some are octogenarians. In my younger days I became so accustomed to hear his compeers speak of Ben Silliman that it is difficult for me to differentiate him, now in his green eighties and with his yet magnetic smile and cheery voice, from the great lawyer of middle age who, as a Federal District Attorney, daily in court coped with such compeers, now passed away, as John Lott, Grenville Jenks and Henry C.

Murphy of the Brooklyn bar. Silliman had a felicitous manner of carrying his habitual bonhommie before jurors and even before the impressive Samuel Nelson on the bench. Silliman and Davis had bonhommie of manner equally. That of Noah Davis — while he was for over a quarter century on the Supreme Bench of New York — was shaded by dignity but never entirely overwhelmed. Davis, like Silliman, became a Federal District Attorney in an intermission between his judicial terms; and also a Congressman; but such was his recognized judicial temper that the people at an election returned him to the Bench: from which an absurd prohibitory age clause had retired him when he was at the very zenith — like Chief-Justice Charles P. Daly — of his judicial fitness. No judge was ever more genial — yet full of firmness — than Noah Davis of sturdy Welsh ancestry. His fascinating smile emboldened many a timid young advocate. His mastery of logic tripped many a presumptuous senior who undertook sophistry or to draw unsound parallels from precedents cited. Silliman was equally logical, and equally a lawyer grounded in principles. Both exhibited remarkable memory of cases. Both used persuasive rather than strictly oratorical tones. Each was equally happy at a post-prandial impromptu speech. Each was as free from affectation as Abraham Lincoln. Each one was an incarnation of probity and truth. I have coupled them, because years ago, on a certain occasion, when Silliman — who always so pointedly contradicted his family name — was arguing before Judge Davis — always happiest as an appellate judge — I detected the obvious similitude of mind and bearing in the twain, and thereafter I never thought of the one without mental recurrence to the other. While the reputation of Silliman was more or less local, that of Davis became national through his patriotic and judicious congressional participation in an era when the Union was recovering from Secession hysterics; and also from duty summoning him to preside at the criminal trial of Supervisor William M. Tweed when charged with official embezzlement in the city of New York. Indicted for a misdemeanor on several counts comprising distinct acts of embezzlement, Judge Davis sentenced him on a general verdict of guilty upon more than one count. The Court of Appeals — of which Davis had once been a member — reversed sentence and the action excited universal gossip among laymen as well as lawyers over the entire Union. Yet substantially, years afterwards, the Judicial Appellate Court in England, wherein I heard the American case cited in behalf of editor Edmund Yates, appealing from a conviction for libel on separate counts with cumulative sentences, his judges ignored the New York Court of Appeals, and followed the law of Judge Noah Davis.

Another of the Nestors, James M. Smith, had for many years after a successful practice at the bar, been also called to preside as a criminal law judge in the office of Recorder of New York City. His claim to old age may well be respected when one hears that he is the sole survivor of that Citizens' Committee who early in the forties tendered Charles Dickens the great banquet and reception so felicitously written about by John Forster in his biography of the novelist. A lithographic copy of the invitation with the autographs of the distinguished signers is affixed to one of the volumes; and the signature, James M. Smith, Jr., there found, is no freer than his recent one now before me. But the suffix "junior" has disappeared, although it properly can be still applied to his head and heart, even if its applicability to his physique be contradicted by the sight of his cane. But Smith has been entitled to a cheery life, for it was mainly passed in a poetic atmosphere; amid the lyrics of his late wife Emmeline, that have delighted myriads of magazine readers in the past. I practiced as a District At-

torney throughout his term as Recorder, and can therefore bear full testimony to his deep knowledge of criminal jurisprudence; to his judicial tact in tempering justice with mercy; and to the steady hand with which he ever held the scales that Justice entrusted to him. Before his elevation to the Bench he had been in company with Ambrose L. Jordan, the Graham Brothers, James T. Brady, and Henry L. Clinton, an acknowledged leader of the New York criminal Bar. It is one of Smith's tributes that he lost a renomination because in his firmness and integrity he had displeased the leaders of his party.

Albert Mathews may be practically considered as the only member of the quintette of Nestors against whose name some might be tempted to write the word "retired." But by no means "on half pay"; for his forty years' practice at the Bar brought him deserved independence, and has allowed him leisure in late years to prepare and publish a delightful volume of essays under the *nom de plume* of Paul Siegvolk,— essays that now remind of the vivacity of Elia, again of the philosophy of De Quincey or of the critiques of William Hazlitt; and anon of the sparkle of Sydney Smith, that witty canon of old St. Paul's in London. In the younger days of Mathews at the New York Bar, when Chancery practice was in vogue and bills were to be drawn at so much a folio to become taxed costs, those bills that came under his drafting as a member of the great law firm of Blunt, Brown & Mathews, whereof he is Nestorial survivor, became although founded on fact, as enticing in style as if founded on fancy and fiction. He was then in appearance an elderly young lawyer; the while his antique gold spectacles beamed persuasively on jurors and judges; but he can now be called reversely a youthful elderly so far as head and heart and still juvenile inspiration are accounted. He began practice in the era when Prince Albert of England was a celebrity, and the familiars of Mathews dubbed him by virtue of his christian name Prince Albert. To one extent the name was appropriate; for he had a German bearing like the Prince Consort and was equally diplomatic in conduct; the which latter quality made him an excellent office-adviser with clients. His partner Blunt was the orator of the firm and owed much of his fame in courts to the elaborate briefs which Prince Albert prepared.

John Townshend as a septuagenarian — although none would think him one to see his vigorous English stride — is to my mind the most legal-looking member of the New York Bar. Tall and stately, he has a lean, but not a hungry, Cassius-like appearance, as betokening laborious days and nights with study that prevented undue attention to creature comforts. His Roman face is lined with thought, and his piercing eyes suggest a man pursuing a constant cross-examination of things, men and measures. You would find replicas of his face in the prints of many ancient lawyers. He exhibits a stern countenance until something occurs to soften it with smiles. Antagonistic and assertive of rights in court, he is in private life genial, tender, kind and courteous. But let no one in pronouncing his surname omit sounding the "sh" in it. Towns-end is a later-day patronymic, while Town-shend goes back to earliest Saxon times. The last syllable has a meaning of "to overpower or surpass." Wherefore the poet Spenser lines it thus: —

> "She passed the rest, as Cynthia doth shend
> The lesser stars."

This application can appertain to Nestor Townshend, for no one can possibly surpass him as a conveyancer or delver in the lore of the law appertaining to realty. Of British birth, he was an English solicitor before emigrating to New York, and naturally brought with him that leaning toward the Coke upon Lyttleton doctrines of real estate which English solicitors, to whom are

committed the custody of deeds which in Great Britain from traditional family pride are never publicly recorded, must have. This emigrated taste became his luck in his adopted country; for he soon acquired fame as a conveyancer. He has, during his vast experience as a searcher of titles in New York City, become possessed of more knowledge about their abstracts than any other member of its Bar, except perhaps the office of the Dewitts. If John Townshend passes a title for real estate, its owner in Wall Street, for instance, where land is valued by the square inch, may sleep soundly over his quarter million purchase of realty. Townshend has a retriever or collie scent for a flaw, and is perhaps sometimes erring on the side of technicality. Had he drawn the last testament of Lord Westbury, or one for the Bay State Howland family, or for the late Samuel J. Tilden, their wills would never have undergone litigation; and in two cases to the evident disregard of testatorial intentions. Townshend's taste for conveyancing naturally invited him towards personal transactions in the ever rising real estate market of New York City, and his dealings have on the average improved his patrimony. Perhaps he is one of the very few lawyers who can give and explain that legal *pons asinorum*, "the rule in Shelley's case." But he is also an "all 'round lawyer"; and his opinion upon any question is valued. He has found time to prepare, in the years gone by, a treatise on spoken and written defamation which is an accepted authority; and also a volume on Circumstantial Evidence, with a collection of remarkable cases. During the past forty years he has been the family counsel of the James Gordon Bennett family; and he often steered their newspaper the *Herald* through those shoals of libel that American newspapers in a search after sensation and in a disregard for the common law of privacy often get grounded upon. He has long been a cherished family adviser in many other directions. His caution as to passing titles once put many thousand dollars into the coffers of the elder Bennett. The Civil War was commencing, and an English merchant named Robert Bage hastened to sell his double mansion on the commanding corner of Fifth Avenue and 38th Street, because believing that war would ruin property. The edifice pleased the great editor, and negotiations for the sale began. The stipulated price was made by agreement a special deposit of Bennett in the famous Chemical Bank. Townshend began a search for the title, and unearthed an apparent flaw that had escaped the scrutiny of a previous searcher who was regarded as a real estate omniscient. He took his own time to complete the title, and a tedious interim elapsed. Meanwhile, gold had advanced to a high premium, and the legal tender act had been enacted. In the end the purchase-money was withdrawn from the bank that all through the war paid gold on its own bills, and the amount was handed to Bage, the vendor — but in greenbacks. The difference between the market value of the latter and the premium upon a sale of the withdrawn gold constituted a handsome profit, and practically reduced the stipulated price for the real estate. It may be well believed that the Townshend fee became a large one under the improved circumstances — circumstances that at least for once extracted the sting of Hamlet's plaint against "the law's delay."

Were I a man of wealth I should tender a banquet to this quintette of legal Nestors, and have them there grouped together as guests surrounded by companionable selections of co-diners from the junior bar. These should toast the honored health of the quintette and descant upon the honorable professional careers of "Ben" Silliman, Noah Davis, James M. Smith, Albert Mathews and John Townshend aforesaid; and not omitting Charles P. Daly.

IN AN ENGLISH COURT OF LAW.

By an American Woman.

IT is a distinct experience, the first time you go to an English court of law. In the first place, you have the feeling that you should have prepared for the visit by going to a costumer's and hiring a fancy dress — something not too dazzling, but unique, and as far as possible from what you ordinarily wear. This seems to be the principle on which every one — that is, every man — who has anything to do with the court is dressed, with the result that you see them arrayed in a choice assortment of black silk tea-gowns and black alpaca Mother Hubbards. They do not call them that, but in the dressmaking department of your intellect you know that is what they really are, and resolve to borrow one for a pattern.

Not content with tea-gowns only, the court shows a distinctly feminine inclination in its style of hair-dressing. They are frankly and obviously wigs that you see — wigs dressed after a most ladylike fashion, with nice little side puffs, such as our grandmothers used to put combs in to keep in place. The "back hair," too, is a distinct feature. What with their tea-gowns and their hair, and their smooth faces, and their brilliant and enduring capacity for talk, an assemblage of English lawyers is, at first view, not unlike a session of a woman's club, or a Dorcas society that has forgotten to bring its work along.

It occurs to you what an unintentional, and therefore sincere, compliment is paid to us women when law, the most intellectual of the professions, chooses as its established and authorized costume one that comes nearer to a woman's dress than any other that men wear. It has the outward appearance, at least, of an acknowledgment that they do their best thinking when they make themselves as much like us as they can.

It is almost time for court to open, but you are not to suppose that it begins without any ado, as is the case at home. In an American court the judge walks in clad in ordinary clothes, hangs up his hat, sits down, mostly on his shoulder-blades, the lawyers present stop smoking for a moment and crowd inside the rail to catch his Honor's eye, and the successful one, one hand in his pocket and the other ready to pound the table with, proceeds to instruct the judge as to what is and is not law, and the lawyer on the other side as to what is and is not admissible evidence.

All of which is not the English mode. Etiquette, if not law, directs in which particular little pew the barrister for each side must sit, backed up by his solicitors, and these parties of the first and second parts arrive with leather valises of a set and established pattern which, under certain circumstances, they may carry themselves; under certain or other circumstances they must have carried for them. Sub-officials of the court lay cold sliced law, in the shape of documents and books, ready to hand. Solicitors, who are a brand of lawyers that know law but don't practise it, apparently because they haven't any tea-gowns yet, make haste to tell their counsel — who are lawyers that practise law but don't know it until they are told it — what has been found out about this particular case since the last conference. Clerks — you must pronounce it with a broad "a," or people will think you are so ignorant that you don't know how to spell it — well, clerks come in with bags, called green bags, for the reason that they are invariably either blue or red. They look so like laundry bags that you send soiled linen in to the wash that when you find that this is a divorce court,

and that these bags contain the documents relating to the cases, you at once realize both the origin and the force of the saying about washing dirty linen in public.

Someone — a *blasé*-looking man in a dress like a stunted polonaise — says something unintelligible to the audience, but they evidently know what he intends to say, and every one immediately gets up; all but you, who are so busy with your eyes that you forget your feet. Someone nudges you, and you rise, thereby not only showing respect to the representative of the Queen — if you did not you could be fined — but getting a very good view of the personages of the small but imposing procession emerging from the curtains behind the judge's chair. Enter, first, a sort of human preface in the shape of a mace-bearer. Generally speaking, judges even in England the Elaborate do not have mace-bearers, but this particular one has set up one pretty much as another man would set up a coach or a new doctrine in religion — by way of being a swell and different from his fellows. And the mace, too, is different from its fellows; others that you have seen are like bludgeons, this one is shaped like a stunted oar.

And now enter the judge, evidently a picturesque-minded person, for his tea-gown is red, with a sash around the place where his waist would be if he had one. His sleeves are turned back with grey, and you imagine that it is to keep them clean, but it is not. In law, the obvious reason is never the actual reason. Those grey sleeve-protectors are mourning; they were put on when somebody royal died — George the Third, as likely as not — and as the powers that be have not said that they were to be taken off, the judge keeps on being sorry, from his elbows down.

His lordship comes in; every one bows profoundly, and he returns it by a complicated movement made up of one part bow, one part a sidling walk, for he is ushering in, not the Prince of Wales, nor Li Hung Chang, as you might expect from his manner, but American Law in the person of Morton of the Supreme Court of Massachusetts. Your pride rises within you, for it is written all over Morton's face and figure and clothes that he is an American and a gentleman and a scholar. You wish that they would find many more just like him, and induce them all to come over here as an offset to the common or garden American, that is as a plague of thistles at about this time of year.

There he sits on the bench beside the judge, guiltless of slouch, his clothes well brushed, his mouth well shut, showing more intelligence by the way he listens than most people do by the way they talk. So marked is his personality and also the distinction which is being accorded him by his lordship, that every one asks who he is, and it delights your very soul to know that this credit to his country and himself is an American.

Meantime the case has begun, and a mixed affair it is. An American barrister, representing an official in China, is petitioning an English judge for a divorce in which an East Indian is involved, with the result that besides the law of divorce there enter questions of geography, domicile, jurisdiction, free ports of entry, and sundry minor entangling considerations.

As soon as you find it is a divorce case you retire, not having provided yourself with a mental disinfectant. Candidly you do so reluctantly, for he of the red gown is the famous Sir Francis Jeune, and the American barrister is Newton Crane, who had his first case at the English bar before this same Sir Francis. You would like to see how the two nationalities hit it off together; but friendship *plus* patriotism, even of the Star-Spangled Banner sort, is inadequate to carry you through the hearing of a divorce case in an English court. So you go to the next room and there learn some disconnected but interesting facts. One is that the judge is wearing a red gown because

it is the eve of St. Somebody's Day: not the anniversary itself, but its eve.

Then you watch them try an Admiralty case. With sweet inconsequence they group together those three unrelated classes of cases, admiralty, probate, and divorce. You discover that under the disguise of Law some more tea-gowns, aided by two gentlemen in uniform (that is where the Admiralty part comes in), are conducting a middle aged kindergarten, toys and all.

Before the judge's bench is a counter with the points of the compass marked on it, and they pretend that this is the sea or river they are talking about. Then there is a box full of toy boats ready, and as the barrister presents his case he puts up one little boat to represent the vessel that was run into, then dives down and gets another and sets it up to represent the one that ran into it. Everything is made beautifully clear until the opposing counsel produces eight more boats, to represent vessels anchored in the vicinity. Then the gentlemen in uniform and the judge ask a confusing lot of questions, and then a plain, everyday sailor man with an impossible accent comes forward as a witness, and turns all the boats around, adds five more to the fleet, and talks about "nor'-nor'-east by north." Just as you begin to think it is a slow kind of game after all, word is brought you that Sir Francis Jeune has decided the divorce case; that the American barrister has won, of course; that, as nearly as you can find out, everybody is divorced from everybody else, and that they all lived happily ever after. — *Ex.*

LEGAL REMINISCENCES.

XIV.

By L. E. Chittenden.

SPECIAL pleading was the science of precision. Like other sciences only to be acquired by hard study and close thinking, it had its evils. The skillful special pleader had advantages over his unlearned adversary which did not always promote justice. Its chief value was reflective. It gave the legal mind a training of which it is now deprived. The old lawyers were its friends, and there were few of them who could be enlisted in the crusade against it in the days when codification was young.

This once valued science has disappeared and scarcely left a sign. Gould and Chitty, once as much studied as Blackstone, have been laid away on the top shelves of our law libraries, behind scores of frothy state reports, valuable chiefly for their calf binding. Its great history has had no historian. The antiquary who would know something of that history, must gather it, here a little and there a little, from the multitudinous volumes of its cotemporary law reports. When in the coming years, some member of our profession, of studious habits and unusual application, shall be impelled by his love or respect for the past to write upon the subject, his sketches will have none but a historical value — interesting for the same reason as the article of Mr. Westley, on the "Quaint laws of Howel Dda."

When such a student of the past encounters the volumes comprising the litigation of Torrey *v.* Field, one branch of which has been discussed in these Reminiscences, he will not only find one of the very best examples of special pleading, illustrating its value, but also a singularly sensational history.

The following sketch of that history may prove interesting to lawyers, who, if they wish to know more of it, will find its details in the seventh, tenth, twelfth and thirteenth volumes of the Vermont Reports.

On the 15th of October, 1832, Roswell M. Field, a young lawyer of Newfane, Vermont, carried away from a ladies' seminary in that vicinity a rather mature schoolgirl, named Mary Almira Phelps. The pursuit of the young couple was immediate and very hot. It did not overtake them in time to prevent the legal ceremony of their marriage, but they were overtaken, and the bride was either compelled or persuaded to return to her school, before the consummation of the marriage by cohabitation. Failing to secure the person of his bride, the nominal husband determined to go after her property, which he claimed had been fraudulently absorbed by the mother of the bride from the estate of her father, claiming to be his wife when she was only his mistress. Field commenced an action by the remarkable bill in chancery described in my former article, and caused the entire bill, with its extremely unpleasant details, to be published in the local newspaper.

This publication created an intense excitement in the rural community where the bride and her family lived. Mrs. Torrey, the bride's mother, immediately commenced an action against Field, alleging that the publication was libellous, and demanding in damages ten thousand dollars. Such was the origin of the *cause célèbre* of Torrey *v.* Field.

As soon as the writ and declaration were served upon him the young attorney retired into the privacy of his bachelor apartments and there evolved from his inner consciousness his defense to the action. He prepared *ten* special pleas in bar. One of them, bearing the number three, alleged the pendency of the bill in chancery, the order of the chancellor for the publication of the notice, and the publication pursuant to the order. Each of the nine others justified the publication in whole or in part upon a variety of grounds. The substantial defense asserted was that the facts stated in the pleas were true, or were by the defendant believed to be true upon due enquiry.

Until he had tried the experiment no pleader could appreciate the questions raised by these ten pleas. It was necessary to consider each one *per se*, and to decide whether it was in law an answer to that portion of the alleged libel which it professed to answer. If it was, it must be traversed or denied, — if it was not, it must be demurred to for insufficiency. In every case there was the risk that the Court would not agree with the pleader. Finally, after much consultation, the counsel for the plaintiff entered the snare which the pleader had set for them, and demurred to each one of the ten special pleas. In such a case, if any one of the ten pleas was held to be a good answer to the whole declaration, there must be a judgment for the defendant, no matter if the remaining nine pleas were worthless.

The County Court decided that several of the pleas were good and gave judgment for the defendant, and the case went to the Supreme Court upon exceptions.

There have been few American appellate courts with judges whose legal learning was superior to that of those who held the February term, 1838, of the Vermont Supreme Court in Windsor County. It is quite sufficient to give their names, for all of them acquired national reputations. They were Charles H. Williams, Chief Justice; Stephen Royce, Samuel S. Phelps and Isaac F. Redfield, associate justices. The opinion in the case under consideration was written by Judge Redfield. As an illustration of the principles of special pleading, to define the issues of fact to be decided by a jury in a complicated case, the opinion was a masterpiece. The first and second pleas were held good as far as they went, but they attempted to justify matters of inducement, only, and

not the substance of the libel. The third plea, which simply justified the publication under the chancellor's order, was held to be a good answer to the declaration. The seven remaining pleas were held to be bad on different grounds, not necessary to enumerate here.

But although the third plea was held to be, *prima facie*, a good answer to the declaration, it by no means followed that a party could make use of such an order to justify a malicious and unnecessary libel. Was the publication in this case warranted by the practice of reputable solicitors? Was so extended a publication by such solicitors deemed necessary to give a proper notice? These were questions of fact to be determined by the jury. It was claimed to be the practice of reputable solicitors to publish only a concise statement of the substance of the bill. If such was the practice, and the defendant had exceeded it, he was liable for the excess if it was libelous. Whether there was such an excess was the issue finally left to the jury. After a spirited trial the jury found that the publication was unnecessarily diffuse, and that the surplusage was false and libelous. They returned a verdict for the plaintiff — damages one dollar!

This verdict appears to have been acquiesced in by all the parties, neither of whom could have claimed the victory. The character of the plaintiff could not have stood very high, if it could only be damaged by such a libel to the extent of one dollar; and the jury must have considered that the defendant had a moral if not a legal justification, or they would have mulcted him in heavier damages.

If any are desirous of following this litigation into all its details, they may consult the seventh volume of Vermont Reports, p. 372, tenth ib. pp. 321–353; twelfth ib. 485, and thirteenth ib. 460.

The recent death of Eugene Field, beloved of so many children, will lead many to desire to know the subsequent history of the parties to this extraordinary litigation. The attempted marriage of Roswell M. Field to Mary Almira Phelps took place in Putney, Vt., on the 15th of October 1832. She was at that time engaged to be married to one Jeremiah Clark. Forty-three days after the Putney ceremony, and without waiting to have it declared invalid, as it was afterwards on the ground that there had been no cohabitation, Miss Phelps and Clark were married. Clark survived the marriage but a few years, when he died, leaving Mary Almira a widow.

In June, 1839, Roswell M. Field left Vermont and took up his residence in St. Louis, Missouri, where he rapidly rose to eminence in his profession, and became one of the leaders of the Bar. He was the inventor of the famous Dred Scott case, and conducted it in all the lower courts, where it was so managed as to present the important questions afterwards so much discussed and so fully decided in the Supreme Court of the United States.

In the year 1839, Miss Phelps, then the widow Clark, followed Mr. Field to St. Louis and offered to renew their former intimacy. Mr. Field had had quite enough of her family, and sternly refused to hold any communication with her. Her ultimate experiences are unknown to the writer.

In St. Louis Mr. Field appears to have been engrossed in his profession, and although of fine address and popular manners took no interest in politics. For almost ten years, little is known touching his domestic life. On the 30th of May, 1848, he married Miss Frances Reed of Dummerston, Vermont. It is praise enough for any wife to say of her, as all who knew her say of Mrs. Roswell Field, that she was a typical Vermont woman. The fruit of this marriage was two sons, Eugene, born Sept. 3, 1850, and Roswell M., junior, born Sept. 1, 1851. Five years after the birth of her youngest son, Mrs. Field died. The death of a New

England mother is always an irreparable loss to her children, but in the case of Eugene and Roswell Field she was almost replaced by another New England woman, a niece of their father, Miss Mary French, of Amherst, Mass. She took these motherless boys to her heart and home, in a New England village, where, in a pure and healthy almosphere, in a community of sound principles and good habits, in a household of love and virtue, they passed the years until they entered upon the plane of practical life when their education was completed.

Eugene Field married a wife, and under the kindly nurture of her love his heart blossomed into song and he became the poet of Western childhood and Western life. The author of "Casey's tabble dote" will be remembered with the author of the "Jumping frog of Calaveras," and as long as the memory of Lincoln and Gettysburg survives, there will be children who will repeat stanzas from "Love songs of childhood," and "With trumpet and drum." And when, in the coming years, good, sweet, pure-souled women repeat, and ask who wrote: —

> "A dying mother gave to you
> Her child, a many years ago.
> How in your gracious touch he grew,
> You know, dear patient heart, you know."

there will be no New England woman who will not be able to answer, "They were written by Eugene Field!"

THE CASE OF SHYLOCK.

By George H. Westley.

IT appears that I have been getting our good friend Shakespeare into trouble. In one of my articles I had occasion to mention "the very clever manner in which Portia saved Antonio his pound of flesh." Taking this as a sort of text for his remarks, Your Disgusted Layman delivers himself emphatically of the opinion that Shakespeare was not even "the little end of nothing of a lawyer." And this is the way he sustains his point. "Just think," he says, "of a lawyer coming any such shallow wriggle as Portia's to get a man off! If that dodge was tried before Judge ——, he would say, 'Oh, Rats! Send a member of the Bar here to try this case,' and would hunt out 'Public Policy' or some such club to knock out Shylock with."

It seems to me that if your Disgusted Layman had looked a little more closely into the matter about which he writes, and applied a little more logic to his consideration of it, he would at least have avoided that unpleasant and undesirable condition of mind expressed in his signature.

I think it will be admitted at the outset that in considering the legal aspects of the Shylock case, the question which should be asked is not what Judge This or Judge That would decide in the matter; not how modern laws and lawyers would deal with it; but whether or not it was possible for such a judgment as Portia's to have been given under the ancient laws of Venice.

Now it is a well known fact that Shakespeare did not invent the plot of "The Merchant of Venice," but adapted it from one or two old stories. Warton tells us that the main part of the play was founded upon the ballad of "Gernutus the Jew." Capell ascribes it to a tale written by Fiorentino. Whichever is right, we find in both ballad and tale, as in the play, the litigants, the bond, the pound of flesh, and the "shallow

wriggle." In the ballad, for example, after we have been told how the parties came into court, how every effort had been made to induce Gernutus to relax the severity of his demand, but in vain, we read: —

"The bloody Jew now ready is
With whetted blade in hand,
To spoil the blood of innocent
By forfeit of his bond.

"When as he was about to strike
In him the deadly blow:
Stay (quoth the judge) thy crueltie,
I charge thee to do so.

"Sith needs thou wilt thy forfeit have,
Which is of flesh a pound,
See that you shed no drop of bloud,
Nor yet the man confound.

"For if thou do, like murderer,
Thou here shalt hanged be;
Likewise of flesh see that thou cut
No more than longes to thee;

"For if thou take either more or less
To the value of a mite,
Thou shalt be hanged presently
As is both law and right."

Here is the quibble made to Shakespeare's hand. If this were a true case, even though a most exceptional one, the great dramatist would of course be instantly justified. But since our efforts fail to discover whether it is fact or fiction, we are compelled to proceed further. Fortunately we are encouraged in our investigations by the following note by a writer who seems to have given the subject his most earnest attention: "Whether it is a record of an actual occurrence, it is alike immaterial and impossible to determine. Certain it is that both the facts and the law of the case are substantially historical. They precisely represent views concerning contract, criminal liability, and law reform, which, however absurd they may appear to us, have widely prevailed, and must be regarded as characteristic of certain early stages of intellectual development."

Let us center our attention at once upon the root of the matter, that stumbling block to both lawyer and layman, the Portian quibble. What shall be said of this? Of course in our enlightened age and country it would not be tolerated for a moment. But Venice is not America, nor is the period of Gernutus or Shylock the nineteenth century.

While many have written on this feature of the Shylock case, no one to my knowledge has so thoroughly anatomized it as Mr. William W. Billson, the critic I just now quoted. And I know of no other writer who attempts to justify the use of the quibble as an expedient in early jurisprudence. Hear him again on this case. "Nothing could be more suggestively true to nature and history than that a judge of the remote age from which this story (of Shylock) is inherited, in struggling to assert against an old and harsh rule of law more recently developed sentiments of humanity, should seek the accomplishment of his purpose through a play upon words."

It would be impossible in a brief article to follow Mr. Billson through all the ramifications of his argument. The outlines of that argument may be given, however, and they are as follows. He points out in the first place that in the bond given by Antonio to Shylock, we recognize the substance of the debtor's life-pledging contract which filled so large a place in the commercial economy of ancient societies. "As a means of securing the payment of debt, the pledging one's life and the lives of the members of one's family, in the history of many races, preceded in order of development the pledging of property." This was because at an early period "all property was vested in the village tribe or *gens;* the individual really had nothing he could call his own except himself and his family." Under the Roman law the several creditors of an insolvent could hew his body in pieces and divide it between them.

Having noted and enlarged upon the historical character of the life-pledging contract, a contract which eventually crystallized into law, Mr. Billson goes on to say that "the conservatism of such communities was so controlling that when, through changed social conditions, a modification of existing law became unavoidable, the tendency was, while adhering nominally to the old law, to inflict penalties upon or in some way obstruct those who attempted to assert rights under it; an expedient whereby the effects of amendment might be obtained without a confessed abandonment of ancient principles."

This brings us close to our subject, and here we see that while the letter of the law stood for the validity of the bond given by Antonio to the Jew, the more advanced spirit of jurisprudence pointed in the opposite direction. This view is sustained by Professor Kohler, who, speaking of those inept survivals from early conditions of society, declares that, "long before the law branded as illegal the execution of such practices against insolvent debtors, popular opinion regarded such practices, even when countenanced by law, as disgraceful and inimical to the interests of society."

We return now to Mr. Billson. "In the domain of law, quibbling had substantial functions, and paved the way for reforms otherwise unattainable. We have already had occasion to notice why ancient societies required methods of reformation not involving an avowed abandonment of established rules. To leave such rules nominally intact, and at the same time to indefinitely curtail or enlarge their operation by the withdrawal or addition of particular classes of cases through judicial construction, was a mode of legal amendment eminently adapted to the genius of such communities, and fruitful of many beneficent modifications of the law. It was a matter of minor consequence whether such modifications were effected by sound arguments or quibbles.

"In an age habituated to the amendment of law by legislation, nothing can be said in defense of the vicious practice of judicial quibbling. However faulty existing law may be, legislation is the appointed, effective, and only appropriate agent for its reformation. But during the ages when men were as ignorant of the processes of legislation as they were implacably hostile to the theory of innovation upon which nearly all legislation proceeds, the only alternative was between an absolutely unprogressive condition of law and an effort to bring it into harmony with the requirements of an ever-advancing society by a resort to such methods of amendment, however vicious or clumsy, as had then been efficiently evolved. The reform of law by judicial construction, however forced and illogical, being a much more familiar and agreeable process than amendment by legislation, the art of quibbling, of drawing distinctions where there was really no difference, and of detecting resemblance though there was no essential similitude, was employed with no inconsiderable effect in contracting or enlarging the operation of legal principles; and exercised, as it usually was, in aid of the finer sentiments and more advanced conditions of a later age, against the crude customs of an earlier, was an important factor in legal development."

Speaking still more directly of the case of Shylock, Mr. Billson says: "It thus represents the very marked propensity of early societies to assail an obnoxious legal right indirectly through its remedy; impairing the latter either by regulations making a resort to it difficult or impossible, or by encumbering its exercise with stringent and technical limitations, the non-observance of which would subject the party to heavy penalties."

Professor Kohler is also in some sort an apologist for the Portian quibble. Says he: "The sentence is good, but its premises are bad; which is, after all, much to be pre-

ferred to a bad sentence with good premises .... Irregular judicial premises are often, although, of course, not always, the ladder on which the consciousness of legal right mounts ever higher. Such irregular premises urge themselves on the judge most especially when some rigid, inflexible legal dictum has survived from ancient times, and like a ruin of the past no longer harmonizes with to-day. Such a dictum no jurisprudence in the world would dare openly to oppose, but the comedy is eminently respectable whereby it is evaded in a thousand byways. I will not express an opinion as to the justification of this proceeding. I neither praise nor blame it; I maintain it only as a fact in the universal history of evolution, which proves through all ages the development of law and right, in the Orient as well as in the Occident."

So much for Portia's "shallow wriggle," and I cannot help thinking that I have quoted enough from those learned writers to show that it had a much greater *raison d'être* than was known to Your Disgusted Layman. And now for another phase of our subject.

Your Disgusted Layman declares that Judge —— would contemptuously reject such a decision as Portia's, and ask that "a member of the Bar" be sent to try the case. It seems to me, though I may be wrong, that he here covertly challenges Portia's right to render a decision on the case. At any rate, the matter is worth taking up, if only to show how easily some of the objections raised by modern minds to Shakespeare's legalisms may be met and overturned.

It will be remembered that in the trial scene the court is presided over by the Duke. After he had tried in vain to move the Jew to pity, he says: —

> "Upon my power, I may dismiss this court
> Unless Bellario, a learned doctor
> Whom I have sent for to determine this,
> Come here to-day."

Bellario does not come, being ill, but sends to represent him a young doctor of Rome (Portia in disguise), who is primed with his opinion and decision. Now this delegating of judicial functions was quite in accordance with Venetian law. Such a procedure, I believe, has also been known in England. What is more surprising is to find that within a few decades the same practice prevailed, possibly prevails to-day, even at our very doors.

In 1852 Mr. John T. Doyle, as agent for a company, became involved in a lawsuit in Nicaragua. The case was tried before the alcalde, who, at the conclusion of the hearing, announced that he proposed to submit the matter to Don Buenaventura Selva, a practicing lawyer of Grenada. This was done, and in due time the lawyer rendered his decision, which turned out to be in Mr. Doyle's favor. So far the foreigner had no fault to find with this peculiar legal custom; but in the course of the same afternoon he received an intimation that he was expected to send Don Buenaventura the sum of two hundred dollars for his services. On inquiring about this, he learned that it was the custom of the country. "I thought it a custom more honored in the breach than the observance," says Mr. Doyle, "and declined to pay. I found out afterwards, however, that this was a mistake; that under their system of administration the judge merely ascertains the facts, and as to the law and its application to the case, reference is had to a jurisconsult, or doctor of the law; and that he, after pronouncing his decision, is entitled to accept from either party — in practice always from the successful one — a *quiddam honorariam*, or gratification." What says the Duke in the trial scene: —

> "Antonio, gratify this gentleman,
> For in my mind, you are much bound to him."

Here we seem to have a modern parallel of one of the peculiar, and, to many, puzzling features of Shakespeare's great play.

A third legal objection has been remarked by some commentators, in the punishment of Shylock. It is argued that after the Jew had been baffled by the quibble about the blood-spilling, he should have been allowed to go, as he desired; that he was already sufficiently punished by losing the sum he had loaned on the bond. But the court did not so consider it: —

"PORTIA. Tarry, Jew,
The law hath yet another hold on you.
It is enacted in the laws of Venice,
If it be proved against an alien
That by direct or indirect attempts
He seek the life of any citizen,
The party 'gainst the which he doth contrive
Shall seize one half his goods, the other half
Comes to the privy coffers of the State
And the offender's life lies in the mercy
Of the Duke," etc.

This latter feature of the case seems to be Shakespeare's own, no hint of it being found in any of the various forms of the story from which he took his plot. Whether he has shown himself the more or the less a lawyer by adding it, is an open question. Mr. Rolfe believes that Shakespeare made this addition solely because he was not willing to rest his case upon the quibble of the story, as a writer unfamiliar with legal matters would naturally have done. He retained the quibble for stage effect, but added the law to satisfy his conscience or his sense of justice.

It is thought by some that this addition involves too absolute a turning of the tables to be consistent with sound law. Had Shylock really sought the life of Antonio? Had he not rather submitted his case in proper form to the authorized tribunal, and asked for judgment according to the statutes, with intention to abide by the court's decision? Truly, from a narrow view, that is, from a purely legal standpoint, Shylock seems to have been a very much abused man. But viewing the matter in the broad, weighing it in the balance of reason, the conclusion must surely be that the inexorable old villain got no more than his deserts. That will be the general opinion, I think, and any judicial decision that tallies with our great human idea of justice cannot be such very bad law after all.

Just a word in conclusion on the trial scene as a whole. Professor Kohler declares that it is "a typical representation of the development of Law in all ages. . . . . Shylock's non-suit and subsequent punishment are needed to crown the victory gained by the new conception of law and right. . . . . The victory over Shylock reveals the higher potency of human law, just as the victory over the Devil in 'Faust' reveals the higher potency of the divine law; the Devil remains black even when he steps before the court with his paper and blood, and Shylock remains a foe to Law even when he boasts of his parchment and seal."

AN IMPERIUM IN IMPERIO IN LONDON.

ONE night in the last week of November, 1896, a profound sensation was created in the British metropolis by the shouts of newsboys flying along the streets and holding up before them contents-bills on which were printed in type of the most emphatic style the startling words, "A Chinaman kidnapped by the Chinese Embassy in London." There was, of course, an immediate movement on the part of press circles towards the Chinese Embassy — or Legation, as it ought more properly to be called, — for information. At first there was some disposition on the part of subordinate officials in that establishment to deny, or at least preserve an attitude of reticence on the subject. But Sir Halliday Macartney, the secretary of the Legation, who is a British subject, soon boldly avowed the fact that a Chinaman named Sun Yat Sen was indeed detained within its walls, and justified the detention on the ground that by the fiction of "exterritoriality" the Legation was in reality "China in London." Lord Salisbury did not embark on any juristic discussion with Sir Halliday Macartney. He simply directed a peremptory letter to the Legation demanding the immediate release of Sun Yat Sen — and Sun Yat Sen was straightway released. The incident has had — as it ought to have — the effect of raising the whole question of exterritorial jurisdiction. According to Sun Yat Sen, he was entrapped into the Legation. According to Sir Halliday Macartney, the Chinaman went into the Legation of his own will and was simply detained there. But it is quite immaterial whether the feat accomplished by the Legation was kidnapping or only false imprisonment. No British (or for that matter civilized) government would tolerate for an instant the claim put forward by the Chinese Legation in this case in the name of exterritoriality, and it will be well if the possibility of such an incident occurring again is excluded by an international convention. The jurists who propounded and have maintained the theory of exterritoriality one and all admit that it is only a fiction created to subserve the purposes of international comity.

Moreover, the precedents, so far as they go, are directly contradictory of the Chinese official position — there is on the one hand, a long line of authorities in favor of the action which Lord Salisbury took. There is, on the other, at least one precedent condemnatory of the Legation's claim of right. When, in the beginning of the 17th century, Sully was ambassador to England for the French Court, one of his suite killed an Englishman. Sully tried the murderer and sentenced him to death, and sent him to the Lord Mayor for execution. That functionary declined, however, to recognize the competency of the Ambassador in the matter, and the irregularity of the proceedings was admitted by Sully himself. If this was the law with reference to one of an Ambassador's suite, *a fortiori* must it be so in regard to a person over whom he had no jurisdiction at all and who was at the time of his arrest entitled to the protection of the British Crown.

A similar case occurred in the time of Cromwell. An attaché of the Portuguese Legation, named Pantaleone da Sa, shot an Englishman on the Exchange. The Ambassador claimed exclusive cognizance of the offense. But the claim was successfully resisted, and Da Sa was convicted. Now that the immunities of ambassadors are

once more the subject of international attention, ought not the question of their general restriction to be fairly and squarely faced? The dangers which these immunities were devised to ward off are now largely imaginary, or, perhaps we should say, as fictitious as the fiction of exterritoriality itself, and diplomacy is well able to cope with the exceptional cases in which they may recur. In any event the person and dignity of an ambassador might surely be preserved without conferring upon him immunity from a legal obligation to pay for the price of his clothes.

LEX.

THE POINT OF VIEW.

BY WENDELL P. STAFFORD.

"A common scold, *communis matrix* (for the law-latin confines it to the feminine gender), is a public nuisance to her neighborhood, for which offence she may be indicted." Blackstone's Commentaries, vol. iv, p. 168.

'TIS only woman, we are told,
Can be in law a common scold.
My! won't the definitions vary
When woman makes the dictionary!

THE SUPREME COURT OF WISCONSIN.

By Edwin E. Bryant.

I. EARLY JUDICIAL HISTORY.

THE State of Wisconsin is one of the younger sisters of the Union. She has not yet celebrated her semi-centennial of statehood, and a goodly part of her area is yet virgin wilderness. But the region of Wisconsin has a history that reaches well back to the beginning of colonial things on this continent. In 1634, when Boston was a mere hamlet, Jean Nicollet, a French *voyageur*, penetrated the wilds of Wisconsin, sat in council with the Indians, and feasted with them in a banquet of which six-score beavers were part of the bill of fare. In the period of exploration in the latter part of the seventeenth century, the French missionaries, Allouez, Marquette and their associates were here establishing missions. Other Frenchmen founded trading-posts, and others, like De la Hut, Radisson and Grosilliers, for mere love of adventure roamed the wilds and explored the streams. As has been pithily said, the incentives that prompted the exploration of these western wilds were "faith, fun and fur."

In 1716, the year that Governor Shute came over to Massachusetts, when Ben. Franklin was but a boy of ten, Wisconsin was the scene of a battle and military siege. De Louvigny, the king's lieutenant at Quebec, came on with an army to punish the Foxes, or Outagamies, who were unruly, selfish and treacherous, constantly interfering with the traders and levying an extortionate tribute. He surrounded them in a palisaded village, on the Fox River, approached by trenches, poured in artillery fire, and used mortars, mined and sapped, and forced them to surrender or be blown into the air.

In 1730, the year after old South Church was built in Boston, before Washington was born, the warlike Marin, a resolute French trader, fought the Foxes at Little Chute on the Fox River, a bloodier battle to the tribe than any of the Indian battles ever fought in New England. All this, to keep open the water-way from Green Bay to the Mississippi. It was here at Green Bay in Wisconsin, that the adventurous Langlade, Marin, Gauthier and other partisan captains, assembled their scalping parties of naked Menominees, Pottawatamies, Foxes, Sacs, Winnebagoes, Ottawas, Chippewas and Sioux to join in those bloody forays upon the western borders so celebrated in the history of Pennsylvania. Langlade, with his painted and feathered savages of Wisconsin, led the onslaught on General Braddock, on July 9, 1755, where Washington won his early fame; and Wisconsin Indians under the same leader skulked about Lake George and around the army of Wolf on the plains of Abraham.

These things happened in the days of the French dominion. By the treaty of Paris, in 1763, the region now Wisconsin was ceded to the English, and for some years there was British occupation. Then came American independence, the treaty of 1783, and the ordinance of 1787 to provide a government for the territory northwest of the Ohio, of which Wisconsin was the northwestern part. In that we find the beginnings of a judiciary; and officers and judges were provided for in the subsequent legislation to carry it into effect.

Wisconsin, being far to the north and remote, remained, till 1796, in British possession. By the Act of Congress of May 7, 1800, the Wisconsin country was included in the territory of Indiana. When the territory of Illinois was erected by the Act of February 3, 1809, it included what is now

Wisconsin. Nine years later the Act of April 18, 1818, admitted Illinois into the Union; and the "leavings" of the northwest territory, part of Iowa, all of Minnesota, and part of the Dakotas were "bunched" into the territory of Michigan.

But as yet the settlements were only a few trading-posts of French and English and half-breeds. Green Bay, on the bay of that name — La Baye Verte — and Prairie du Chien, at the mouth of the Wisconsin, on the Mississippi, were the principal settlements; and there was small need for courts and judges for many years.

The jurisdiction of the United States over this region was at first more nominal than real. The English settlers were really the ruling element till after the War of 1812. In 1816 the first American vessel laden with troops arrived at Green Bay, and Fort Howard, at the mouth of the Fox River, was soon after established; and this part of the then territory remained substantially under military rule until 1824, when civil authority was fairly established. From 1816 to 1824 a few justices of the peace and judges of the county courts of Brown and Crawford Counties exercised a limited authority, divided, as it appears, with military commandants, who dispensed justice according to their own notions in the range of their authority.

The first to represent the judiciary in Wisconsin, so far as known, was Charles Reaume, of Green Bay, who came from La Prairie, near Montreal, in 1792. He acted for many years as justice of the peace, but by what authority or whose commission is not definitely known. It is said he had a commission from Gen. Harrison. He presided over his primitive court with pompous dignity, dressed in an ancient British uniform, red coat and cocked hat. He had once served as an officer in the English army in Canada. In making arrests he issued no warrants, but handed his buckhorn-handled jackknife to the constable as a token of judicial power, with verbal authority to arrest and bring persons before his august court. His was virtually the supreme court of the country during his official career, as there could be no appeal, except by going to Vincennes, in Indiana, some hundreds of miles distant. Many stories are told of his quaint rulings. He did not stand much on law, of which he knew but little, but his decisions rested on a sort of natural justice that gave general satisfaction. He would fine men, and sentence them to work out the fine on his own farm, or to bring wood and hay for his own use. He would enforce specific performance of contracts to labor, compel deserting laborers to return to their employers, and adapt his judgments to the most practical solution of a controversy. One of the most pleasing of his official duties was to attend the weddings of the French settlers. He drew up lengthy marriage contracts, had them signed by the parties and some sixteen witnesses, and finally by himself, "Charles Reaume, Juge de Paix, de la Baye Verte." Then followed the festivities and the dance to the music of the violin. The feast was of venison smothered in wild rice and maple sugar, stewed sturgeon, fat ducks; and the jug of strong waters was by no means a neglected part of the good things served. The traditions of Green Bay and the historical collections of the State contain many anecdotes of this unique character. He was fond of brandy and water, and of an Indian dish called *pe-we-ta-gah* (prepared in oil), composed of dried venison pounded fine and cooked in maple sugar and bear's oil. Some of the "Judge's" legal papers are extant, and show a crude notion of legal formalities. It is said that in one case brought before him for seduction and breach of promise of marriage, he gave judgment that the seducer purchase the woman a calico gown, two dresses for the baby, and that the constable pay the costs by splitting a thousand rails for the Judge. The old justice lived alone in his later days and was found dead in his

bed, when about seventy years old. Some of the anecdotes of him represent him as having rather a low sense of justice; but all agree that he led a jolly, easy life, and that he was, despite his eccentricities, arbitrary decisions and facile conscience, warmly beloved by the settlers among whom he spent his life.

Until 1823 all that part of the territory of Michigan now forming Wisconsin had no separate courts, except county courts of very limited civil and criminal jurisdiction, and justices' courts. All important cases were tried by the supreme court at Detroit. Suitors and witnesses must travel in sailing-vessels some hundreds of miles to attend court, and then only when navigation was open.

JAMES D. DOTY.

THE FIRST JUDICIAL ORGANIZATION.

In January, 1823, Congress provided for the appointment of an additional judge of the Territory of Michigan for the counties of Brown, Crawford and Michilimackinac. This court had concurrent civil and criminal jurisdiction with the supreme court of the Territory, subject to review of its decisions by that tribunal, but was given no jurisdiction in admiralty or maritime cases, nor in certain cases in which the United States should be plaintiff. This act provided for one term of court each year in each of the counties named.

The late Honorable JAMES DUANE DOTY was appointed judge of this court and presided over it until 1836, when it was abrogated by the creation of the Territory of Wisconsin.

Judge Doty, then twenty-four years of age, was one of the brilliant, able, forceful young men whom General Lewis Cass attached to himself in his early days of power in Michigan. Doty was born in Salem, Washington County, New York, November 5, 1799. Receiving only a common-school education, he studied law, came to Detroit in 1818, and soon became prominent. He was of handsome face, commanding presence, and a suavity and courtliness of manner that afterwards led people, even in Washington, to believe that he had dwelt at courts. He was soon made secretary of the territorial legislature, and clerk of the supreme court of the Territory of Michigan.

When General Cass made, in 1820, his famous tour in a flotilla of birch-bark canoes to search for the sources of the Mississippi, and explore the northern region, its copper and other resources, accompanied by Henry Rowe Schoolcraft, the famous scholar, whose writings on the American Indian are now so famous and familiar, Mr. Doty was secretary of the expedition, and his report contains much information relating to the Indian tribes, the game and resources of the then unknown region. The three canoes, each thirty or more feet long, were propelled by twenty-six men, ten of whom were Chip-

pewa, Ottawa or Shawnee Indians, ten Canadian *voyageurs* and six United States soldiers, with light cedar paddles, and when the winds were right sails could be used.

The departure of this expedition, as reported in the "Detroit Gazette" of May 26, 1820, was a novel spectacle. "The canoes were propelled against a strong wind and current with astonishing rapidity, the *voyageurs* regulating the strokes of their paddles by one of their animated row-songs, and the Indians encouraging each other by shouts of exultation. On leaving the shore considerable exertion was made by the *voyageurs* and Indians to take the lead, and a handsome boat-race was witnessed, in which the Indians displayed their superior skill, and soon left the other canoes far behind." The expedition visited the Saulte Sainte Marie. Young Doty was present when Governor Cass went alone into the camp of a hostile band of Chippewas, and, in defiance of their menaces, pulled down the British flag which the Indians had displayed on the American side of the straits on his arrival, and trod it under foot. The party then hoisted the American flag in its place. The intrepid conduct of the young governor awed the savages, and prevented an attack on the American party. The party then passed into Lake Superior, skirted along its shores, passed by the Pictured Rocks to the western part of Wisconsin, crossed over at the portage, descended into the Mississippi, thence up the Wisconsin River and down the Fox River to Green Bay; thence along the western shore of Lake Michigan to Chicago, thence to Detroit, late in September, a five-thousand-mile journey, every day of which revealed things new and interesting.

Judge Doty's appointment as judge of this court of the western part of Michigan Territory entailed dangers and responsibilities little understood in the state of settled habits and the community wonted to law and order. It was no less than the establishment of judicial authority over a region unaccustomed to such restraints. The population might be said to be semi-savage. At the principal posts were a few soldiers; here and there were traders, French or half-breed, and trappers living with squaws, in a relation not sanctioned by the laws of the land, but perhaps good marriage by the common law. In October, 1824, Judge Doty held the first special term at Green Bay, and there the first grand jury of Wisconsin was empaneled. There were forty-five indictments found by the grand jury—twenty-eight of which were for illicit cohabitation, the aim being to break up the prevalent custom of taking Indian women as wives of the traders and trappers without the formality of a legal marriage, merely buying them of their fathers, as a canoe or a pony would be bought for a price. At first the inhabitants were disposed to resent this interference with established customs, but they found the suave and courtly judge a man of iron and without fear. They for the most part pleaded guilty, and the judge suspended sentence whenever they consented to legally marry the dusky mothers of their children. One sturdy fellow refused to marry, paid his fine of fifty dollars, and continued to live with his unwed Indian mate. He was again indicted, and the court kindly advised him to marry before the opening of the court next day. He at first stood out, but appeared in court next morning, presented his marriage certificate, and said: "There, I hope the court is satisfied. I have married the squaw."

During the years 1825, 1826, 1827 and 1828, Judge Doty and Henry S. Baird, Esq., of Green Bay, the district attorney of the Territory, traveled to Prairie du Chien, on the Mississippi, from Green Bay and back, in bark canoes, by way of the Fox and Wisconsin Rivers, with a crew of six or seven Canadians and Indians. The time of making the trip each way was seven days. The country was then an entire wilderness, the two points above named being the only white settlements.

The *voyageurs* employed were of the class originally from Quebec Province. They or their ancestors had come into the lake region in the employ of traders. They could live on a little corn and tallow, enriched with venison or bear-meat when obtainable, yet with simple and spare diet they were always happy and cheerful. They had fine voices and made the camps ring and woods echo with their songs, and would row for hours to the tune of a row-song. Their powers of endurance were great. They would row or paddle all day, and when "packing" must be done over a portage or trail, they would carry on their backs, suspended by a strap crossing their breast or forehead, large packs of furs or merchandise, from one hundred to one hundred and thirty pounds in weight, for whole days. At night, after a frugal meal, they bandied merry jokes, or sang their songs around the camp-fire, or joined in the dance to the music of some old violin. They were a light-hearted, improvident set, and always glad to be on an expedition such as above described.

In May, 1829, Judge Doty, Mr. Baird and Morgan L. Martin, Esq., one of the earlier lawyers admitted to the bar, and a man of notable memory in Wisconsin, traveled on horseback from Green Bay to Prairie du Chien, a seven days' journey in which not a white man was met. At night they tethered horses and rolled themselves in blankets by a camp-fire and slept the sweet sleep of the bivouac, on the rolling prairies, or in the solemn woods.

It is recorded that the Judge found Prairie du Chien inundated, in 1826, by an unwonted rise in the rivers, when he went there to hold court. The fort and houses on the low grounds, or dog-prairie (Prairie du Chien), were abandoned. The court was held on the bluffs in a large barn. The jury occupied the haymows, and the Judge and Bar sat on the threshing floor. Amid such surroundings the proceedings were conducted with a dignity and solemnity worthy of Westminster Hall. The jury, on retiring to consider their verdict, were led into another stable near by.

One of the trials at which Judge Doty presided at Prairie du Chien was that of We-Kau and Chic-hon-sic. These two Indians, of the Winnebago tribe, with Red Bird, a young brave, had entered the cabin of Rijeste Gagnier, at McNair's Coulee, near Prairie du Chien. They were received with civility and asked if they desired food. They said, "Want fish and milk." As Mrs. Gagnier turned to procure the repast, she heard the click of Red Bird's rifle, who shot her husband dead at her feet. At the same instant Chic-hon-sic shot and killed an old man named Lipcap. Mrs. Gagnier, seeing the other Indian, We-Kau, lingering at the door, wrested from him his rifle, but her strength, superhuman for a moment, then failed. As she expressed it, she felt "like one in a dream trying to call, or to run, but unable to do either." She soon rallied, and with her eldest child ran away, carrying the rifle. The Indians then scalped her babe left in the house and departed. The babe, however, lived, grew to womanhood, and was the mother of a family, but was despoiled of the glory of her sex. Red Bird and his Winnebagoes who had committed this murder, and others of the band, some thirty-seven in number, then fled up the Wisconsin. The news of the murder spread through the settlements, as fears of an Indian outbreak had for some time disturbed the settlers. Governor Dodge, the brave executive of the Territory, advanced upon them from one direction and pursued them up the river. Major Whistler of the United States army, in command at Fort Howard, on Green Bay, sent a force up the Fox River. The Winnebagoes were closed in at the present site of Portage City, at the point where the Fox River and the Wisconsin flow so near each other that a short portage enables the *voyageur* to proceed by water from Lake Michigan into the

Mississippi. The Indians, assailed from each quarter, finding themselves in extremity, sought peace. They sent out a party of thirty warriors, unarmed, bearing a white flag carried in the hands of Red Bird, the murderer. When they came near the military, on the opposite bank, they stopped, and singing was heard in their band. Those of the troops familiar with the chant of Indian music, said: "It is Red Bird, singing his death song." The officer of the guard was sent to meet them on the bank of the river. They answered that they had come to deliver up the murderers. The party of Indians were then taken into the camp. There Cari-mau-nee, a prominent chief of the Winnebagoes, said, pointing to the three murderers, "They are here. Like braves they have come in. Treat them as braves. Do not put them in irons." Red Bird and his two accomplices stood in the center. He was a model of symmetry, tall, straight as an arrow, with a face full of pride and Indian dignity. He was dressed in a suit of elk-skin, white and soft, and daintily fringed. On each shoulder was a preserved red bird as an epaulette. A collar of blue wampum encircled his neck, and the rim of his collar was formed of the claws of the wild cat. On his breast hung his war-pipe, trimmed with dyed horsehair and the feathers and bills of birds. In one hand he bore the white flag, in the other, the calumet or pipe of peace. His appearance, says an old chronicle, won the admiration of all. He stood in calm dignity; not a muscle of his features moved. Cari-mau-nee then explained that the Winnebagoes disclaimed the murderous act of the three Indians, whom they gave up to the white man's vengeance. He offered horses as a commutation for the lives of the white people killed. Major Whistler told them they had done well to bring in the wrong-doers, and promised that the prisoners should not be manacled. Then Red Bird stood forth, surveyed calmly the troops and his own people, and said, "I am ready. I do not wish to be put in irons. I give my life away — (stooping and taking some dust between his thumb and finger and blowing it away) — like that. I would not take it back. It is gone."

Red Bird, Chic-hon-sic and We-Kau were taken to Fort Crawford, on the Mississippi, at the mouth of the Wisconsin. The proud young chief soon died of the confinement and humiliation of his prison. The accomplices were tried at the September term, 1828, before Judge Doty, and sentenced to be hanged, but were afterwards pardoned by President Adams, as a conciliatory measure.

This Cari-mau-nee, the Winnebago chief above mentioned, was a man of great importance in his tribe. He afterwards visited Washington to arrange some matters in controversy between the government and his people. On his return, he and his fellow traveler stopped at a prominent settler's tavern at Blue Mounds, and thus accosted him: "How, how! Brigham." Pointing to the house, "Brigham, dinner." Pointing to the barn, "Brigham, horse, corn. Big man, me." After dinner, the old chief made a display of much silver coin, and said, "Brigham, horse." The horses were brought out. The Indians mounted and without payment rode off at full speed, merely saying, "Brigham, good-by."

Judge Doty, the first judge of this wild region, was too marked and distinguished a citizen to be retired when his court was abolished. He was delegate to Congress from the Territory in 1838 and in 1841, and its governor from 1841 to 1844. His efforts and tactful management established the capital at Madison, in the beautiful "Four Lake Country," where it is now situated. On leaving the office of governor to his successor, he explored the State and the indefinite region known then as Upper Michigan. He equipped himself in woodsman's style, with a Canadian pony, a rifle, small axe, tin cup, blanket, and, with a single Indian guide, he plunged into the forest, follow-

ing up every trail, coursing the main streams. He visited and gained the confidence of all the tribes. His complete knowledge of the territory and his reputation for probity and good judgment made him the trusted agent of capitalists of the East in locating lands for purchase. He was member of Congress in 1849 and 1851. He closed his career in Utah, where he was sent in 1861 as superintendent of Indian affairs; and in 1865 he died there while Governor of the Territory.

He will ever remain as an antique figure in Wisconsin's early history. Later investigations and the work of historians of the present day bring out in strong relief the valuable services to the young commonwealth of this worthy gentleman, who blended with the love of frontier life and its primitive simplicity, an elegance and dignity of manners rarely met with except in courts and diplomatic circles. He established his home on Doty's Island in the Fox River, near where Menasha and Neeñah are now located; and there in a cluster of log cabins, called "the Grand Loggery," he dispensed a hospitality as graciously as from palaces of ancient renown.

An incident of his early life he used to tell with great relish. While residing, in the early days, at Detroit, young Doty was assigned by the court as counsel to defend an Indian who had murdered Surgeon Madison of the regular army. Doty, desiring to do his full duty to his dusky client, repaired to the jail with Colonel Lewis Beufait, a skillful interpreter, to learn of the Indian any facts that might make for the defense. Doty asked the prisoner how it happened that he shot the surgeon. The honest Indian replied, "I saw him and thought I would like to shoot him." "But," said Doty, "was there not some accident? Were you not shooting at something else?" After some little time the Indian seemed to comprehend the theory of defense his lawyer was working on, and replied, "Yes, I was shooting at a little bird." The young lawyer took courage. "Ah, surely," said he, "this is no case of malice aforethought. Now, tell me, how far was this little bird from Madison's head?" The Indian, when made to understand the question, held up his own finger and measured on it with the forefinger of his other hand the distance of one inch and said, "So far." The defense when urged in court was hardly sufficient to satisfy a jury of white men, and the Indian was hung — the first public execution in the Territory of Michigan.

The lead-mines in southwestern Wisconsin began to attract attention in 1827, and that part of the Territory rapidly filled up with eager prospectors and miners, and soon became the most populous and wealthy portion of the Territory. This led to the creation of the County of Iowa, into which the Crawford District was absorbed. The terms of court were then held at Mineral Point. The records of this court, still extant, are of interest to the lawyer. He would question the judgments in some cases, and the regularity of procedure, doubtless, but the courts, as a whole, administered justice according to the goodly law of the land.

THE SUPREME COURT OF WISCONSIN TERRITORY.

In 1836 Michigan was admitted into the Union, and the region west of Lake Michigan must be provided for. The Territory of Wisconsin was then formed, embracing what is now the states of Wisconsin, Minnesota and Iowa, and the eastern part of the two Dakotas. The act provided that the Territory be divided into three judicial districts. The judicial power was vested in a supreme court, district courts and probate courts. The supreme court was to consist of a chief justice and two associate judges, to hold a term at the seat of government annually, and each of the judges was to hold a court in the districts, at such times and places as the law territorial might prescribe.

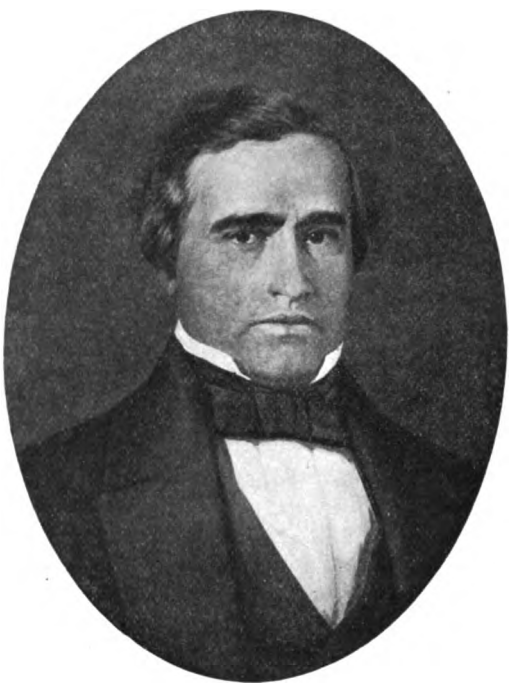
In constituting this court, Charles Dunn was appointed chief justice, and William C. Frazier and David Irvin were associate judges.

CHARLES DUNN, the first chief justice, was born at Bullitt Old Licks, in Bullitt County, Kentucky, December 28, 1799. His father was from Dublin, Ireland, and his mother, Amy Burks, was a native of Virginia, one of the Burks of Burks' Valley. He was sent to school at Louisville, Kentucky, when nine years of age. After nine years there he was called home and sent on a business tour to Virginia, Maryland and Washington. He then began the reading of law with Worden Pope, a prominent lawyer of Louisville, and later pursued his studies at Frankfort with the eminent John Pope, then secretary of state, and who was the first law professor in the Transylvania University at Lexington. Young Dunn went to Illinois in 1819, and there continued his law studies under the direction of Nathaniel Pope, then district judge of the United States for the District of Illinois. In 1820, he and Sidney Breese, afterwards chief justice of Illinois, were together admitted to the bar. He practiced law at Jonesboro, Union County, and Golconda in Pope County, in Illinois, for several years, and was for five years chief clerk of the house of representatives of that State. He also acted on the commission that surveyed and platted the first town of Chicago, in 1829.

In the early part of 1832 the Indian troubles, known in Illinois and Wisconsin as "the Black Hawk War," broke out. A requisition was made upon the governor of Illinois for troops to put down the uprising of the Indians under the resolute chief, Black Hawk, which, it will be remembered, called Abraham Lincoln into the service. The subject of this sketch raised a company of volunteers in Pope County; and in Posey's brigade of Colonel John Ewing's division he pushed on after the Indians, then on the Rock River. Soon after an engagement with the Indians, in which the latter were defeated and routed, Captain Dunn pursued them, with his command, into Wisconsin. In what is now the town of Dunn, Dane County, he was shot and severely wounded in the groin by a cowardly sentinel, whose post he visited as officer of the day in making "the grand rounds" at midnight. On his approach the sentinel on duty, in alarm at the intrusion, without challenging the relief party, fired at them at a distance of ten paces, and ran. Dunn was supposed to be mortally wounded, and was taken back to Fort Dixon. He was for some time disabled, and, when sufficiently recovered, he acted as assistant paymaster of the brigade. He afterwards served in the Illinois legislature in 1835; and in 1836 he was appointed by President Jackson as chief justice of the newly-created Territory of Wisconsin. He arrived at Mineral Point July 4, 1836, and was sworn into office as part of the exercises of the "glorious Fourth." The court held its first session and organized at Belmont, in the assembly hall of the legislative council, a barn-like structure that then was called "the state house." The court met, chose a clerk and, on motion of one of the attorneys present, Thomas P. Burnett was appointed reporter. His labors are found in the one small volume known as "Burnett's Reports."

In the division of judicial districts, Judge Dunn was assigned to the first district, embracing the counties of Grant, Iowa, Lafayette, Green and Dane, the southwest portion of the State, and then comparatively wealthy and populous by reason of the large lead-mines then in successful operation. The duties were onerous, but so admirably discharged as to make him exceedingly popular. One of the most dignified and polished of men, charming in manners and gracious in bearing, he was every inch the judge. An incident finds record that illustrates his fearlessness. In 1838 an atrocious murder

had been committed in Grant County. A person charged with the crime and supposd to be guilty had been arrested, examined and committed to await the sitting of the grand jury. Judge Dunn admitted him to bail on a writ of *habeas corpus* brought for that purpose. The inhabitants in the neighborhood of the murder were greatly incensed that the accused should be enlarged. They arose *en masse*, and the accused and his bail fled to avoid lynching. The mob, in which were many prominent and reputable citizens, then passed a resolution, a copy of which they sent to Judge Dunn, that if he attempted to hold another court in that county it would be at the risk of his life. On the first day of the next term in this county, the Judge entered the court room, calm, undisturbed, as if ignorant of the threats of the mob. Many of its members and leaders were in the court room. He spoke to no one of his danger, brought no escort, but it was noticed that he took to his seat upon the bench his saddle-bags, and placed them by his side. They contained an arsenal of pistols. In his usual quiet and dignified manner he directed the sheriff to open court. In his calmness and his resolute manner the bystanders saw that it would be a serious business to interfere with him; and the court was held undisturbed; and all thoughts of mob violence were dispelled; and admiration for the intrepid judge took their place. To the pioneer bar and the following generation of lawyers Judge Dunn was always endeared. Always courteous and considerate, helpful to the younger members, and as indulgent as he could be compatibly with the interests of justice, and a most charming and entertaining companion in the social circle, he was honored and beloved.



CHARLES DUNN.

An incident is told to show his natural dignity and the respect that he deemed due to his judicial character. On one occasion he was out with companions on a hunting expedition. In the rude camp he was engaged in skinning a magnificent buck he had shot; as he shared in all the labors of the camp, and, like the western gentlemen of his time, he deemed the dressing of his game a knightly accomplishment. One of the party, with whom he was but little acquainted, wishing to speak to him, called out from a distance, "Dunn, Dunn." The Judge turned on him, with sleeves rolled up, and knife in hand, but with a look in his face that bespoke the chief justice, and said, "Judge Dunn, if you please, sir." The crestfallen mess-mate, utterly dumbfounded by this rebuff, indulged in no more familiarity.

The district to which Judge Dunn was assigned was the southwestern part of the State, including the mining region. He, as a Kentucky gentleman fond of sport and with no prejudices against a good article of whiskey, was in touch with all the surroundings. He enjoyed the rude life of the frontier, and

would adjourn court to attend a wolf-hunt, join in the sport, be hale-fellow-well-met in customary conviviality, but under all circumstances he was the dignified judge, urbane and gracious, but tolerating no familiarity.

Judge Dunn gained the unpleasant notoriety of a mention in Dickens's "American Notes." In 1842, during a session of the legislative council, high words arose between Charles C. P. Arndt and James R. Vineyard, two of the members, over an executive nomination. Arndt approached Vineyard in a threatening manner. The president called order, and, before bystanders could part the combatants, Vineyard drew pistol and shot Arndt dead. This event created intense excitement, for it was as shocking to the prevailing sentiment in Wisconsin as such a tragedy would have been in the Boston State-house. Vineyard, the homicide, was soon after brought before Judge Dunn on *habeas corpus*, to be granted bail. After a careful examination into the facts of the case the Judge admitted him to bail, and he was subsequently tried and acquitted on the ground that he acted in self-defense. This event Dickens seized upon, and published newspaper items in his "Notes" to convey the idea that, in Wisconsin, life was so cheap that one legislator could shoot another in session for words spoken in debate and be *discharged by Judge Dunn on bail.*

After the organization of the State courts he retired to private practice, and a large clientage thronged to his country seat at Belmont, where he kept his office. His professional education had been very thorough for a western man. He was an excellent classical scholar. He was, however, too modest and too dignified to seek civil office or push himself forward in candidacy. He served in the constitutional convention which framed the organic law, as chairman of the judiciary committee, and exercised a commanding influence over that body. He was State senator from 1853 to 1856. He "ran" for Congress in 1858, and for justice of the supreme court in 1860, but being in the minority party and sturdy in his political convictions, he had no thought of election. He died at Belmont, April 7, 1872. He was regarded by all the members of the bar who knew him as "a great man in private station."

Edward G. Ryan says of him: "He ranked the superior of most and the equal of any of his contemporaries. He might have ennobled many positions filled by them; none could have ennobled him; for, truly, he was a great man in private station. While his intellect was calm, it was solid; while it was not brilliant, it was comprehensive and far reaching. It was deliberate, discriminating, clear, wise and just. His character was solid, strong and resolute, but not stern or harsh. His stronger qualities were softened by great sense of humor and great kindness of heart. His temper was singularly genial. He was generous and trustful to a fault. His foibles — for like all born of woman he had them — all arose from his generous character, the warmth of his heart and the kindness of his temper. Strong in character among the strongest; he was, in carriage and manner, gentle among the gentlest; eminently modest and unobtrusive in demeanor. His culture was of a high order, in and out of his profession; like himself, useful and thorough, not superficial or showy. His knowledge of men and things, of the world and its ways, was profound. . . . . It is little to say that he was the soul of honor. He could be nothing that is false or mean. He did not know what treason was. That which he believed, that which he loved, that to which he gave his faith, were part of himself. He could not desert faith, a friend, or duty without betraying his own life. Dishonor in him would have been moral suicide."

These warm words of praise express the sentiment of all who knew Judge Dunn. It is seldom that a man is so endeared to his professional brethren as he was to the emi-

nent bar of lawyers who gathered in the territorial courts.

DAVID IRVIN, who was judge of the additional district of Michigan Territory for the Counties of Brown, Crawford and Michilimackinac, and afterwards an associate justice of the supreme court of Wisconsin Territory, was born in Albemarle County, Virginia, about 1794, of Scotch-Irish parentage. His father was a Presbyterian minister and teacher of the ancient languages of much repute in Virginia. The son was educated as a lawyer and settled in the Shenandoah Valley. Not especially successful in practice there, he obtained from President Jackson, through the influence of William C. Rives, a judgeship of the then Michigan Territory, in 1832, and upon the organization of the Wisconsin territorial supreme court he was appointed associate justice. He was a man of southern tastes, a bachelor; and judicial duty and western society were distasteful to him. He spent most of his time in southern cities. Not a profound nor studious lawyer, he was regarded as a fair judge, his strong common sense and love of justice guiding his rulings. He had the keenest relish for field sports, and for his horse, dog and gun. It used to be said that the lawyer who praised his dog usually won his motion. His horse, "Pedro," and his dog, "York," are fully described in the gossipy collections of the State Historical Society. The Judge is described as six feet in height, very erect and well formed, auburn hair, blue eyes, and narrow features. He was fond of hunting prairie chickens, and was a little whimsical. The gossip of the time said that he mended his own stockings and sewed on his own buttons. He was very frugal, detested vice, saved his pay and invested it in wild cotton-lands in Texas, which, later, made him rich. The Wisconsin soldiers during the Rebellion found him there on the Rio Guadalupe, and, it is said, were ordered to take him prisoner, but he prudently kept out of their way. He died in Texas, June 1, 1872, at the age of about seventy-six years. The kindness with which his contemporaries, members of the bar, speak of him, attests that he was upright, honest, fair and generally right.

Among the traditions of Green County, where he sometimes held the term, it is remembered that he would adjourn court at a moment's notice to go shooting chickens. He used to say that "his horse Pedro had more sense than any lawyer in his court." He was in the habit of consulting Mr. Whiton before deciding a cause, to get an idea of what the law was. It is recorded that in 1841 he gave the following charge to a jury: "It appears from the evidence that the plaintiff and defendant in this action are brothers-in-law. On the Wabash River, in Indiana, they associated themselves together for the purpose of swindling their neighbors. Not content with that, they got to swindling each other, and I am like the woman who saw her husband and a bear fight. 'Fight husband, fight bear; I don't care which whips.' And, gentlemen of the jury, it is a matter of indifference to me how you bring in your verdict." Five minutes after the jury had retired the sheriff was instructed to see if they had agreed. Informed that they had not, he immediately ordered in the jury and discharged it.

Another incident of him was told by Andrew E. Elmore, well known in the State for half a century as the "Sage of Mukwanago." In a speech in the legislature, to illustrate the uncertainty of the law, he said that he once had a case on trial before Judge Irvin. The case seemed very clear for him, and the jury brought in a verdict in his favor for the amount of the claim. Just then, as the winner of the suit sat in the bar with his counsel, "York" became annoyingly familiar, and he unluckily gave the dog a kick, which caused a yelp to reach the Judge's ears. The Judge's brow instantly grew dark and he set the verdict aside.

Such are among the stories told by the gossips of his generation — probably in revenge for the Judge's ill-concealed dislike for Yankees.

WILLIAM C. FRAZER, of Pennsylvania, was the other associate judge of the territorial supreme court appointed in 1836. He served but two years, and died in Milwaukee, October 18, 1838, when he was sixty-two years of age. He left but little mark on the jurisprudence of the State. His advanced age and intemperate habits unfitted him for a judicial position. A few anecdotes, more or less apocryphal, indicate that he was of average learning and fair ability, but that his usefulness was impaired by his confirmed convivial habits.

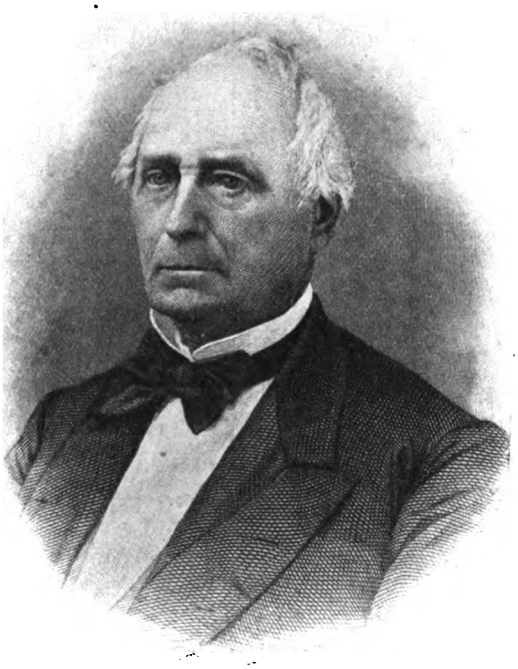
He sat but once with the court *in banc*. In the "Transactions" of the Historical Society of the State are some reminiscences of his demeanor on the bench when sitting in his district, which indicate that his appointment was not a judicious one, but, like many appointments to territorial judgeships, the subject of severe criticism. His was the only case in the territorial life of Wisconsin in which the appointments to judgeships were not excellent selections.

An old story is current that once an affidavit was made for change of venue from Judge Frazer, on account of the prejudice of the Judge. The Judge heard the affidavit, remarked that he did not know the party, had never seen him, and desired him to stand up. Thereupon a very tough and unkempt specimen of mortality rose. The Judge took one look, and said, "All right. The order is granted. After seeing the man I am convinced of a bias." The contributions in the Historical Society's collections tell that Judge Frazer would spend the night in high play at cards, enter the court room in the morning, and charge the grand jury to diligently inquire and true presentment make as to any gambling that might be going on in the Territory, which he characterized as "a sin to cause heaven to shudder."

One memorable trial in which Judge Frazer presided was that of Mau-ze-mon-e-ka (Iron-walker), a son of one of the chiefs (Whirling Thunder), of the Rock River band of Winnebagoes, for the murder of Pierre Pouquette, a prominent Indian trader and interpreter, a French and Winnebago half-breed. In October, 1837, Governor Dodge held a council with the Indians, at Portage, to induce them to sell their lands east of the Mississippi. Pouquette was interpreter and very desirous that the sale be consummated for twenty-one boxes of money ($21,000), which he claimed was due him from the Indians for goods and provisions he had advanced to them. Mau-ze-mon-e-ka stoutly opposed the terms of the sale, insisting upon a division among the bands, some of whom were not indebted to Pouquette. After the council, Pouquette, being in liquor, set upon Mau-ze-mon-e-ka and soundly whipped him. The Indian, smarting under the indignity, retired to his lodge. Pouquette went there the next day, still infuriated with drink, and told the young brave that he had come to whip him again. The Indian came out, gun in hand, and told Pouquette to come no further; that he had beaten him the day before without cause, and if he advanced another step he was a dead man. Pouquette then put his hand to his breast and said, "Fire, if you are brave." He fired, shooting the trader through the heart. Mau-ze-mon-e-ka then was taken into custody. Supposing that he was to be killed, he sang his death song. He was taken to Green Bay and there tried. Pouquette was a very giant in strength, but when sober was a man of easy temper and very popular with the settlers and military, and was the interpreter in all councils with the Indians. His death was much regretted by all. His slayer was tried before Judge Frazer and sentenced to be hanged. The case was taken to the supreme court on writ of error, and there reversed for

defects in the indictment. On a second trial he was acquitted, and lived many years afterwards.

ANDREW GALBRAITH MILLER, of Pennsylvania, was appointed to succeed Judge Frazer, by President Van Buren, November 8th, 1838. He was born at Carlisle, Cumberland County, Pennsylvania, September 18, 1801, of Scotch Presbyterian stock. His mother's ancestors in this country came from England, and located in Penn's settlement at Philadelphia. The Millers settled in Pennsylvania, the grandfather when young purchasing a large tract from William Penn, the proprietary governor. The maternal grandfather, Andrew Galbraith, on coming of age, purchased a tract of land in Cumberland County, then still on the border. Upon hearing of the Declaration of Independence, Andrew Galbraith promptly raised a company, and was commissioned major of his regiment. He participated in the gallant defense of Fort Washington on the Hudson, November 16, 1776, and being taken prisoner, was confined in the prison ships in New York Harbor. The horrors of this confinement fastened upon him a disease of which he died soon after peace was declared.



ANDREW G. MILLER.

The paternal ancestors of Judge Miller also shared in the perils and honors of the Revolution. His father was an officer of militia in the arduous, if not glorious, Niagara campaign of 1814. The family, at one time holding a large landed estate, were greatly reduced in circumstances by the depression and pecuniary disaster following the war. The subject of this sketch was the eldest of ten children. After primary instruction in the best schools then available, he entered an academy in 1813. In 1815 he was in Dickinson College, Carlisle; afterwards he studied at Washington College, at Washington, Pennsylvania, and graduated thence with honors in 1819. The same year he began the study of law in the office of Andrew Caruthers, Esq., a lawyer of high professional character and personal worth. In 1822, Miller was admitted to the bar, having resolved never to hold an office of profit outside of his profession. During sixteen years he practiced law in Cumberland County. His father dying about the time he came to the bar, young Miller became virtually the head of the family. In 1827 he married Caroline E. Kurtz, daughter of Benjamin Kurtz, of Harrisburg, a gentleman descended from one of the founders of the Lutheran Church in America. When twenty-one years of age, upon his admission to the bar, he became partner with his preceptor. He subsequently removed to Gettysburg, and there practiced his profession until his appointment to the vacant judgeship in Wisconsin.

On receiving the appointment, he came to Wisconsin, and, on the 10th day of De-

cember following, took the oath of office. In the following spring he brought his family to Milwaukee, where he resided until he died. His appointment was a happy one. He brought to the bench a needed element. The practice was loose, and Chief-Justice Dunn was not so much of an organizer, nor so familiar with the details of practice, as a man of great intellect and judicial power. Judge Irvin disliked the work and had little judicial ambition. In practice and pleading Judge Miller was especially skilled; and his methodical system soon established order in the chaos of litigation, and set the courts into a proper procedure, so far as it could be done by rules. He had more to do in settling the practice than any of the other judges. The rules of court which he formulated, modified and enlarged by experience, were adopted for the territory at large in 1840, and were finally substantially adopted in the federal courts of the district, where they still remain, attesting the wisdom of their framer.

The legislature assigned Judge Miller to the eastern district. He was greeted on the opening of his first term, in the spring of 1839, with twelve hundred cases on the dockets of the several courts of his district. This mass of litigation arose largely from the crash of 1837, which had overwhelmed the Territory, in common with the rest of the country, in commercial prostration and bankruptcy. Litigation increased as new counties and courts were created. In the last two years of his territorial service, his district embraced eleven counties. For the last three years of his territorial service, he held three terms a year, of six weeks each, in Milwaukee, and two terms a year in each organized county of his district; his longest vacation in either year being three weeks.

During his nine years' service as territorial judge he disposed of over seven thousand five hundred cases, besides three hundred discharges in bankruptcy. The legal questions involved were many and intricate. The earlier statutes were borrowed from various sources, were often incoherent, and their intent obscure, and the acts of Congress often gave perplexity. The immense labor he performed bore testimony to his devotion to duty, and the capacity for work of an exceedingly powerful constitution added to the facility in labor of a highly trained intellect.

On the 29th of May, 1848, Wisconsin was admitted into the Union, and was made a judicial district in the federal system. Judge Miller's excellent work in imparting order and certainty to the system in the new State were so well known and fully appreciated that he was commissioned on the 12th of June, 1848, as district judge. The following July he organized his court at Madison, and until 1862 he exercised the powers of circuit and district judge for the whole State. Until 1870, the State constituted one district. He served on the bench of the district court until January, 1874, when he voluntarily retired, still hale, hearty and strong. On the 30th of September following, he died very suddenly, stricken down while in usual good health and engaged in his daily avocations.

His career of thirty-five years upon the bench made his name, his services and character very familiar to the people of Wisconsin. In many respects he was an admirable judge, in all a great one, faithful, painstaking, honest, vigorous and fearless. Probably few judges have administered their office against so strong a tide of hostile and earnest public opinion. In 1852, the State had become profoundly stirred on the subject of the Fugitive Slave Act of 1850. The opinion of the great majority in Wisconsin was that the Act was unconstitutional. In 1854, one Garland, of Missouri, came to Wisconsin and claimed, as a fugitive slave, one Joshua Glover, a colored man, who, as alleged, had escaped from servitude and fled to this State. On complaint of the owner, Judge Miller issued a warrant for the ar-

rest of the alleged fugitive. The seizure of the poor black caused intense excitement.

The manner of the arrest, as related and believed at the time, added fuel to the flame of popular wrath. It was said that the deputies who arrested him knocked him down with a bludgeon; that it took three men to put manacles on his wrists, and that he broke the manacles. The news soon spread abroad in Racine, and the little city was aflame with indignation. A monster mass-meeting was held, and resolutions were passed protesting against the outrage, demanding a fair and impartial trial, and declaring their purpose to aid the negro, and to attend on purpose to aid, by all honorable means, to secure his rescue. The heated populace also resolved that they, as citizens of Wisconsin, declared the fugitive-slave law "disgraceful and also repealed."

Meanwhile, the mayor of Racine telegraphed to Sherman M. Booth, the editor of the "Free Democrat," a trenchant anti-slavery newspaper of Milwaukee, that the negro had been kidnapped, and asking if a warrant had been issued from the federal judge. Booth was not the man to be quiet in such an emergency. He soon learned that a warrant had gone out, and that the negro had been brought in that morning and lodged in jail, bloody, and bearing the marks of brutal treatment. He published an "extra," announcing the fact, and, mounting a horse, rode the streets shouting, "Freemen, to the rescue; slave-catchers are in our midst!" and calling on citizens to meet at the court-house square at two o'clock.

The citizens assembled in great numbers and resolute determination. Before proceeding to extremities, they appointed a committee to wait on Judge Miller and inquire whether a writ of habeas corpus issued by a State magistrate would be obeyed. He frankly told them it would not; that the Federal law must take its course, and that the negro would be brought before him on the following Monday, for a hearing. The Judge's answer was made known to the assembled multitude. A committee of vigilance and protection was appointed to see that the fugitive had a fair trial. The excitement grew, and at six o'clock a mob, headed by John Rycraft, surged toward the jail. Rycraft demanded the prisoner, and, on refusal, the mob battered in the door with a heavy stick, and, taking out Glover, placed him in a wagon and ran him down the street. The negro lifted his manacled hands, shouting, "Glory, hallelujah!" He was placed in charge of an "underground railroad" agency, run out to Waukesha, not without pursuit, and thence by night spirited to Racine and hurried aboard a vessel about to ship to Canada.

The act met general approval throughout the State, such was the hostility to the law in that "era of slave-hunting."

On the devoted heads of Booth and Rycraft was visited the wrath of the master foiled of his prey. Booth was arrested for his part in the rescue, and a civil action was brought against him, in which the owner recovered the value of the slave. He and others were indicted and tried, convicted and sentenced, in January, 1855, under the provisions of the fugitive-slave act, to fine and imprisonment. In this exercise of judicial power Judge Miller ran counter to a strong public sentiment. He was consequently severely denounced. But he fully believed the act to be valid, and saw only his duty in enforcing it, and paid no heed to the angry clamor that resounded through the State. His decisions in the case were subsequently affirmed by the Supreme Court of the United States. But, in the State, denunciation of the "slave-hunting court" was for a time unsparing and bitter.

Processions of excited citizens groaned as they passed his house. Mass meetings denounced him as "an old granny" and a "miserable doughface," and the press was unsparing in its bitter reflections; but not

one hair from his course did the intrepid and fearless judge ever waver.

Again, in the period of financial depression following the year 1857, the many actions brought by non-residents in the district court against their debtors caused much outcry against the court, as always happens in such periods of financial distress. The court was stigmatized "the plaintiff's court," and much evil was spoken of it.

Another class of cases arose in which he, in common with most federal judges, was obliged to rule contrary to local feeling and interest, and came to be distrusted and denounced. Questions as to validity of bonds in the hands of distant holders, which had been recklessly issued in the times of rapid growth by towns, cities and counties, came before him. He decided them, as the federal courts have generally done, and as is now deemed just; but it brought upon the sturdy and honest judge much of local censure and distrust, and put his judicial firmness to the severest test. But Judge Miller's character as an upright, faithful judge was generally acknowledged, and he stood high in the estimation of the bar. After the occasions had passed when feeling or prejudice ran so high, it came to be appreciated that Judge Miller had always acted from a high and stern sense of judicial duty; that he had faithfully administered the law as he believed it to be. His judicial action might be odious and unpopular, but it was, as he believed, but duty. For a time, under something like a cloud of obloquy, growing out of the exciting political controversies, his reputation as a faithful, painstaking, laborious and able judge steadily advanced. Men who had at one time joined in the popular outcry, at last came to understand that he was exercising the highest attribute of the judge. His decisions which provoked the most complaint have been affirmed, and principles that he first applied have become settled and accepted law. It is now conceded by all that he was a remarkably able and just judge. In admiralty, he was regarded as having few if any superiors in the country. He excelled as a judge in chancery causes, giving them the most patient and laborious examination. In the common law he was profoundly learned, and in federal jurisprudence and jurisdiction his thirty-five years of laborious study had made him master.

He presided with great dignity, but was affable and kind to the members of the bar, unyielding in rule, but indulgent in practice. Chief-Justice Ryan said, "His patience was wonderful. I have seen it tried as I never saw another judge's, and I never saw his temper visibly ruffled. His forbearing self-possession was admirable; and it appeared to be a native grace of character, not a habit." When he retired from the bench he was the oldest judge in commission of the federal list. When he came to the bench, he found the practice loose and chaotic, but he reduced it to order and system. He was one of the hardest worked of judges, but his hardy constitution and regularity of life enabled him to perform it, and always to bring to it the fullness of his powers. "His personal morality was of a high type. As the head of a family, he was a model for men to applaud and copy. He walked all the common ways of life with the upright carriage of a considerate, kindly, worthy Christian gentleman." So says Ryan, who, as an advocate, often disappointed, could not divest his mind of the "ancient grudge." It was said of Judge Miller that he "loved power." For this he was censured. It has been the lot of all federal judges to be thus charged. It could but be the fate of a federal judge to be so criticised in Wisconsin during the period that Judge Miller served. But denunciation had no effect upon him. "Regardless of all outcry he held his own way," says Chief-Justice Ryan. "And so he appeared to others arbitrary, when he was only true to his own sense of the duty and dignity of his office."

During the period of his greatest un-

popularity, it used to be the fashion for lawyers in his court to make comments in his presence that he might well have dealt with severely. Matt. Carpenter could flippantly refer to "meeting Shylock on the bench," but he paid no heed. As a judge he was as self-contained and self-reliant as the mountain. With a temper never known to be ruffled, and with no trace of cynicism, he wielded the power of his great office, satisfying himself that he was right and heeding neither the praise or blame of others. And it remains to be said that when our people and bar — a little inclined to become unruly — had become accustomed to the federal jurisdiction, their respect for Judge Miller was heightened by the very sturdiness and independence which their clamors and censure could not disturb.

The early respect for the rights of squatters in possession may have lingered in his later judicial work, for we find Mr. Ryan, afterwards the eminent Chief Justice, saying in eulogy of Judge Miller, "His notion of the rights of property was very high; unduly so, I think. They betrayed him into a leaning toward all *prima facie* creditors; and so his court was called a 'plaintiff's court.' But the same bias led him in actions of ejectment, to lean towards persons in possession under color of title. And thus in real actions his court became a defendant's court."

In one place in Wisconsin Judge Miller was long held in aversion. That was the village of Monroe, a smart county seat in the southern tier of counties. At the breaking out of the Rebellion the people of this village were full of loyal zeal, which assumed a high-pressure stage. They sent liberal quotas to the war and subscribed freely for local aid to soldiers' families. But they went further and organized a vigilance committee to require every one to take the oath of allegiance. A sturdy Illinois man came into the village and expressed himself quite freely as to their high-handed methods and refused to take the oath of allegiance which their strict rules required. He was at once ridden on a rail, and that in no delicate manner. He sued the leading citizens of the village, who had been a part of the vigilance committee, for damages, and brought his action in Judge Miller's court. The leading citizens pleaded their patriotic purposes in vain. A verdict of $5,000 was given against them, and they found themselves designated by the Judge as mere rioters. These men went to their graves with a feeling that Judge Miller was but little better than a rebel, though he treated their case with perfect judicial fairness. But as they had not taken part in the actual maltreatment of the defendant, they never could see how it was that the jury mulcted them, or how the judge could permit it. One of the luckless defendants was wont to complain that a judge who would fine a man for riding a Copperhead on a rail could not "understand the impulses of patriotism."

To return now to the story of the judiciary. The Supreme Court of the Territory sat at Madison after its first term, the seat of government having been transferred thither, and held annual sessions until the dissolution of the court upon the admission of the State into the Union. The greater portion of the work of the judges consisted in the sittings in the counties in their respective districts. The decisions of the territorial supreme court were not reported in full until 1872. Mr. Burnett, the first reporter, published the decisions for the years 1839 to 1843 in one small volume of 220 pages. All the decisions in which written opinions were filed are contained in a few pages more than the first volume of "Pinney's Wisconsin Reports." A large part of the decisions turned on mere questions of practice, which at the time was in an unsettled state.

In attending the district courts the judges and lawyers rode horseback from their residences to the places of the sittings. When

night overtook them they were glad to espy smoke curling from the chimney of some shanty among the foliage, and invariably found welcome in the rude homes of the settlers. "The latch-string hung out." The settlers took no newspapers in those primitive days, and were delighted to entertain the passing traveler, and learn the news. While the shanty was filled with the odors of frying pork, or, perchance, quail or prairie chicken, the guests told all the news of the day to the eager listeners. The bill of fare was often little more than pickled pork, potatoes, and tea sweetened with maple sugar, and the table was of the rudest; but the meal was a banquet to the journey-worn guests, and the conversation was refreshment to the host and hostess, living in the lonely exile of the pioneer. There was little intemperance in those days. "I have traveled," says Judge Andrew G. Miller, "perhaps ten thousand miles in this Territory, and have no recollection of having seen the proprietor of a log cabin setting a bottle of spirituous liquor before his guests. In the villages, men would occasionally take a little something for the stomach's sake. And, sometimes, in the villages, an article called whiskey was sold to the Indians, in violation of law, but the vendors eased their consciences, upon drawing a certain portion from the spigot, by adding the same quantity of water through the bunghole. By this process the mass in the barrel became so much diluted as to be neither whiskey nor water, but both, and scarcely of sufficient strength to intoxicate a half-starved Indian." The guests slept on the floor of the cabin on a shakedown, or ascended by a ladder into the loft. A blanket or buffalo robe hung up as a screen made a sufficient division of rooms or partition to separate the guests from the family.

Much of the litigation in the territorial days arose in this wise: Before the public lands were brought into market by the President's proclamation, the settlers, by mutual, tacit consent, adopted the rule that he who first entered on a quarter section of land, or a fraction of a section, gained a "squatter's right," and was protected in his possession against "jumpers" of his claim. The settlers had a code of their own. When complaint was made that the claim of a settler had been "jumped," the jumper was summoned before a committee of settlers. A summary hearing was had. The only points passed on were actual settlement and the intrusion of the jumper. This rude and effectual action of ejectment served its purpose, as the judgment of the committee was final, and the whole community, gathered from miles around, were the posse to enforce the execution. It sometimes happened that the settlers on these claims would sell out their interest, and take therefor the obligation of some newcomer. The purchasers then, in the belief that, as the original settlers were mere trespassers on the public lands, with no interest that could be conveyed, the contracts were void for being without consideration, refused to be bound by them. Many of these obligations were sued upon, and formed a considerable part of the calendars of the district courts. The courts, however, held the contracts valid, notwithstanding the settler might strictly be regarded in the light of a trespasser on the public lands. Where the government had not ousted the squatter or his purchaser, and he had made some improvements or done some work on the land, the courts ruled that the settler's rule should have the force of law. Another usage received the sanction of the courts: the miner who prospected for and discovered minerals claimed the right to work the mine he had located, subject to a certain royalty to the owner of the land. But these usages and rulings of the courts were soon superseded by territorial statutes on the subject.

TRIAL BY JURY OF ROMAN ORIGIN.

By Boyd Winchester.

THE Saxon common lawyer delights to attribute the usage of trial by jury to his German ancestry; and his American associate seldom lets a jury trial pass without some adulatory sentiments to the great Alfred, to whose age it is conceived are to be traced the earliest memorials of its establishment. But we conceive the trial by jury can be shown to be derived from the institutions of Rome by more direct and conclusive testimony than is adduced in favor of its Saxon origin.

The proofs of such an establishment among these people, previous and, indeed, down to the time of William the Conqueror, amount to no more than evidence that barbarous men may submit questions of contestation to the decision of their friends; but surely amounts to no proof that the trial by jury existed among them, as an institution entirely aboriginal. And because such a custom gave hints to successive lawmakers of a system by which regular adjudications might be regulated, it does not prove that such a system might not have been matured by more polished ancient nations, and have originated with them. The disposition to arbitrate questions of controversy is not indigenous to civilized communities. We think testimony may be gathered from the customs and habits of all barbarous nations, in proof that such a mode of deciding differences is natural to all men. The North American Indians could furnish us as many incidents upon this point, in favor of their being the originators of the trial by jury, as any other people.

So far as the records of such trials exist in English history, the most enthusiastic advocate of this theory has been able to imagine memorials of its existence only so far as the age of the Conqueror.

The triumphant instances given only prove that, to settle questions, they resorted to the simple mode of summoning persons having a knowledge of the facts — these were only witnesses.

But even if such cases were entitled to any consideration in tracing the origin of jury-trial, it is within the legitimate province of conjecture to conceive that the first idea of such a custom may have been taken from the Romans. For Cæsar invaded Britain upwards of eleven hundred years previously, and even Germany some years earlier. His superior abilities, great ambition and extensive knowledge, combined with the pride of a Roman in the institutions of his country, render it more than probable that he labored to extend her civilization, as well as empire, to the barbarous people whom he had conquered.

Now it is much more reasonable to infer that the various invasions of the Roman armies of the territory of barbarous nations may have impressed their habits upon political and judicial institutions than that particular systems originated with the latter.

Mr. Turner, in his history of the Anglo-Saxons, states that, by one of the judicial customs of the Saxons, an accused person was acquitted if a certain number of men swore he was innocent; and he hence infers the existence of the trial by jury in the earliest Anglo-Saxon times.

There is nothing conclusive in this circumstance. The resort to witnesses to prove or repel an accusation is what people, however rude their institutions, may resort to. The same author dwells much on the fact that those jurators were of the number

of twelve. This circumstance must be purely accidental. Or, if not, its establishment may be traced to a more remote time.

We read in the early Greek poets that twelve was the number of persons who met often to deliberate on important affairs. But admitting that these circumstances are entitled to the weight given them, it is very evident that the customs indicated may still be of Roman origin.

The fame and prosperity of the Roman people must have been known to the people of all Europe. Men from every barbarian tribe must have occasionally visited this great city, and carried back to their countrymen accounts of her manners, customs and habits. In this way her institutions may have been insensibly impressed upon the customs of these rude nations. It is not difficult to imagine that Addison had in view the famous lines of Virgil in summing up the mission of Rome in contrast to the artistic glories of Greece, "*Tu regere imperio populos Romane, memento,*" when he placed in the mouth of Juba the sentiment of Rome's dominion founded on law: —

> "A Roman soul is bent on higher views:
> To civilize the rude, unpolished world,
> And lay it under the restraint of laws."

Again, there is a remarkable similarity in these customs and the judicial regulations of Rome. By the laws of Alemanni persons who swore to the innocence of the accused were called *nominati* or persons named. So the judex or arbiter was either named by the parties or selected by the prætor. The shire-gemot, among the Saxons, determined on the dispute in the first instance, but if the judge doubted, twelve men were chosen who swore to the truth of their decision. Thus among the Romans the prætor acted in the first instance and summoned a jury, who swore to decide according to law and the best of their judgment. By a law of Ethelred the verdict of a majority of eight of the twelve, selected to expurgate an accused, was conclusive. Among the Romans the opinion of a majority controlled the judgment; and if the judges were divided equally the prætor decided.

When we reflect upon the manner of selecting the Roman *judices*, the time during which their authority lasted, and compare them, in these respects, with the regularly appointed judges, we think a striking resemblance exists between them and the jury of the present day.

Like most nations of ancient times, judicial power was exercised by the kings of Rome to the time of their expulsion, A. U. 244. When this event occurred, two supreme magistrates, called prætors, *judices* and consuls, were created, and performed the duties of judges. The wars in which the nation was engaged devolved the administration of justice, in the year A. U. 389, upon the prætor. The influx of foreigners and increase of causes at Rome, in 510, induced the appointment of a second prætor. Because this last officer administered justice to foreigners, and between these and citizens, he was called *Praetor Peregrinus*. The prætor who performed the functions of judge between citizens of Rome was known as *Praetor Urbanus*.

The prætor possessed a permanent judicial authority. He was not only the dictator of trials, but sometimes the judge himself. When a plaintiff summoned a defendant before the prætor he demanded from this officer a writ suitable to the injury, and also judges of the affair in issue. These judges were: (1st) a *judex* or single person who determined the controversy according to the declaration of the law, or the forms prescribed by the prætor; (2d) an arbiter who was not restricted by law or form, but who determined *bona fide* or according to equity; (3d) recuperators, men who first judged between the Romans and foreign states concerning the recovery and restoration of private property, but who afterwards determined other matters — these three

classes were chosen from the body of the Roman citizens; then (4th) were the *centumviri*, composed of three persons selected from each of the tribes, and these judged matters relating to testaments and inheritances, and exercised their functions for a year; while the appointment of the judges, selected by the prætor, expired with the decision of the particular cause.

We do not pretend that the trial by jury, as modified and improved upon by successive generations, existed at Rome. But it is reasonably certain that we see in the institutions of the civil law the germ of this system, and in the authority of some of the judges functions similar to those of juries. From the functions of these Roman judges, the nature of the courts over which they presided and the proceedings in the actions before them, it is possible to trace the origin of jury trial to the civil law. Laws grow great and ennoble themselves like our rivers by running; but follow them upward to their source, 'tis but a little spring, scarcely discernible, that swells thus, and thus fortifies itself by growing old.

From the nature of the institution of Roman judges it is inferable that they were composed of various orders; and that it was in the power of litigating parties to choose one or the other of them; that they came from the vicinage of the litigants to aid the prætor; and were selected from the different classes of the people. That these judges were inferior to the prætor is proved by the fact that while the prætor sat on a tribunal, the judices sat on lower seats, called subsellia.

The first steps of municipal justice in private disputes consist, on the one hand, in subjecting rude strife to some conventional regulation, and investing the appeal to force in this regulated form to the solemn aid and ideal of trial by combat, thus introducing the conception of legal process; on the other hand, by the occasional intervention of neutral parties or bystanders as arbiters. With respect to the latter, the history of the Roman law furnishes an instructive and interesting parallel. "Very far," says Maine, "the most ancient judicial proceeding known to us is the *Legis Actio Sacramentis* of the Romans, out of which all the later Roman law of actions may be proved to have grown. In early and even in mature Roman life, the judges no more than the priests were a class distinct from the rest of the community. These were offices open to the whole body of citizens, and were filled by its most distinguished members, forming their title of honor and highest road to distinction. In the absence of our formal courts of justice, every contending claim, as it arose, was referred by the presiding magistrate for the year to the arbitration of one or more citizens, who, on the facts presented to them, formed their decision, to which the authority of the magistrate gave the force of law."

"In Rome," says Forsyth, "we find a presiding judge who was either the *praetor* or *judex questionis* specially appointed by him, and a body of *judices* taken from a particular class, whose duty it was to determine the facts of the guilt or innocence of the accused." At the close of the evidence they were said to be *missi in consilium* by the judge, that is, told "to consider their verdict," and to each were given three tablets marked respectively with the letters *A* for *absolvo*, *C* for *condemno*, and *N L* for *Non Liquet*, one of which he threw into an urn, and the result of the trial was determined by the majority of the letters that appeared.

The prætor referred many cases to a single *judex*; in many instances again they were sent to a number of *judices* who constituted a sort of board or jury to look into the merits of the controversy, and under a *formula* — a brief technical expression of the disputed issues, constructed by the prætor — they proceeded to receive the evidence of the witnesses, to hear the arguments of the advocates, and finally to return their

verdict or decisive judgment to the prætor who had appointed them.

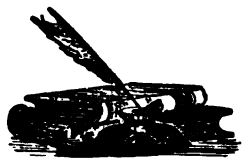
Always, however, prætor and *judices* stood towards each other in much the same relation that the judge and jury of our own system hold towards one another; except that they did not sit together and hear cases at the same time, but acted separately.

There is a strong disposition, especially with those who are not familiar with the excellence of the civil law, not only to undervalue the system, but to set up every just rule of right as indigenous to modern times. It seems, indeed, to be the favorite effort of juridical writers to establish for their own age a system of independent institutions, reaching far back into antiquity. The mind which revolts from the recognition of hereditary honors in a family, loves to linger on the feeblest evidences of a country's ancient establishments. Such antiquarian partiality has been eminently exhibited in researches upon the common law of England. Men have explored every region of fancy to furnish it an independent existence; and in the United States we freely admit that our only hope of a name and praise in the world, politically speaking, is derived from an attachment to those old British monuments of liberty, trial by jury, the habeas corpus, freedom of speech, and liberty of the press.

But a sober investigation of the civil law evinces the identity of many of its principles with those of the common law. The connection of the histories of Rome, Germany and England prove that the common law is, generally speaking, but a set of laws and customs engrafted upon the stock of Roman jurisprudence. No investigations prove this more fully than the history of the Roman courts and their mode of proceeding, and, especially, the trial by jury.

Sir James Mackintosh has observed that "governments are not framed after a model, but that all their parts and powers grow out of occasional acts prompted by some urgent expediency or some private interest, which, in the course of time, coalesce and harden into usages, and that this bundle of usages is the object of respect, and the guide of conduct long before it is embodied, defined and enforced in written laws." It has been said to be the great and final object of government to get twelve impartial and intelligent men into the jury-box; by which, of course, is meant that the administration of equal rights between man and man is the primary object of civilized and social life. Paley declares, "the wisdom of man hath not devised a happier institution than that of juries, or one founded in a juster knowledge of human capacity." In despite of the mist that may surround the origin and development of this "buttress of liberty" as Chatham called it, this "mud-sill" of constitutional liberty and broad foundation of personal rights; and despite the contention that its institution is valued rather as a protection against governmental encroachment on private rights than as an instrument for performing in the most efficient manner the intellectual process involved in the judicial administration of law, we all must concur in the hope expressed by Mr. Hallam: "From this principle may we never swerve, may we never be compelled in wish to swerve, by a contempt of their oaths in jurors, a disregard of the just limits of their trusts."

The Lawyer's Easy Chair.



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

BY IRVING BROWNE.

CURRENT TOPICS.

PRENTISS' WIT AND ADROITNESS. — In reading Oakey Hall's memoir of Sergeant S. Prentiss, we are reminded of a jest that he made as he was about to fight one of his duels with Foote. A boy had climbed into a neighboring tree to see the fun, and Prentiss warned him to come down and go away, "for my friend Foote shoots very wildly." *E non vero, ben trovato.* His brilliant argument on the trial of Judge Wilkinson for murder is given in full in Snyder's "Great Speeches by Great Lawyers." Prentiss in this speech quoted several times from Byron. Was this on account of a fellow feeling for him by reason of his pedal deformity? There is a good deal of fustian in the speech, but it was well designed to go down with a jury. The circumstances, as narrated by Mr. Snyder, partake somewhat of the ludicrous. The Judge, who lived in Mississippi, had gone up to Louisville with his brother, who was a physician, and another Mississippian named Murdaugh, to make preparations for the Judge's marriage. The Doctor, wishing to have a proper wedding garment, ordered a suit there from Mr. Redding, a fashionable tailor. Two days before the day fixed for the wedding, the three went to the shop to try on the garments. The coat did not fit, and the tailor promised to correct it. The trousers had been sent to the hotel, but the Doctor was about to pay for the whole suit, when the Judge (who believed in having suits tried) suggested that he had better try them on first, for they might prove no better than the coat. Redding thereupon remarked, as he testified, that too much had been said about that already, or as the other party testified, "You are too damned meddlesome." The Judge retorted that he did not come there to be insulted, and seizing a poker struck the tailor a violent blow. The Doctor and Murdaugh also fell on him with drawn knives, the tailor then seized his shears, but as Prentiss said, "did not succeed in cabbaging therewith any part of his assailants." Redding and the Judge brought up in the street, and the tailor offered to fight the whole party if they would lay down their knives. The parties separated however without further trouble. Redding resolved to have the Wilkinsons arrested, but needing to learn their names, was going to the hotel for the purpose that evening, when encountering some friends on the way, he narrated the occurrence to them, and they accompanied him thither. The Wilkinson party were there attacked. Knives and pistols were freely used, and two of the tailor's party were killed. Although the original fault was thus on the part of the Judge and his party, Prentiss had the art to make the jury believe that the tailor's party went there in a conspiracy to kill or degrade the Wilkinsons, and he got them off scot-free, in a State where they were strangers, and where the feeling was so hostile to them, at first, as aristocratic slaveholders who had slain poor mechanics, that they were safe only in jail,— very much to the delight of two hundred ladies who flocked to hear the charming advocate. He had a better field for his display than Pinckney had in the Supreme Court on an occasion when the ladies crowded to hear him, and he was obliged to make a dry legal argument in respect to insurance upon a cargo of asses. Not the least amusing circumstance in the affray came out in the testimony of one Oldham, who testified that he was not in the fight and knew nothing of the affair nor of the defendents, but as he was in the passage-way the door opened and he received a cut from the Doctor, whom he knocked down for his pains. Then he saw Murdaugh retreating upstairs, and heard him asking for a pistol. This reminded him of his own, which he thereupon drew and discharged at Murdaugh. Thus, says Prentiss, "he fought, to use his own descriptive and unrivaled phraseology, entirely 'upon his own hook.'" A parallel to this however may be found in Scott's "Fair Maid of Perth," where Harry of the Wynd volunteered to fill a vacancy in the ranks of one of the two rival Scottish clans which contested to the death, not that he had any special bias or choice, but fought, as he phrased it, "on his own hand." One is gratified to observe that Prentiss did not wholly justify his client's conduct at the tailor's shop; he admitted that it was "reprehensible," and that they were speedily "ashamed" of it. Between the lines we imagine that we can read an excuse for it, and we think Prentiss might well have urged it, in the potent and unaccustomed Kentucky whiskey and the rarified atmosphere of the Blue Grass State. The

whole affair shows a curious phase of life in the South half a century ago, and it seems probable from the account that no important vacancy in society was caused by the elumination of the two Kentuckians in question, so that no very serious shade is cast on the picture.

THE TREACHEROUS BEDSTEAD.

(White *v.* Oakes, 88 Me. 367.)

"*Caveat emptor*" is an ancient saw
Established in the wisdom of the law,
Like "*Cave canem*" on a Roman wall
Where fruit was ripely nodding to its fall,
Or in mosaic inlaid in the floor
By way of warning at Pompeian door.
A man may puff his goods, and hypnotize
The incautious customer, until his eyes
Grow blind to grave and palpable defects,
The seller knows, or at the least suspects,
But in such case the law extends no aid,
For "*caveat emptor*" is the rule of trade;
And though the doctrine seems to be immoral,
It cuts off much excuse for legal quarrel.

One Oakes kept furniture already made,
And in his warerooms temptingly displayed
A versatile and most convenient bed,
Reminding one of what the poet said
Was "chest contrived a double debt to pay,
A bed by night, a chest of drawers by day."
This article stretched out a bed at night,
And folded up afforded to the sight
The aspect of a mantel-piece by day,
On which the tasteful housewife might display
Her store of bric-a-brac and plaster fruit,
And other gauds her artistic sense to suit.
He sold this bed to Mrs. Agnes White,
Who lying down confidingly at night
Upon its frame, beside that of her spouse,
Sought rest which night to tired folk allows.

They meant no joke, they were in earnest quite,
But to this humorous bedstead the strange sight
Of people venturing in its cavity
Disturbed and overcome its gravity;
It quick "went back" — and forward — on the pair,
And almost smothered them as they lay there;
It closed upon them like the jaws of shark,
And squeezed them nearly lifeless in the dark.
They scrambled out, faint, angry, bruised and scared,
And next day to the seller they repaired,
Who thought he could repair the queer abuse,
And soothed them with some plausible excuse.
He never knew the thing to act that way
(It probably mistook the time of day);
He "guessed" the joint should be a trifle stiffer —
There was no need for him and them to differ.

But when the bed came home the second time
The lady ventured not in it to climb,
But wisely thought some safety 'twould afford her
To try it first upon a "single boarder."
He had defied the perils of her hash,
But little dreamed that he would come to smash
In this queer piece of ornamental lumber,
Extended to invite him there to slumber,
But he was horrified and she surprised
To find it snapped again, and paralyzed
Him in a manner horrible to view;
So when he vowed his hostess he would sue
Five thousand dollars she was fain to pay,
And use the bedstead only in the day.

Then Mrs. White sued Oakes to reimburse
Her injuries in body and in purse.
"This Oakes 'doth murder sleep!'" her counsel cried;
But the judiciary calm replied:
"The bed was not of Oakes's manufacture;
He did not know its tendency to fracture;
No warranty was made nor is implied;
It is not shown that he deceived or lied;
He simply praised his wares, as traders may,
In the commercial customary way;
The bed was open and exposed to view;
And all was equal as between the two;
The case is really hard; we grieve to disappoint,
But had she prudent been she would have tried the joint!
And when she heard the smooth commercial tempter,
Should have recalled the maxim, "*Caveat emptor*."

So Agnes White went home, and shut her bed,
Nor dared on it again to lay her head.
And it affords her trifling consolation
To view it as a piece of decoration,
A stationary, permanent wall-flower,
That never opens at the evening hour.
She never mentions Oakes but she attacks him,
And doesn't care a snap for that old maxim.

The law above declared is different very
From that adjudged in Lewis *versus* Terry,[1]
Decided in the selfsame month and year,
Away across this western hemisphere,
In California, wherein the guest
Made "preparations" to retire to rest, —
(About their nature the report is shady,
But we infer she was a pious lady) —
And resting on the bed her *humerus*
Was putting up petitions numerous,
When it descended with a vicious snap
And broke off prayers and bone and promised nap.
But here the seller knew of the defects
And warranted the bed as sound in all respects.

NOTES OF CASES.

UNDESERVED CENSURE OF A COURT. — In the number of the "American Law Review" September–October, it is editorially said: "The decisions of the Court of Appeals of New York are becoming so monotonously uniform in favor of private corporations and against public rights, in every controversy between

[1] 111 Cal. 39.

such corporations and the people where there is room for doubt or casuistry, as to create the painful impression that that court sits as a sort of stakeholder for private corporations." This language is held of a decision that a railroad company is not bound to lock or guard a turntable on its own lands for the protection of trespassing infants. We believe that the decision is wrong, but there is nothing in it to justify such intemperate and disrespectful language. The decision was foreshadowed in that court some years ago in a case between individuals, and is in harmony with decisions in Massachusetts and New Hampshire. The statement in the same article that a Missouri judge once entertained the New York opinion, but was converted by the death of a near relative of his, "a bright and promising boy," while playing on an unfastened turntable, strikes us as very funny. Causes are not decided on such emotional and personal considerations in the Eastern States.

The turntable cases are distinguished in a very recent case in Texas (Missouri &c. Ry. Co. *v.* Edwards, 32 L. R. A. 825), in which it was held that —

"Injury to a child while playing on a pile of railroad-bridge ties in the railroad yard, which is fenced except on the side along the railroad track, and out of which the servants of the company always ordered any children found there, does not render the railroad company liable, as it was not under obligation to so pile the ties as to prevent injury by a child climbing upon them."

The court adverting to the ground on which the turntable cases are put, namely, the attractiveness of the machine to children, observe: —

"The question suggests itself, what object or place is not attractive to young persons who are left free to pursue their innate propensity to wander in quest of amusement? What object at all unusual is exempt from infantile curiosity? What place, conveniently accessible for their congregation, is free from the restless feet of adventurous truants? Here the language of an eminent judge in disposing of a similar case is appropriate: 'There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it or fill up their ponds and level the surface so that trespassers may not be injured would be an oppressive rule. The law does not require us to enforce any such principle even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit, yet I never heard that it was the duty of the owner of a fruit-tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents.' Paxson, J., in Gillespie *v.* McGowan, 100 Pa. 144, 45 Am. Rep. 365."

PRACTICAL JOKING. — Judge Dent of West Virginia, although evidently possessed of a sense of the humorous, does not believe in practical joking. In the recent case of Plate *v.* Durst (32 L. R. A. 404), it appeared that the plaintiff, in 1885, when twelve years old, went to live with the defendant, her brother-in-law. For three or four years she was sent to school, clothed and treated like a daughter, rendering in return a daughter's natural service in the family. She also acted as clerk in the defendant's store. This lasted till 1894, when the defendant and his wife quarreled and separated, and the plaintiff was turned adrift, without compensation or provision. It conclusively appeared that in 1890 the defendant asked her if she was tired. She said she was. Then he asked her how long she had been with him. She said five years. Then he replied, "When you are with me ten years I will give you $1000." On another occasion he promised to give her on her marriage $1000 and a $500 diamond ring. The defense was that the defendant was joking. The Judge observes: —

"It must be admitted, in any view of the matter, that this was jesting on a very serious subject to this unfortunate and parentless young girl — still in the eyes of the law an infant — engaged early and late, week days and Sundays, at home and abroad, actively, earnestly, and faithfully endeavoring to promote the worldly interests of the defendant. Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile. The services were rendered in advancement of the defendant's business. They were valuable and necessary, and so he regarded them. Until she was seventeen, nothing was said as to compensation; but she was clothed, fed, furnished spending money, and received some so-called presents from the hands of the defendant. She had then arrived at an age when she had become quite proficient in his business, — that of a caterer and confectioner; was very useful to him, and diligent and attentive about his business. It was also quite time for her to begin thinking about her own future. He, as a sensible business man, undoubtedly realized this fact, and also that he was receiving gratuitously services to which he was not entitled, and that as soon as she became fully informed as to her own worth and rights, she would ask compensation at his hands, or seek other employment. The defendant says he was not in earnest, but only jesting. Admitting such to be the case, these conversations, whether he was in earnest or not, were calculated to mislead her, and leave the impression on her mind that in any event he would deal justly by her, and fully compensate her for her services; and in this manner he retained her in his employ until it suited his convenience to discharge her without compensation, which he did, to say the least, in an unkind and heartless manner, ill becoming to a stranger, much less a brother-in-law. And now it devolves upon us to say whether she is entitled to pay for what her services were actually worth, or does the law, from the fact that he

was only misleading her, and never intended to pay her, excuse him from doing so? A person is estopped from denying sincerity of his conduct, to the injury of a person misled thereby. We therefore must conclude that these promises, in spite of the declaration of the defendant to the contrary, were made in sincerity, as an inducement to her future service."

Counsel for defendant complained of "useless verbiage and trifling repetitions" in the record; to which the Judge answers: —

"In view of the many exceptions and instructions 'useless in verbiage and trifling in repetition,' with which the counsel have encumbered the record, their attention is respectfully called to the celebrated decision of a beam against a mote, with which they are familiar."

MALPRACTICE. — A curious history is shown in Richards *v.* Willard, 176 Pa. St. 181. This was an action against a surgeon for malpractice in the gratuitous treatment, at a hospital, of an alleged fracture of the tibia. The first jury gave $5,512.50 damages — evidently a quotient verdict. The second disagreed. The third awarded $12,000, although the plaintiff had asked for only $10,000, and the court reduced it to $4,000. On appeal from this a new trial was awarded. The court observed: —

"It must not be overlooked that the medical and surgical service rendered by the defendant to the plaintiff was entirely gratuitous, the defendant receiving therefor no compensation of any kind. For many years Dr. Willard had been rendering such service to the hospital to which the plaintiff was brought after receiving his injury. He was one of a corps of physicians who, from motives of benevolence and charity, contribute, as they do in many other cities and towns, their time, their skill, their labor, and their most valuable and humane service in relief of the sickness and suffering of their race. If such gentlemen are to be harrassed with actions for damages when they do not happen to cure a patient, and are to incur the hazard of having their estates swept away from them by the verdicts of irresponsible juries, who, caring nothing for law, nothing for evidence, nothing for justice, nothing for the plain teachings of common sense, choose to gratify their prejudices or their passions by plundering their fellow-citizens in the forms of law, it may well be doubted whether our hospitals and other charitable institutions will be able to obtain the gratuitous and valuable service of these unselfish and charitable men. It is much more than probable that if this plaintiff had been content to remain at the hospital a week or two longer he would have been cured of his hurt. Because he would not submit to such a reasonable detention he apparently brought upon himself all his subsequent sufferings. If he chooses to take snch risks he must take the consequences himself."

A SINGULAR DISSENT. — In a recent case in the New Jersey Court of Errors and Appeals, McCann *v.* Newark &c. Ry. Co., 32 L. R. A. 127, the judicial head-note is as follows: "The plaintiff, being the only passenger in a street-car, became suddenly ill, told the conductor she felt sick, and twice requested him to stop the car so that she might get off. He failed to do so, and, going to the front of the car, began talking to the motorman. The plaintiff, growing worse, and becoming frightened and dazed, rose to her feet, and staggered towards the rear of the car, and there fell, unconscious, through the door. *Held*, that whether the plaintiff was guilty of negligence, whether the conductor was guilty of negligence, and whether the plaintiff's injuries were the natural and proximate consequence of the conductor's negligence, were all questions of fact for the jury." To this statement, perhaps, might well be added the fact that the plaintiff testified that her purpose in going to the rear of the car was to endeavor to get someone on the street to stop the car. Five of the judges of this numerous court dissented, but why, it is difficult to understand. The connection between the conductor's gross negligence and the plaintiff's conduct seems to us quite natural and reasonable.

AN ARCADIAN ELECTION. — "The account of the election at Lake Precinct is a breeze from Arcady," says Hensha J., in Tebbe *v.* Smith, 108 Cal. 101; 49 Am. St. Rep. 68. This was a highly important contest. Smith had 13 votes, Tebbe 20, in this precinct, which was a ranch. The polls should have opened at sunrise, but did not until nearly 10 o'clock. At dinner time the officers adjourned and took the ballot-box with them to a house one hundred yards from the polling-place, and set it on the dining table while they dined with others. They left the ballots unpolled in the poll-room. The witness who gave this account testified that he "served on the election board in my father's place." Nobody was deprived of his vote, but the Court felt constrained to throw out the vote of the precinct on account of the failure to open the polls at sunrise. This is certainly careful.

MENTAL DISTRESS. — The Texas doctrine that damages are recoverable for the non-delivery of a telegram received a set-back in the place of its origin, in Rowell *v.* Western U. Tel. Co., 75 Tex. 512. The plaintiff had received information of the dangerous illness of his mother-in-law. A subsequent dispatch, announcing her improved condition, was not delivered. The Court declined to allow for the continuance of the mental anxiety thus occasioned, on the ground that it would give rise to "intolerable litigation." The action was by husband and wife, and the former estimated his distress at $100 and that of his wife $2400, which seems to be a reasonable apportion.

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.

FACETIÆ.

"LAWYERS are a good deal like baseball players, after all."

"How so?"

"The ones that can't make a hit are put on the bench."—*Ex.*

"YOUR honor," said a lawyer in a recent trial in England, "the argument of my learned friend is lighter than vanity. It is air; it is smoke. From top to bottom it is absolutely nothing. And therefore, your honor, it falls to the ground by its own weight."

A GOOD story is related of a juryman who outwitted a judge, and that without lying. He ran into court in a desperate hurry, and quite out of breath, and exclaimed: —

"Oh! Judge, if you can, pray excuse me. I don't know which will die first, my wife or my daughter."

"Dear me, that's sad," said the innocent judge. "Certainly, you are excused."

The next day the juryman was met by a friend, who, in a sympathetic voice, asked: —

"How is your wife?"

"She's all right, thank you."

"And your daughter?"

"She's all right, too. Why do you ask?"

"Why, yesterday you said you did not know which would die first."

"Nor do I. That is a problem which time alone can solve."

A NORTH CAROLINA lawyer, who was more apt in his similes than perfect in his pronunciation, recently referring to the classic incident of avoiding a rock to fall into the whirlpool, electrified judge and audience by telling the jury that the opposing counsel, "like the mariner of old, in avoiding '*Squealer*' had run squarely into '*Cherrybobus.*'" As the jury were not well acquainted with Scylla and Charybdis, his simile went down all right.

IN the same State, up to 1868 many offenses were punishable by fine or whipping, at the discretion of the Court. Counsel at the Warren bar, who had his client convicted of a bad case of larceny, told the Court: "My client is a very poor man, and I hope no fine will be imposed. It will be really a punishment on his poor wife and children, who sadly need every dollar of his earnings. Let the punishment be placed on his back, as he alone is the offender, and he knows that he alone should, in justice, bear the punishment." The client nervously clutched his lawyer's coat-tail: "Good God, Mr. J——, *don't* talk so! It hurts my feelings to hear you."

IN Buncombe Co., N. C., General Edney having had a client convicted of larceny, moved the Court for a new trial, and went out to get his books. While he was gone the Court passed sentence, "39 on the bare back," and the sheriff, taking the culprit out, administered the dose. They had scarcely returned when General Edney came back with a basket of books, and renewed his motion for a new trial. This was too much for his client, who was still rubbing his back. "A *new* trial is it you want, when I have been already whipped most to death. I have had trials enough — I don't want no more trials in this business."

NOTES.

A BRITISH magistrate has decided that rice-throwing at a wedding constitutes an assault. Probably then, shoe-throwing must be an aggravated assault.

A GOOD story is told of a couple of wagers in which Daniel Webster, Tazewell and Gen. Jackson's secretary of the navy were concerned, and of which the last named was the victim.

The three were walking together on the north bank of the Potomac, and while Webster lingered a little in the rear, Tazewell offered to bet Branch a $10 hat that he could prove him to be on the other side of the river.

"Done," said Branch.

"Well," said Tazewell, pointing to the opposite shore, "isn't that one side of the river?"

"Yes."

"Well, isn't this the other side?"

"Yes."

"Then, as you are here, are you not on the other side?"

"Why, I declare," said the victim, "so it is; but here comes Webster, I'll win back my bet from him."

As Daniel came up, Branch saluted him with, "Webster, I'll bet you a $10 hat I can prove you are on the other side of the river."

"Done."

"Well, isn't this one side?"

"Yes."

"Well, isn't that the other side?"

"Yes, but I am not on that side."

Branch had to pay for two hats, and learned that it is possible to bet both ways, and win upon neither.

ONE of the possible effects of the rise and rapid progress of the new woman is indicated in a certificate of acknowledgment found in an Illinois case, decided in 1872 (Board of Trustees *v.* Davison, 65 Ill. 124).

A justice of the peace, in certifying the acknowledgment of a deed executed by husband and wife, after reciting the acknowledgment by the wife in due form, continued his certificate as follows: "And that said A., husband of said B., personally known to me, etc., and being examined separate and apart, and out of the hearing of his said wife, and the contents being made known and fully explained to him, acknowledged said instrument to be his free act and deed; that he executed the same, and relinquished his dower, etc., voluntarily and freely, without the compulsion of his wife, and did not wish to retract." The Court, not being so advanced as the justice, held that the acknowledgment was wanting in all the substantial requirements of the statute respecting deeds of married women.

IN the United States the names applied to lawyers are usually attorney and counselor-at-law. In Great Britain there are barristers-at-law who are counselors, learned in the laws, qualified and admitted to practice at the bar; solicitors who are attorneys, advocates or counselors-at-law who are authorized to practice in the English Court of Chancery; serjeants-at-law who are lawyers of the highest rank and answer to the doctor of the civil law; only after sixteen years of practice at the bar can one become a serjeant. Queen's counsel are eminent lawyers who are given by the government that title, and from their number all the judges are chosen. In Spain and countries settled by Spaniards the name is notary. In France the name is *avocat.* In ancient Rome the name was *juris consultus,* or in English, jurisconsult.

CURRENT EVENTS.

BARONESS HIRSCH has given twenty million dollars for the continuance of her late husband's labors for the emigration of poverty-stricken Jews from Russia to the Argentine Republic.

COMMENCING with January 1, 1897, the city of Glasgow, Scotland, will cease to levy taxes of any kind upon its citizens. The entire expenses of the city will be borne in future by the income from its public works. The city operates water-works, gas and electric light plants, street tramways, sewage farms and other institutions, and all pay large profits.

A LONDON company, known as the Hot Water Supply Syndicate, has been given a charter for the very latest in the line of penny-in-the-slot machines. It has been granted permission to erect, experimentally, a number of long columns and fittings for supplying hot water to the public at the rate of a half-penny per gallon. The apparatus ingeniously uses the heat given off by the gas burned in the street lamps. The idea is said to have worked satisfactorily in Manchester, and for several years a similar apparatus has been working successfully in households.

PARTS of Holland are from ten to thirty feet below the level of the sea.

LORD LEIGHTON'S house in London has been offered by his sisters to the British nation on condition that it be preserved as it is.

THREE women who were recently admitted to the bar in New York city have been appointed receivers. This is the first instance of such an appointment in New York city.

SIR WILLIAM HERSCHEL'S system of identifying persons by their thumb-marks has been introduced experimentally into Bengal. The chief measure appears to be to identify Government pensioners and to make it impossible for anyone else to impersonate them.

IT is said that Mrs. Humphrey Ward rewrote "Sir George Tressady" four times before it appeared as a serial, and twice more before she allowed it to appear in book form. It is also stated that ten thousand dollars is her price for serial rights in England alone.

THOUGH the Cook Islands of the Southern Pacific have been annexed to the British Empire but eight years, the Federal Council has already passed a bill to keep out persons of bad character, drunken habits and unsound mind.

DENMARK, it is said, has an *entente* with Russia, which places Copenhagen, with all of Denmark's available forces, under Russian command in case of a war. In return Denmark is to be kept intact, and Schleswig is to be returned to her as soon as possible. Germany has been fearing such a treaty, and, to be on the safe side, built the Baltic North Sea Canal and added largely to her North Sea squadron.

AN experiment was recently made at an Austrian wood-pulp factory, to determine how quickly it was possible to make a newspaper from a tree. Three trees were felled in the presence of a notary and witnesses at 7.35 A. M. The trees were then taken to the factory and cut up into short pieces, which were stripped of their bark and converted into mechanical pulp. This was placed in a vat and mixed with the material necessary to form paper, and the first leaf of paper came out at 9.34 A. M. Some of the sheets of paper were taken, the notary still watching the proceedings, to the printing-office, about three miles away. The printed newspaper was issued at ten o'clock. Thus it took two hours and twenty-five minutes to convert a tree into a newspaper.

LITERARY NOTES.

THE value of THE LIVING AGE, this old eclectic weekly, to every American reader, as the freshest and best compilation of gleanings from the field of British periodical literature, has been long recognized.

With a desire to give the best the *world* can offer, the publishers have arranged for the introduction of certain "New Features," so widening its scope as to embrace translations of noteworthy articles from the leading publications of France, Germany, Spain, Italy, and other continental countries. In addition a monthly Supplement will be given, containing three departments devoted to American literature, viz.: Readings from American Magazines, Readings from New Books, and a List of the Books of the Month.

THE ATLANTIC MONTHLY promises for 1897 a new story by Charles Egbert Craddock, called "The Juggler." Lafcadio Hearn will contribute several papers on oriental countries, with which he is so familiar. T. W. Higginson will contribute a series of personal recollections entitled "Cheerful Yesterdays." There will be a series of articles bearing on the various educational movements of the day. There will also be series of articles on Surveys of the 19th Century, Present-Day Problems, and New American Writers.

THE year 1897 will be a Red Letter Year in the history of SCRIBNER'S MAGAZINE. The publishers offer, among other good things, "London as seen by Charles Dana Gibson," "Soldiers of Fortune," by Richard Harding Davis, and series of articles on the "Conduct of Great Businesses," and "Undergraduate Life in American Colleges." Mrs. Helen Watterson Moody will contribute three or four articles on woman, entitled "The Unquiet Sex." W. D. Howells, Geo. W. Cable, and others, will contribute articles for the lighter portion of the magazine.

IN the opening paper of HARPER'S MAGAZINE for January, Poultney Bigelow sums up the result of "Portuguese Progress in South Africa," showing how ineffectual a colonizer Portugal has been during four centuries of nominal possession, and how demoralizing has been her influence upon the blacks. An important paper on "A Century's Struggle for the Franchise," from the pen of Professor Francis N.

Thorpe, relates the history of the movement which has underlain all American politics, and shows how the individual has become, in fact as well as in theory, the political unit in the United States. "Science at the Beginning of the Century," by Dr. Henry Smith Williams, is an important contribution to the history of nineteenth-century civilization, and will be followed by other papers showing the progress of scientific discovery during the last hundred years. The fiction of the number is noteworthy.

THE Christmas number of THE NATIONAL MAGAZINE has an extremely readable account of "Christ and His Time," by Dallas Lore Sharp, written for the average reader and profusely illustrated with reproductions from the famous paintings of the world. The table of contents includes, also, a charming little reminiscence, by Grace LeBaron, on Dr. Holmes, entitled, "In the 'Autocrat's' Library." Mr. Winthrop Packard has an illustrated humorous sketch of an experience in Ireland, under the title of "The Sacking of Doe Castle." Contributed by Mr. Arthur T. Winslow is a depiction of the humorous side of monastic life, under the name of "Beneath the Monastery Bell," illustrated with reproductions from the works of some famous painters.

"THE Engineer in Naval Warfare" is the title of an effective and well considered symposium presented in the opening pages of the NORTH AMERICAN REVIEW for December. It is intended as a reply to the articles published under a like heading in the REVIEW for May last. In this instance the contributors are: Rear-Admiral John G. Walker, U. S. N.; Captain A. T. Mahan, U. S. N.; Captain R. D. Evans, U. S. N.; and Lieutenant S. A. Staunton, U. S. N. Among other articles are: "Some Memories of Lincoln"; "Penal Colonies," by Major Arthur Griffiths; "American Bicycles in England," by Geo. F. Parker; "The Duty of the Republican Administration," by Hon. Jas. H. Eckels; "Has the Election Settled the Silver Question?" by Hon. Wm. J. Bryan.

"THE Progress of the World," the editorial department of the REVIEW OF REVIEWS, touches in the December number on a great variety of topics of national and international significance. After devoting several paragraphs to a lucid and instructive analysis of the results of the Presidential election, the editor proceeds to review the history of the efforts to obtain arbitration of the Venezuelan boundary dispute with Great Britain, explaining the attitude of the United States in the controversy; discusses the merits and demerits of the Cleveland administration now drawing to a close, criticising with especial vigor the President's Turkish policy; describes the latest phase of the European situation, with reference to the Eastern question and the Franco-Russian alliance; comments on Lord Rosebery's resignation and the resulting complications in English politics — making altogether a most interesting and valuable summary of the world's important doings for the month just passed.

A STRONG list of contributors is presented in APPLETON'S POPULAR SCIENCE MONTHLY for December. Mr. David A. Wells resumes his papers on the "Principles of Taxation" in this number with a discussion of the justification and the limitations of the taxing power, which will undoubtedly clear away many foggy ideas on these points. Mr. Herbert Spencer contributes an article on "The Relations of Biology, Psychology, and Sociology." Dr. Andrew D. White gives a synopsis of the recent book by Prof. E. P. Evans on "Animal Symbolism in Ecclesiastical Architecture." In "Possession and Mediumship" the psychology of demonism and spiritism is set forth by Prof. W. R. Newbold.

ON petition of the creditors of the Arena Publishing Company made Oct. 1, 1896, before Judge Dunbar to appoint a temporary receiver, A. D. Chandler, Esq. was appointed for the protection and adjustment of the interests of the creditors during a reorganization of this company. The Arena Company will be recapitalized by experienced businessmen, and placed in new hands and on a firm financial basis, the magazine to be an open court for the promulgation of all authoritative and important opinions. With the reorganized company THE ARENA will be enabled to extend its growth and add to its reputation now so well established, in the success of which all readers and thinkers feel a personal interest on account of the national influence which this publication has attained.

THE December CENTURY continues to emphasize the Christmas traditions of this magazine, not only by papers and poems bearing directly upon the Christian festival, but by others breathing the spirit of the common human feelings. The frontispiece of the number is a "Study for the Head of Christ," from the painting of "The Last Supper" by Dagnan-Bouveret, exhibited at the Salon of the Champ de Mars last spring. "The Christmas Kalends of Provence," by T. A. Janvier, with illustrations by Louis Loeb, is the product of intimate acquaintance

with the charming life of the South of France. "Light in Dark Places," by Jacob A. Riis, is a study of the better New York, presenting hopeful aspects of tenement-house work in the metropolis.

McCLURE'S MAGAZINE for 1897 will contain a new Life of Grant, by Hamlin Garland, profusely illustrated, Rudyard Kipling's first American serial, "Captain Courageous," and Robert Louis Stevenson's "St. Ives," the only novel of his still unpublished. Chas. A. Dana will also give an account of his "Recollections of Wartime." Conan Doyle, Ian Maclaren, Joel Chandler Harris, Octave Thanet, and many others will contribute the fiction.

THE December number of CURRENT LITERATURE has numerous holiday features, in addition to its regular departments, which are abundant and interesting as usual. Among these special features are a French Christmas Legend, "The Three Low Masses," by Alphonse Daudet; a Yuletide Legend of King Arthur's Country; two pages of Christmas Verse, and a timely reproduction of Washington Irving's "Christmas Feast at Bracebridge Hall," from the Sketch Book.

THE complete novel in the December issue of LIPPINCOTT'S is "The Chase of an Heiress," by Christian Reid. The scene is in Santo Domingo, a region hitherto unfamiliar to fiction. "The Whipping of Uncle Henry" is a tale of Georgia before the war, in that original and effective vein which is peculiar to Will N. Harben. Pauline Shackleford Colyar tells a Thanksgiving story of "Two Old Boys." "How Timmy Saved the Piece," by Livingston B. Morse, records a remarkable event in theatrical annals of the humbler sort.

WHAT SHALL WE READ?

This column is devoted to brief notices of recent publications. We hope to make it a ready-reference column for those of our readers who desire to inform themselves as to the latest and best new books.

(Legal publications are noticed elsewhere.)

AMERICAN ideas of the Chinese are vague and indefinite, but the reader of Mr. Ralph's *Alone in China*[1] will find that they are after all much like other people, possessing the same qualities which distinguish civilized nations the world over. "They are the jolliest, most sympathetic, generous souls" the author ever found in his wanderings. The stories are written in a bright, entertaining manner, and the account of "House-boating in China" is fascinating in the extreme.

In *Sister Jane*,[2] Mr. Harris writes in a more serious vein than usual. The story comes very opportunely at this season of goodwill to man, for the heroine displays true charity to rich and poor alike. The book is admirably written, with here and there touches of the quaint humor that characterizes the author.

Few writers have a stronger hold upon the reading public than Charles Dudley Warner. Whatever comes from his pen, whether story or essay, is sure to contain the best possible food for reflection. *The Relation of Literature to Life*[3] is made up of a series of essays devoted to showing the connection between our literary, educational and social progress. One paper, on "The Novel and the Common School," ought to be placed in the hands of every teacher and every parent in the land.

Life on the ocean wave in all its varied phases is graphically described by Lieut.-Commander Kelley of the U. S. Navy, in *The Ship's Company*.[4] The Chapters on "Midshipmen, Old and New," and "Superstitions of the Sailors," are particularly interesting, and it may be news to the legal profession to learn that lawyers are looked at with disfavor on sailing-ships, as sure to bring ill luck. The book is most attractive in every way and is beautifully and profusely illustrated.

No one was more prominently identified with the formation and early history of the Republican party than *William H. Seward*,[5] and the story of his life covers the most exciting and critical period of our national existence. Mr. Lothrop's biographical sketch is fair and unprejudiced. While recognizing, appreciatively, Seward's many noble qualities, he does not overlook his weak points, and the reader is given an admirable insight into the real character of the man. Whatever may be one's political affiliation, he will find this book exceedingly interesting.

[1] ALONE IN CHINA, and other Stories. By Julian Ralph. Harper & Bros., New York, 1897. Cloth. $2.00.

[2] SISTER JANE: Her Friends and Acquaintances. A narrative of certain events and episodes transcribed from the papers of the late William Worman. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.50.

[3] THE RELATION OF LITERATURE TO LIFE. By Charles Dudley Warner. Harper & Bros., New York, 1897. Cloth. $1.50.

[4] THE SHIP'S COMPANY and other Sea People. By J. D. Jerrold Kelley, Lieut.-Commander, U. S. N. Illustrated. Harper & Bros., New York, 1897. Cloth. $2.50.

[5] WILLIAM HENRY SEWARD (American Statesmen Series). By Thornton Kirkland Lothrop. Houghton, Mifflin & Co., Boston and New York, 1896. Cloth. $1.25.

NEW LAW-BOOKS.

A TREATISE ON THE LAW OF REAL PROPERTY as applied between Vendor and Purchaser in Modern Conveyancing; or Estates in Fee and their Transfer by Deed. By LEONARD A. JONES, LL.B. Houghton, Mifflin & Co., Boston, 1896. Two volumes. Law sheep. $12.00.

A new law-book by this distinguished author is always an "event" in legal literature. Whatever comes from his pen is the result of long and careful research, and his works are always clear, comprehensive and accurate treatments of his subjects. This treatise on the law of real property is a most successful effort on the author's part to state, as he says, "with considerable fullness the law of the topics" on which he writes, and "to state it with such completeness as to make the treatise valuable to the courts and to practicing lawyers." All this has been accomplished, and the profession owe Mr. Jones a deep debt of gratitude for his efforts in their behalf. We are willing to assume the rôle of a prophet so far as to predict that it will be many a long year before a better work on the law of real property will be published.

THE LAW OF EVIDENCE in Civil Cases. By BURR W. JONES of the Wisconsin Bar. Bancroft-Whitney Co., San Francisco, 1896. Three volumes. 18mo. Law sheep. $7.50.

There is no question but that the legal profession is ready for a new standard work on the law of evidence. Not that the old familiar text-books on the subject have not well stood the test of time, but a disinclination on the part of editors of later editions to alter the original text has necessarily confined the many changes in the law to the "notes," and to them the reader must go to ascertain the law as it exists to-day. Whether this new treatise by Mr. Jones is to fill this long-felt need time alone will demonstrate, but from a careful examination of the work it seems to us in every way an admirable guide for lawyers in the trial of civil cases. It is written in a remarkably clear and comprehensive style, and is an exhaustive exposition of the law as it is to-day. It is no hastily thrown together collection of digests of cases on evidence, but bears evidence of careful preparation on the author's part. The volumes are a convenient size (4 x 6 inches) for ready reference. We regret that no table of cases cited is included, but that perhaps is a matter of taste. We cordially commend the work to practitioners and students at law.

A TREATISE ON THE LAW OF CIRCUMSTANTIAL EVIDENCE, illustrated by numerous cases. By ARTHUR P. WILL of the Chicago Bar. T. & J. W. Johnson & Co., Philadelphia, 1896. Law sheep. $5.00.

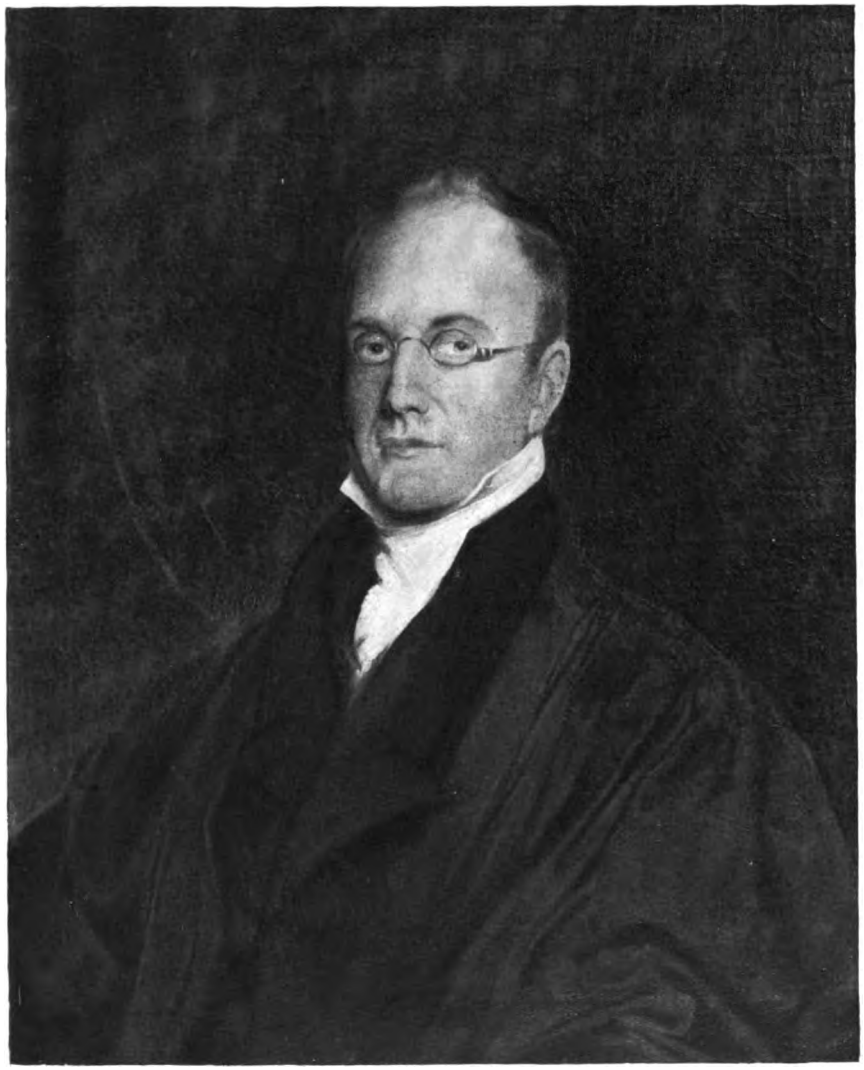
This treatise covers what is, perhaps, the most important branch of the law of evidence, and practitioners in criminal cases will find the work admirably adapted to their needs. The profession should welcome it heartily, as there has been a long-felt need for a reliable treatise upon the subject.

A TREATISE ON THE MODERN LAW OF CONTRACTS, including a full consideration of the Contracts and Undertaking of public and private Corporations as determined by the Courts and Statutes of England and the United States. By CHARLES FISK BEACH, Jr. The Bowen-Merrill Co., Indianapolis and Kansas City, 1896. Two vols. Law sheep, $12.00 net.

Mr. Beach is one of our most indefatigable law writers, and the wonder is that he is able to accomplish so much in so satisfactory a manner. This work on contracts appears to cover the subject thoroughly, and while we have had no occasion to test its accuracy, we doubt not it is to be relied upon as a correct and exhaustive statement of the present law. We advise those of our readers seeking a treatise upon the subject to carefully examine this book.

A TREATISE ON THE LAW OF CONTRACTS. By SAMUEL S. HOLLINGSWORTH, late Professor of the Law of Contracts and Corporations and Pleading at Law in the University of Pennsylvania. Prepared for the press by Randolph Sailer of the Philadelphia Bar. Rees, Welsh & Co., Philadelphia, 1896. Cloth, $5.00.

This is a very complete and exhaustive treatise upon the law of contracts and worthy to take a place beside the recognized standard works upon the subject. The arrangement is admirable and in every way adapted to the needs of both practitioner and student. One feature of the work strikes us as most worthy of imitation by other writers: the author is content to prove his propositions by a few well selected cases, and does not feel it necessary to add a mass of cumulative evidence upon the point. We cheerfully commend the treatise to our readers as one which will prove a valuable addition to their libraries.



Joseph Story

The Green Bag.

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JOSEPH STORY.

"Greatness and Goodness are not means, but ends!
Hath he not always treasures, always friends,
The great, good man?" COLERIDGE.

TO the present generation, and especially those of it who are not of legal education, the memory of Joseph Story is pepetuated mainly in his son, William Wetmore Story, poet and sculptor, as well as in his grandson, Julian Story, a great painter. But to the generation of lawyers in the quarter century that ended in 1845, the name of Joseph Story remains a household word to be uttered with love and veneration. Even the later generation of lawyers, who know Joseph Story only through history, will class him with Tribonian, Hale, Mansfield, Marshall and Kent.

When the recording angel, fifty-two years ago, called among the spirits of just men made perfect the name of Joseph Story, and he answered *adsum*, the angel knew him by his record to be a triumvirate of mortal greatness as author, statesman and jurist. None lingering in that great city of the dead, Mount Auburn Cemetery, fail to visit the tomb of Joseph Story; and to recall that his pathetic eloquence dedicated it, served its government for many years; and in it, at the comparatively early age of sixty-six, worn out by excessive mental toil, he was laid away in mortal rest.

He was the eldest son by a second wife of Doctor Elisha Story, who was a Boston son of liberty, one of the Indians who destroyed the unjustly taxed tea, and who served as an army surgeon during the Revolutionary era, attached to Washington's army. He was born at Marblehead when the Declaration of Independence was three years old, and much of his childhood was passed in that romantically situated seaport, acquainted with its stately granite sides and with the sound of billows relentlessly breaking, as Mrs. Hemans has described them in her Pilgrim hymn. While yet a schoolboy he selected legal pursuits as his profession. With that end steadily in view, he matriculated at Harvard in the class with William Ellery Channing, with whom he contested for the valedictory honor; but graduated contented with the English salutatory. He passed from Cambridge, destined to become his lifelong residence, into the law office in Marblehead of Samuel Sewell, who afterwards became chief justice of the Bay State; and he concluded his law studies in the office of him who, in the time of President John Adams, also became a Massachusetts Supreme Court Judge — Putnam. In the year that opened this century, Joseph Story was called to the Bar and took chambers in historic Salem as a young Democratic Jeffersonian attorney; the only one, indeed, at a Bar theretofore wholly composed of Federalists. Political feeling raged more intensely then than it does even now, and young Story found his full share of Jeffersonian clients. When only two years old as a practitioner, politics brought to him the office of naval officer of the port of Salem which, because it would interfere with his profession, he declined. A year later he acquired oratorical prestige

as a Fourth of July speaker, but he had previously delivered a eulogy on the death of Washington. About the same time, perhaps taking courage from the fact that the great English and Indian jurist, Sir William Jones, had recently published poems, young Story also published a volume of verses entitled "The Power of Solitude, and other Poems." He had written poetry while yet a schoolboy, and indeed his whole adolescence had been tinged with romance, so that he was an idol of the female sex, and did not hesitate to reciprocate their attentions. This fondness of and aptitude for verse was, as all *literati* well know, inherited by his son William Wetmore, whose metrical tragedy of Nero is in every well appointed library, and whose poetry sharpens even his chisel as sculptor. The same inherited poetic temperament attends the palette and pencil of Julian Story, the grandson of Joseph Story. But even this love of art in the descendant is inherited from the grandsire who in college gave much attention to drawing and water-coloring. The son's poetry, however, bears higher marks of inspiration than does that of the father, whose poem on solitude was evidently modeled on Mark Akenside's "Pleasures of the Imagination," which was the notable poem of Story's boyhood.

These extracted lines give example of the poetic ability of Joseph Story when singing the charms of solitude, which Robinson Crusoe, through the poet Cowper, had contemned: —

> "Ask lovely Maintenon when Fortune smiled
> To deck with regal charms its fortunate child:
> Why 'mid St. Cyr's lone walls she loved to dwell
> And pace with musing steps the vestals' cell,
> Her conscious lips the motive could declare,
> Beneath the purple lurked the fiend of Care."

When Rutherford B. Hayes, George Hoadley and I were classmates at Harvard Law School, in 1844, we found chained to a shelf, by Librarian Sibley, in the great college library, a small, thin volume bound in dark sheep, backed as "Solitude, and other Poems, by Joseph Story," and of date 1804. It had become a curiosity, because the author, grown to be a great world-renowned jurist, had bought up all the copies that he could find — deeming the publication a youthful folly; and perhaps in poetic memory recalling this verse of Edmund Waller, subsequently paraphrased by Byron in "English Bards and Scotch Reviewers": —

> "That eagle's fate and mine are one,
> Which on the shaft that made him die
> Espied a feather of his own
> Wherewith he wont to soar so high."

Perhaps had Joseph Story lived to hear it mooted that Lord Bacon was the author of the Shakespeare plays, he would have been emboldened to ally "rhyme" with the "reason" of jurisprudence.

Young Story needed such possession of the poetic temperament in order to antidote the dryness of his studies. In his novitiate there were only six volumes of American law reports, and very crude at that, and for English reports he had only the year-books, Rolle, Siderfin and Coke. Besides, like his contemporaries, John Marshall, Alexander Hamilton, Emmet, Kent and Pinkney, Story's text-books, beyond Blackstone, were those dry bits of fossils, Coke on Lyttleton and Fearne on Contingent Remainders. Nowadays, such is the wealth of text-books for the law student that he is in danger of being mentally wrecked on the maxim, *dulce est desipere in loco*, with temptations toward superficiality.

Joseph Story's mother was the daughter of an eminent Boston lawyer named William Wetmore (from whom the sculptor son takes his patronymic), and perhaps some milk of Themis through her may have suckled her son Joseph and aided to make him the introactive jurisprudent that he really became. His learning seemed ever more than of mere bookish origin. While yet a young lawyer he turned from reading the few treatises at his command towards

editing law books of London origin. His first attempt was annotating "Abbott on Shipping" — a subject near to his clients of seaports Salem and Marblehead and Boston. Many of these notes became afterwards incorporated into new London editions of the main work. His next venture into legal authorship was in editing "Lawes on Assumpsit." He was now only thirty-two years of age, and addicted to great research and accuracy. All of his writings bear testimony to those qualities so necessary to a legal author. His industry became the gossip of the Bar and Bench; for by that time his practice had so increased that he was occasionally brought to the *nisi prius* of New Hampshire where he met in jury combat its great advocate, Jeremiah Mason, the traditions of whose power as a jury lawyer survive to the present legal generation of the Granite State. Story became remarked for his persuasive powers. Indeed, he was naturally an instructor. In his manner, whether at the Bar or on the Bench, throughout life, he joined to the vigor, earnestness and concentration of a man the naturalness, buoyancy and unconsciousness of a child. Young or aging, his face was that of a beatified saint. His beaming countenance invited confidence.

Joseph Story's pioneer case as a young lawyer will be found for the defendant in Rust *v.* Low, 6 Mass. 90. It was the etiquette of the Salem Bar then, for adversary counsel in a case, after joining issues, to exchange points and authorities, and in some cases this practice resulted in settlements and compromises and, indeed, withdrawal of suits or defenses. In that cited case, Story's opponent preliminarily said, "There is a decision by Hale which totally defeats your contention." Note was made of it, and Story set about tracing the decision to its source and foundation principles, when he discovered that Hale had made an error. When the point was cited against him and he began to differentiate it, the Judge amusedly and sarcastically asked, "Do you attempt to overrule Sir Mathew Hale?" and eventually ruled with the citation. When the temporarily discomfited Story reached the Appellate Court his argument prevailed, and the Judge writing the opinion was unfair enough not to notice Story's brief and research, but took to himself the sole credit of discovering and pointing out Hale's error. Nevertheless, in legal circles the incident gave Story much prestige.

He had now also embarked in politics, and been elected to the Massachusetts Legislature, where he served as Speaker of the House with executive ability, and in the post first displayed judicial acumen. He was next elected to Congress, and against the peace predilections of his constituents by his speech and votes he sustained President Madison's patriotic plans in the naval war with England.

It is commonly supposed that Story owed his professorship in the Cambridge law-school to the fact that its overseers selected him because of the prestige of having a Federal judge in the chair. But his selection (first as professor in the Royall foundation, which he declined, and later as in the chair founded by Nathan Dane) was made on his merits at the Bar, and before President Madison selected him for Justice of the Federal Supreme Court to fill a vacancy. While a Congressman, Story was oftenest found in the chamber of the Supreme Court. Indeed he was there daily, studying the methods of the great lawyers who argued, and betraying the greatest interest in the legal issues at stake — most of them of a novel and unprecedented character. He formed many legal friendships, and especially with Attorney-General Pinkney and Chief-Justice Marshall. Story's letters of the period to his wife (published after his death) were filled with comments upon the lawyers, the judges and the cases: evidencing that, notwithstanding the grave

political issues then at stake in Washington, his thoughts and sympathies were most with legal pursuits. One or two Federalist Senators opposed his confirmation (1811) on objection to his youth; but he was confirmed and became the youngest judge of a high tribunal known to legal history in any country. He was also feebly opposed as being too much of a politician; the opposite reason to that urged by Senator Hill in 1894 to the confirmation of William B. Hornblower. With the exception of Chief-Justice Marshall, Story's new associates of the Bench were not of that distinguished legal character that later marked the Supreme Bench. Bushrod Washington of Virginia, William Johnson of South Carolina, Brockholst Livingston of New York, Thomas Todd of Kentucky, became Story's associates. None of them had been as eminent at their local Bar as had been Story; and each one was many years older than the newcomer. But Story soon demonstrated to Bar and associates the legal grasp of his logical mind and his familiarity with legal principles, as well as his powers towards discrimination in their application to controversies.

He had already enjoyed a notable debut in the court as one of the counsel in what is known to Cranch's reports as the Georgia claim: a case involving grave constitutional questions by which, in discussing, Story attracted marked attention. It had previously been the judicial tone in the court to give liberal and Hamiltonian constructions to constitutional provisions, but, from his Jeffersonian proclivities, Story urged strict construction of the letter. These views he carried upon the Bench. Seventh Cranch contains some of Story's maiden decisions, and these all gave promise of the learning and perspicuity which marked all of his after opinions.

Yet not only on the Supreme Bench but as judge of the whole New England Federal Circuit he proved his judicial ability — as Gallison's reports first showed. Substantially, Joseph Story may be termed the Father of American prize law, admiralty law and patent law; as he also afterwards became of American equity jurisprudence by his Commentaries.

It was the case of Martin *v.* Hunter at Washington which undoubtedly led to his creation of Commentaries on the Constitution. The case first settled the jurisdiction of the Federal Supreme Court to over-ride State constructions of the local constitutions. He took part also in deciding the great Dartmouth College case involving the jurisdiction of a legislature over charters as constituting vested rights. That was the case which first brought Daniel Webster conspicuously to the legal fore; and it is recorded of the great Daniel that being once in a den of juridical lions he was complimented for his argument, but said, "Ah, gentlemen, you should read Story's opinion, which throws argument of counsel into shadow." Story also had the courage of his legal convictions, for in the notable "Nereid" prize case growing out of the Naval War he dissented from Chief-Justice Marshall; and after the Civil War that dissent was substantially sustained in an opinion of Chief-Justice Chase.

Marshall died in 1835, and Story wrote for the "North American Review," a paper upon that great man which exhausts the biographical topic. Almost every lawyer in the Union and many newspapers now felt assured that to Story would come the vacant chief justiceship; but Andrew Jackson was president, warring against the constitutionality of the United States Bank and its potent branches, and Story was known not to have legal views on that controversy sympathetic with Jackson's views. Then it was that the President, who had made Roger B. Taney of Virginia Secretary of the Treasury for the purpose of crippling that Bank by removing from it the national deposits, after the conscientious refusal of Secretary Duane,

tendered to Taney the Marshall succession. Reference to files of Whig party-newspapers of Boston and other cities of that time show what a political storm Taney's nomination raised. It was urged that the appointment was purely a political reward, and that — as was indeed the case then — Roger B. Taney had not, even while Jacksonian Attorney-General, displayed any conspicuous legal ability. But as all lawyers know, Taney during his twenty-eight years of service amply vindicated his skill in jurisprudence, and to that extent vindicated the policy of a political appointment to a judgeship. Judge Story, to judge from his family letters of the period, did not take to heart the loss of the chief-justiceship, and he and Taney became conspicuous for comradeship and friendship. But the incident sharpened his ambition of authorship, and in time, amid harassing judicial duties and delighted occupation as instructor in the Law School (which he and Greenleaf had now raised from bankruptcy to great scholastic and pecuniary success), Story successively presented his students and the general legal public with his commentaries on Bailments, on Agency, on Commercial Paper, on Equity Jurisprudence and on the Federal Constitution. In intellectual industry and tenacity of authorship Story fairly rivalled Sir Walter Scott: beside whose pen ever stood the demon of paralysis, javelin in hand, ready to strike, and also the grim demon of debt urging to incessant literary toil. But Story, although his income was far smaller as judge and as professor than his great abilities entitled him to receive, had no such pressure upon him as had Scott. His labors were eminently labors of love. Whatever debts of distinction he owed to his "jealous mistress" of the law he abundantly discharged by his treatises — which were "not for a day, but for all time." His work on Bailments at once superseded the editions of Sir William Jones and his editors. That on Negotiable Paper destroyed the prior value of all other authors on the same subject. While his Equity and Constitutional Commentaries left nothing for subsequent writers to illuminate. The literary skill of all Story's treatises equals their proofs of accurate research and learning. Marshall and he remain the great scholars of the Federal Bench, approached only in average legal estimation by the scholastic ability of Benjamin R. Curtis and Horace Gray. What a chasm of succinct expression lies between the diction of Coke and Fearne and that of Story.

Mental toil told heavily upon Judge Story. At forty he began to present the appearance of an aged man, so far as polished skull and telltale furrows on the face concerned physical appearance. But the querulousness of age, its diminution of mental vigor and its loss of physical vigor were ever absent. I had not enjoyed a sight of him until, as a law student, I confronted him at his professorial desk. I recall that I became so impressed with his majestic presence, his genial face, his musical voice and his delightful method of conversational tutorship on that occasion, that I lost attention to that first lecture in contemplating the great jurist and in musing upon my knowledge of what he had achieved. I had taken to his house a letter of commendatory introduction from Theodore Frelinghuysen, the Chancellor of my alumnus university, and nothing could exceed the cordiality of the Story welcome in his study at his beautiful cottage residence; and yet such interviews from and with students must have become monotonous, and perhaps irksome. Such individual admiration could be always seen portrayed upon the faces of my fellow classmates as they were surveyed in the act of listening and gazing upon Story's saint-like face. To paraphrase the line of a well known hymn, Story, as a lecturer, "was his own interpreter and he will make it plain." His comments were interspersed with such appropriate anecdotes as was the habit of Abraham Lincoln. When he presided at the moot courts which he had established for the

nisi prius practice of the students or for their views upon a stated controversy — generally patterned from some case in his circuit — Professor Story was the embodiment of geniality and seemed as pleased with the proceedings as would be a child at blindman's buff. His constant tenet to students was "the nobility and attractiveness of the legal profession." As matter of personal pride, I fancy he was prouder of his professorship than of his judgeship or authorship. Three decades of his law students all over the Union derived from Story unfeigned delight in the practice of their profession.

He had served thirty-four years as judge — equal with Marshall's service and the longest of any other Supreme Court judge: two more than that of McLean and Wayne and six more than that of Taney, Curtis and Miller — when at the age of sixty-six Story's physical constitution gave way; but he died in harness, as Charles Sumner, of whose pupilage Story had been very proud, narrated in a sketch of his old preceptor and neighbor for the "North American Review." Sumner had seen him, two days before the mortal attack, returning from the lecture room, with feeble step, across the college campus, and had exchanged what proved to be farewell salutations. In truth, Story faded into the next world rather than died out of this. He may be described as a man who lived forty years without knowing a moment of what the world calls leisure. He died, as he had lived, a zealous exponent of the Unitarian faith and an ardent practitioner of the beatitudes of the Christ-man. His death and that of Henry Baldwin brought to their vacant chairs Levi Woodbury and Samuel Nelson; but the Story judicial and legal influence has never left his old court.

Doubtless, if the profession were polled to vote who was the greatest American lawyer and jurist, an immense majority would decide for Joseph Story. There was more than pleasantry in this toast, once drunk at a banquet of lawyers whereat the great jurist and instructor was a guest: "However high in the temple of Themis a lawyer may seek to climb he will never get above one story."

WILLS OF FAMOUS AMERICANS.

THERE is a remarkable collection of old wills in the city hall vault of the District of Columbia. One only needs to enter the vault with the registrar, says the "Washington Post," to realize what a wealth of historic manuscripts and of quaint forgotten eccentricities it contains. There was a provision in the early law by which the wills, once deposited, could not be withdrawn, so that the registrar has in his keeping all the legal instruments of this character since the year 1800. Many men known to history and identified with the development of the nation have lived and owned property in Washington, and their wills or exact copies thereof repose in the great iron receptacles.

The will of George Washington is, perhaps, the most famous of all the documents. It was recently copied by the order of the registrar into a record book where it could be consulted with facility. The original is somewhere in Virginia, but Washington had some property interests in the capital city, and a copy was deposited with the authorities here. It is a mammoth document, and probably covers more writing paper than any other will among the archives. It is spread upon eight broad pages, and it would require at least two solid pages of a daily paper on which to print it. While the earthly possessions of the father of his country, though he was one of the richest Americans of his time, were by no means as extensive as those of many modern millionaires, he prescribed

with the greatest minuteness how they should be disposed of.

The most famous provisions in this great document, which Washington declares to have written with his own hand, are those in which he devises fifty shares of stock in the Potomac River Company for the founding of an American university, and that in which he provides for the liberation of his slaves. The shares of stock were presented to him by the Virginia legislature, and were at first declined, but the gift was afterward so arranged as not to conflict with his notions of propriety in receiving public gifts. The provisions for the gift to the proposed university are couched in patriotic language characteristic of the man. Washington was not only patriotic; he was public spirited. He made many gifts in his will which were intended to be public benefactions.

It is the slave clause which reads most curiously to the child of the last generation. It is, in fact, an excellent abolitionist document. They were not to be released till the death of Martha Washington, his wife. He stated that it was his earnest wish that they should be emancipated before, but he thought this would be accompanied with insurmountable difficulties. The chief of these was the intermarriages which existed with the dower negroes. He says that he should be glad to emancipate both, but it was not in his power to do so. They were to be taught to read and write, and at Mrs. Washington's decease all his directions with regard to their freedom were to be religiously carried out without evasion or neglect.

As a remembrance of the days of bondage the will of "Old Hickory" is a curio. It was made at the Hermitage, where he passed his declining years. It required nearly all his earthly possessions, saving a few slaves, to pay the debts which his adopted son, Andrew Jackson, Jr., had contracted, and he states at the beginning of the document that he had made this will on account of the change in his affairs, necessitated by the obligations he had assumed for his son. Every member of his immediate family, including his grandchildren of tender years, is remembered with at least one slave to be owned absolutely. These bequests are made in language expressive of the great affection which he possessed for all his kin.

Probably the old pictures of Jackson which represent him as always walking with a cane are true to life, for in his will he has several bequests of his favorite walking-sticks. These appear as dear to him as his swords. He presents the latter with the patriotic request that they never be raised except in the defense of the nation. Indeed, the language of the will leaves no room to doubt that Jackson was a patriotic man to the core and that he had the highest welfare of the nation at heart.

In striking contrast to the will of Jackson is that of John Quincy Adams. They are as unlike as were the two men. Adams was a Unitarian of the Boston school, and his will contains none of the usual references to religious matters, but deals strictly with the topic in hand — the disposition of his property. He says nothing of his belief in God, as does Jackson, nor of his hope in the hereafter. Adams lost his original will and wrote the one which stood at the time of his death in its stead. It is a lengthy document and is more like the will of Washington than that of any other President. He, too, was fond of his walking-sticks, and gave particular directions as to the disposition of those which had been presented to him in honor of his labors for the right of petition. One of these canes, in accordance with his wish, is now deposited in the Patent Office.

Adams died a wealthy man for his time. He owned a considerable amount of property in Washington. He had a house and some land on F street, and a store and house on Pennsylvania avenue. Besides these he had many possessions in Massachusetts, of which some were in the city of Boston and very valuable. A peculiarity of his will is that he mentions his own name as John Quincy

Adams, doctor of laws. He was very proud of this distinction, which was given to him as a graduate of Harvard College, where all the men of the Adams family have attended for generations. It was like a sword through the plates of his armor when Jackson, his arch enemy, visited the hallowed precincts of old Cambridge and received this honored degree from the college authorities.

The briefest of all the presidential wills in the vaults of the District of Columbia is that of James Monroe. He had but little to give, and he gave it without the use of any unnecessary language. It contains but one hundred and sixty words. He gave six thousand dollars to each of his two daughters, Elizabeth and Maria, and the works on which he was engaged at the time of his death to his son-in-law. The will was made in New York and had one witness who resided there, and one whose home was in Washington.

One of the most remarkable testaments that one finds stored away in the dusty archives is that of Thaddeus Kosciusko, the Polish patriot. His original will, which was executed when he sailed from America at the close of the revolution, is deposited here. It is a very brief document and shows how thoroughly he was imbued with the love of freedom. It names Thomas Jefferson as executor, and directs that all his property in America should be sold at his death and the proceeds applied to the purchase and the liberation of slaves in his name. He also wished that they should be given instruction in the trades and otherwise, and in the manner to properly conduct themselves as moral and upright citizens.

There was a proviso in this document that all this should be done unless he should make other disposition of his property before his death. As a matter of fact he did make two other wills, and his will which he left in America at his sailing away for Europe in 1798 became the subject of a hot legal contest. In 1806 he made a codicil to this in Paris by which he bequeathed three thousand seven hundred dollars to a friend. Later he wrote a will at Soleur, in Switzerland, which seems to have been the result of his friendship for a certain family with which he came frequently in contact, and from whom he received many assurances of regard. This instrument was written in French, and an exact copy in that language is on file in the registrar's office. There was much difficulty in establishing the legality of this document, as the laws of France differ from ours on those matters. When the instrument was executed Kosciusko was a legal resident of Berville. This last will gave five thousand dollars to his executor, a Frenchman, and sixty thousand francs each to the two lovely daughters of Pierre Joseph Zelbeur.

The will of Dolly P. Madison, President Madison's wife, who reigned as Washington's first social queen, is stored away with the documents for the year 1849. Dr. M. J. Griffith, the deputy registrar, said that she must have been very sick when she signed it, for her signature is very feeble. She had twenty thousand dollars to give away, the amount which Congress had appropriated for the purchase of her husband's papers. One-half of this she gave to her son, John Payne Todd, by her former husband, and the other half to her adopted daughter. This sum stood invested at the time of her death in the name of James Buchanan, who afterward became President of the United States.

The last will and testament of Chief-Justice Salmon P. Chase is a bright and shining example of the saying that lawyers make poor wills for themselves. His will is brief and to the point, but it was defective because it devised certain real estate in the District of Columbia and had but two witnesses. The law demands that there shall be three witnesses. He had followed according to the Ohio law, which requires but two witnesses. This called forth the remark from the most celebrated wit before the District bar at the time, that there was a high law, a higher law, and an O-high-o law.

OATHS.

By R. Vashon Rogers.

A STORY is told of a Highlander who had been swearing to all sorts of lies; the judge suddenly required him to take the Highlander's oath which invokes the souls of his ancestors to witness his veracity, whereupon the witness recanted and told a very different story and the true one; when asked why he had perjured himself at first he replied that "there was a muckle difference between blowing on a book and damning his soul." The moral is that every one should be required to take that form of oath, or affirmation, which he considers binding upon his conscience.

And many and divers and strange have the forms been: nations have had their venerable and venerated oaths, and kings and great personages have had quaint and curious ones which they deemed binding on their souls. Let us recount some of these in an unphilosophic manner.

In sundry lands and in divers ages animals have died to make the oaths of the semi-civilized effective. In ancient Rome, one form was slaying a swine and praying that in case of falsehood the curse of heaven might fall upon the perjurers' heads as surely as the victim died. Among the Nagas of Assam two men lay hold of a dog by head and feet, quickly the poor brute is chopped in twain with a single blow, this being emblematic of the fate in store for the false swearer. Slicing off a cock's head seems to be the most solemn and sacred way of getting a Chinaman to swear truly, even nowadays (36 A. L. J. 142). On very solemn occasions in India a sheep was killed in the name of Tari Pennu (the dreadful earth-goddess), rice is then moistened with the blood, and the deponent swallows this, in the full conviction that Tari will slay him if he insults her power by perjury.

Sometimes the animal need not die that truth may be spoken. Sir James Mackintosh once, in India, had a cow brought into court that a witness might swear with its tail in his hands.

In Siberia, when swearing an Ostyak, a bear's head is brought into court, the Ostyak makes the gesture of eating, and calls upon the bear to devour him in like manner if he swerves from the truth. The neighboring Samoides have the same custom. Many of the jungle tribes of India have to be sworn upon a tiger's skin, as they believe a false witness is sure to become food for tigers. Some Hindus think it better to stand upon a lizard's skin and invite the scaliness of that reptile to come upon them if they foreswear themselves; others take the oath over an ant-hill, with an imprecation that if they swear falsely they may be reduced to powder.

A Galla of Abyssinia sits down over a pit covered by a hide, implicating that he may fall into the pit if he breaks his word.

Menu said, "Let the judge cause a soldier to be sworn by his horse or elephant, a merchant by his kine." Omichaund's case settled that a Gentoo might be sworn by touching the feet of one of his priests. (1 Atk. 21.)

The oaths administered in the courts of Burmah and Siam are awe-inspiring: calamities upon calamities are invoked on the perjurer's head; penalties in this life and in the next, and those after the next are freely called down; and punishments *ab omnibus rebus et quibusdam aliis*. Here is the one in vogue in the land of the White Elephant: "I will speak the truth. If I speak not the truth may it be through the influence of the laws of demerit, namely, passion, anger, folly, pride, false opinion, immodesty, hard

heartedness, and skepticism, so that when I and my relations are on land, land animals, as tigers, elephants, buffaloes, poisonous serpents, scorpions, etc., shall seize, crush and bite us, so that we shall certainly die. Let the calamities occasioned by fire, water, rulers, thrones and enemies, oppress and destroy us till we perish and come to utter destruction. Let us be subject to all the calamities that are within the body and all that are without the body. May we be seized with madness, dumbness, deafness, leprosy and hydrophobia. May we be struck with thunderbolts and lightning, and come to sudden death. In the midst of not speaking truth may I be taken with vomiting black clotted blood and suddenly die before the assembled people. When I am going by water, may the water-rats assault me, the boat be upset and my property lost, and may alligators, porpoises, sharks, and other sea-monsters seize and crush me to death; and when I change worlds may I not arrive among men or nats, but suffer unmixed punishment and regret, in the utmost wretchedness, among the four states of punishment, Hell, Prita, Beasts and Athuraki. If I speak the truth may I and my relations, through the influence of the ten laws of merit, and on account of the efficacy of truth, be freed from all calamities within and without the body and may evils which have not yet come be warded far away, may thunder and lightning, the nat of the waters and all sea-animals love me that I may be safe from them; may my prosperity increase like the rising sun, and the waxing moon; and may the seven possessions, the seven laws, and the seven merits of the virtues be permanent in my person, and when I change worlds may I not go into the four states of punishments, but attain the happiness of men and nats, and realize merit, reward and perfect calm." (The Land of the White Elephant, by F. Vincent.)

The oath administered to witnesses in Siam is still more awful and blood-curdling. It is "I . . . who have been brought here as an evidence in this matter, do now in the presence of the divine P'hra P'hoot-hee-rop (Buddha) declare that I am wholly unprejudiced in this matter against either party and uninfluenced in any way by the opinions or advice of others; and that no prospects of pecuniary advantage or advancement to office have been held out to me. I also declare that I have not received any bribe on this occasion. If what I have now spoken is false, or in any further averments I should color or pervert the truth so as to lead the judgment of others astray, may the three holy existences, i. e. Buddha, the Bali and the Hierarchy, before whom I now stand, together with the glorious Dwattas of the twenty-two firmaments, punish me. If I have not seen, yet shall say that I have seen, if I shall say that I know that which I do not know, then may I be thus punished: Should innumerable descents of the Deity happen for the regeneration and salvation of mankind, may my erring and migrating soul be found beyond the pale of their mercy; wherever I go may I be encompassed with dangers and not escape from them, whether arising from murderers, robbers, spirits of the ground, of the forest, of the water or of the air, or from all the T'hewatda (the divinities who adore Buddha), or from the gods of the four elements, and all other spirits. May blood flow out of every pore of my body, that my crime may be made manifest to the world. May all or any of those evils overtake me three days hence. Or may I never stir from the place where I now stand; or may the lightning cut me in twain, so that I may be exposed to the derision of the people; or if I should be walking abroad may I be torn in pieces by one of the preternaturally endowed lions, or destroyed by poisonous herbs or venomous snakes. When in the waters of the rivers or of the ocean may the alligators, the horned alligator mang kan (a fabulous monster), or

large fishes devour me; or may the winds or the waves overwhelm me, or may the dread of such evils keep me during life a prisoner at home, estranged from every pleasure, or may I be afflicted by the intolerable oppressions of my superiors; or may cholera cause my death; after which may I be precipitated into hell, there to go through innumerable stages of torture among which may I be compelled to carry water over the flaming regions in open wicker-baskets to assuage the heat felt by the head Wetsoowan when he enters the infernal hall of justice, and thereafter may I fall into the lowest pit of hell, or if these miseries should not ensue may I after death migrate into the body of a slave, and suffer all the hardships and pains attending the worst state of such a being during the period of years measured by the sands of the four seas; or may I animate the body of a beast five hundred generations; or be born an hermaphrodite five hundred times; or endure in the body of a deaf, blind, dumb, houseless beggar during the same time, and then may I be hurried to narok, there to be crucified by Phreeavom (one of the kings of hell). (Siam, by Sir J. Bowring, p. 179.)

To balance the zoological oaths aforesaid we will give some botanical ones. A Bedouin picks up a straw and swears by Him who made it grow and made it wither. The ancient Franks, also, were wont to swear holding straws in their hands. Max Muller tells us that in most of the villages in India there is a sacred tree, a pipal tree, and the gods are supposed to delight in sitting among its leaves and listening to the music of their rustling. The deponent takes one of these leaves in his hands and invokes the god, who sits above him, to crush him, or those dear to him, as he crushes the leaf in his hand, if he speaks any thing but the truth. He then plucks and crushes the leaf and states what he has to say. In some parts, the Hindus are sworn upon the leaf of the sweet basil, which is placed by a Brahman in the hollow of the hand with some water of the Ganges; the leaf and the water are swallowed by the swearer. This oath, however, is not deemed very efficacious. The old Ionians swore at times by the plant colewart, at times by cabbages; Socrates, occasionally, by the plane tree.

Both in the old and modern world oaths by rivers are most sacred. Nothing is more binding upon the conscience of a Hindu than swearing by the waters of the Ganges, for he believes that the goddess of the river will take most awful vengeance upon him and his children should he lie. In ancient times — before Mr. Bangs launched his "House Boat" — men swore inviolably by the Styx.

The Syracuseans (those of old Sicily, not of New York State) sware laying their hands on lighted torches. In New Guinea they invoke the sun to burn them, or the mountain to crush them, if they swear falsely. Many of the ancient warriors swore by their weapons.

The Bedouin of the desert grasps the middle tent-pole and swears by the life of the tent and of its owner. While the Mahometan takes the Koran in his right hand and holds it in front of him, then presses his left hand over his heart, and bending down until his forehead touches the sacred book, remains in meditation for a few moments, then straightens up and tells his tale.

As befits the people of such a mighty empire, the Chinese have a variety of ways of swearing. We have already mentioned one or two; now for some others. In one case, in Missouri, it was stated that the joss-stick burning was the true oath among the Chinese: they take the joss-stick in their hand and swear to it; some burn a candle (36 Alb. L. J. 142); others write sacred characters on paper and then burn it, praying that the witness may be so burnt if he swear falsely. Another plan is to break a saucer, praying that so the deponent may perish if he errs from the truth.

The old Scandinavians swore upon a sacred bracelet kept on the altar in every high court. The judge reddened this with the blood of a bullock sacrificed and the witness said: "Name I to witness that I take the great oath on the holy ring, law oath, so help me Frey, and Niord and Almighty Thor." The Irish, in the good old days when the Brehons judged the land, swore by the sun, moon, wind, the dew, the crops, the countenance of men, by all the elements visible and invisible.

In the early days of Christianity began a controversy as to the lawfulness of Christians swearing which has not yet been closed. In the fourth century Christian soldiers swore allegiance "by God, Christ, the Holy Spirit and the Majesty of the Emperor." Under the codes of Constantine and Justinian all witnesses had to be sworn; and by the Middle Ages oaths had increased and multiplied in Christendom far beyond the practice of any other age or religion. Very early came in the practice of swearing upon the Gospels. St. Chrysostom mentions it: apparently it was derived from the old Jewish oath taken holding in the hand a scroll of the law of Moses. Usually the hand was laid upon the Gospels: but the practice of kissing the book appears in the Middle Ages, and it is now the general form in England and where English law obtains. And as good Cowper says: —

"Thousands, careless of the damning sin,
Kiss the book's outside, who ne'er look'd within."

Oftentimes the book was placed on the altar, and the swearer touched the altar, or looked towards it. Oaths taken on a relic, on a shrine or reliquary, on a cross or on the bishop's crozier, were also deemed very solemn and binding.

The words, "So help me God," used as the deponent raises the book, are of very ancient origin. They have been used in England since the days of Henry IV; the Germans have "So mir Gott helfe"; the old French had "Si m'ait Dex"; in Charlemagne's time the form, "Sic me adjuvet, Deus," closely resembled the formulas of pre-Christian Rome. How near akin all these are to the old Viking's prayer, "So help me Frey."

Old Giles Jacob in his Dictionary says, "Antiently at the end of a legal oath was added, 'So help me God at His Holy Dome,' i. e. Judgment; and our ancestors did believe that a man could not be so wicked to call God to witness anything which was not true; but that if any one should be perjured, he must continually expect that God would be the Revenger."

In one case in New Jersey it was decided that where a person accepts a form of oath as usually administered, without objection, it is not absolutely necessary for him to kiss the Bible; and in another case, where the deponent kissed Watt's Psalms and Hymns, supposing it was the Bible, it was decided to be all right. (Pullen *v.* Pullen, 4 Atl. Rep. 2; People *v.* Cook, 4 Seld. 84.)

The position of the body when swearing used to be considered of much importance. Lifting the hand towards Heaven, putting the hand under the thigh, and joining hands, are positions all mentioned in Holy Writ. In England the Lords of Parliament at one time held up their hands when swearing; French jurors still do so, and witnesses in Scottish courts do likewise while the judge administers the oath. Pelagius swore holding the cross and the Gospel on his head. Under the Brehons the Irishman swore first standing, then sitting, and then lying, as in these three positions his life was spent. In some parts of Spain a witness forms a cross by placing the middle of his thumb on the middle of his forefinger, and as he kisses it says, "By this cross I swear." The Austrian takes the oath by raising the thumb and the two first fingers of the right hand, saying "So help me God." In Italy, under the Napoleonic Code, the judge first admonished the witness of the importance and

sacredness of the oath, reminding him of the punishment of false witnesses, then he and the clerk, rising, and bareheaded, the the judge administered the oath.

In Norway every one who takes an oath lifts up three fingers, i. e., the thumb, the forefinger and the middle finger; these signify respectively God the Father, God the Son and God the Holy Ghost. The other fingers are bent down in the hand, the larger signifying the soul which lies hidden in man, and the smaller the body of man, because it is little — just as the body is of small account as compared with the soul. An exhortation, or address, is delivered when the oath is administered. It begins: "Whatever person is so ungodly, corrupt and hostile to himself as to swear a false oath or not to keep the oath sworn, sins in such a manner as if he were to say, 'If I swear falsely then may God the Father, God the Son, and God the Holy Ghost punish me, so that God the Father, who created me and all mankind in His image and His fatherly goodness, grace and mercy, may not profit me; but that I, as a perverse and obstinate transgressor and sinner, may be punished eternally in hell.' . . . 'If I swear falsely, then may all I have and own in this world be cursed, cursed be my land, field and meadow, so that I may never enjoy any fruit or yield from them, cursed be my cattle, my beasts, my sheep, so that after this day they may never thrive or benefit me, yea, cursed may I be and everything I possess.'" And the exhorter goes on a great deal longer in the same strain. (The Land of the Midnight Sun, Du Chaillu, vol. I, page 413.)

The old Aztec, when called upon to take an oath, touched the ground with one of his fingers, and then touched his tongue with the same. This reminds us of the Abyssinian chief who, having been obliged to take an oath he disliked, was seen to try and scrape it off his tongue and spit it out.

People generally are required to remove their glove before taking the Gospels into the hand, but such uncovering does not appear to be necessary. Mr. Justice Hawkins on one occasion said he would be very sorry to find himself in the dock on a charge of perjury, and as his only defense the fact that he had taken the oath with his gloves on.

In olden days persons who deemed themselves of considerable importance in the world used special and particular oaths, which they copyrighted or patented, as it were. The pilot Palinurus swore by the rough seas he was wont to navigate. Pythagoras, by the air he breathed, or by the water he drank; Socrates, when he did not swear by a dog, did, as we have seen, by a plane tree. William the Conqueror swore "By God's resurrection," or by "His splendor." Rufus, his son, swore "By this and by that," or "By St. Luke's face"; John, "By God's teeth"; Richard II "By St. John the Baptist," and the third Richard, "By St. Paul"; Henry, of many wives, "By the Mother of God"; and James I "By his own soul." The French kings, also, had special oaths: Louis XI only considered himself bound when he swore by the golden image on the hilt of his sword; the Twelfth Louis' favorite oath was, "Le diable m'emporte." Charles VIII swore "Par le jour Dieu," while Francis I used the dignified oath of "La foi de gentilhomme." Pretty Rosalind swore "By my troth and in good earnest, and so God mend me." The astronomer Vettius Valens, in binding his disciples to secrecy, administered to them an oath "By the starry vault of heaven, by the circle of the zodiac, by the sun, the moon, by the five wandering stars, by Providence itself, and by Holy Necessity."

Nowadays legislators in Bavaria complete their oath of office by saying, "So help me God and His Holy Gospel"; in Denmark, "So help me God and His Holy Word"; the Greek says, "I swear in the

name of the Holy and Consubstantial and Indivisible Trinity"; the Prussian says, "I swear by God, the Almighty and omniscient." In Servia the legislator says, "I swear by one God and with all that is according to law most sacred and in this world dearest. So help me God in this and that other world."

> "Oaths were not purpos'd more than law
> To keep the good and just in awe,
> But to confine the bad and sinful
> Like mortal cattle in a penfold."

LOVE AND LAW.

(After Robert Herrick.)

By John Albert Macy.

WHEN Cupid's cases went astraye,
He vowed he'd learne the art to pleade,
And to the law-courtes tooke his waye,
And learned it well indeede.

So when he taught my lips to speake,
I told my love most fluentlie—
But Silvia ranne in fright to seeke
A refuge far from me.

She was afraid to heare me wooe,
And never hesitate nor stammer;
So Cupid saw it wo'd not doe
For Love to use fine grammere.

THE SUPREME COURT OF WISCONSIN.

By Edwin E. Bryant.

II. THE FIRST SUPREME COURT OF THE STATE.

THE constitution adopted in 1847 for statehood provided for a judicial system of five circuits, one circuit judge for each, who were to sit in banc once a year as a supreme court. After five years, the legislature might, if deemed necessary and expedient, establish a separate supreme court consisting of a chief justice and two associate justices. The judges were paid a yearly salary of fifteen hundred dollars, for frugality is declared in the state constitution to be one of the virtues on the "adherence to which the blessings of good government depend," and the compensation was fixed by the constitution, so that the judges might be as independent as poor. Out of this meagre salary they must pay their traveling and other expenses while riding the circuit and holding court in the various counties. The constitutional virtue of frugality was enforced upon them, as all must admit.

EDWARD V. WHITON.

The judicial election in 1848 brought to the benches of the circuits the following named judges: First circuit, Edward V. Whiton; second, Levi Hubbell; third, Charles H. Larrabee; fourth, Alexander W. Stow; fifth, Mortimer M. Jackson. They met as a supreme court and held their first term in January, 1849. Alexander W. Stow was chosen chief justice by the ballot of the judges; and this court, thus constituted of the circuit judges, continued for five years. Of these several gentlemen short biographical sketches will here be given. A desire to relieve the dullness of the annals of men whose lives are not eventful in the more active sense must be the apology for an occasional anecdote or incident, which gives glimpses of life in a new State in a remarkable period of our national development.

Edward Vernon Whiton was born June 2, 1805, at South Lee, Berkshire County, Massachusetts. He descended from James Whiton, who came from Hingham, England, in 1640, and settled at Hingham, Massachusetts, and whose second son, Joseph, removed to Ashford, Connecticut, in 1730. Edward was the son of Joseph Whiton, who descended from this line, and was born at Middleton. Entering the army in the Revolutionary War he served under Gates in the campaign that ended by the surrender of Burgoyne at Saratoga. He came to South Lee soon after the close of

the war. In the War of 1812, he was major general of one of the divisions called into service to defend Massachusetts from threatened invasion in 1814, and commanded the defenses at Boston while it was feared that that city would share the fate of Baltimore and Washington.

General Whiton returned to South Lee after the war, and represented the town of Lee nine years in the general court of the commonwealth. He had three sons, all of whom became judges : Joseph Lucas, who settled in Lorraine County, Ohio, and was there the founder of a distinguished family; Daniel Garfield, who resided awhile in Ohio and then came to Wisconsin, where he died; and Edward Vernon, the subject of this sketch. The latter resided in his native town until about thirty years of age. He read law with William Porter, Esq., a lawyer noted for the solidity of his learning and the soundness of his judgment. Young Vernon was of a studious turn, and was at one time librarian of the town library, which consisted of some three hundred volumes, mostly of history and travel. He read these volumes and laid in that stock of accurate historical knowledge that made him afterwards the marvel of his associates in the legislature, constitutional convention and on the bench in Wisconsin. It is recorded in the annals of his native town that he, with a dozen other leading citizens, subscribed, each, twenty-five cents a week, in 1832, for the privilege of "seeing" a daily New York paper, "to be informed daily of the progress of the cholera." He left for the West in the year 1835, and went to Lorraine County, Ohio. There he remained until 1837, when he came to Wisconsin, and settled on a tract of prairie land near the present site of the beautiful and enterprising city of Janesville on Rock River, in one of the most fertile regions of the Northwest. In his youth he had learned the trade of millwright and carpenter, and it was an easy matter for him to build his own cabin. Afterwards, with his own hands, he built the more pretentious house in which he lived and died.

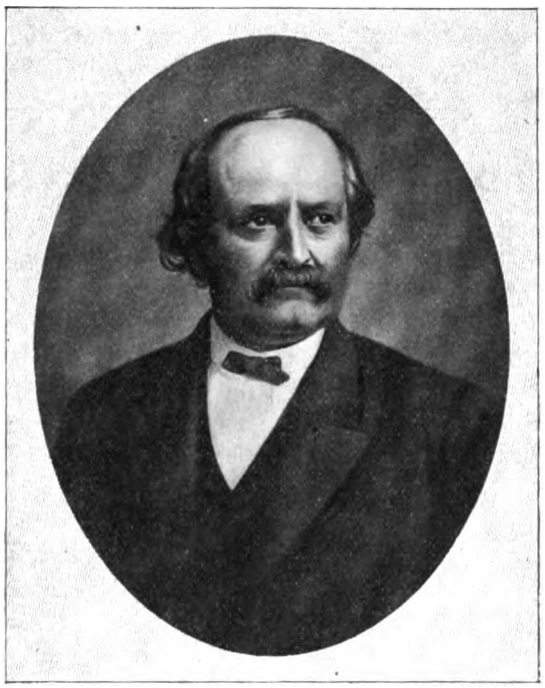
In September, 1838, an election was held in the Territory for members of the legislative assembly. Mr. Whiton was a Whig in politics, but party lines were not then drawn in the Territory on merely territorial matters, and he was elected one of the members of the House of Representatives from the counties of Rock and Walworth, then recently created in the south central part of the State. This council held three sessions, beginning November, 1838. Mr. Whiton at once took prominence. A ready and courteous debater, with vast stores of political information at his command, drawn from a memory of remarkable tenacity, he spoke upon every question which related to the formative law of the new Territory, with a wisdom and foresight that stamped him one of the foremost men of the Territory. His solid learning amazed the members of the Bar, of whom there were several in the council, themselves men well trained in law and public affairs. He left his mark on every measure. A vast amount of labor is thrown upon the builders of a new state. The founding of institutions and systems calls for men who "look before and after." One of the labors of the session of 1839 was a revision of the laws, then in a chaotic state.

Mr. Whiton served on a committee which collated, revised, borrowed, pieced out, and codified a quite complete body of statutes which served the Territory for ten years. To him was entrusted the care of the printing and publishing of the volume of these laws. The work was carefully done, and the book was for the ten years of territorial life the *vade mecum* of the lawyers and judges of the Territory on all points of statutory law.

The legal practice in a new Territory is usually a jumble of uncertainty. Lawyers coming from various jurisdictions each bring the methods to which they were accustomed. The revision of 1839 was especially valuable in settling the procedure.

Adopting the common law and equity systems, the whole was simplified, the more technical features eliminated, and so much as comported with common sense and was adapted to the situation was retained. The statutes of 1839 have been the basis and laid down the analysis, it may be said, to the subsequent revisions; and much of their language is still retained.

The sessions of the Legislative Council were usually held in the winter. The journey to the capital was a serious undertaking. Members from the North came sometimes on snow-shoes, and few had the benefit of traveled roads. When the first session was held at Madison, it was ascertained and reported by a committee that only fifty persons could find accommodations at the hotels and private houses where boarders could be taken. An old witness writes: "Having organized the legislature, the next question was for members, officers and lobby to find places to eat and sleep in. Though we paid metropolitan prices, it cannot be said that we had metropolitan fare." One of the hotels had a large garret, and beds were laid upon the floor, as thick as they could be spread. This was called the "school section." The floors of the taverns were nightly covered with "shake-downs" for transient guests. Those who could find board at private houses and sleep four in a cold room, ten by twelve feet square, were considered fortunate.



CHARLES H. LARRABEE.

It must not be supposed that these early legislatures met in marble halls. Speaking of the Representative's Hall, Colonel Childs, who was a member of the body, says: "The floors were laid with green oak boards, full of ice; the walls and room were iced over; green oak seats and desks made of rough boards; one fireplace and one small stove. In a few days the flooring near the stove and fireplace so shrunk, on account of the heat, that a person could run his hands between the boards. The basement story was all open, and James Morrison's hogs had taken possession. The weather was cold, the halls were cold, our ink would freeze—so that when we could stand it no longer we passed a joint resolution to adjourn for twenty days, and I was appointed by the two Houses to procure carpeting for both halls, during the recess. I bought all I could find in the Territory, and brought it to Madison and put it down, after covering the floor with a thick coating of hay."

In the session of 1840, Mr. Whiton was elected speaker of the House of Representatives, which place he filled during an exciting session with great ability and such impartial justice and dignity as to gain the confidence and respect of all parties and to place himself in his judicial candidacies afterwards above all partisan feeling. He served in the sessions of 1841, 1842, 1843 and 1844, in the House of Representatives,

and in 1845 was elected to the Council (or Senate). In 1847, the first constitution proposed and submitted to the people having been rejected, he was elected a delegate to the second constitutional convention, and took a prominent part in framing the constitution which was adopted. He and Judge Dunn were the leading characters in the convention. Gen. David Atwood, one of the reporters of the convention, in a book called the "Fathers of Wisconsin," thus speaks of Whiton: "His whole career was strikingly marked by every characteristic of true greatness. He was profoundly educated, not only in the law, but in the minutest details of the history of his country. Possessing a memory of unfailing tenacity, the vast stores of learning he had accumulated were ever at instant command, available to illustrate any mooted point either in law or political science." The little library in Lee, so carefully read years before, stood the librarian in good stead when out in the new region he became a state-builder, with few books at hand, and the foundations of a great commonwealth to be laid.

Chief-Justice Whiton served on the first Supreme Court until 1853, when he was elected Chief-Justice of the Separate Supreme Court, of which more is narrated later on. He presided over the new Court with great dignity and ability, constantly rising in the confidence and esteem of the people. He was re-elected in 1857, and served upon the bench till his death. Early in 1859 he was observed to be visibly failing in strength, and, on the 12th of March, his associates prevailed upon him to retire for a short time to rest. He repaired to his home in Janesville. He declined rapidly and, on the 12th of April following, died, in the house built with his own hands, honored, beloved and sincerely mourned by bench, bar and people. He left a record of most conspicuous ability. During his term the important cases growing out of the Fugitive Slave law, of which mention is elsewhere made, were decided. The *quo warranto* case of State *ex rel.* Bashford *v.* Barstow was before the Court in 1855, involving an inquiry into the election of governor, the ousting of the incumbent and seating of the relator. In this the State was shaken with profoundest agitation. The new questions that beset the courts of a newly created State are legion. Constitution, statutes, practice, all are to be construed and settled, and the legislature, by frequent changes, give the judicial department little rest. In this formative period, Chief-Justice Whiton, so learned in the law, so profoundly read in the wider range of statesman's culture, of such incorruptible integrity and finely balanced intellect, was regarded by all as "standing four square to all the winds that blew." His labors as a judge on the Separate Supreme Court are reported in the first eight volumes of Wisconsin reports. Those of his earlier service find record in the third volume of Pinney's reports.

Few incidents have survived to enrich the stock of anecdotes of Chief-Justice Whiton. It is said that his feet were remarkable for their symmetry and smallness, while he was not handsome in the face, a sad, far-away expression adding to the plainness of his features. Isaac Woodle, one of the wits of the Bar in those days, said, "if he could have Whiton's feet he would almost be willing to have his head."

It is told that while at the Bar and on the circuit, he had one night retired to his bed at the tavern, a man came to his room desirous of having him take a case. The man's grievance was that he had put his horse out to pasture in the field of a neighbor at an agreed price, and that a massasauga (rattlesnake) had bitten the horse, so that he died. He insisted that the owner of the field was liable for the horse. Wishing to be rid of the fellow, Whiton said, "Can't take your case. I am retained for the snake." He was ever in general company a still, reticent man, apparently ab-

sorbed in his own reflections. Once, while dining at a hotel, those sitting beside him began to expatiate upon peat, large beds of which are found in the Four Lake Country. Someone asked Whiton, "Judge, what do you think of peat?" "Pete! Pete!" replied the Judge, as if startled from a reverie, "really I don't know him."

The expression on his face and the manner of Judge Whiton betokened a tinge of melancholy and disappointment. There was no trace of misanthropy, but, though reticent, his kindliness of heart and simplicity of character were soon apparent to all who met him.

ALEXANDER W. STOW.

LEVI HUBBELL, the circuit judge of the second circuit, was born at Ballston, New York, April 15, 1808. He graduated at Union College in 1827, and, choosing the legal profession, was admitted to the Bar and practiced several years in Canandaigua, in his native State. He was for a time editor of the "Ontario Messenger," and was adjutant general of New York on the staff of Governor Marcy. In 1836 he settled at Ithaca, and represented Tompkins County in the State Assembly. He came West in 1844, and settled in Milwaukee, forming a partnership with Asahel Finch and William Pitt Lynde, then in large practice. Active, ardent in politics, of fine presence and pleasing address, he soon became prominent in the councils of the Democratic party, and was a delegate to the National Democratic Convention at Baltimore in 1843, where he supported General Cass.

Upon the admission of the State into the Union, he was elected judge of the circuit embracing the counties of Milwaukee, Waukesha, Jefferson and Dane. His term of office expiring in 1851, he was re-elected for the term of six years. His career as judge was stormy. He was a man who made enemies, and an attempted impeachment in 1853 furnished the only trial that has ever taken place in Wisconsin before the Senate as the high court of impeachment. He was a prominent Democrat, and his party was then in power. He was ambitious, agreeable in manners, and one who felt and evinced a consciousness of leadership. He gave offense to a prominent juryman in a case tried before him, it is told. The jury brought in a verdict of not guilty. The Judge, greatly surprised at the verdict, made the remark, "Gentlemen, may the Lord have mercy on your consciences." One insulted juryman then vowed vengeance. Pursuing the track of rumor, he gathered in time a formidable array of material for articles and specifications, which in the early days of the next session were formulated upon his complaint in the Assembly. The charges, contained in ten articles, each with numerous specifications, ran the whole gamut of official misconduct. The trial began March 23, 1853, and after issue was joined, the case was set

for trial June 6th, from which date until July 11th, the trial continued. The court of impeachment acquitted him by an overwhelming vote on all the numerous specifications, and the result was a triumphant vindication. Among those who voted for his acquittal were many whose reputation for probity, legal learning and judicial fairness added weight to his acquittal. The evidence given its worst construction showed only some indiscretions, which he freely admitted, in allowing some casual interviews with suitors, which in no wise influenced his adjudication.

Judge Hubbell had the sympathies of a large portion of the people of the State, especially the people of Milwaukee, during the trial, and his acquittal gave his friends opportunity to manifest their joy at the result. A special train loaded with a committee went out part way to meet him; and on his return to Milwaukee a large throng met him and marched in a triumphant procession through the streets, the like of which that city had never seen. A public reception, then a monster procession to accompany him to his home, made the day one of congratulation and holiday parade.

Upon the establishment of the Separate Supreme Court in 1853, Judge Hubbell resigned. He realized that his reputation though vindicated was somewhat clouded by the aspersions thrown upon it by the impeachment. He retired to practice, and withdrew from publicity until 1863, when he represented a part of the city of Milwaukee in the legislature and served in that body in the stirring times of the war with conspicuous ability, and quite won the admiration of the upholders of the Union. He desired more effectual vindication, and when a vacancy occurred in the office of circuit judge in 1869, by the resignation of his successor, he obtained a petition very numerously signed for his appointment to the bench. Governor Fairchild's refusal to appoint him was one of the keenest disappointments of his life. His high but dignified anger, when the suave but stout-hearted, one-armed governor told the Judge that he did not feel justified in re-instating him upon the bench, was one of the most dramatic episodes the writer — then executive secretary to Governor Fairchild — ever witnessed. But his services as an upholder of the Union were so well recognized that President Grant appointed him United States district attorney for the eastern district of Wisconsin. He ably filled this office for five years.

Of fine presence, most agreeable manners, and a bearing that betokened leadership, a man potent to influence others, it is not unlikely that the unfortunate episode of his impeachment arrested a career which otherwise might have been most successful.

He died in Milwaukee when sixty-eight years of age. A few days before, he fell on an icy pavement and broke his leg. The shock brought on other troubles and he sank suddenly. Always a handsome man, he was singularly well preserved, and retained his buoyancy of spirits, and tried causes in his last days with the alertness and energy of a young man. No courtlier gentleman ever graced society in Wisconsin.

CHARLES HATHAWAY LARRABEE was born at Rome, Oneida County, New York, November 9, 1820. He descended from a Huguenot clergyman who fled from the persecutions in France about the time of the St. Bartholomew massacre, and, with part of his flock, sought refuge in America. His father was Major Charles Larrabee of the United States Army, who served as captain under General Harrison at the battle of Tippecanoe, and, at the battle of Brownstown, in 1812, lost an arm while managing the artillery. His ancestor on the maternal side was John Haynes, colonial governor, first of Massachusetts, and then of Connecticut. His maternal grandfather, Judge Joshua Hathaway, was one of six brothers who,

side by side, carried muskets under General John Stark at Bennington.

The education of the subject of this sketch was principally obtained at Springfield (Ohio) Academy, and at Granville College, now Denison College. There he excelled as a debater. He read law with General Samson Mason and W. A. Rogers, prominent at the Bar of Springfield; but being young and preferring out-door occupation, he found employment in civil engineering in the construction of the Little Miami railroad. Afterwards, he went to Pontotac, Mississippi, and there attempted, but soon abandoned, farming; was there admitted to the Bar, and, entering politics, was an unsuccessful candidate for the legislature, on the "bond-paying" Democratic ticket. The climate not agreeing with the young lawyer, he came to Chicago. He there began practice in 1844, and also edited the "Democratic Advocate," and was city attorney. In 1846 he married, and settled in Horicon, Dodge County, Wisconsin, which place, and the beautiful lake on which it is situated, he named, and there he founded a home and erected mills.

TIMOTHY O. HOWE.

In 1847, he was elected a member of the second constitutional convention. He took an active and prominent part; and several important features of the constitution that have since proved statutory safeguards were strongly advocated by him. The "homestead exemption clause" was his special hobby, so to speak. He was a powerful advocate of the restriction upon state indebtedness, and the provision against state internal improvements, and the clauses preventing the division of counties by the legislature without local consent.

In 1848, upon the adoption of the constitution, and the admission of the State into the Union, he was elected circuit judge of his district, which made him one of the judges of the Supreme Court, as at first organized. He much distrusted his fitness. "I know I have mind and firmness enough; but then, I am such a lazy dog," he wrote. Afterwards he said he had been honest and industrious on the bench, but doubted whether he had been an able judge. He served on the bench as part of the Supreme Court till its reorganization in 1863. In 1852, he ran for chief justice of the Separate Supreme Court, on the Democratic ticket, but was defeated by Chief-Justice Whiton. He served on the circuit bench until 1858, when he resigned to become a candidate for Congress, at the urgent solicitation of Stephen A. Douglas, whose personal friend and faithful follower he was, who wanted to show his anti-Lecompton strength in the Northwest in view of the Charleston convention of 1860. He made a spirited canvass, and so great was his personal popularity that he overcame a twenty-five-hundred Republican majority; but, when running for re-election in 1860, he shared the fate of his

leader and went under. He took part in the fiery debates of that session and warned the South, in able speeches, against the folly of secession. His term expired March 3, 1861. Secession and civil war were then imminent. He at once was outspoken for the Union. When Sumter was fired on, he offered his services to Governor Randall. On the 17th of April, he entered in the Horicon Company, the speedy enrollment of which he hastened; but before that regiment had mustered he was selected for the place of major in the Fifth Wisconsin. In this regiment he served with distinction in the Army of the Potomac in the Peninsula Campaign. He served in General Winfield Scott Hancock's command, who wrote to the Secretary of War commending him highly as one "eminently fitted to command troops," and recommended him for a brigadier general. He particularly distinguished himself on several occasions, especially at Lewinsville, Lee's Mills, and at the battle of Williamsburg. In the arduous campaign up the Peninsula, the Major's constitution was much broken. On the 25th of July he was commissioned colonel of the Twenty-fourth Wisconsin. He came home and recruited for that regiment in his old district—a portion of the State where was much opposition to the war—and brought in men enough, it was said, for four regiments. He enlisted, as stump-speakers to plead for enlistments, old Democratic wheel-horses, like Matt H. Carpenter, Henry L. Palmer and Edward G. Ryan. He served with that regiment for one year, participating in the battles of Perryville and Chaplin Hills with great credit to himself and command. But his health was so shattered by service in the Chickahominy swamps that he was compelled to resign. He left the service with high commendations from General Rosecranz, General Philip H. Sheridan, and other commanders under whom he served.

In 1864, he removed to San José, California; thence to Salem, Oregon; thence back to San José. He was of a roving turn, and did not remain long enough to become well rooted anywhere. He settled in Seattle, Washington Territory, and was a member of the constitutional convention, in 1879, to frame a constitution for that State. He there served on a board of trustees to locate the University of Washington. But his old army complaint rendered it necessary for him to seek a softer climate. He finally established a home in San Bernardino, Southern California, and there, in the founding of his home and the cultivation of a variety of tropical fruits, he found pleasure.

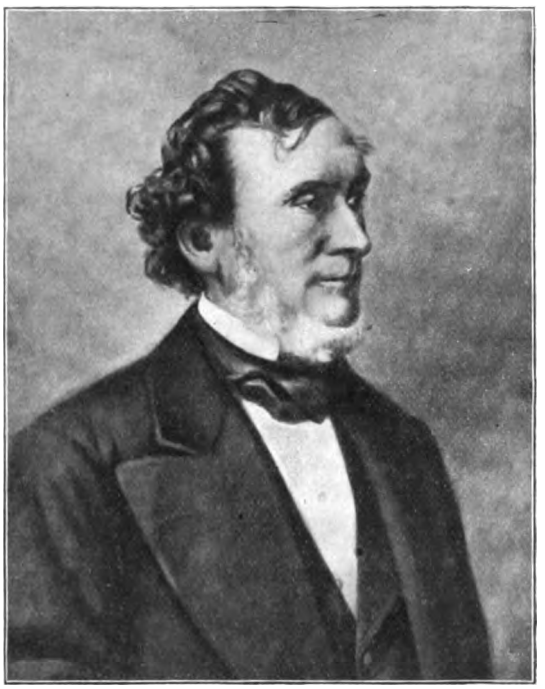
His death was tragical. Returning from a visit to San Francisco, Jan. 20, 1883, the train, making a brief stop on a summit it had just gained, being detached from the engine, started on the down grade and ran at a frightful rate of speed for some four miles and then plunged down an embankment. Among the sixteen persons killed or burned to death was Colonel Larrabee.

His work as judge on the supreme bench is found in 2d and 3d volumes of Pinney's Wisconsin Reports. People of all parties speak of his personal worth and ability. The lawyers and judges who were his contemporaries speak highly of his services on the bench. He was an interesting and able man, and possessed the qualities to speedily win and retain public confidence.

ALEXANDER WOLCOTT STOW was born in Middleton, Connecticut, in 1804. Of his early life there are but few data. It is known that he received a liberal education, after which he traveled extensively in Europe, where he acquired tastes and prejudices that were apparent in his after life.

He studied law and was admitted to the Bar and practiced for a time in Rochester, New York. He was a man of learning and culture, and, it is said, he translated from the original into English, De Tocqueville's "Democracy in America." In 1845, he came to Wisconsin, where he purchased a

farm, not as a farmer, but with the idea that a gentleman should own an estate. He had a law office at Fond du Lac and also at Milwaukee, between which he divided his time. It soon became apparent that he was profoundly learned in the law. Tall, handsome and of imposing presence and commanding mien, he bore those insignia of superiority that men, even in democratic communities, instinctively respect. In the first judicial election he was chosen circuit judge for the fourth circuit, comprising the then northern counties of Brown, Manitowoc, Sheboygan, Fond du Lac, Winnebago and Calumet.



MORTIMER M. JACKSON.

He presided over the old Supreme Court with great dignity, and impressed all the pioneer lawyers of the State as a man of great learning and power. Ryan, Chief-Justice Cole and many of the earlier lawyers speak of him as a giant of the profession. The terms of the judges of this court were, under this system, determined by lot, and in the drawing Judge Stow's term was the shortest, and ended with the year 1850. He then resumed the practice, residing nominally on his farm at Fond du Lac, but spending most of his time in Milwaukee.

He was long remembered in Madison, where he presided as Chief Justice, by his tastes, so strange to the Western people. He had acquired in foreign travel, the taste for game well "ripened." It was told with disgust that the Chief Justice required his prairie chickens to hang out of his bedroom window till the legs and the bills were green, and the feathers rubbed off by a stroke of the hand, and the odor told of decay, before he would allow them to be cooked. He was a proud man and stood upon his dignity. It is told that he had a client, one Captain B——, who had been an officer in the British service, and being a man of wealth had settled in Wisconsin. He was a little peremptory in his bearing, yet he and Stow were warm friends, and the latter was his trusted counsel. One day, Captain B—— rode up to the door of his office and not wishing to dismount, which was something of a task to a man of his bulk and years, he called to Stow through the open door, "Judge Stow, come out here a moment." The lawyer, offended by the brusqueness of manner and dominating air, which had often nettled him before, sung out, "See you d——d first; if you want to see me, come in here." A general substitution of attorney followed this episode.

Another anecdote is told of this jurist. One of his cases decided at the circuit had been reversed by the Supreme Court of which he was the chief justice. The *remittitur* confronted him at the circuit, and he was reminded that his decision was reversed. "Then," said he, "I have only one other decision to make, and that is, that the Supreme Court are consummate blockheads."

In his day the charges at the wretched hotels in Madison were proverbially exorbitant, and especially so to men of mark who demanded extra attentions and single rooms. On leaving the hotel after a day's sojourn he threw down a ten-dollar note to pay his bill. The clerk asked if he had nothing smaller, as he could not change the bill. "Well," said the Judge, "this is the first time I have known this hotel to charge less than ten dollars."

He never married, and died in Milwaukee, September 14, 1854. Edward G. Ryan penned of him these words: "He had eminently able and comprehensive powers of mind, liberally cultivated by wide and varied learning, both in and outside the profession; he had singular firmness of integrity and sensitiveness of honor; he had a large and generous heart, and gave to the profession and the world an honorable and high example of an able lawyer, an upright and enlightened judge and an accomplished gentleman."

His opinions are found in Chandler's and the second and third volumes of Pinney's Wisconsin Reports.

TIMOTHY OTIS HOWE, though not long or prominently connected with the judiciary of Wisconsin, is, perhaps, one of the most famous names of Wisconsin. Able as a lawyer and as a judge, his fame was chiefly won in the larger field of national statesmanship, where he was a conspicuous figure during the eventful days of the Civil War and of the settlement of the country after the close of the war. He was born at Livermore, Me., February 24, 1816. He was a farm-bred boy, receiving a common school education. He read law and came to the Bar in 1839. He began practice in the same town with Lot M. Morrill, afterwards his compeer in the Senate. He was an ardent Whig and one of the young men who well-nigh idolized Henry Clay. He was member of the legislature in Maine in 1840. Later, in 1845, he came West and settled at Green Bay, which continued to be his residence through life.

In 1848, he was an unsuccessful candidate for Congress as a Republican — a Whig nomination being a forlorn hope. Upon the admission of the State into the Union, and the retirement of Chief-Justice Stow from the fourth circuit in 1851, Judge Howe was elected in his stead and became *ex officio* a judge of the Supreme Court.

In 1855, he resigned from the bench, the meagreness of the salary driving him back to the profession. He entered into the fall campaign of 1855 as an able speaker for the Republican cause. The next year he won great professional reputation in the famous Bashford-Barstow *quo warranto* controversy, as to who was legally elected governor. Mention of this celebrated case will be made later on.

In 1857, Judge Howe was a prominent candidate for the United States Senate. In 1858, he was the leader of the opposition to the "State-Rights" wing of the Republican party, which, goaded by the intense hostility to the slave power, had avowed sentiments bordering on, if not quite entering, the field of nullification. It cost him the election to the Senate, but he was always a man loyal to his convictions, and a stout defender of the cause he espoused. In State conventions in 1858 and 1859, the lively passages of debate between Judge Howe and Carl Schurz, then a young German lawyer of this State, and afterwards a prominent national character, were matters for the whole State to talk over for weeks.

As a debater Judge Howe was remarkable. A close logic marked his speeches, but a quaint humor pervaded them which was almost classic in its aptness and crisp expression.

He was elected to the United States Senate and took his seat March 4, 1861. He was twice re-elected, serving eighteen years, when he was defeated, succeeded by Matt H. Car-

penter, in 1879. Of his record as a senator, and his part in the eventful period, they are a part of national history, and outside of the range of this sketch. It need not here be said that he took rank among the foremost and ablest senators of his time.

He was appointed by President Garfield commissioner to the international monetary conference, held in Paris in the summer of 1881, and served with fidelity and distinction in the meetings of that body. In January, 1882, he became Postmaster-General in the cabinet of President Arthur. While serving in this office, he came on private business to Wisconsin in the spring of 1883. The weather was raw and the change of climate brought on pneumonia, of which he died at Racine, March 25th.

His judicial work on the bench of the Supreme Court is reported in the third volume of Pinney's Reports. His most elaborate opinion is in the case of State *ex rel.* Resley *v.* Farwell, governor, on the question whether the courts can control by mandamus the action of the executive of the state. His style of argument at the Bar is found in the 4th Wisconsin Reports (p. 625), in the report of his argument in the *quo warranto* case against Governor Barstow.

His broader career as a statesman cannot be considered within the space here allotted.

MORTIMER MELVILLE JACKSON was born in Rensselaersville, Albany County, New York, of Puritan stock. He received a good education in common schools, in boarding schools, and a collegiate institution in the city of New York. He then entered a counting-house in New York, and, while a merchant clerk, became an active member of the Mercantile Library Association, of which he was first a director, then vice-president. Preferring the study of law to mercantile pursuits, he first pursued a course of reading as a preparative, then entered the office of the distinguished David Graham and read law.

Early in life he took an active part in politics, and, in 1834, sat as delegate in the convention of Young Whigs of New York, who first nominated William H. Seward for governor. After his admission to the Bar, he came to Wisconsin in 1838, and, in the spring of the following year, he settled in Mineral Point. He soon became prominent at the Bar and had a considerable practice. He prosecuted or defended some of the leading murder trials in the Territory. He attracted attention in the defense of Du Charme, indicted for a murder committed in the Stockbridge settlement.

Mr. Jackson visited various portions of the territory, became acquainted with its resources, and wrote a series of articles over the signature of "Wisconsin," setting forth desirable features of the Territory to those seeking homes in the West. He was a Whig, and the party was then in the minority, but he was soon recognized as one of its leading members and able speakers.

In 1841, President Tyler removed Governor Doty, the Democratic governor, and appointed Judge Doty in his place. Doty, soon after, tendered the office of attorney-general to Jackson, who served five years and then resigned, when the Democrats came again into power. During his term he conducted many important cases, adding to his reputation as an able jurist.

He took a deep interest in popular education, and, in an educational convention in 1846, he reported as chairman of a committee a plan or scheme of a system of common schools and educational organization, which, in its essential features, was afterwards incorporated into the State constitution. He was also prominent in having the mineral lands brought into market, which aided and hastened the development of the southwestern part of the State.

When the State came into the Union, Jackson was elected circuit judge of the fifth circuit, which took in the southwest and western part of the State—about one-

third its area. He thus became the circuit rider of a large district, and member of the Supreme Court. He served until the separate court was organized, in 1853. When Levi Hubbell's term as chief justice expired, in 1852, Judge Jackson was unanimously chosen by the judges as chief justice, but he gracefully declined, to give place to Chief-Justice Whiton, whom he insisted was the worthier for the place. Thereupon Whiton was chosen.

Judge Jackson left a good record as judge. He was a man of great personal dignity and very courteous and considerate to all. He was impartial and just, and his opinions bespeak a clear and vigorous intellect. In 1857 he was a prominent candidate for the United States Senate. From 1853 to 1861 he practiced law. He was then appointed by President Lincoln as consul to Halifax. The place was an important one during the war, as it was naval headquarters for Confederates. The consul must keep a close watch of them and report to his government. Through his vigilance, it is said, millions of dollars' worth of material was captured as contraband of war.

Judge Jackson was one of the best informed men on the fisheries controversy, and wrote, in 1870, at the request of the Secretary of State, a report upon the fisheries and fishery laws of Canada, in which he set forth in forcible and vigorous argument, but dignity and courtesy of style, the rights of American fishermen.

In 1880 he was tendered the appointment of consul general at Melbourne, but he declined the appointment. In 1882, he tendered his resignation as consul, which was accepted with many acknowledgments of his long and faithful public service. The city authorities of Halifax voted him an address, in the usual terms of distinguished consideration, expressing appreciation of his courtesy and ability in performing his duties.

He returned to his old home in Madison, Wisconsin, where he had resided before going to Halifax, and spent the rest of his days in leisurely retirement. His high courtesy and most agreeable manners made him a social favorite and welcome guest in all Madison homes. He was always a cultivated and refined gentleman. He had accumulated a competency, and as he left no immediate relatives his fortune was mainly bequeathed to the Regents of the University for the benefit of the law department.

He died of old age on October 13, 1889, at Madison, as an inmate of a hotel, with no kindred to attend him in his last sickness.

WIRAM KNOWLTON was born in Chenango County, New York, January 24, 1816. He came to Wisconsin in 1837, and studied law with Perley Eaton, Esq., at Mineral Point. He was admitted to the Bar and began practice at Platteville in Grant County, and afterwards he removed to Prairie du Chien on the Mississippi River, the site of Fort Crawford, where a military force was stationed during the early history and up till after the Mexican War, somewhat famous as the place where Jeff Davis courted the daughter of the colonel of the post — the brave Zack Taylor. Here Knowlton became prominent as a lawyer and citizen.

He took much interest in military matters, and in 1846 was empowered to raise a company of volunteers to occupy Fort Crawford at Prairie du Chien and was commissioned captain. He is said to have been a strict disciplinarian, and drilled his men with a regularity that they did not like. They were enlisted from a class who did not like to be treated as common soldiers, and all wanted to wear officer's uniforms. The most interesting record of his military service is of his precautions to keep whiskey out of the garrison, and his finding at last how his efforts were thwarted. The whiskey was drawn in through the lines by a string, in a package covered with cat-skin to resemble a cat. In the night time the

package seemed to be a cat quietly moving on the ground. The soldiers who stood guard had their gun-barrels full of whiskey, which they drank to keep out the chill during the lonely hours of walking the beat.

Afterwards, in 1850, he was elected judge of the sixth circuit, and became one of the judges of the Supreme Court until a separate court was created. He then continued to serve out his six-year term on the circuit. He died June 27, 1863, at Menekaune, Oconto County, when only forty-seven years of age.

His work is found in Chandler's reports and in second Pinney. He was but a short time on the bench of the Supreme Court. He was industrious, and his opinions give evidence of judicial ability.

A witty remark of Judge Knowlton is often mentioned in the legal gossip of the State. While the Supreme Court was holding its session, the lawyers and judges, most of whom were absent from their homes, were wont to meet in the evenings in the court room for social intercourse. In one of these gatherings, Chief-Justice Whiton said in his quiet way, "Judge Knowlton, you must have some peculiar country or very peculiar officers in your circuit." "How so?" asked Knowlton. "One of your county clerks up there," says Whiton, "has recently certified in a statistical return to the Secretary of State that there is no real estate in his county." A general laugh greeted this remark. "The clerk is entirely right," replied Knowlton, "there is no real estate in his county, it is all *government land*."

MYSTERIOUS FINDING OF LOST PAPERS.

By Judge J. W. Albertson.

SOME four or five years ago, I was employed by a shooting club located on Currituck Sound to fix in my memory the bounds of the lands belonging to the club, in order to prevent trespasses and to prosecute offenders in that line. The club owned a large area, made up of many small tracts which were consolidated into one. The title to these various tracts rested on grants from the Lords Proprietors of North Carolina, grants from the State, deeds from sheriffs under execution sales, deeds from commissioners appointed under decrees in judicial sales, and private conveyances from various grantors. They were all recorded, but the tracing of the various links in the chain of title to make it complete involved, in each separate parcel, a work of much time, labor and expense. There were about one hundred deeds and muniments of title in all. These papers were given into my keeping by the president of the club, who lived in Boston, with the charge to keep them safely, as their loss would cause much embarrassment in the event of a suit. I took them to my office, made an index of each one, with the book and page of the records on which they appeared, and placed them in a compartment of my safe in which was no other paper. A short time afterwards, the local superintendent of the club wrote for me to go to the clubhouse to prosecute a trespasser whom he had arrested under a warrant, the day of trial being fixed. I did not go myself, but sent my partner to try the case. Thinking that some of the deeds might be necessary in the trial, and not knowing what particular one might be called for, I gave him the whole bundle. I carefully wrapped the papers up and tied them securely. I directed my partner to deliver them to the superintendent, with instructions to place them in a desk in the clubhouse in which they had formerly been kept, and to keep the desk securely and constantly locked. I sent them back, because it was more convenient to have them on the spot in the event of their being needed on other trials, and also to prevent the loss of any of them in frequently carrying them about. My partner tried and won the case, which, from its nature, did not require any proof of title, but of possession only. No deed was used, and he told me that he delivered the bundle of deeds to the superintendent with my instructions as to the place of deposit and for care in keeping them.

A short time after this, the superintendent died, and another one was appointed who had been in the employment of the club for several years, lived at the clubhouse and was familiar with all its appointments and property and with the habits of its members, most of whom were residents of Boston and New York City. Some time after the change of superintendents, the president wrote me to send him the deeds, saying that he wished to investigate some points in the boundaries and title. I informed him of my having given them to the superintendent that died.

Upon inquiry and search the deeds could not be found. My partner again told me that they were delivered to the man. I saw my partner place the papers in his satchel, and leave our office for the train on which he went to the trial. He knew their value and there was no reason why he should be neglectful of their care. The family of the dead superintendent had left the clubhouse and it was some time before I could find them. After locating their residence, I wrote

to them making inquiry concerning the deeds. A daughter of the dead man wrote me that she remembered well that on the day of the trial she saw her father with a bundle of papers, and saw him put them inside the desk where were kept the letters and papers of the club, and that they had not been carried away by the family when they left. I informed the president that I could not trace the deeds and offered to have copies taken with proper certificates, which I was able to do by means of the index to them which I had preserved. I often saw the empty space in my safe in which the deeds were placed, and daily I was reminded of the loss. I prepared a memorandum of the copies I wanted, and was about to send it to the clerk of the court and the register of deeds for the copies. The cost to me would have been considerable, besides the mortifying reflection that the president would justly accuse me of neglect.

Before sending the letter for copies and after it was ready for mailing, something induced me to look again in my safe, although I had done so fifty times only to be confronted with the empty space in which the deeds had rested. On this occasion, only the day lock was used to fasten the safe, a circumstance of unusual occurrence, because I had in it other valuable papers, and I was careful to always lock it with the combination when I left the office at night. I observed this circumstance when I opened the safe on this morning. On opening it and looking into it, I saw with surprise that the receptacle for the deeds was full of papers done up carefully and placed in it. When my partner came in, a few minutes after I saw this, I asked him if he had placed any papers in the safe on yesterday or this morning. He replied that he had not been in the safe on yesterday or to-day. I then produced the papers, and they proved to be the bundle of deeds entire, not one being lost. The papers were damp, as we both observed. I charged him with replacing them and intimated that he had not given them to the superintendent. He was annoyed and again declared that he had delivered them as instructed.

We had not seen or written to the superintendent who succeeded the one that died, my partner not remembering that he was present at the trial, in fact, at that time not knowing him. He wrote to him after the reappearance of the deeds. He replied that he was present at the trial, and that he saw my partner take a bundle of papers, wrapped up and tied, and give them to the former superintendent, with the instruction to put them in a desk in the clubhouse and keep them safely. He did not see them afterwards, or know what they were. After receiving the president's letter, he searched the house for them, but could not find them. Afterwards I saw him personally and he made to me the same statement contained in his letter.

I never doubted, really, my partner's account; but I was much relieved to have the testimony of the daughter of the dead superintendent and this man to its truth, both on my partner's behalf and on mine.

It was not positively direct testimony, but it was so nearly up to the mark that it convinced me, and I think would convince any jury that my partner delivered the deeds I gave him to the superintendent.

I know that I carefully did them up, handed the bundle to my partner, and saw him place it in his satchel, fasten it, and leave the office immediately for the railroad depot.

He proves by two witnesses, that he gave a bundle of papers answering the description to the superintendent. So far as appears they were disinterested witnesses. The deeds were of no value to them, either to keep, or to dispose of; nothing but pure malice could prompt their destruction, or the withholding them, and in the relations existing between them and the club there

was no room for malice; not even for ill-will, so far as I have been able to learn, and I made strict inquiry on that point.

How did those deeds get back into my safe! Who brought them back?

They *were brought back* after an absence of nearly six months and by human means.

This circumstance in the life of a lawyer but serves to show the great difficulty that exists in producing satisfactory evidence in classes of cases like the one I have described.

Am I mistaken in my remembrance of facts, or is my partner? It must be so; but we prove by competent witnesses that our statement must be accepted by every rule of settled evidence. I know the deeds were in my safe. I had spent days in reading and becoming familiar with their contents and in making an index of them. I made a particular place for them in the safe, and no other papers were mixed with them. I gave them out with my own hands, and their place of deposit remained empty for months, causing me chagrin every day. After a long time they reappear and in the same spot from which I took them.

They were damp when I observed them first on their return. They had been in the safe only a short time, because on the evening preceding the morning I found them they were not in the safe.

Their dampness was the only clew I had, and that lead only to a field of conjecture so wide that I knew not what step to take. My safe was perfectly dry, and papers that lay in it for years show no appearance of moisture. My office was locked and I opened it with the usual key. There was no sign of its being tampered with and no trace of anyone having entered it before myself on that morning.

The dampness of the papers was a circumstance also that went to show that some other person than my partner replaced the bundle. Why should he expose them to the weather? He knew their importance, and he, equally with myself, was interested in their preservation. Our relations were such that had he failed to deliver them, or had he misplaced them, he would not have hesitated to make it known at once. Neither one of us had spoken of the matter, because we did not care to advertise our seeming negligence, and we thought that the papers would be found at the club upon a careful search.

No one, to our knowledge, was frightened into returning the papers by the fear of a prosecution, for we had no reason to fix a suspicion upon any person and we had not spoken of the matter to others.

Why should they have been returned in a manner apparently clandestine?

No damage actually resulted, and that fact, perhaps, should satisfy one. But it would gratify me to have the matter cleared of the mystery that enshrouds it; and I make this narrative in the hope that some lawyer, from a similar experience in his own case, or in the practice of another which has come to his knowledge, may take up the clew, if there be one, and follow it out to a demonstration.

PLACE AUX DAMES.

A CURIOUS instance of a lady availing herself, in 1540, of the right to appear by champion in a "breach of promise of marriage" case, is mentioned in the memoirs of the Maréchal de Vielleville. The husband of Philippe de Montespedon having died in Piedmont without issue, she was left a young, rich, and beautiful widow, and was sought in marriage by several noble suitors. Amongst these was the Marquis de Saluces, to whose attentions she seemed to listen favorably, and she permitted him to accompany her from Turin to Paris. It turned out, however, that the sly dame merely wished to have the advantage of his escort on the journey; and when she arrived at its termination, she cavalierly dismissed him, saying, "Adieu, sir! your lodging is the hostel des Ursins, and mine at the hostel Saint Denis, close to that of the Augustines." The marquis still persisted in his suit; but as Philippe continued obdurate, he asserted that she had made him a formal promise of marriage, and cited her to appear before the Court of Parliament. She came there, attended by a numerous company of friends, and having been desired by the president to hold up her hand, she was asked whether she had ever promised marriage to the marquis, who was then present in court. She answered upon her honor that she had not; and when the court proceeded to press her with further questions, she exclaimed with passionate warmth, "Gentlemen, I never was in a court of justice before; and this makes me fear that I may not answer properly. But to put a stop to all captious cavilling and word-catching, I swear in the face of this assembly to God and the King, — to God under pain of eternal damnation to my soul; and to the King under the penalty of loss of honor and life, — that I have never given pledge or promise of marriage to the Marquis de Saluces, and, what is more, that I never thought of such a thing in my life. And if there is any one who will assert the contrary, here is my chevalier, whom I offer to maintain my words, which he knows are entirely true, and uttered by the lips of a lady of honor, if ever there was one. And this I do, trusting in God and my good right, that he will prove the plaintiff to be (begging the pardon of the court) a villainous liar."

This spirited defiance caused no little sensation in the audience; and the president told the registrar that he might put up his papers, for Madame la Maréchale had taken another and much shorter road towards settling the dispute. Then, addressing the marquis, he asked, "Well, sir, what say you to this challenge?" But the love, as well as the valor of the latter, was fast oozing away; and the craven Knight answered by a very decided negative: "I want not," said he, "to take a wife by force, and if she does not wish to have me, I do not wish to have her." And so, making a low obeisance to the court, he prudently retired, and the fair Philippe heard no more of his pretensions to her hand.

CURIOUSLY CAUGHT CRIMINALS.

IN the annals of crime, truth is often stranger than fiction, and there is no doubt that these contain many strange records of crime and its detection which beat anything that has come from the fertile brains of the most imaginative writers of detective stories.

In this age, science plays an important part, and those deeply versed in its mysteries are frequently called on to lend the aid of their knowledge to assist the ends of justice. The microscope has been often used to decide whether spots of blood on clothing or other things were really human blood or not, and the immensely more delicate test of the spectroscope has been able to decide in like case where the microscope has failed. Another curious use has been made of the microscope in the detection of crime. It has shown that human hairs have a marked individuality, and, not long ago, a single hair — the evidence in a murder case — was shown to a microscopist with the request to determine whether it was from the head of the suspected man, whose hair was of the same color. The specialist found, after careful consideration, that it was sufficiently unlike to acquit him. Subsequently the real culprit was captured, and his hairs were found to be identical in character with the one first examined.

A somewhat similar case occurred at San Francisco. There had been a sensational murder, a young lady having been stabbed by a Sunday-school superintendent named Durant, and there were produced at the trial a few hairs from a horse's mane, which had been found on the victim's clothing. These were carefully measured by a delicate micrometer, and found to correspond exactly in diameter with the hairs of Durant's horse, while measurements of hairs from twenty other horses gave different results. It was testified by Durant's stableman that his master had driven the horse on the day the crime was committed, and that he stood near the animal examining him for some time before getting into his road-wagon.

An important work on dentistry published a short time ago contained some remarkable instances of the identification of criminals by peculiarities in their teeth. In one case, a man was attacked on a lonely highroad, and in the tussle he, in his frantic efforts to get rid of his assailant, bit him on the left hand, while his little dog took a mouthful of the man's calf. The ruffian was finally forced to take to his heels. The police were duly informed, and ten days later a suspicious character was arrested, but denied everything, and as the night of the assault was a very dark one, he could not be identified by his looks. But there was a small wound on his left hand which looked like the mark of a tooth. It was not, the accused stolidly maintained. The victim of the attack suggested that if it was the same man he ought to have the marks of the terrier's teeth on his leg. Three tiny wounds were found on his calf, which he ascribed to the bite of a large dog. The terrier's teeth were, however, found to match the wounds exactly, and conviction followed.

A man accused of murder had wounds on two of the fingers of his right hand, which had been evidently caused by peculiarly shaped human teeth. The murdered man's teeth were found to correspond, and there was conviction in due course.

A rich Russian banker had been discovered murdered in his house in St. Peterburg. There was no clue, but in the room there was found a cigar mouthpiece containing part of a cigar of such an expensive kind that it was supposed the banker himself had been smoking it just before the crime had been committed. On close examination, the

mouthpiece was found to be worn away by the teeth of its owner, but the dead man's teeth did not fit the indentation. The servants were one by one examined, and it was then found that the hollows of the mouthpiece compared exactly to the formation of the front teeth of the cook, to whom no suspicion had been attached. He afterwards confessed to the murder.

The belief that "murder will out," sooner or later, was amply justified in the following curious instance. One day Dr. Airy was passing through St. Sepulchre's Churchyard in London. The gravedigger was excavating a grave, and the doctor, unaccountably attracted, stood looking on. While he was there a skull was thrown out which appeared to have the power of motion. Taking it up, the doctor found the cause to be a live toad. The casual examination disclosed the presence of a nail embedded in the temple bone. Merely calling the sexton's attention to this, the doctor went away. The sexton, thinking the matter over, remembered that the skull was that of a young man who had died suddenly twenty-two years before, and gradually there came back to his memory certain fleeting rumors of that time. Putting this and that together, he became more than suspicious and laid the whole matter before a magistrate. The widow of the long-buried man was arrested and taxed with having killed her husband. Ultimately she confessed her guilt, and was duly hanged for the crime so long hidden and so strangely brought to light.

While on his way to one of the stations at Budapesth, a French gentleman went into a hatter's shop and bought and put on a hat which had attracted him by its unusual color and shape. After reaching the station, and walking up and down there for a few minutes, he was astonished to find in one of his overcoat pockets a purse full of money, and in the other a gold watch. He at once went to the station-master, whom he found listening to the tale of a man who had lost his purse. The purse turned out to be the identical one the Frenchman was returning, but when lost it had contained but 10s., while now it held as many pounds. The mystery was explained when a policeman brought in a pickpocket he had just arrested. He confessed to the theft of the purse, into which he had put the proceeds of previous robberies. These and the watch he had passed into the Frenchman's pockets because of his hat, explaining that hats of that particular pattern, made only by one firm, were the badge of an international gang of pickpockets, so that he had taken the unsuspecting traveler for a confederate. The hatter, when questioned, stated that he had sent out a large consignment of that particular hat to a place named by the thief, but he was able to prove that he had no complicity in the base uses for which his wares were utilized.

Detectives are not over scrupulous in the means they sometimes use to assist them in making captures. Nothing quite so bad can, however, be laid to their charge as the accusations made against the terrible Russian police, who are said to give suspected prisoners a drug which renders them delirious, and when in that state they are watched and interrogated, in the hope that they may utter remarks incriminating themselves and perhaps others.

A wily French detective, sent to the country in a murder case, disguised himself as a hawker, and put up at an inn frequented by a gang of poachers, with whom he soon ingratiated himself, playing cards with them nightly, until, at a favorable opportunity, he offered to treat them to a couple of bottles of hot wine. While this was being prepared, he managed to pour a flask of pure alcohol into the pan, with the result that the gang became intoxicated, talkative, and boastful, so that he found no great difficulty in drawing out of them enough to justify him in having one of the crew arrested, who afterwards made full confession.

LONDON LEGAL LETTER.

LONDON, Jan. 3, 1897.

THERE is no department of English jurisprudence which has a wider interest for American manufacturers and merchants than that of trade-marks, and at the same time there is none which is in anything like so unsatisfactory a condition. It was bad enough before the legislature took the matter in hand, but it is infinitely worse since the Merchandise Marks Acts of 1862 and the Trade Marks Act of 1875 and the Patent Act of 1888 were passed. In the days when the common law was the only protection to a manufacturer who had established a distinctive mark and name for his goods, the simple question was whether or not he had acquired a property in the mark or name which he had affixed to his goods. If he had, then, of course the property thus acquired was, like all other property, under the protection of the law, and for the invasion of the right of the owner of such property the law afforded a remedy similar in all respects to that by which the possession and enjoyment of all property is secured to its owners. Now, however, the legislature, in the evident attempt to simplify the matter and increase the protection to the individual while guarding the rights of the public and certain classes of the community, has so complicated the subject that endless confusion is the result. This comes of the endeavor to define what a trade mark must "consist of or contain." If, for example, it is a selected word, "it must be a word having no reference to the character or quality of the goods, and not being a geographical name." It might appear to be a simple matter to conform to this requirement, and so evidently thought the American owner of a process for making an anti-friction metal, which, under the name "Magnolia," has acquired a wide repute, not only in the United States, but all over the world. In order to protect the name in Great Britain it was registered here, and was freely admitted to the register, as the article was an alloy of certain metals, of which the word "Magnolia" was in no sense descriptive of the character or quality. In a recent action, however, the validity of the registered trade name was called in question, and those disputing the monopoly which "Magnolia" anti-friction metal had acquired, raised the point that it was not the subject of registration as it was a "geographical name." It was not contended that there was any town or geographical area in the United Kingdom bearing that name, but Lippincott's Gazeteer was put in evidence to show that in the United States there were no less than twenty-three towns and villages called "Magnolia"! This was considered fatal by the Court, and now that a motion has been filed to take the name off the register it will in all probability succeed.

This should be a warning to other American manufacturers, as there are undoubtedly many of them whose interests in this country rest upon a similarly insecure foundation. The worst of it is that the ruling which seems so great an absurdity has a precedent which has been invoked upon more than one occasion with the same result. A manufacturer of camel's hair belting registered, as his trade name, before the passage of the Act of 1888, the word "Camel." There could be no doubt that it was not a geographical name. But someone who had a fancy to the same name discovered that a very small and unimportant parish in a remote county in the west of England bore that name. The register, therefore, in an application to extend the name to another class, refused to accept the name "Camel" on the ground that it was a geographical name, and upon an appeal to the Board of Trade this ruling was affirmed!

It goes without saying that the object the legislature had in enacting the law was to prevent a manufacturer in a given locality from registering the name of that locality as descriptive of his goods to the exclusion of all other residents of that locality. It would be a manifest hardship if Jones could register "Yorkshire" sauce and thus prevent every other Yorkshireman from making sauce which he might desire to describe as Yorkshire sauce. It would be a still greater and more inequitable discrimination to give an individual the protection of the register to describe his coal only as "Newcastle" coal, or his tin as the sole "Cornwall" tin. But to successfully contend that a name which is not in its origin geographical, and which has only an acquired and limited use of this kind, is within the spirit of the law, simply shows what gnat-straining can accomplish.

It is gratifying to notice that in several of the secular as well as the professional papers which review the work of the Courts during the year which has just closed importance is given to the visit of the Chief Justice of England to the United States and his warm welcome at the hands of the American Bar Association and the people of the United States. It is regarded as a significant incident tending to show the harmony of the relations which exist between the two nations. The proposed International Court of Arbitration is another matter which has the support of lawyers and laymen alike. The former may possibly see in it a prospect of employment, but this is a consideration which would not weigh for a moment in their estimation of the advantage it will have in preventing the recurrence of the unhappy feeling which just a year ago strained the relations between these two great countries.

STUFF GOWN.

The Lawyer's Easy Chair.

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

BY IRVING BROWNE.

CURRENT TOPICS.

DICKENS' ANIMALS. — It has often occurred to the Chairman that one might construct a quite readable commentary on Dickens' unnamed characters. So fertile in his creative capacity is this great author that he runs short of names for his personages in every one of his novels. He has a class of characters, however, for which he contrives to find names, but who are not human. His love of the brute creation indicates a deep nature, whose sympathies are not bounded by mere human affections, but extend to all created things. St. Peter was instructed in a vision that God has made nothing common or unclean. Cowper would not number on his list of friends, though gifted with good manners and fine sense, the man who, wanting sensibility, needlessly set foot upon a worm. Coleridge, in one of the most powerful poems of this century, taught the lesson of humanity to animals through the type of the albatross. But no author of fiction makes such distinct characters of animals as Dickens. So strong is his propensity to personify animals, that in defiance of grammatical rules, he always dignifies them by the personal pronoun "who." It must be confessed that his strictly human characters frequently less deserve this construction.

Unquestionably his most famous animal character is Barnaby Rudge's raven "Grip." This personage is a much more healthy and sensible one than that morbid bird in Poe's ballad, which simply sat on a bust and croaked disaster and ministered to his master's unhappy and morbid fancies. (It is a singular manifestation of the poet's nature, that in his celebrated criticism on "Barnaby Rudge," he blames Dickens for not making Grip morbid and a prophet of woe and disaster, like his own dreary bird.) This excellent bird was one of the cheerful kind, who ejaculated "Hurrah!" whose favorite motto was "Never say die," and who suggested festive ideas by continual drawing of corks, and by exhortations to "Polly" to "put the kettle on." Even his constant asseveration "I'm a devil," must be taken less as an assertion of diabolical propensities than of an excess of good fellowship, equivalent to "I'm a devil of a fellow." "Grip" was also a useful person, helping his poor distraught master to gain a living by the display of his vocal accomplishments. He was generally an orderly citizen, becoming a little demoralized, to be sure, in the Gordon Riots, but returning to the paths of sobriety and loyalty upon his master's providential escape from the gallows. Perhaps the only serious blot on his character was his native acquisitiveness, unregulated by a fine sense of ownership, and accompanied by the abnormal secrecy and disposition to hoard which belong to his race. In these days, when many in the community are advocating the privilege of paying their debts at fifty cents on the dollar, men should not be severe on him for that.

Less known, but even more carefully drawn, and a more influential and independent character, is the pony "Whiskers," the property of the Garland family in "Old Curiosity Shop." A more willful, headstrong and determined little fellow never existed, nor one who more tyrannically ruled his owners, going or refusing to go at his sovereign pleasure, choosing his own side of the street or road, stopping beyond or short of the desired place, and finally refusing to be cared for or driven by anybody but the honest lad Kit, and therefore very unhappy during the incarceration of his young ostler, through the wicked wiles of the dwarf Quilp and the legal firm of Solomon and Sally Brass.

Dickens portrays several dogs with careful delineation, and differentiates them in a marvelous manner. In "Jip," Dora's lap-dog, in "David Copperfield," he gives the characteristics of a lady's ribboned, spoiled and pampered pet, his mistress' favorite confidante and not wholly unresponsive companion, who pines away with her and dies at almost the same moment, out of sympathy and grief. David's foolish but fond little wife could fitly have been furnished with no other kind of dog. A dog of sense would have been out of place with her, and neither could have cared for the other. Of a stronger and more resolute character was "Diogenes," little Paul Dombey's dog. His very name is in strict keeping with his original environment in the famous classical school of Dr. Blimber, where little Paul first encountered him. (Dickens ought to have given him a tub for a kennel.) By an exquisite sense of

the fitness of things, after Paul's death this sturdy fellow was made over to Paul's beloved sister, Florence, and guarded her and her efficient maid, Susan Nipper, with great discretion and fidelity. All the world has laughed at Mr. Toots' encounter with this dog, toward whose legs "Diogenes" seemed to entertain a strong antipathy. "Diogenes" was a plebeian dog, and as such was recognized and frowned upon and disapproved by the stiff and starchy Mr. Dombey, senior. The waking and sleeping moments of these two animals are portrayed by the novelist with the most delicate touches and the most observant elaboration. Less minutely drawn, and still quite characteristic, is Bill Sikes' cur in "Oliver Twist." This knowing animal was painfully aware of Bill's design to take his life, and promptly evaded him for the time, but returned in time to perish with him, as it would seem almost by suicide, by precipitating himself from the fatal roof upon his ruffian master's body dangling from the rope below. This incident is one of the most powerful in the great master's earlier works, and strongly enhances the horror of the criminal's singular death. In the incident of the dog "Lion's" attack upon Blandon, in "Little Dorrit," the author shows how well the animal remembered and how surely he recognized a villain. It is evident that Dickens agreed with the lisping circus-master, in "Hard Times," that "dogth ith wonderful animalth." So strong is his sympathy with them that the gipsy Hugh's last words on the gallows, in "Barnaby Rudge," are an appeal to some one to adopt and care for his dog.

Dickens has not done so much for cats, but that is their fault, not his. In two instances, however, he makes very suggestive companions of them — one as the dozing, winking associate of the severe Mrs. Pipchin, little Paul Dombey's nurse, and the other as the black familiar of old "Krook," the ole-clo' "chancellor" in "Bleak House," sitting on his shoulder and brandishing his athletic tail like a mace of office. In this same novel we encounter another example of the novelist's exquisite sense of fitness, in giving to little Miss Flite, the crazed Chancery suitor, for companions cages of larks, linnets and bullfinches (the Chairman is shocked to see that in "Law and Lawyers in Literature" he called them canaries) — her wards in chancery, which she had appropriately named Hope, Joy, Youth, Peace, Rest, Life, Dust, Ashes, Waste, Want, Ruin, Despair, Madness, Death, Cunning, Folly, Words, Wigs, Rags, Sheepskin, Plunder, Precedent, Jargon, Gammon and Spinach, and to which she gave their freedom on the memorable day when the famous suit of Jarndyce *v.* Jarndyce "lapsed and melted away," amid the laughter of the lawyers, because there was no fund left to pay the costs.

The minuteness and accuracy of Dickens' observations of animals is illustrated by the following, from "Tale of Two Cities": "The owl made a noise with very little resemblance in it to the noise conventionally assigned to the owl by men-poets. But it is the obstinate nature of such creatures hardly ever to say what is set down for them." In the same wonderful story, the author illustrates the poverty of the village by the fact that it had no dogs. That is a weird touch of fancy by which he sets the bird to singing sweetly near the head of the cruel Marquis lying murdered in his body. And in his description of the wine-shop on a hot day in Paris, he gives this minute observation of flies: "Heaps of flies who were extending their adventurous and inquisitive perquisitions into all the glutinous little glasses near Madame, fell dead at the bottom. Their decease made no impression on the other flies out promenading, who looked at them in the coolest manner (as if they themselves were elephants, or something as far removed), until they met the same fate. Curious to consider how heedless flies are! — perhaps they thought as much at Court that sunny summer day."

The only other very great author in whom the love of dumb animals is very apparent is Shakespeare, in whom we now recall Launce's friendship with and sufferings for his dog "Crab," and the melancholy Jacques' touching description of the sorrow of the hunted stag. To these two greatest creators of character in fiction seems to have been given the capacity to understand and describe the emotions of instinct in animals, as well as the processes of reason in humankind from the cradle to the grave.

Dickens, who dwelt so much in his stories in the Inns of Court, would rejoice to read the following from a late number of the "Law Journal":

"Much concern has needlessly been expressed as to the fate of the Temple pigeons. It has been asserted in all quarters of the Press that the Benchers had determined upon a policy of extermination, and that before many weeks were over the pleasant whirr of the pigeons' wings would cease to be heard in the Inn. The officials of the Temple are quite unaware that the Benchers have arrived at any such decision. It is necessary, of course, to reduce the number of pigeons from time to time, but there is no foundation for the statement that a policy of extermination by starvation has been decided upon."

NOTES OF CASES.

Coercion of Wife. — In the march of legislation, which has done so much to put the wife on a legal equality with the husband in this country, it was a well advised step, in the Penal Code of New York, to do away with the ancient legend that the wife

was *prima facie* presumed to be irresponsible for the commission of certain crimes in the presence of her husband, inasmuch as it was inferred that she acted by his command and under his coercion. It is extremely doubtful how far this presumption extended at common law. It certainly did not extend to some offenses, but what the exceptions are is left in doubt by the authorities. Wharton says (1 Crim. Law, § 78), "It may be questioned, however, whether the coercion and presence of the husband, if a defense at all, are not a good defense in all cases, and whether the exception taken as to the higher grades of felony can be maintained." This is the language of the eighth edition, toned down a little from that of the seventh (§ 72), which omitted the words, "if a defense at all," and added, "and the better opinion now is not to recognize such an exception." Bishop says (1 Crim. Law, § 358), actual constraint imposed by a husband on his wife will relieve her from the legal guilt of any crime whatever committed in his presence," arguing that the distinction of heinous crimes on account of their enormity "seems unsatisfactory in principle"; but subsequently (§ 359) he lays down the doctrine that "whatever of a criminal nature the wife does in the presence of her husband is presumed to be compelled by him," except (§ 361) that this doctrine does not apply to certain crimes by reason of their peculiar nature," and which "show so much malignity as to render it improbable a wife would be constrained by her husband without the separate operation of her own will," — such as "treason, probably murder, possibly robbery," etc. Mr. W. W. Thornton, in an article on "Intent in Crime" (9 Crim. Law Mag. 156), says, "Actual constraint imposed on the wife by the husband relieves her from the legal guilt of any crime whatever committed in his presence," and further, "In principle there is no exception to this rule, nor is there any decision that sanctions an exception," and "well considered cases refuse to entertain this view of the law," i. e., the exception in case of heinous crimes. This is dissented from by Mr. Louis Richards, in an article on "The doctrine of marital unity in the modern criminal law." (13 Crim. Law Mag. 337.) Kent excepts treason, murder and robbery, and all *mala in se* except theft. (2 Com. 150.) Greenleaf excepts treason and homicide (1 Ev., § 28). Schouler excepts *mala in se*, observing, "Such a distinction is vague and somewhat shadowy — the line seems to be rather drawn between such heinous crimes as murder and manslaughter and the lighter offenses." Undoubtedly the law is stated too broadly by Miller, J., in Pringle *v.* Ryland, 97 N. Y. 130: "The rule undoubtedly is that *whatever* of a criminal nature the wife does in the presence of her husband is presumed to be compelled by him"; at least if he intends it to be understood that such coercion absolves her from responsibility; and this unguarded statement is not entitled to any greater authority, although derived from Mr. Bishop, for it ignores the wife's conceded responsibility for very heinous offenses. In Uhl *v.* Commonwealth, 6 Grattan, 706, a case of attempt by husband and wife to commit arson, the Court charged that if she acted in presence of her husband, coercion was presumed, but if satisfied that she was not so acting they might convict her. They convicted her, and this was affirmed. The most ancient writers excepted only treason and murder. Hale excepts also manslaughter, and Hawkins robbery. In some of the reported English *nisi prius* decisions are queries whether there is any well recognized distinction between felonies and misdemeanors in the application of this presumption.

The cases cited by Mr. Thornton do not seem to authorize his inference. Hildreth *v.* Camp, 12 Vroom, 306, was a civil action for forcible entry and detainer, and the Court merely said, "If the *tort* is done by the wife in the company of the husband, the law presumes coercion on his part." Com. *v.* Lewis, 1 Metc. 151, held that a wife, living apart from her husband, may be indicted alone for keeping a house of ill fame, and the Court observed: "The humanity of the criminal law does indeed in some instances consider the acts of the wife as venial, although she has, in fact, participated with her husband in certain acts, which on the part of the husband would constitute an offense as against him; upon the ground that much consideration is due to the great principle of confidence which a *feme covert* may properly place in her husband, as well as the duty of obedience to the commands of the husband, by which some *femes covert* may be reasonably supposed to be influenced in such cases. Then, in cases of theft or burglary, where the wife is in company with her husband, the law presumes that she acts under coercion; and she is to be acquitted." Wagener *v.* Bill, 19 Barb. 321, was an action for an assault and battery committed by the wife. The Court, speaking of the doctrine of coercion, explicitly recognized the exception as "to such offenses as are *mala in se*, and prohibited by the laws of nature, or those which are highly heinous," citing Com. *v.* Neal, 10 Mass. 152, in which this precise distinction is laid down. The point was not passed upon in People *v.* Wright, 38 Mich. 744; S. C. 31 Am. Rep. 331. In that case the enterprising wife choked the complainant and told him to keep still, and the husband picked his pockets. It was held properly left to the jury to say whether she was not acting independently — and they said she was. In Miller *v.* State, 25 Wis. 384, the Court held that whether, where a wife conspires with her husband to commit a robbery, and while both are so engaged he

commits a murder, she would be presumed to have acted under coercion, it was not necessary to determine, for there was evidence tending to rebut such a presumption. The effect of this case is not accurately stated by Mr. Richards, 13 Crim. Law Mag. 47. People *v.* Seiler, 77 N. Y. 411, was a case of larceny, and the presumption was rebutted. State *v.* Boyle, 13 R. I. 537, was a case of selling intoxicating liquors.

Mr. Wharton's authorities are equally indecisive. Regina *v.* Smith, 8 Cox C. C. 27, was a case of serious beating by the husband with a stick; the wife under coercion wrote letters inviting the complainant to the place, pretending that she was a widow, and met him there dressed as a widow, but did not aid the beating. A conviction of her was reversed. Regina *v.* Wardroper, 8 Cox C. C. 284, was an indictment for jointly receiving stolen goods. A new trial was granted because of the exclusion of evidence that the wife received the goods from her husband. Williams, J., observed: "I am not prepared to say that the liability of a wife differs from that of any other person, unless there is some evidence to show that she was acting under his control."

The decision in Davis *v.* State, 15 Ohio, 72, is not correctly stated in the syllabus, which is as follows: "If a wife join with her husband in the commission of a crime less than murder, she is presumed to act under the coercion of her husband, and in law is not guilty; but the fact of coverture must be clearly made out by proof." The charge was arson. All that the Court said on this point was: "It is claimed that she was the wife of William Davis, and joined with him in the commission of the crime, and therefore was not guilty, as the law presumes that she acted by the command and coercion of her husband. *The legal principle claimed for her benefit is admitted*; but the fact of coverture, necessary to bring her within its operation, was not established." The words which I have italicised could in no event be extended beyond the particular crime of arson in question, and could not be held to apply to all crimes less than murder; but the principle thus "admitted" was clearly *obiter*. The point was very slightly touched upon in the arguments.

The case of State *v.* Parkerson, 1 Strobh. 169, is not in point, for the charge was but assault and battery, and the point decided was that husband and wife were properly indicted jointly therefor, as the presumption of coercion was rebuttable. The Court did say that the wife would not be punishable "if she committed a bare theft or even a burglary by the coercion of her husband."

VALUE OF DOG. — A novel use of a dog was shown in Heiligman *v.* Rose, 81 Tex. 222; 13 L. R. A. 272, an action for killing two dogs of the Newfoundland breed, which resulted in a verdictof $75. The court held that it was not essential to show market value, and sustained the verdict on the proof that one of the beasts "was trained to signal the arrival of any person at appellee's, who could tell from his look if the person was man, woman or child." That certainly was a shrewd dog, but a shrewder owner, and it would seem less trouble to look at the person than to scrutinize the dog's face.

DEFINITIONS. — In Wadsworth *v.* Marshall (Maine,) 32 L. R. A. 888, a statute requiring reasonable notice of setting off a blast to persons "approaching," is held to apply to persons who have just passed the point nearest the blasting, if they are not at a safe distance therefrom. So under the beautiful "elasticity of the law" "approaching" may mean "going away from." But the decision is right. We know of one case where a custom was held probable to show that "white" meant "black." Nothing could be more elastic than that.

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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.

IT is interesting to note in the old statutes of Virginia and Maryland the honor that for decades hedged around the domestic hog. The crime of hog-stealing is minutely defined and specified, and vested with bitter retribution. It was enacted by the Maryland Assembly that for the first offense the criminal should stand in the pillory "four compleat hours," have his ears cropped, and pay treble damages; for the second offense be stigmatized on the forehead with the letter H, and pay treble damages; for the third be adjudged a "fellon," and therefore receive capital punishment.

In Virginia in 1748 the hog-stealer for the first offense received "twenty-five lashes well laid on at the publick whipping-post"; for the second offense he was set two hours in the pillory and had both ears nailed thereto, at the end of two hours *to have the ears slit loose;* for the third offense, death. Were the culprit in either province a slave, the cruelty and punishment were doubled. For all hog-stealers, whether bond or free, there was no benefit of clergy. — *Curious Punishments of Bygone Days.*

FACETIÆ.

SOME good stories are told of the wit and humor of Judge Wilson of Ohio.

In a divorce case tried before him the parties were young, had been married less than a year, and the testimony led the judge to conclude that it was a case of mother-in-law on both sides. He interrupted one of the counsel with, "I will postpone further hearing of this case for one month; the mothers-in-law may consider themselves on their own recognizances to keep the peace. I believe the young people will come together again."

Another wife was suing for divorce on the ground of drunkenness, and the husband's counsel argued: "Why, your honor, I don't believe there is any man in this room who has not drunk more liquor than the plaintiff has proved against her husband."

"Except the Court, except the Court," interrupted Judge Wilson.

Several lawyers gathered in Judge Wilson's room after adjournment of court, and were discussing the retirement of a member of the bar. Among them was one whose practice is worth $25,000 a year. He said: "I have been practicing several years and am well fixed. I have thought I would like to retire and devote my remaining years to studies I have neglected."

"Study law," put in Judge Wilson.

A WESTERN member of Congress was describing to the Hon. Thaddeus Stevens a certain township in his district, and, after expatiating upon the fertility of its soil, the salubrity of its climate, and the magnificence of its scenery, wound up by saying that all it wanted was plenty of water and good society.

"That is all they want in hell," said Mr. Stevens.

"Do I understand you to say," queried the barrister, looking hard at the principal witness, "That upon hearing a noise in the hall you rose quickly, lit a candle and went to the head of the stairs — that a burglar was at the foot of the stairs, and you did not see him? Are you blind?"

"Must I tell the truth?" stammered the witness, blushing to the roots of his hair.

"The whole truth," was the stern reply.

"Then," replied the witness, brushing aside his damp, clinging locks, and wiping the perspiration from his clammy brow, "my wife was in front of me."

NOTES.

THE Fleming murder trial in New York City, which lasted forty-two days and resulted in the acquittal of an alleged matricide, was the topic of much serious comment and of not a little raillery in the city newspapers. As a specimen of the latter was the following excerpt, the sarcasm of which may possibly apply to many localities.

"Now, children, what was the object of a murder trial in the last century?"

"To prove a murderer guilty and hang him for the good of the community."

"Right. And what is the object of a murder trial at the present day?"

"To prove the guilty innocent and protect him from the punishment he deserves."

"Quite right. What is the prosecution? And what is its duty?"

"The prosecution is supposed to be the State, and its duty is to make pegs for the prisoner to hang his defense upon."

"Good. And what is the defense?"

"The defense is the court oracle, who instructs the judge, the jury and the prosecution in behalf of the prisoner, and threatens them with reversals unless they agree with his views."

"Who is the judge?"

"The judge is the assistant defense, who is afraid to charge against the prisoner lest the latter be convicted and there arise a new trial. He prefers to acquit the guilty in order to save his reputation."

"Who are the jury?"

"Twelve men supposed to be peers, who get all tangled up with the evidence and vote for acquittal because they don't know what else to do."

"Very true. And who is the defendant?"

"The defendant is the leading man, whose duty it is to amuse the spectators and make fun for the newspapers."

"That will do."

WE pride ourselves on our humanity, our justice. Therefore it may be well to note that we have now in the United States the most extreme code in the entire world in regard to capital punishment — sixty-two crimes punishable by death. A bill is before the Senate to strike sixteen offenses from our brutal list. Belgium, Holland, Brazil, Italy, Portugal, Guatemala, Venezuela and Costa Rica have wholly abolished the death penalty. In cruel Russia the death sentence has been, since 1753, never pronounced save for treason, while China has only eleven capital offenses. We have adhered to obsolete English laws while England has done away with them and has now only four capital crimes. It is certainly surprising and even mortifying to know that, in Maryland, setting fire to a hay-rick is to this day punishable by death. — *Curious Punishments of Bygone Days, by* ALICE MORSE EARLE.

CHARLES EDWARDS, once a London solicitor, who became an old-time lawyer of New York, and whose son became British consul there, gave this ingenious legal aspect to three classic poems: The Iliad is an action of assault and battery, in which the Greeks were plaintiffs and the Trojans defendants; the Æneid was a suit in heaven's chancery, with bill filed by Juno against Æneas and pals (Palinurus included); and the Jerusalem an action of ejectment, commenced by Christians against Pagans to recover the Holy City.

THE following observation was made by an English nobleman to our late minister at the Court of St. James, Mr. Phelps: "Is it not very remarkable," said the nobleman, "that Mr. Webster, who was a great American statesman and orator, should have compiled a leading dictionary of the English language, and also have been hanged for murder?"

THE allowance of lawyers to population in this country is rather more liberal than that of preachers. There are 89,422 men and 208 women engaged in the legal profession, and supposing each to have an average of ten suits on hand, the litigation going on at one time in the United States would foot up 896,300 cases. — *Current Literature.*

THE late John Jay, once Minister to Austria, had this anecdote of Daniel Webster to narrate: "At a dinner party I once gave him, during the forties, he proposed the health of my father in these words: 'When the spotless ermine was dropped by Washington on John Jay's shoulders it touched a man not less spotless than itself.'"

CURRENT EVENTS.

BELGIUM has until recently enjoyed the distinction of being the most thickly populated country in the world. In the year 1890 a census was taken in almost every country, and it appeared by that census that the average population of Belgium was 530 to the square mile, England followed with 505, France with 420, Holland 350, Italy 260, Germany 233, Ireland 148, Spain 86, Sweden 28, and the United States 20. The population of Belgium was, at that time, 25 times denser than the population of the United States. In 1820, Belgium, then a part of the Kingdom of Holland, was the most thickly populated portion of Europe. Ten years later, when she established her independence, there were 3,700,000 people to a land area of 11,000 square miles. With the multiplication of its manufactories and mining interests and through its remarkable commercial and railroad facilities, the population of Belgium has been increasing rapidly and to-day is in excess of six million souls. But even with this rapid increase the distinction of Belgium has been eclipsed during the present year by Saxony, where the population has increased more rapidly than in any other part of Germany. At the present time Saxony has a population of 3,500,000 to a land area of 5,789 square miles, or 604 people to each square mile.

A LONDON paper states that the Poor Law Department of Berlin has come to the rescue of heads of large families who are too poor properly to provide for their children. Land in the suburbs of Berlin is given them, free of charge, for the cultivation of vegetables. Idle or careless cultivators are not allowed to remain in possession of the land. Inspectors oversee the work, and in spite of this fact evictions are extremely rare; 11,340 children are largely dependent for food on the 3,703 holdings. Only men with large families are given land, and in this way the scheme puts an ingenious premium on population.

NOT all consular fees are abolished by the order issued by Secretary Olney, but the bulk of them are cut off, and when this order shall have taken effect the office of Consul-General at London and the consul at Liverpool will cease to be what they have been for many years — the most lucrative office of the Federal government. It has been commonly understood that the London office alone was worth $100,000 a year to its incumbent. It is also stated that the other English consulates will lose at least $100,000 by the new order. (1) No oath shall be required for the verification of invoices of merchandise on the free list or subject to specific duty only. (2) The verification by oath of invoices or merchandise, subject expressly or in effect to ad valorem duty, may be required when the consular officer to whom the invoices are presented has reasonable ground to suspect fraudulent undervaluation or other wilful misstatement therein, but should not be required in any other case (under this section any oath may be taken by a commissioner or such other officers as are permitted by law). (3) Consular officers are prohibited from receiving the whole or any part of the fee charged by a commissioner or other officer for administering oaths to invoices, from receiving anything as a gratuity or otherwise on account of the administration of such oaths, and from being in any way, either directly or indirectly, pecuniarily interested in such fees.

DR. ENRICO MORSELI declares that divorced persons are particularly liable to commit suicide or become mad, and gives these statistics in proof of his statement: In Prussia there are for every million of inhabitants 61 suicides of married women, 87 suicides of young girls, 124 suicides of widows, 348 suicides of women divorced or separated from their husbands, 286 suicides of married men, 298 suicides of bachelors, 948 suicides of widowers, and 2834 suicides of men divorced or separated from their wives. In Wurtemburg we find for every million of inhabitants 143 lunatics among married women, 224 lunatics among young girls, 338 among widows, 1540 lunatics among women divorced or separated from their husbands, 140 lunatics among married men, 236 among bachelors, 338 among widowers, and 1484 lunatics among men divorced or separated from their wives. These figures give matter for reflection for those who find the bonds of matrimony too heavy.

THE wise legislators of the Argentine Republic have been much troubled about providing a population for their large and fertile country. They have decided to provide a remedy by making marriage almost compulsory.

A law has been introduced, the first clause of which reads: "On and after the 1st day of January, 1897, every male from the age of twenty to eighty shall pay a tax till he marries, and shall pay it once in every month."

The next clause is more severe, and reads: "Young celibates of either sex who shall, without legitimate motive, reject the addresses of him or her who may aspire to her or his hand, and who continue contumaciously unmarried, shall pay the sum of five hundred piastres for the benefit of the young person, man or woman, who has been so refused."

EVERYONE'S sympathies must be with the English "Society for Checking the Abuses of Public Advertising." At one of the meetings a speaker made an excellent suggestion. It was that the sympathy of all who are connected with the training of the young be enlisted. He would begin with the very young and impress the doctrine by slightly altered nursery rhymes. The rising generation would be taught to say,

"Mary, Mary, quite contrary
How does your railroad go?
With Castor oil the view to spoil
And Liver pills all in a row."

Or again,

"Never take it, never touch it, never buy it, baby mine,
When you see it in big letters disfiguring the line."

THE question has been seriously agitated as to whether the Röntgen rays affected the skin of the person being photographed. The most striking testimony to its influence is to be found in a letter to "Nature" from the operator in charge of the X-ray demonstration at the Indian exhibition. After working with the rays for several hours a day during nearly three weeks, blisters of a dark color appeared under the skin of his hands, which afterwards became much inflamed. The skin then peeled, the tips of the fingers swelled and the nails came off. The right hand, through which the rays were constantly passing, peeled three times and four of the nails were lost.

It must be remembered that these unpleasant effects were in no way due to chemicals, but merely to the action of the rays upon the skin, producing an accentuated form of burn, and were only produced by long exposure to the rays. It now remains to be shown whether this active property can be utilized in any form of skin disease.

GOVERNOR PINGREE of Michigan has found by experience that there are a number of obsolete laws or so constructed as to be inoperative. He has accordingly offered a prize of twenty-five dollars to the student of the University of Michigan who will discover the greatest number of these laws, and has appointed a commission, consisting of a Circuit judge and a prominent lawyer, to decide the contest.

LITERARY NOTES.

THE January number of the NORTH AMERICAN REVIEW contains a most carefully and tersely written paper by Senator Henry Cabot Lodge entitled "The Meaning of the Votes." Andrew Lang contributes a delightful essay on "Genius in Children," in which the eccentricities which distinguished the boyhood of many famous men in letters and art are piquantly described. Hon. Albion W. Tourgee has a timely article on the financial problem which assails the incoming administration, entitled "The Best Currency."

THE complete novel in the January issue of LIPPINCOTT'S is "Stockings Full of Money," by Mary Kyle Dallas. It is a tale of domestic relationships and affections, but turns on the mysterious disappearance of two thousand dollars, and the various suspicions as to the thief. Henry Willard French, in "A Christmas Midnight in Mexico," narrates an adventure of the road which might have ended disastrously. The other short stories are "An Anonymous Love-letter," by Virginia Woodward Cloud, and "Robert the Devil," by Claude M. Girardeau.

THE January number of SCRIBNER'S MAGAZINE marks the beginning of its second decade with an entirely new dress of type. The first article on Great Businesses is devoted to "The Department Store," by Samuel Hopkins Adams, a skillful journalist, who devoted many months to a study of the subject. "A Bystander's Notes of a Massacre" is a conservative and evidently truthful statement of simple facts by one who was following the routine of his daily life in Constantinople. The new serial by Richard Harding Davis, "Soldiers of Fortune," opens with greater vigor than any of his previous work.

WE notice some changes of appearance in the January ARENA, the type and place of authors' names and titles of articles being exchanged, and red ink is used in the table of contents. The paper of special interest in this number is, we think, that by A. B. Choate, a lawyer, on "A Court of Medicine and Surgery."

WITH the number bearing date January 2, THE LIVING AGE begins its *two hundred and twelfth* volume. This sterling magazine loses none of its interest or value, but rather grows in excellence as its years increase — adding the experience of the past with full appreciation of the needs of the present.

THE NATIONAL MAGAZINE for January opens with the third paper on "Christ and His Times." "Hans Holbein and House Decoration in Lucerne" is treated of by R. H. E. Starr. The fiction of the number is comprised in four short stories.

THE "Progress of the World," in the REVIEW OF REVIEWS for January, 1897, gives an admirable *résumé* of the great world-events of 1896. Among the articles in this number are "How *Not* to Better Social Conditions," by Theodore Roosevelt, "Some Reputations in the Crucible of 1896," by Wm. T. Stead, and "Voice-photography," by Laura Carroll Dennis.

ONE of the first articles in the January number of THE CENTURY likely to attract the attention of the reader is a new story by Chester Bailey Fernald, author of "The Cat and the Cherub." The title is "The Lights of Sitka," and it exhibits this already versatile story-teller in an entirely new vein. The number also contains a novelette of a wholly different sort by Hamlin Garland, entitled "A Girl of Modern Tyre," and depicting life in a Western town. Gen. Horace Porter, in his "Campaigning with Grant," continues his series of anecdotes, incidents, and descriptions of the movement upon Richmond in 1864. A paper, richly illustrated by Mr. Castaigne, on "Public Spirit in Modern Athens" is contributed by Mr. D. Bikélas, the leading literary man of Greece.

OUR brilliant and compact contemporary, LIFE, has recently grown larger, and now contains several pages more reading matter than formerly. LIFE we have always regarded as being the most artistic and readable of the illustrated weeklies, but lately it has surpassed itself, and it is difficult to see now how any further improvement could be made. In the great mass of indifferent current literature it is a pleasant relief to pick up a copy of LIFE, with its genuine refinement, its charming pictures, and its clever text matter.

WHAT SHALL WE READ?

This column is devoted to brief notices of recent publications. We hope to make it a ready-reference column for those of our readers who desire to inform themselves as to the latest and best new books.

(Legal publications are noticed elsewhere.)

THE most powerful novel which has appeared for many a long day is *Quo Vadis*,[1] by the famous Polish writer Sienkiewicz. The author's portrayal of life and customs in Rome at the time of Nero is marvelously impressive, and the dramatic scenes with which the book abounds are described with a vividness and intensity which are almost unequaled in modern literature. In every respect it is a most remarkable book, and one which will make a deep and lasting impression upon the reader. Mr. Curtis has done his part as translator most admirably.

Equally interesting, but in a different way, are the Memoirs of *Mgr. de Salamon*,[2] who was an eyewitness of some of the most remarkable events in the French Revolution, and who was brought into close contact with the social life of the times. The Memoirs remained unpublished for nearly a century, but were fortunately discovered by Abbé Bridier, who edited the manuscript in 1891. The Memoirs abound in anecdotes. "Without any premeditation," says a writer in "Les Etudes," "in quite an off-hand way, just as if he were merely chatting or telling a piquant anecdote, M. de Salamon causes a numerous gallery of scamps, rascals, tremblers, dastards, ingrates, and assassins to defile before us; then, with sudden changes of the scenes, a number of admirable figures, — Marie Antoinette, Madame Elizabeth, and so many intrepid and faithful men and women of the people."

The extent and character of juvenile crime are dealt with in an interesting manner by Mr. Morrison in *Our Juvenile Offenders*.[3] How largely the physical and mental characteristics, and the social, parental and economic conditions are instrumental in forming our young criminals, the author shows by a startling array of facts, and he makes many valuable suggestions as to the best methods for reclaiming them. The work comes from one who knows whereof he speaks.

There is a peculiar fascination to both old and young in so-called "detective" stories, and no writer succeeds better in mystifying the reader to the very end than Anna Katherine Green. Her latest book, *That Affair Next Door*,[4] is absorbingly interesting.

The plot, — no, we will not spoil the reader's enjoyment by divulging it. Suffice it to say that it is a tangled skein and very skillfully unraveled.

No writer better appreciates the humor and pathos of the Irish people than Miss Barlow and her pictures of Irish life are remarkable for their truthfulness. Her latest work, *Strangers at Lisconnel*,[5] is the best that has come from her pen, and establishes her right to be considered one of the most able writers of fiction of our day.

[1] QUO VADIS. A narrative of Rome in the time of Nero. By Henry K. Sienkiewicz. Little, Brown & Co., Boston. Cloth. $2.00.

[2] MGR. DE SALAMON. Unpublished Memoirs of the Internuncio at Paris during the Revolution, 1790–1801. With Preface, Introduction and Notes by the Abbé Bridier, of the clergy of Paris. Little, Brown & Co., Boston. Cloth. $2.00.

[3] OUR JUVENILE OFFENDERS. By W. Douglas Morrison. D. Appleton & Co., New York. Cloth. $1.50.

[4] THAT AFFAIR NEXT DOOR. By Anna Katherine Green. G. P. Putnam's Sons, New York. Cloth, $1.00. Paper, 50 cts.

[5] STRANGERS AT LISCONNEL. By Jane Barlow. Dodd, Mead & Co., New York.

NEW LAW BOOKS.

THE QUESTION OF COPYRIGHT. Compiled by GEO. HAVEN PUTNAM. *Second Edition.* Revised and with Additional Material. G. P. Putnam's Sons, New York. Cloth. $1.75.

The first edition of this book "was prepared for the press very hurriedly, immediately after the passage of the Act of 1891, for the purpose of putting into shape the text of the new law, and of presenting a brief record of the international copyright movement in this country, and a sketch of the development throughout the world of the conception of literary property."

This second edition, five years later, covers the same ground more maturely and thoroughly. Although written by a layman, and not intended especially for legal use, it is an interesting book to lawyers as citizens, readers and authors, and cannot be ignored by the lawyer who has a copyright case in hand. The chapter devoted to decisions under the Act of 1891 covers only thirteen pages, but the statement and analysis of the copyright acts of the various civilized nations, the historical sketch of literary property and the evolutions of copyright, and the summary of the copyright legislation of the United States, are all as practical as they are interesting.

The author in his preface suggests as desirable modifications of our present law: *first*, the extension of the term of copyright to correspond with that of Germany, covering the life of the author and thirty years thereafter; *second*, provisions as regards works in foreign languages, allowing registration for American Copyright and a specific term — say twelve months — thereafter, for translation; *third*, a separate Copyright Bureau, with adequate appropriations, prompter registration, and more satisfactory records; *fourth*, revision of the regulations as to copyright of works of art, not now sufficiently explicit.

Mr. Putnam further suggests that "the framing of a satisfactory copyright act which shall have for its purpose an equitable and adequate protection for the producers of intellectual property, and which shall be so worded as to carry out that purpose effectively, should be entrusted to a commission of experts. Such a commission should comprise representatives of the several interests to be considered: producers of works of literature, producers of works of art, publishers of books, and publishers of art works. The commission should include at least one skilled copyright lawyer, and it may be in order to add some representative of the general public."

This suggestion is so sound and sensible that it ought to be adopted. Such careful preliminary consideration of legislation would work well in other directions also.

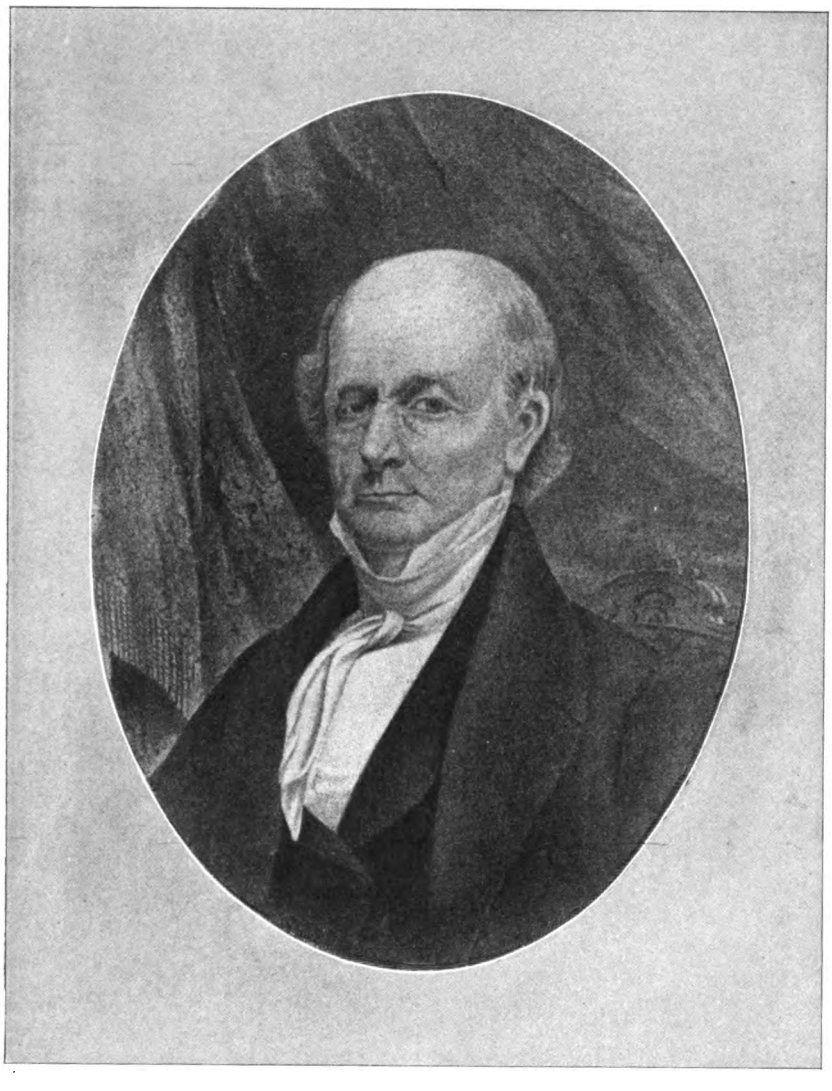
Mr. Putnam's compilation can be commended as readable and valuable to all who possess, attack, or defend literary rights.

GENERAL DIGEST of the decisions of the principal Courts in the United States, England and Canada. Includes all officially reported cases and all cases not to be officially reported which were first published between Sept. 1, 1895, and July 1, 1896. Refers to all reports, official and unofficial. Volume I. New Series. The Lawyer's Co-Operative Co., Rochester, New York, 1896. Law sheep.

This volume is the first of a new series. It is a Digest of Official Reports. All other cases unofficially reported during the period of this Digest are included in a supplement which accompanies the volume for temporary use, and they will appear in permanent form in a subsequent volume of this series when they are officially reported. It is prepared by the same persons who have made the previous volumes, and their work is thorough and exhaustive. We do not see that it leaves anything to be desired, and we heartily commend it as fully adapted to the needs of the profession.

THE AMERICAN STATE REPORTS. Volume II. Containing the cases of general value and authority decided in the Courts of the Last Resort of the several States. Selected, reported and annotated by A. C. FREEMAN. Bancroft-Whitney Co., San Francisco, 1896. Law sheep. $4.00.

Mr. Freeman manages to keep this excellent series of reports fully up to the high standard which has been the distinguishing feature of his work. His annotations are as voluminous and valuable as ever, and these volumes enable the practitioner to keep well informed on the recent and most important decisions our State Courts.



Daniel Carey

The Green Bag.

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DANIEL CADY.

BY GENERAL EDWARD FITCH BULLARD.

DANIEL Cady, who became the distinguished lawyer and jurist, was born in Caanan, Columbia County, N. Y., April 29, 1773. That county has been the birthplace of many of our eminent men, among whom may be named Martin Van Buren, Elisha Williams, William W. Van Ness, Ambrose L. Jordan, and John W. Edmonds.

The father of Daniel was an honest farmer of limited means, who was strongly opposed to the idea that his son should abandon the honorable occupation of farming to become a lawyer. His mother, however, early perceived the latent genius in her son and encouraged in every way his ambition. In the fall after he had attained the age of sixteen years, and after the season's work on the farm had been concluded, he became a teacher in a country school. At the same time he continued his studies and in this way prepared for the study of law without calling upon the limited means of his father.

He read law in 1794 with John Woodworth at Albany, who was subsequently attorney general and a justice of the Supreme Court. Admitted to the bar in 1795, Mr. Cady commenced practice at Florida, in the County of Montgomery, N. Y., from which place he soon after removed to Johnstown, then the county seat of that county. In that historical town, at the baronial residence, which was erected by Sir William Johnson, Cady was married to Margaret Livingston, on the 8th day of July, 1801. Margaret was the daughter of Col. James Livingston, who was second in command at West Point under Benedict Arnold. While Arnold was temporarily withdrawn from the Fort and was carrying on his secret negotiations with Major André, Colonel Livingston fired upon the "Vulture," which vessel had brought André up from New York and was waiting to take him back. The shot drove the vessel down the river, and left André to attempt his return by land, when he was captured and afterwards executed as a spy.

Mr. Cady first saw his future bride as she was riding through the village on a spirited horse. He so admired her courage that he sought an introduction and was married to her within three months after, when she was but sixteen years of age, and he twelve years her senior.

Mr. Cady and his wife had ten children, of whom Elizabeth was the seventh. She afterwards married Henry B. Stanton, and became famous as the great champion of "Women's rights." The mother of Gerrit Smith was a sister of Daniel Cady, and from her distinguished cousin, Elizabeth imbibed much of her sympathy for the slave, which made her a hater of oppression and a lover of freedom.

The law-office of Judge Cady was adjoining his residence, and before she was ten years of age, his daughter Elizabeth spent much time in the office with her father. She now states that the woes and wrongs from time to time related to him by his female clients in her presence, strongly impressed her, and at that early age she resolved to advocate their cause as best she

could. For that purpose she drew black lines around all laws she found which seemed to wrong her sex, and was preparing to cut them from the books when her father discovered her object. He said to her, "If you believe these laws are wrong, your remedy must be to wait until you arrive at a proper age, when you can go before the legislature and ask for their repeal."

Her father was very conservative upon this and all other questions and then little dreamed that he would live to see that advice followed. In the year 1846, when thirty-one years of age, she appeared before a committee of the legislature of New York to advocate the cause of women, and in 1848 that celebrated law awarding women many rights was enacted, mainly on account of the interest she had awakened. She prepared her address in advance, and while reading it to her father, tears filled his eyes, and he became a convert to her cause. Elizabeth Cady Stanton is now in her eighty-second year and is engaged in writing the "Woman's Bible."

When Mr. Cady entered the profession it was adorned by such men as Alexander Hamilton, James Kent, Edward Livingston, and George Clinton was then Governor. In his long practice he often appeared before Chancellor Kent, Ambrose Spencer, Samuel Nelson and Greene C. Bronson and other distinguished jurists.

During his practice he came in contact with different generations of great lawyers, among whom may be mentioned Abraham Van Vechten, John V. Henry, Marcus T. Reynolds and Samuel Stevens of Albany, Joshua A. Spencer of Utica, and B. Davis Noxon of Syracuse, Benjamin F. Butler and Thomas Addis Emmet of New York.

In that early day lawyers had to practice three years as attorneys before they could be admitted as counselors which authorized them to argue cases in banc. Mr. Cady was admitted such counselor in 1798, and he at once argued his first case, which was an ejectment suit, but it was not reported, as in that early period no reports were published.

The first reported case in which he was counsel is Jackson *v.* Sample (1 Johnson's Cases, 231). It involved a large tract of land in Montgomery County. Abraham Van Vechten was counsel for the plaintiff, and Daniel Cady and Aaron Burr represented the defendant.

The court-house in Johnstown was built by Sir William Johnson before the Revolutionary War. It is still standing and has been the scene of many a famous professional contest, among which was the trial of Solomon Southwick in 1812, on an indictment for attempting to bribe Alexander Sheldon, Speaker of the Assembly, to give his vote in favor of incorporating the Bank of America. Chief-Justice Kent presided. Thomas Addis Emmet, Attorney-General, led on behalf of the prosecution; Southwick was defended by Aaron Burr, Daniel Cady and Ebenezer Foote. The defendant was acquitted.

About 1841, a prominent lawyer from New York City, on his way to Johnstown to try an ejectment suit, called at the office of Nicholas Hill, the famous Albany lawyer. Mr. Hill inquired who was to be his opponent, and the New York attorney said his name was Daniel Cady, a country lawyer, and he predicted he would have no trouble in succeeding in the case. Mr. Hill asked him to call on his return and report the result. A few days later the city lawyer did call and reported Mr. Cady non-suited him before he knew where he stood.

Mr. Cady's reputation as an ejectment lawyer places him at the very head in that branch of jurisprudence. He was as familiar with reversions, remainders vested and contingent, and executory devises, as with the simplest questions in ordinary practice. Although elected several times to the legislature, and to Congress in 1814, he preferred his profession rather than the life of a politician.

His last appearance at the bar was at the Saratoga Circuit before Judge Willard in May, 1847. In August, 1846, he had commenced a large number of cases to recover farms in Saratoga County, in favor of the heirs of Sarah Broughton, who was a direct descendant from one of the original grantees under the patent of 1708, which covered nearly all of the land in that county. The suits were defended by different lawyers, among whom were the late John K. Porter, Judiah Ellsworth, Judge Warren, and the writer of this sketch. The counsel for the defendants feared the result of the cases, although their clients had been in possession about fifty years, for infancy and coverture had suspended the operation of the Statute of Limitations. The County of Saratoga was organized in 1792, and no conveyance was recorded in that county which could save the defense. Fortunately the writer made a search in the office of the Secretary of State at Albany, where he found an ancient deed given by the married ancestor and her husband, which cut off the plaintiff's title. As the cases had been postponed many times, in May, 1847, the writer was prepared to try the case which was brought against Elisha Howland in which he appeared for the defense. The other counsel representing the other defendants postponed their cases.

When Mr. Cady arrived at the court, for the first time he met the writer, then twenty-six years of age. The fact that so young a man appeared alone to defend so important a case upon which the title to farms worth over $100,000 depended, excited the alarm of the distinguished ejectment lawyer, and he asked, "Are you going to beat me?" I replied, "Certainly." Mr. Cady then said, "You and I can try this case as well in my room at the hotel as to appear before the court. If you are right, I do not want to be defeated in court, as this is the last case I expect to try as counsel." We at once repaired to Mr. Cady's hotel, and upon seeing the old deeds, he immediately gave up the case and told me to go up and tell Judge Willard to enter a non-suit, which was done.

Although Daniel Cady had a giant intellect, a commanding presence, with great book-learning, yet his greatest power with the people and before juries was his purity, truthfulness and integrity. That reputation so long and well established gave a magic to his every act and word. He ever hated deception of any kind, and how bitter his denunciation of fraud in court, and especially before juries. He would demolish the cause of his adversary by exclaiming to the jury, "That's a cheat," "That's a fraud." And again by saying of his own side of the case, in strong Saxon, "That is honest. This is right." These expressions were alone sufficient with many juries (who knew the high integrity of the man) to overcome the doubtful evidence of his opponents, and demolish the sophistry of his adversaries. When Mr. Cady was admitted to the bar in 1795, Robert Yates was chief justice of the Supreme Court, and he continued in practice before eleven successive chief justices, of whom Greene C. Bronson was the last, and who held the office until July 1, 1847, when the old court was superseded by the constitution of 1846, and Mr. Cady was elected a justice of the new Supreme Court. The judicial district from which he was elected was normally Democratic by about 2000 majority. Justices Paige, Willard and Hand, three of the candidates on the Democratic ticket were elected by about that majority, but Judge Cady, running on the Whig ticket, was elected by the same majority, defeating the other Democratic candidate.

With his great reputation as a lawyer and his high character, when before the people, he always drew a large vote from his political opponents. At the time of his election his age exceeded seventy-four years, but he was re-elected in 1849 by a large majority for a term of eight years. As his

hearing began to fail, he resigned December 31, 1854, then over eighty-one years of age, with intellect undimmed.

At a general term of the Supreme Court held at Sandy Hill in January, 1855, a meeting of the bench and bar was held at which highly complimentary resolutions were passed while he was yet living. He died at his residence at Johnstown, October 31, 1859, in the eighty-seventh year of his age.

In 1874, the Honorable P. G. Webster, a member of the bar of Montgomery County, procured a fine likeness of Judge Cady and sent copies to prominent members of the bar. He received many letters in return. Among such letters extracts are taken from a few as follows: —

From John K. Porter, late judge of the court of appeals: —

"My Dear Webster:

I am very much indebted to you for the photograph of Judge Cady. It is perfect, and it refreshes one to look at so speaking a likeness of the Grand Old Man. There is something monumental in his very image. He was a giant among giants."

From William A. Beach, the late eloquent advocate and distinguished lawyer: —

"My veneration for him as the noblest exemplar of the honest and profound lawyer led me to preserve his counterfeit presentment, and to allow it to hang in my office with Nelson's, Cowen's, Buell's, and Hill's. I fancy the daily sight of them recalls their professional learning and purity and leads to an ennobling emulation. The love of virtue and truth is quickened by the contemplation of such examples."

From Judge Wallace, the present presiding judge of the United States Circuit Court of Appeals: —

"Accept my sincere thanks for the photograph of Judge Cady. It will aid in perpetuating the memory of a good citizen, an able jurist and a just man, one whose sturdy virtue and vigorous intellect deservedly won for him a conspicuous place among the ablest of his contemporaries of the bench and bar, and who will be ever held in reverent regard by the members of the profession of which he was so great an ornament."

Like complimentary letters were received from Governor Dix, Roscoe Conklin, Judges Platt Potter, Ira Harris, and James, and numerous others.

The writer knew Judge Cady in his latter life, and so venerated him, that he regards it a pleasure and a duty to aid in the perpetuation of his memory, through the columns of The Green Bag.

BEYOND A REASONABLE DOUBT.

By Charles E. Grinnell.

RECENT popular discussions about the conduct of juries, in cases celebrated for the enormity of crimes requiring the most thorough examination, have increased the interest of people of all classes in the jury as an institution. One of the favorite topics for argument is what doubts are sufficiently reasonable to prevent a verdict. Nor is it surprising that there should be much difference of opinion especially among disputants neither shut up in a box together, nor constantly instructed as to the limits within which they are to think. It is pretty generally understood, however, that to judge of the evidence one should have heard all of it and the witnesses. Jurors are judges of fact, and it is worth while to consider their judicial difficulties. A judge has the advantage of a poet, for the judge is both born and made. A clear mind is a gift of nature, but that may be clarified. Experience which is reflected upon, learning which is digested, original ideas, especially if criticized by himself, and the feelings which control him, or are mastered by him, all contribute to that power of forming opinions as to what shall be done which is known as good judgment. People differ about particular opinions or decisions of this or that judge, but there is apt to be a pretty general agreement among those who know well a good judge, or his opinions, that he is fit for his task. They agree in this estimate because they are to certain degrees like him. He represents instincts which they share.

There are judges in all kinds of life. But in the courts of law the judicial character is most conspicuously developed. It is highly trained upon the bench, and there is a constant training in the jury of judges of fact. In civil cases men chosen from many occupations and different ranks of life work together, without a very great strain, to discover what upon the whole is the thing to do in view of what the preponderance of the evidence proves. But in criminal cases where they are instructed that the prosecution must prove its case beyond a reasonable doubt, the jury have added to their task one which is in some respects equal to that of the prosecuting officer. They are thereby required to criticize their own judgment, and hence to doubt what they believe to have been proved. Twelve men may be convinced by the evidence that a prisoner did the act with which he is charged, but the questions of what doubts there are, and which of such doubts are reasonable, necessarily divide them at least for a time. Each man is thus bound to ask himself, Am I in this case a good judge of fact?

Good judges whether of law or of fact, of literature, of horses, or of machinery, habitually try to come to opinions which are free from reasonable doubts. So far as possible under the circumstances in which they are, they strive to learn all things which belong to the problems before them, to appreciate those things, to get their meaning, and to subject their minds to the influence of it all, so that a state of mind may result which shall be not a mere arbitrary act of will, but an impartial opinion wrought by the facts of the case upon the disinterested intellect. A desire to learn the truth is a wish to learn something beyond a reasonable doubt. The habit of thorough study is the habit of trying to learn something beyond a reasonable doubt. The natural disposition to abide in a conviction which we have thus reached after we have got to what we call "practically" the bottom of a subject, is the habit of

determining that our discovery is beyond a reasonable doubt.

It is necessary that men should differ in their doubting, and in their estimate of what is reasonable. It is easier for twelve men to agree that certain evidence, for instance that a prisoner killed a man, is convincing, than for each of them to quiet his mind upon whether certain essential parts of the evidence have in his opinion been proved beyond a reasonable doubt. This becomes more difficult in those minds which are so unused to conscious reasoning that they confound a reasonable doubt with any doubt. And it is rendered yet harder when the feelings of responsibility for the life of a human being, and sympathy for the prisoner and perhaps for his wife and children have been appealed to by his advocate at the bar. It is almost impossible for any man to separate such a harrowing scene of responsibility from his intellectual condition. Then each man has to confess to himself that he sometimes makes mistakes. And since few persons are accustomed to be taught by such a formidable controversial method as the trial of a capital case, the very warnings that they receive from counsel at the bar tend not only to enlighten, but to frighten a modest mind. The instructions given by the court are usually too long, and few of the learned judges have the gift of expressing themselves in English of a quality that attracts the attention and helps the listener to think. Even the judges on the bench are so overwhelmed by their responsibility in capital cases that their feelings often lead them to a homiletic style. And yet a jury will sometimes surprise the community and gratify citizens of clear judgment by agreeing upon a verdict of guilty when there was a general expectation of a disagreement.

Such a result is hailed by some as a sign of good sense on the part of the jury; and by others is attacked as probably the result of too yielding a disposition in a minority. Forty-five years ago an able judge, distinguished for his power of expression as well as for his law, instructed a jury in a criminal case that "Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows," they must examine the questions submitted to them with "candor," and said "in conferring together you ought to pay proper respect to each other's opinions and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And on the other hand if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows." [1]

This charge, which seemed a bold one to lawyers, was sustained by the Supreme Court of Massachusetts, and the decision sustaining it has been relied upon by other courts and has within a few months been cited as an authority by the Supreme Court of the United States. This was in a case where a prisoner had been tried and convicted for the third time of murder, and a like charge had been given.[2] It was sustained.

The tendency of such instructions evidently is to reduce to a minimum doubts which,

[1] Charge of Hoar, J., in Commonwealth *v.* Peter Tuey, 8 Cushing's Reports (Mass.) 1 (1851).

[2] Allen *v.* United States, Supreme Court Reporter, Vol. 17, p. 154 (No. 8, 28 Dec., 1896).

before them, may seem reasonable to men puzzled by many arguments.

This appeal to numbers indicates an appreciation of the practical side of the theoretical principle that a verdict should express the individual conviction of each juror. It bids him to think not as one man but as one of twelve men. Although the words were ably framed to come within the principle of personal convictions of fact, their tendency in the minds of practical men is to lead them to substitute persuasion that the majority are most probably right for conviction that the prisoner is guilty, or that he is not guilty, or that it is impossible to believe either. Nor is this an evil under the circumstances. It counterbalances the extreme tendency to a disagreement stimulated by introspective questions concerning reasonable doubts. It helps the doubter to consider whether his doubt is big or little; and it leads him to consider how much greater, in force of mind and experience, than his own doubt of the correctness of the majority, is the majority's doubt of his own position. When he hesitates because every material thing must be proved beyond a reasonable doubt upon which a verdict is to rest, and because certain things do not seem to him to be so certainly proved, his judgment is apt to accommodate itself to the opinion of the majority by treating those details as either of less importance than others in which he agrees with the majority, or as to be accepted because consistent with those others. The view of the whole affair under consideration is usually the controlling view, as distinguished from particular uncertainties. Men are in the habit of trying to reach the meaning of situations and of acting upon them in everyday life. Thus they risk their fortunes, their lives and their chances of happiness. It would be unnatural if they were not disposed to act accordingly when serving as jurymen even when instructed strictly. And of course under such an invitation, as the charge above given contains, to be candid, the average mind would be inclined to think: since I agree with the majority that the prisoner is guilty, or not guilty, why should I think any more about my doubts whether they are reasonable or not? If I do not think about them, I shall not have them. I know what I believe, and I am certain that it is true. This result is often reached by a decision to believe or to disbelieve entirely one or another witness whose testimony, if received, furnishes points then regarded as settled, if rejected, needs no further consideration.

But there are minds of a different make to some of whom a suggestion to agree with a majority, or even to consider numbers at all while deliberating upon the evidence and its meaning appears to be absurd, to others of whom such a suggestion seems wrong. Candor or no candor, they say, the opinion of another man is irrelevant to what my opinion should be. I will listen to it, but what of it? If it seems to me to be a better explanation than mine, then I may be influenced by it, but the mere fact that it is an opinion of somebody has nothing to do with the question what I shall think. These are the minds that have to be really convinced, or that have to convince their fellows. When they do not succeed in one or the other they disagree and there is no verdict.

The charge above referred to was a supplemental one given to a jury which after an absence of several hours had not agreed and was consequently sent for by the judge, who instructed them in that manner. Then they went out again and brought in a verdict of guilty. The prisoner's counsel objected that the verdict had been thus in a manner forced by the court. Although the charge has been followed by other courts and approved by the highest authority in the country, there are lawyers who do not appreciate it. They object to any influence towards forcing or persuading the jury to agree, especially after they have been out for a considerable time. They say that it is

contrary to the sanctity of the oath of a juror.[1] They say that if it is expected by the public that there will be as a matter of course an agreement upon a verdict of guilty or not guilty, juries will be tempted to neglect their duty, and to agree without proper consideration of the grave issues presented to them. They fear that beliefs and prejudices will be substituted for honest attention to the evidence. And when they come down to the final point they deny that one juror should ever yield what he thinks is a reasonable doubt, unless he is entirely convinced that it is not reasonable.

This position reduces the chance of a verdict to the state of mind of the most vacillating man on the panel. It is true that it sustains the right of the men of the best judgment to explain away the difficulties of others after agreeing upon the main lines of some reasonable position, and it sustains the equal right of one independent juror to stand out with superior intelligence and courage perhaps against eleven mistaken men. But the intelligent and able men can be trusted to take care of themselves in such discussions. They know how to listen and to learn and to deliberate and to decide beyond a reasonable doubt. They see when doubts are unreasonable as they gradually reach certainty. If they cannot learn enough from the evidence to get some more positive stand than mere puzzling over the question whether a doubt be reasonable or not, they decide that they cannot decide. And such men should be followed, and are followed by their fellow jurymen in most cases. They know more about the case before them than their fellow jurymen, although they have all sat in the same box. When the learned judge referred to spoke of the jurors as "equally honest, equally intelligent, who have heard the same evidence, with the same attention," he really used the language of theory; he was speaking with that judicial diplomacy which is adapted to prevent the lay mind from suspecting that any citizen is being treated otherwise than as having his full rights to live up to the Declaration of Independence. Jurors are not equally intelligent, and most of them acknowledge it if their right to disagree is not encroached upon. Nor are they all equally able to make up their own minds without assistance. Yet those who are inferior in these respects may be of material assistance through other qualities to the whole jury.

The fundamental error in the objection to the practice of one or more jurors yielding to the opinions of others whom they think to be more probably correct than themselves seems to spring from the irrational assumption, that the function of every member of a jury is the same. But twelve men rarely excel each in the same direction. The man who can attend to every detail of the trial that goes on before them all is an exceptional person. The man who can remember everything which he does hear or see is even rarer. The man who with a shrewd judgment of human nature weighs every witness and gives a proper proportionate value to each person's testimony is a person of unusual experience. The man who has a special knowledge which enables him to understand evidence of matters not universally familiar, for instance, as to whether a ship's wheel can be left lashed when she is under full sail, is a help when such matters are in evidence. The man who can, by his clearness of mind, put all these things in their places in a comprehensive view of the whole case and then not merely argue logically but make the facts do their own reasoning by his life-like statement of them, is a convincing force. He too needs the natural and irrepressible doubter to whom as a rule any theory is unsatisfactory. And they all need the man of

[1] "You shall well and truly try, and true deliverance make, between our sovereign lady the queen and the prisoner at the bar whom you shall have in charge, and a true verdict give according to the evidence. So help you God." This is said to be the immemorial form of the common law oath.

decision who theorizes as little as possible and works for a unanimous vote.

But it is not the business of the jury individually or collectively to be satisfied absolutely. They are merely to be satisfied beyond a reasonable doubt. They are to reach what is called a moral certainty, a theory which makes all other theories appear to be unreasonable. That is not a mathematical certainty. Two and two make four. But this assertion is made only with regard to this present universe. There are said to be mathematicians who imagine that in some other possibly conceivable universe that might not be true. Hence, even in mathematics of a rudimentary degree, assertions of established fact are made within certain defined limits.

The moral certainty aimed at by a jury is within the confines of the evidence submitted to it in the case then at bar. Their heads may be big or little, full or empty, but they are to do as well as they can with the evidence which is actually before them, and not to imagine what might have happened. Doubts which are not raised by that evidence are not relevant and, whether reasonable or not, may be dismissed. This disposes of a good deal of the ordinary activity of the doubter who doubts for the pleasure of it. The special knowledge of the sailor is of use as information, but has to be controlled by the jury's estimate of the witnesses to such points. The man who is most attentive to details sometimes loses his head about the meaning of the whole case. The man who remembers everything which he attends to does not always attend to the chief things. The judge of human nature is not always a good reasoner, and the reasoner frequently needs to be held down to earth by every other sensible man present. Take these men working together in their several ways, and they inevitably find themselves relying upon one another. In coming to a mutual understanding as to what the chief parts of the evidence are, they disclose themselves to each other at the same time. Each man has an opportunity to feel his own weakness as well as his own strength. Therefore, when this one and that one asks himself whether his doubts are reasonable he is prepared with a more or less open mind to entertain the views of others about his own thoughts. Then, under such circumstances, when twelve men agree that they are collectively and individually convinced beyond a reasonable doubt that the prisoner is guilty, their verdict may be entirely sincere. Nor is their sincerity to be suspected merely because one or more of them expresses afterwards doubts which return upon him. In the absence of his fellow jurymen who with him had heard all the evidence, the arguments and the instructions of the court, it is to be expected that a vacillating, or forgetful, or timid person will yield to the assertions and arguments of outsiders as he yielded to those to whom it was his nature to yield when on the jury. Such mental traits are as honest in their operation as the bolder peculiarities which urge men to be more confident of the truth of their verdict after than before it is rendered.

A doubt may be roughly defined as a thought that another thought may be erroneous. In civil cases the jurymen do not have to rack their brains with such self-examination. There it is what they believe a preponderance of the evidence proves, which they must find conclusive, even if reasonable doubts remain unanswered. But in criminal cases the personal equation is distinctly recognized in each juror, and each juror is to consider the person of the prisoner surrounded by the invisible armor of reason. A foolish doubt is no more sacred in the jury-room than any foolish thought. A doubt that ignores the evidence or any part of it is of no more consequence than a dogmatic theory that is equally baseless. What is reasonable, however, has to be determined not once for all, but in each separate case. Some juries are more reasonable than others, but

each has to act according to its own lights on the evidence before it. Reasonable to some juries means a fair compromise, notwithstanding the warning of the court, and they do not trouble themselves for a more profound agreement. To others it is the rule of some dominating men who overcome by argument their fellows and hold them vanquished until the verdict. Occasionally every one sees the evidence in the same way substantially, and when all agree they can all unite in disposing of the reasonable doubts of any one or more. But always the substance of the court's proper instruction to the jury is that reasonable means according to their knowledge of life. Each man's knowledge of life differs from that of the other eleven. Hence they have to learn from each other what reasonable means. It is what is reasonable to the members of each particular jury under all the circumstances of the one case before them that is the test of doubt. When this is understood in detail and clearly, the difficulty of reaching a verdict is lessened.

The uncertain jurors learn to doubt their own doubts and to trust their own conviction which the others share. Instead of dwelling upon every possible way in which the crime could have been committed, they gradually submit to the evidence, and to what it proves. They cease applying a merely controversial method to the effort to find facts. They realize that they are not advocates, but judges of fact. They discover that the gravity of a judicial view of the evidence is deeper than an exclusively emotional impression. They feel that impartial justice is of more value than mere sympathy or revenge. And whether they relish these reflections or not, they have to acknowledge that it is their business to try to decide upon a verdict. They are performing a function of the public life of society as it tries to protect its safety, order and character. It may be hard for private citizens with the instincts of private life to be suddenly called upon to abandon the methods of conciliation and to stand up as judges of the fact that a fellow man did or did not murder a fellow man. And yet when the awfulness of such a burden disturbs their imagination, their legal duty is to calm themselves with the plain truth that they are merely considering a question of fact. The fatal consequences to the prisoner which may follow a verdict of guilty, the danger to society which may follow an acquittal, and the failure of the institution of the jury in this instance which would be caused by a disagreement, are, each, ideas which they cannot altogether dismiss from their minds, but they are each irrelevant to the question whether the prisoner is proved guilty beyond a reasonable doubt.

It has appeared in these reflections that several considerations affect a verdict, which from a theoretical point of view are irrelevant to the finding of a fact by a jury. They consider numbers as a motive for agreeing upon others' opinions. They consider the terrors of death as a motive for standing out against others' opinions. They consider time and the suffering of their private business and the needs of the public courts as motives to dispatch the matter as soon as they can decently do so. All these things unite to help each man to distinguish between his possible doubts and his reasonable doubts. They fix his attention upon essential things in evidence. When this process has worked awhile, it is not a long step to doubt the doubts which at first blush seemed to him to be reasonable. He more and more prefers what seems to him to be the most reasonable view of the evidence, he adopts that view, and he finally thinks that doubts which conflict with the most reasonable view are not reasonable. At last the conscientious juror is relieved by finding that reason itself delivers him from reasonable doubt. The more thorough his appreciation of this practical truth the better judge of fact does he become.

If the suggestions here made concerning human nature in the jury room are correct,

they furnish reasons for permitting a verdict to be given, after proper time for consultation, without a unanimous vote. Fraud has not been discussed, but its occasional existence is a strong reason for amending a system which enables one rascal to defeat eleven honest jurors.

Would that more of our citizens of high character and responsibility were willing to serve the public in the unambitious but deeply judicial work of the jury. Nothing would tend more efficiently to improve the methods of advocates at the bar. Wise jurymen uphold the liberties of their country and preserve against fools, knaves, and brutes the lives, the fortunes and the sacred honor of their countrymen.

AN INDIAN DEED.

A MR. JOSHUA T. TRAVIS, late of Brooklyn, N. Y., was a great collector of relics. Among the many curiosities which he gathered together is an old Indian deed or rather the only copy of one, filled with quaint phrasing, Indian names, distracting hieroglyphics and seals. It is written on heavy parchment paper of the regular legal cap size. It is indorsed on the back: "Copy of Indian Deed," and reads as follows: —

"This indenture witnesseth that Wo Lare Packenah, Tareckham, Sickias, Pettquesitt, Towis, Essepennick, Tethoy, Kekellapan, Teomis, Mackaioka, Methconga, Wisse Pansy, Indean Kings, Sackhomakeils, Right owners of all the lands from Quing Quingus Creek, called Duck Creek, unto Upland, called Chester Creek, all along by the west side of the Delaware River, and so between the said Creeks backward as far as a man can ride in Two DAYES with a horse, for and in consideration of the following goods, to us in hand paid, and secured to be paid by WILLIAM PENN, proprietary and Governor of the province of Pennsylvania and territories hereof, vido colot:

"Twenty Guns, twenty fathoms matchcoat, twenty fathoms stroudwaters, twenty blankets, twenty kettles, twenty pounds of powder, one hundred barrs of lead, forty tomahawks, one hundred knives, forty pairs stockings, one barrel of beer, twenty pounds of red lead, one hundred fathoms of wampham, thirty glass bottles, thirty pewter spoons, one hundred awl blades, three hundred tobacco pipes, one hundred hands of tobacco, twenty tobacco tongs, twenty steels, three hundred flints, thirty pairs scissors, thirty combs, sixty looking glasses, two hundred needles, one skiple salt, thirty pounds of sugar, four gallons of molasses, twenty tobacco boxes, one hundred Jew's Harps, twenty hoes, thirty gimlets, thirty wooden screw boxes and one hundred string beads:

"Do hereby acknowledge in behalf of ourselves as only right owners of the aforesaid tract of land to bargain and sell, and by these presents do fully and clearly and absolutely bargain and sell unto the said William Penn, his heirs and assigns forever, the aforesaid tract of land, with all the woods, rivers, creeks and appurts unto the same belonging, to be held, used, possessed and enjoyed by the said William Penn, his heirs and assignees forever, without any molestation or hindrance from or by us, or any of us, or from or by any other Indeans whatsoever that shall or may claim any right, title or interest in or unto the said tract of land, or any part thereof.

"In witness whereof we have hereunto set our hands and seals at New Castle, this second day of the eighth month, 1685."

Here follows a facsimile of the seals affixed by the Indians. There are thirteen of them, and remind one of a child's first exercise in learning to make pothooks. The original deed was under these thirteen seals,

affixed by labels appended with each seal. This follows: —

"Signed, sealed and delivered unto Captain Thomas Holme, Surveyor in General of the Province of Pennsylvania, to and for the use of William Penn, Esq., proprietary and governor of the aforesaid province and territories thereunto belonging, in the presence of us:

"Peter Abricks, Lasse Coe, Phillip Th. Lehumann, James Atkinson, Christopher Gore."

Following this are the marks of John Walker, Edward Love, John Monday and the Indian Chiefs Tamma Quaran, Owoghan, Owogherds, Patuska and Cashute.

The following affidavits accompany the deed: —

"John Durborow, of the City of Philadelphia, yeoman, son-in-law of James Atkinson, late of the same city, merchant, deceased, the former being one of the people called Quakers, upon his solemn affirmation, according to law, doth depose and declare that, having viewed the writing of the said James Atkinson, for that James Atkinson therein indorsed as a witness to the signing, sealing and delivery thereof by the several Indeans within named is the handwriting of the said James Atkinson, for that the same appeareth exactly to agree with other of his handwriting.

Signed JOHN DURBOROW. (Seal.)

"Affirmed at Philadelphia, the twenty-first day of April, A. D. 1735. Witness my hand and seal.

EDWARD ROBERTS. (Seal.)

"Hermanns Abricks, of the city of Philadelphia, gentleman, grandson of Peter Abricks, late of the county of New Castle, on the Delaware, gentleman, deceased, maketh oath on the Holy Evangelist of Almighty God that he, having viewed this writing, indented, doth verily believe the above Peter Abricks thereon indorsed as a witness to the signing and sealing and delivering thereof by the several Indeans within named is the handwriting of him, the said Peter Abricks, for that the same appeareth exactly to agree with other of his handwriting in this deponent's custody.

"Witness my hand and seal.

SAMUEL HASSELL. (Seal.)

"Recorded the 21st day of April, 1735."

It will be seen that this deed is drawn up in fairly good English, and this is explained in the story of how Mr. Travis came into possession of the document.

He was as well known in Philadelphia as in Brooklyn, and on one of his visits several years ago he met John G. Hollick, one of the associates of Recorder of Deeds Thomas Green. Mr. Hollick exhibited the original, and on Mr. Travis's suggestion a copy of the deed was made for him, and most of the unintelligible matter has been eliminated.

PRESIDENTIAL LAWYERS.

THE instalment during this month of the twenty-fourth incumbent of the Federal executive chair revives a boast of the American bar that it is the nursery of presidents, for, out of the twenty-three who have held that office, sixteen were bred to the legal profession, and now comes the seventeenth in William McKinley. Six of the exceptions were warriors who had obtained popular credentials — Washington, Monroe, Jackson, Harrison the first, Taylor and Grant. Each of these, however, upon election to a first term, succeeded against an opponent who was a lawyer. Other exceptions were Andrew Johnson and John Tyler, who each entered the White House through the *ex officio* gate of the vice-presidency. The accession of those five military presidents serves to emphasize the classic maxim "*inter arma silent leges.*"

While lawyers may boast the aforementioned pre-eminence, it is probable that no

laymen will quarrel with the preponderance alluded to, because they must recognize that professionals who have been expert students of constitutional and international jurisprudence, which intimately concerns presidential duties, should be best selected for those executive trusts that the Federal Constitution devolves upon the head of the Government. Indeed, each of the military presidents seemed to have recognized that reasoning when it is seen that in selecting their attorney-generals, Washington chose successively those eminent counselors of their generation, Edmund Randolph and Charles Lee, of Virginia, and William Bradford, namesake of a great Pilgrim Father; Jackson, the astute Butler of New York, who had been its illustrious codifier of statutes; Harrison the first, that almost born jurist, John J. Crittenden, who also served two other lawyer-presidents; Taylor, that pride of the Baltimore bar, Reverdy Johnson; and Grant, five attorney-generals who had each been eminent in their local spheres of professional practice, and among them Ebenezer R. Hoar and Edwards Pierrepont, who had graduated in judicial positions. Even President Johnson, the tailor, saw the necessary benefit of having as his legal adviser the brilliant William M. Evarts. And it is greatly to American governmental renown that no president ever selected as his attorney-general an eminent politician of his own party, unless he was also an eminent lawyer.

Among presidential lawyers, Jefferson, Lincoln, McKinley, Garfield, Pierce, Hayes, Arthur, Van Buren, Harrison the second, and Cleveland might be selected as the best known in professional practice and perhaps in the foregoing precedence; while Madison, Monroe, Adams the second, Fillmore, Polk and Buchanan could lay claim to precedence as much of the political as of the legal profession. President Van Buren had been attorney-general of his native State, and Pierce had become so eminent a lawyer as to have been tendered, by President Polk, the post of his attorney-general, which, for private reasons, he was compelled to decline. The legal training and legal experience of our new president have been themes of the GREEN BAG in its issue of last November, and need not again be referred to. When governor of Ohio, he was to a large extent his own legal adviser as to official duties; and doubtless, as Cleveland has largely been, President McKinley will again, in the discharge of executive duties, become to an extent his own legal counselor.

General Garfield, whose legal studies were interrupted by the Civil War, had established pre-eminent legal skill by his argument in the Indiana case before the Supreme Court; which upon his admitted logic decided that court-martials could supersede the jurisdiction of a civil court over a civilian offender only when military power prevailed at the locality of offense and trial; a most important decision for this or any other country. His brief as on file in the Congressional library establishes his legal fame, although unhappily the weapon of an assassin prevented a concurrent acquisition of presidential fame.

President John Adams, a decade before the battle at Lexington, had won legal fame while counsel for the then "town" of Boston, in an argument before the Tory governor and his council, in behalf of a memorial that they should suspend operation of the Stamp Act. He it was who in that legal effort coined the phrase "taxation without representation," in contending that the Act was *ipso facto* null and void, because it was a measure of taxation wherein the people taxed had no share. His legal triumph was accentuated by his views being reiterated afterwards on the floor of the House of Commons with the result that the Stamp Act soon became repealed. A few years later, young Adams added to his legal reputation by his acquittal of his clients, British Captain Preston and members of his military company, charged with participa-

tion in what history terms the Boston Massacre. Thereafter he became one of the chief legal advisers of the patriot party.

Jefferson, during the very first year of his colonial practice at the Virginia bar, had sixty-eight clients; and during the next year took legal supervision of an hundred cases, as his early register showed. He found time also to edit Henning's Statutes of Virginia in collected form. One of his sayings, when yet a young attorney, was that "the study of Coke tended to make Whigs of students, but of Blackstone, Tories." His dispute of Sir Mathew Hale's contention that Christianity was part of the common law gave rise to the assertion that Jefferson was an atheist. But Jefferson, inheriting a fine patrimony from his father, and sharing the fortune of his wife, had no need to engage in hearty practice of his profession, from which indeed patriotism detached him. But historically his legal attainments are shown by his masterful indictment of George the Third in the Declaration of Independence, and by his after voice and writings.

Madison imbued himself with legal principles and was admitted to the bar; but he cannot be said to have ever practiced at it. Yet at the bar of the constitutional convention he showed how great a lawyer he was.

If the Revolutionary War had not interrupted the studies of James Monroe at Williams and Mary College and called him into the army while not yet of age, he would undoubtedly have also embraced the legal profession; yet as author of the world-renowned Monroe doctrine his fame became more than juridical.

Although the pursuits of diplomacy prevented John Quincy Adams from embracing the legal profession until he was forty-three years of age, and although immersion in politics prevented his shining at the bar as equally as he shone in the forum as the "Old Man Eloquent," there cannot be a question that his knowledge of all the tenets of jurisprudence was philosophically profound and entitles him to a place on the roll of presidential lawyers.

President Jackson interrupted the legal sequence held by those predecessors; but the election of Van Buren resumed the succession. It is difficult to decide from the accounts of his earlier career given by his contemporaries and biographers whether his career excelled most as the politician or the lawyer. But he was primarily the lawyer, adopting as one preceptor at his birthplace the clever lawyer, Francis Sylvester, and another at New York City in William P. Van Ness, a bar leader with Burr, Kent, Emmet and Sampson. Van Buren's legal eminence was emphasized by his selection as attorney-general of his State; and Johnson's reports show his legal assiduity and ability both in private and official practice. His power as a politician was also emphasized by his removal as attorney-general for political reasons when the opposition obtained power; and by the offer of reinstatement when his own partisans resumed control, which he declined in order to continue legal partnership with the New York Benjamin F. Butler, who became the first attorney-general of the Van Buren administration.

The legal succession of presidents was again interrupted by the accessions of General Harrison and Tyler, but resumed in their successor, President Polk, who had in Tennessee studied law with Felix Grundy, who was President Jackson's attorney-general. Polk spent two decades in the successful practice of his profession at several Western circuits, and was esteemed for his argumentative qualities of mind and of an address that avoided the ornate.

Again came, so far as the White House was concerned, an interlude of *inter arma* by the election of General Taylor, who, dying in the second year of his term, restored, in his *ex officio* successor Fillmore, the old influence of bar in the executive chamber, an influence which survived during four succeeding presidential terms. President Fill-

more, before becoming president, had maintained, as a senior partner, for seventeen years, in Buffalo, the important law firm of Fillmore, Hall & Haven, which retained during all that time a large share in the litigation of Western and Midland New York. In that firm Fillmore was the principal advocate because of his magnetism and fluency. When he retired from the White House only a second marriage with a widow, and her desire for European travel, prevented his desired return to his profession, of which he was manifestly fond.

To Fillmore succeeded lawyer Franklin Pierce — a graduate from the offices of that famous jurist, Levi Woodbury, and Judge Edmund Parker, both of the New Hampshire bar. Pierce also took a legal degree from the Northampton Law School. His legal eminence may be estimated from the fact that President Polk offered him the post of attorney-general in his cabinet, which he declined in order to continue his lucrative practice at Concord. His first jury case resulted in a dismal failure. But it no more disheartened him than the well-known failure of his first speech in Parliament disheartened Disraeli. Young Pierce remarked on that unfortunate debut to a sarcastic sympathizer: "I will try 999 cases, if clients to that number bring me briefs; but even if I should in managing them do no better than I have done to-day, I should take the thousandth and try again; for the time will come when this court-house shall ring with praises of my success."

President Buchanan practiced his profession at Lancaster, in his native State, for many years of his youth; and the name "J. Buchanan" modestly appears several times in the volumes of Pennsylvania Reports between the years 1812 and 1820, as attorney of record in cases therein decided. But in the latter year he entered politics as a Congressman, and the rest of his career has become historical. His knowledge of international law, however, was serviceable to his fame when twice in our diplomatic service in Europe, or as Secretary of State under President Polk.

But the legal experience of Buchanan's successor — the incomparable and beloved Lincoln — is in contemplation the most interesting of all the presidential lawyers. His posterity never wearies of hearing or reading about his perusal of borrowed law-books, of nights by the light of a blazing wood-fire, after an exhausting day of physical labor; nor of his travels upon Illinois circuits, through wastes and forests, upon horseback, carrying his law-papers in saddle-bags; nor of his involuntarily obtaining clients literally by the wayside as they became impressed with his gathered knowledge of human nature, and his quaint, persuasive treatment of human contentions, and came to prefer his homely legal services to those of the better educated and more refined of his circuit associates; nor of his partnership with his friend Stuart, and with the wise Judge Stephen T. Logan, during four more years, and during subsequent two decades with Herndon, who has left racy and delightful reminiscences of Lincoln, and described how he would throw brain, soul, heart, physical vigor and keen sympathies into participation with clientage that was founded in right and justice; and how he would decline even large fees when asked to ally his professional services with possible fraud or suspected injustice; and how he declined a lucrative offer of partnership with an eminent Chicago lawyer because he feared contact with the artificial society and constrained methods of a large city. "From 1849 to 1854, I practiced law assiduously, and then I took up Free Soil as my best client," has said Lincoln in a private letter. His more cultured contemporary on circuit, David Davis — whom Lincoln well remembered by placing him on the bench of the Federal Supreme Court — gave this tribute in a biographical sketch of Lincoln: "He was great both at nisi prius, and before an appellate tribunal. His mind

worked logically and directly. In addresses, he did not indulge in extraneous discussion or generalities; and platitudes never had charms for him." Indeed, the readers in this generation of Lincoln's pathetic plea for union to be found in his first inaugural, or of his great argument for fraternal pacification contained in his Gettysburg oration, can well appreciate what an effective jury lawyer or arguer Abraham Lincoln must have been at the bar in a former generation. Judge Drummond, in summing up that bar career, observed: "Lincoln could hardly be called very learned in his profession, but he never tried a cause without fully understanding the whole law applicable to it. I have no hesitation in saying he was one of the ablest lawyers I ever knew." May it not be safe and just, therefore, to put on record that in the list of names of presidential lawyers, that of Abraham Lincoln, like Leigh Hunt's Abou Ben Adhem, "led all the rest;" and as one to be likewise "written as one who loved his fellow men."

Lincoln as a lawyer was appropriately followed in the presidential succession by that notable sextette of bar veterans, Hayes, Garfield, Arthur, Harrison, Cleveland and McKinley, all of whom the lawyers of this generation best know by their own experience or observation. Was it not on the eve of his nomination that General Garfield won the great legal renown, by his association with that American Justinian, David Dudley Field, in the Supreme Court case already adverted to?

Before Arthur became the great political leader, which all parties acknowledge that he was, he had won legal fame in New York city as counsel for the poor Lemmon slaves, and in obtaining, by suit at law, civil rights for the oppressed colored race long before the latter read the thirteenth and fifteenth constitutional amendments, and also as valuable counsel to a municipal taxation system. The great law-firm which he founded and supervised, and to which he gave prestige, still exists in that city, with memorable traditions of his learning and skill.

Grover Cleveland also founded two law-firms memorable to the Buffalo bar; and as a young prosecutor of criminal pleas by public appointment he attained a legal celebrity which beckoned him on to his many political preferments of sheriff, mayor, governor and president. Moreover, he passed the recess between his two terms as the head, in New York city, of another hard-working, painstaking and successful law-firm.

President Harrison's laurels — won at the bar of Indiana and in the Supreme Court at Washington previously to his presidential career — have been again made greener and freshened by a new legal career during his recent retirement. And thus the catalogue of presidential lawyers ends, fit to be bound in embossed leather and labelled with golden letters.

It is impossible for the lawyer re-perusing the inaugural addresses pronounced by each of those just enumerated not to detect, while reading those, the training of the bar. During his attendance at the Boston bar, John Adams had learned the concentration of language that has always been its marked characteristic, so that his inaugural address contains only an hundred and forty — but pregnant — words. But it may be said that, in his ears and in those of the concourse whom he addressed, there still lingered echoes of the matchless Washington inaugural.

Jefferson's inaugural is throughout pitched in that personally deprecatory key that "bar with his jury droop and eyeglass" — quoting herein Dickens — is, after the advice of rhetorician Seneca, in the traditional habit of using before a jury. In the main, Jefferson's inaugural reads as if a summing up of popular rights in a republic upon all the proofs of the two previous administrations. In his second inaugural he employed the adroit art of the advocate when he parried the assertion of opponents that he was atheistical.

Madison's inaugural was substantially a

plea to his jury of constituents against the duplicities of French witnesses and British aggressions upon his Brother Jonathan clients.

John Quincy Adams' inaugural instanced the ambitious lawyer addressing his jury in ornate phrases with oratorical effort to the exclusion of convincing argument. That of General Jackson was pitched in the aggressive note of a young lawyer opening his case and too manifestly exposing the weak points of his contention.

When Martin Van Buren was inaugurated, declaring, "I follow in the footsteps of my illustrious predecessor," his address was of the cautious lawyer who opens his case without promises and leaves his jurymen free to form their own conclusions upon his evidence as it progresses.

Polk's inaugural was an exceedingly lawyer-like summing up of the pending international contentions of England regarding the Northeastern boundary questions and of the suit of Texas versus Mexico.

The inaugural address of Pierce sounded, and reads now, like the apologetic opening of a lawyer who has been assigned by the court and who is not fully retained by a client; or one who feels unprepared because untimely forced upon trial. A method which was, perhaps, in the case of Pierce, natural, because the presidential honor had been fairly thrust upon him *ab initio*.

Buchanan's address to his jury of constituents smacked of the adroitness of some veteran Q. C. who appreciated how puzzling were the questions of the pending cases, and that it was more prudent to deal with glittering generalities. In truth his treatment of formidable national questions then pending before his forum was a masterful *petitio principii* borrowed from shrewd bar methods.

In marked contrast the two inaugural addresses of Lincoln are to be read. Fearless as an Erskine, a Brougham, or a Rufus Choate, he dissected pending contentions; and having the cause of the Union for a client, vivisected with the scalpel of patriotic indignation the festering body of secession. In American literature that inaugural of the saviour of the Union will ever hold place beside that of the creator of the Union, George Washington.

Each inaugural address of the sextette of presidential lawyers before referred to takes its keynote from the most approved bar methods; and when contrasted with the inaugural addresses of all the laymen presidents (excepting that of the first incumbent) exhibits those methods in yet stronger approving light.

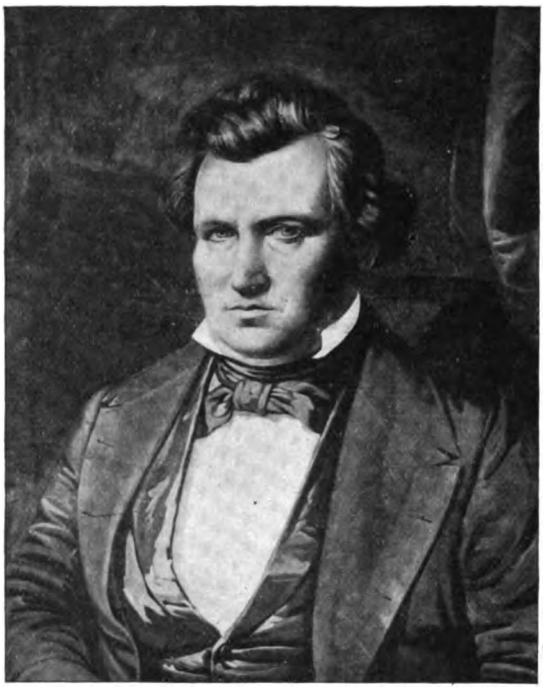
Every barrister of the London Inns who takes oath of office thinks, perhaps, that the prize of a Lord Chancellorship lies in his future grasp. Similarly, every new Bachelor of the Law admitted to any court of the Union as practitioner may well, under our array of presidential lawyers, feel that the prize of successorship to Washington and Lincoln may become some day equally within his own grasp.

THE SUPREME COURT OF WISCONSIN.

By Edwin E. Bryant.

III. THE SEPARATE SUPREME COURT.

THE people of the State soon found that a Separate Supreme Court was desirable; and the legislature in 1852, as soon as possible under the Constitution, provided by law for a special election to be held in September of that year to elect a chief justice and two associate justices. The terms of office were to begin the first day of June, 1853, to constitute a supreme court. The judges first elected were to hold, the chief justice till May 31, 1857, the two associates were to draw lots for a long term ending May 31, 1859, and a short term expiring May 31, 1855. Under this act, Edward V. Whiton — whose biography has already been given — was elected chief justice, and Abram D. Smith and Samuel Crawford, associate justices. A sketch of each of these gentlemen — except Whiton — will here follow: —



ABRAM D. SMITH.

Abram Daniel Smith was born in Lowville, Lewis County, New York. But little is known of his early youth. The following anecdote, told of him as a tradition in the region whence he came, found its way into the "New York Sun" of July 9, 1873, and is here repeated for what it is worth. While a law student at Sackett's Harbor, he was indignant, so the story goes, because no provision was made to observe the national holiday; and he resolved to celebrate on his own hook. Supplying himself with proper outfit — literary, patriotic, and substantial — he took a row-boat, on the evening before the Fourth, and paddled alone out to an uninhabited island in the bay, and camped for the night. At sunrise next day he fired the national salute. At ten o'clock he formed himself into a procession and moved to a grove, where he read the Declaration of Independence, and then delivered a carefully prepared oration all by himself. Then he marched back to his boat and dined, reading and drinking the conventional toasts, responding to one, singing a song to another, cheering a third, and drinking that to Washington standing and in silence.

He came to Wisconsin in 1842 and began to practice. He was able, earnest, eloquent, and successful. In 1848 he was candidate for circuit judge in the second judicial circuit, and came near election. The following incident explains his defeat. Before

coming to Milwaukee, and in his youth, he was justice of the peace in Cleveland, Ohio. During a "scare" in regard to the small-pox, a person afflicted with that disease had been placed in an isolated building, and there left alone, no one being allowed to visit him. A humane and high-spirited physician, in violation of municipal regulations, broke into the building and ministered to the sick man. For this humane but lawless act he was brought before Justice Smith, who imposed a heavy fine. In the office of this doctor was a young Irish student, William H. Fox, who afterwards became an excellent and influential physician in Dane County, Wisconsin. When Mr. Smith became a candidate for circuit judge, Dr. Fox took the field against him, having stored away a grudge for this severity to the Good Samaritan, his medical teacher. By his activity in Dane County the scales were turned, and Smith was defeated by a few votes, and Dr. Fox declared "the account settled." In 1852, when the Separate Supreme Court was created, Smith was easily elected.

As a judge he was fearless and decisive in his opinions. He wrote fluently and gracefully, in a luminous, attractive style. He came into great prominence in his judicial career by his bold action and able opinion in the *habeas corpus* case growing out of the "Glover Rescue," in 1854. Sherman M. Booth had been arrested, and was in custody of the United States marshal, for aiding in the escape of a fugitive slave. Application was made to Justice Smith, then in Milwaukee in vacation, for a writ of *habeas corpus*. It was granted, and, after hearing, Booth was discharged, Justice Smith, in a well-written and forcible opinion, taking the ground that the fugitive-slave law was void; that Congress had no power to legislate on the subject, and that the warrant under which Booth was arrested was issued without jurisdiction. The decision caused a great sensation in legal and political circles. It was heartily applauded by Charles Sumner. "He has placed the lovers of Constitutional freedom under renewed obligation." His "opinion showed the true metal." "It will live." "He has been making history." Thus wrote the great champion of the slave; and it is said he went a long distance out of his way to visit and congratulate the Judge. The antislavery press of the North was loud in congratulation. The court *in banc* sustained Smith's action, which came before it on *certiorari*. Again, after Booth and Rycraft had been convicted before the District Court of the United States for aiding in the rescue, they were discharged by the Supreme Court of the State on *habeas corpus;* and, in these cases, Justice Smith again delivered exhaustive opinions on the subject, taking the views that began in the Kentucky Resolutions of 1798, and had their run up to the time of the Rebellion.

But, strong as Judge Smith's following seemed to be in 1854, his radical state-rights views cost him his seat upon the bench. When his term was about to expire, in 1859, the Democracy, contrary to usage, called a convention and nominated William Pitt Lynde, an able, conservative lawyer, who did not entertain Judge Smith's extreme opinions. Judge Smith much desired re-election. But a very considerable element in the Republican party dissented from the "state-rights" stand the court had taken; and this led a caucus of the Republican members of the Legislature and many leading men of the party to join in the call on Byron Paine, the able young lawyer who had argued the cases before Judge Smith, and in the courts, State and Federal; and Judge Smith did not become a candidate.

Upon the close of his term he resumed practice at the bar in Milwaukee. His health being impaired, he was appointed by the authorities at Washington to some official position in the revenue service in South Carolina during the war, and entered upon that field of duty. His arduous labors there

told upon his strength, and in 1865 he sailed for New York. On the day after taking passage on the steamer he was found to be in an exhausted and sinking condition. He died on the 3d of June, just after the vessel had arrived in New York, and was buried at his home in Milwaukee.

His memory is kept green in Wisconsin, though his peculiar political and constitutional views are no longer entertained. He lived to see them become the settled law of the State. He was the leading spirit that originated and taught them. But all agree that he was a man of high intellectual powers, strong native ability and liberal culture, a prominent figure on the bench and at the bar. If he went too far and trod on dangerous ground it was because of great love for the principles of civil liberty, and because he would secure the rights of the downtrodden. His decisions, however much we may dissent from his ultimate conclusion as to the scope of the powers of the Federal Supreme Court, are an interesting and able discussion of great principles, and a part of the great controversy. Matt. H. Carpenter, who differed widely from Smith's opinions on this great question, said they "were honestly entertained, and with great ability promulgated and enforced." Of the Judge's patience, kindheartedness and courtesy, particularly to the younger members of the bar, all his contemporaries bear witness.

SAMUEL CRAWFORD.

SAMUEL CRAWFORD was born in Ballibay, County Monahan, Ireland, April 11, 1820. He was the fourth son of John Crawford, a wholesale linen merchant, and was given an excellent academic education. He came to the United States in 1820 and studied law at Warwick, Orange County, New York. He came to Galena in 1841, and there continued the study of law with J. M. Douglass, then a prominent lawyer. He was admitted to the bar in 1844, and began practice in a smart town of mushroom growth in the mines, which bore the literal name of New Diggings. Here were then a number of able lawyers, many of whom afterwards became famous in the State. Among them was James Nagle, a witty Irishman, of whose droll sayings many traditions remain. Chief-Justice Ryan, in a most inimitable way, used to tell one that ran as follows: A case was on trial in the Galena district, over the line in Illinois, before a quarter-sessions court composed of three justices of the peace, the senior or presiding justice being also an Hibernian. Nagle arose at a stage in the trial and said, "And now may it plaze yer honors, we'd like to swear one of your honors as a witness in this case."

"Which one of our honors, Mr. Lavin?" asked the presiding justice.

"Yer honor's own honor," replied the lawyer.

"And what would ye ax me to be swear-

ing to in this case?" asked the magistrate a little surprised.

"The truth, your honor; it is not to be consaved that we'd ask ye to be swearing to a lie."

"Mr. Nagle, ye are thriflin' with the dagnity of the coort, sir," said the offended magistrate.

"I'm humbly cravin' pardon, thin," replied the lawyer in mock humility; "I was unaware that the coort was so damnably imprignated with a sinse of its dagnity."

Young Crawford, a man of most exemplary habits for that region of wild life, where was plenty of money and little of civilization, soon became prominent. He distinguished himself in several important trials, and his fame spread throughout the mining region. He had the bearing of a high-spirited, cultured gentleman, and a manner which, while somewhat imperious and masterful, was fascinating, and he soon became popular. He was an able politician, and a graceful and eloquent speaker. He had no little dramatic power, and, in his earlier days, would bear a part in a play with great adaptation. The theatrical troupes in those days thronged to New Diggings, sure of good houses and appreciative audiences. Crawford sometimes took a part, and when Jo. Jefferson was there in his youth, the young lawyer gave him advice as to his acting and how to reform it.

After a few months, he was invited by Francis J. Dunn, then the lawyer of largest practice in that section of the State, to join him in partnership at Mineral Point. This firm built up a large business, and Crawford's fame extended, no less as a lawyer than as a prominent advocate of the principles of Democracy.

Upon the re-organization of the Supreme Court in 1852, he was selected as the candidate to represent the western portion of the State, and was elected, the vote in his own section being especially large. The law creating the court provided that the terms should expire at different times, and fixed one term for two, one for four, and one for six years. Judge Crawford drew by lot the short term. He sat upon the court in the trial of the fugitive-slave-law cases. In those he dissented on some points from the views of his associates. He believed that Congress had the power to legislate upon the subject of fugitives from justice; that the fugitive-slave law was an exercise of that power; that the question had been virtually settled by the Supreme Court of the United States, and was *stare decisis*, and he filed opinions setting forth his views.

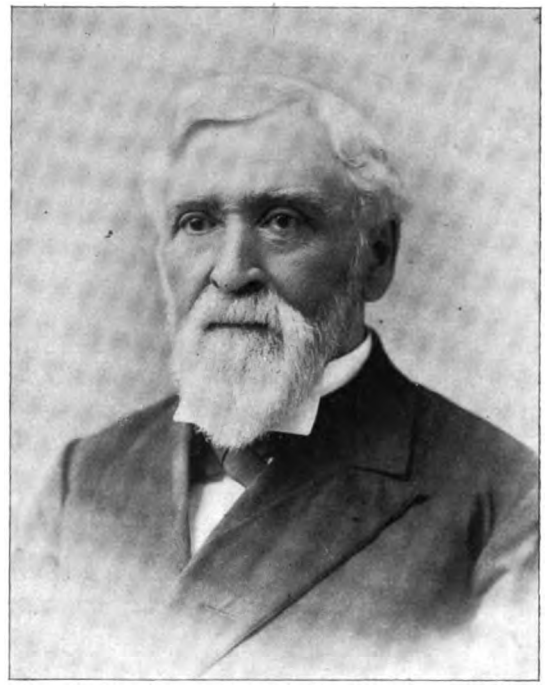
These opinions and his views on this question cost him his place. In 1855, when a judicial election was to be held to choose his successor, the rising tide of anti-fugitive-slave-law feeling could brook no such views as he had advanced. Orsamus Cole was selected by the Republicans to run against him. Crawford's defeat was a surprise and a disappointment to him. He did not accurately measure the force and earnestness of the anti-slavery feeling, and erroneously attributed his defeat to the Know-Nothing movement then having its short-lived run in the United States. He felt deeply outraged that he should be selected as "one of its earliest victims," and wrote that he should soon, "with their envenomed arrows sticking in his sides, show himself among the public who had proscribed him."

On the expiration of his term, he left the bench and resumed practice at Mineral Point. He then went to Madison, in 1858, hoping to build up a practice in the Supreme Court; but political ambition, personal friendship and the attraction of a clientage soon recalled him to Mineral Point, his own strong seat.

In 1856, he was the Democratic candidate for Congress, in the Western or third district, but was defeated by Cadwallader C. Washburn, one of the distinguished Washburn family. In 1859, he was the candidate of the same party for attorney-general, but the young Republican party was too strong

in Wisconsin. He continued in practice, and while engaged in the trial of a cause, in 1861, he was taken suddenly ill and died within a week, on the 28th of February, 1861.

He was an able and gifted man, highly esteemed in his time, evincing always the high spirit, courtesy, dignity and hospitality of the higher classes of his nationality. His written opinions show a cultivated and trained mind. He was absent from his family while sitting on the bench, but he wrote daily to his wife the most charming of letters, showing the homesickness of a heart that loved best of all to be with the wife and children. In the evening, or during trial, or on the bench, or while waiting for a train, he snatched a moment to write to his wife, sending "a thousand kisses to be divided *pro rata*," or on her birthday penning sweet love-verses to his mate. He hopes she will have success in making the preserves, and wishes he were there so that he could "stick in a finger and go off licking it," and tells how he has attended parties and danced with other ladies "only as her proxy." He is fidgety and anxious if he does not get his letter from home every day, and quite in the dumps when any ailment of a child is reported. With small allowance for the convivial frailties that were too common in his time and in that region, he was an ornament to the bench and bar during his period of activity, and his untimely death was mourned throughout the State.



ORSAMUS COLE.

ORSAMUS COLE was born in Cazenovia, Madison County, New York, August 13, 1819. His ancestors were English of early immigration before the French war, and settled in Rhode Island. The great-grandfather was a Tory and he disinherited his son, the grandfather of Judge Cole, because he took sides with the Colonies and served in the Colonial army. The grandfather on the maternal side, Samuel Salisbury, held a commission in the Continental army. He fought at Bennington, and was with Washington in the terrible experiences in New Jersey during the winter of 1777. He was at the surrender of Burgoyne and Cornwallis, and was honorably discharged at the close of the war.

The subject of this sketch was "brought up on a farm." He attended common schools at Washingtonville, Oswego County, New York, fitted for college at the Clinton County Liberal Institute, New York, and at the Black River Academy in Jefferson County. He graduated from Union College in 1843. He then studied law with Curtis & Boomer, at Belleville, Jefferson County, and was admitted to the bar in 1845, coming the same year to Chicago. Not finding that a promising place, he came in the autumn of 1845 to Potosi, a rough mining town in Southwest Wisconsin, on the Mississippi, a few miles above Dubuque, and in the heart of the lead region. The town was better known to the miners as "Snake Hollow," as

lead was first found in a ravine of that name. Here he entered upon practice and was successful. A modest, unassuming manner, little in keeping with the rudeness and boisterousness of those times in that section, did not obscure his talents, and he became a popular and prominent lawyer. The miners and settlers soon found that he was careful, painstaking, conscientious, and always sober, and that implicit confidence could be placed in him, and they took his advancement in their own hands, and conferred honors upon him of their own motion without even stopping to consult him as to whether he would be a candidate or not.

In 1847, he was elected a delegate from Grant County to the second constitutional convention. He was one of the youngest members of the body, and one of the most modest of men. But he soon took rank among the ablest, clearest debaters. Cautious and conservative, careful as to details, it was admitted on all hands that he made a most valuable member. It is said by those who attended the debates and reported the proceedings, that "he had taken prominent part in the shaping of all the more important articles of the constitution."

In 1848, the Whig convention, held in the western half of the State, put him in nomination as candidate for Congress. He was not a seeker after the nomination, was not present, and at first was quite incredulous in believing the report of his nomination. He accepted and made a vigorous canvass, speaking for "Old Zach Taylor" and Whig principles. The modest bearing, yet able arguments, of the young lawyer made him friends, and he was elected. In the exciting sessions of the 31st Congress he upheld the principles of the anti-slavery wing of the Whig party and voted against the fugitive-slave law. Not deeming it exactly proper for a new member, and having little sympathy with the unending speech-making of that day, he took little part in the debates, but was active and zealous in the wing then opposing the extreme demands of the South. He voted for the abolition of slavery in the District of Columbia and for the admission of California; also, against the fugitive-slave law, because it was inhuman, against the organization of the territories without the Wilmot Proviso, and against paying ten millions to Texas.

On retiring from Congress in 1851, Mr. Cole again entered vigorously upon the practice of law in Potosi, then a stirring town and aspiring to rivalry with Dubuque. He was again put in nomination in 1853, without his knowledge, this time by the consolidated Whig and Free-Soil party — which organized as the Republican party the following year — as its candidate for attorney-general, but with the entire ticket he met defeat. In the winter of 1855, as Judge Crawford's term was about to expire, the anti-slavery element was opposed to his re-election, as his dissent from the decisions in the fugitive-slave-law cases had gone against the grain of the zealous Republicans of the State. A Republican caucus of the members of the legislature was held to consider the question; and it was decided to put up young Cole of Grant as a candidate for associate justice of the Supreme Court. He was at the time at home, several days' journey overland, and had no knowledge of what was going on at the State capital, and it had never entered his thoughts that he was to become one of the judges of the highest court of the State. Judge Crawford was a strong candidate, very popular in that portion of the State, and, in his modesty, Mr. Cole insisted that he was not able to fill the high office. Against his own protest his friends almost compelled him to make the canvass, little expecting that he would be elected. But to their surprise the result was in his favor, and he took his seat on the bench as one of the associate justices in June, 1855, and occupied it continuously until 1880, when he became chief justice. He was re-elected in 1861, 1867, 1873 and

in 1879 under the amended constitution for ten years. He served until January 4, 1892, when he retired from the bench, "carrying with him not alone the reverent respect and high esteem of his brethren of the bench and bar, but laden with the spontaneous tributes of their affection and with their earnest wishes that many years of health and happiness may yet be his lot and portion."

Only once during his terms did he meet with anything amounting to considerable opposition. In the early history of the State many farmers had been induced to mortgage their farms, giving the mortgages as collateral security to the bonds of projected railroad companies. The Supreme Court sustained the validity of these mortgages. The Farm Mortgage League then called out James H. Knowlton as their candidate, in 1861, but Cole was re-elected by a large majority.

For more than thirty-six years he served on the bench. His judicial labors are found in seventy-eight volumes of Wisconsin reports—from volume four to eighty-one, inclusive—and his consideration was given to about eight thousand causes, many of them of the greatest importance, and settling the policy of the State and its rules of law on new and difficult topics. It is a record of judicial labor that has seldom been surpassed. He sat in the decision of the great Bashford *v.* Barstow case (4 Wis. 567). He delivered the judgment of the Court in the Grimer case (16 Wis. 423), sustaining the power of the President to call out the militia and execute the laws of the Union, and for that purpose to draft and call into the field quotas from the several States. He gave an elaborate opinion in the Kemp case, denying the validity of the President's proclamation of September 24, 1862, generally suspending the privilege of the writ of *habeas corpus* (16 Wis. 359). He also gave the opinion in the case of Jones *v.* Estate of Keep (19 Wis. 369), holding that the Act of Congress of 1862, requiring stamps to be affixed to the writs and process of state courts, was unconstitutional. These decisions were made at a time when any dissent from the legislation to put down the rebellion or strengthen the arm of the Federal government in its great struggle was likely to meet with the criticisms of patriotic men sternly in earnest. In many cases during his long service, the cause involved questions of vast importance to the State and some of national concern, when the weak or timorous judge, thinking of his re-election, would "look out of the window to see how the wind blows." Such was never imputed to the members of the court in which Judge Cole sat until one generation had succeeded another on its bench and at its bar.

Since his retirement, Judge Cole has resided in Milwaukee with his son, and has acted as advisory counsel in important cases. He also has devoted himself to a systematic course of reading of the British poets and other choice literature, thus finding delightful companionship in the evening of his long and useful life. His life has been prolonged, despite its laborious tasks, by a temperance and regularity that make him an exemplar to the members of his profession.

LUTHER S. DIXON was born in Milton, near Burlington, in the valley of the Lamoille, Vermont, June 17, 1825, of the sturdy stock of New England farmers of the early part of the century. His early training was in the common schools and academies, or "select schools," of that region, and a year or two at Norwich military academy, which was then under instructors of marked ability. There he took high rank, and was an excellent scholar in Latin. In this school, still a successful and excellent institution, he received the thorough instruction and severe mental and physical discipline so valuable in forming character. One of his memories was of an "experience march" to Boston and back, in which the cadets were toughened to march under knapsack, and tasted

the realities of war service, when the skin adhered to the sock, taken off after the day's march.

The smart Vermont boy of that period must "teach school winters." Young Dixon had this experience, and thus earned money to enable him to prosecute his studies. The present writer well remembers the tall and handsome cadet who taught school in the Lamoille valley, and whose manly form and winning manners made him the admiration of the belles for miles around, in the sleighride parties and country dances of that mountain region.

LUTHER S. DIXON.

Young Dixon read law with Hon. Luke P. Poland, then of high standing as a lawyer, and afterwards a judge of the Supreme Court and a United States Senator from Vermont, and later a prominent member of Congress. Dixon came to the bar in 1850, in his native State. The West was then the inviting field to the young men of New England, and Wisconsin was then well on the frontier. He established himself at Portage, in this State, in 1857. A young man of such manly bearing and winning personality could not but draw clients and make friends. He was twice elected district attorney. While serving as prosecutor he tried a murder case against two of the older and ablest lawyers of the State with an ability and success that brought him into local prominence. A vacancy occurring on the bench of the Ninth Judicial Circuit in 1858, Governor Randall appointed Dixon circuit judge. He discharged the duties of this position with great satisfaction to the bar of the circuit, then an exceptionally able and critical one.

In 1859 Chief-Justice Whiton's death cast on Governor Randall the duty of making an appointment to fill the vacancy until an election could be held. He appointed Judge Dixon, who was then thirty-three years of age, and had had but a few months judicial experience. He was comparatively unknown throughout the State as a lawyer and jurist. There was an impression, among those who did not know him, that he had not had sufficient professional training and judicial experience to fit him for so responsible a place. Governor Randall was himself an able jurist, and correctly estimated the powers of his appointee, who soon gave evidences of a judicial power and ability that amply vindicated his appointment. His mind was discriminating, his memory retentive. He had robust common-sense, a nice sense of justice, and was well imbued with the principles of the common law and of equity jurisprudence.

"He came to the bench," says the veteran Judge Cole, who was his associate during his entire service, "at a most critical period in the history of the Court. Questions of constitutional law — involving the objects, the limit, and rule of taxation under our Constitution; of the validity of municipal indebtedness; of the liability of railroad cor-

porations for injuries for negligence of their employees; of the relation of the State and Federal judiciary; soon to be followed by the supremely important questions growing out of the Rebellion, such as the power of the President to suspend the writ of *habeas corpus;* the validity of the law authorizing the draft, and one permitting the soldiers in the field to exercise the elective franchise; the validity of the legal tender acts; the right of Congress to tax the process of State courts; and other kindred questions of transcendent interest to the people of the State and nation — were before the Court or soon to come before it for decision. Judge Dixon, in the disposal of these cases, played no subordinate part. It was not in his nature to rely on others in the examination and decision of causes. He must form his own opinions by his own study and research, master the facts of the case and the principles of law applicable to it for himself, think his way through and over whatever obstacles and difficulties were presented, by the light of his own judgment; and he always did so."

Very soon after his appointment his judicial fearlessness and stamina were put to the test. The Court had previously decided the fugitive slave law unconstitutional, and that the State courts and judges could issue writs of *habeas corpus* and discharge prisoners from custody who were arrested by Federal authority for violating it. Booth, as previously narrated, had been convicted in the United States District Court, under Judge Andrew G. Miller, for assisting in the rescue of Glover, the fugitive slave, and had been convicted, and the Supreme Court of Wisconsin had, upon *habeas corpus*, discharged him. The Court had also, in 1857, disregarded the writ of error sent down by the Supreme Court of the United States to call up the record for review, and had directed its clerk to make no return to it. In 1859 the Supreme Court of the United States, having obtained a copy of the record unauthenticated, proceeded to review and reverse the decision, in the case of Ableman *v.* Booth, 21 How. 506, and sent down its mandate and *remittitur*. A motion was made to file them. On this motion Chief-Justice Dixon filed a lengthy opinion in support of the appellate jurisdiction of the Federal Supreme Court over the case. (11 Wis. 498.) This raised a storm of censure in the Republican party, to which Dixon belonged. The Republican press opposed his election, which must be held in the spring of 1860. A "state-rights" candidate was put in nomination. Chief-Justice Dixon was called out to "run independent." The Republican press quite generally opposed his election, though a very considerable portion of the Republican party did not endorse the ultra "state-rights" position of the court in denying the appellate jurisdiction of the Federal court of last resort in the fugitive slave law cases. Judge Dixon received his first election from the people by a majority less than 400, in a vote of about 113,000. The campaign was quite spirited, especially in the newspapers. A notable event of the election was a speech by Hon. Abram D. Smith, ex-judge, in support of the decisions he had made, and an answer to it by Hon. Timothy O. Howe. These speeches were an elaborate discussion of the aspect of the "state-rights" doctrines, which had attracted such wide attention.

The war came on, and the "state-rights" question soon became, to use the familiar phrase of the politician, "a dead issue." Judge Dixon's subsequent elections were without opposition, except one which signally demonstrated his strength with the people. He found it hard to support his family on the small pay allowed. In 1867, the salary was raised by law from $2,500 to $3,500, but by the Constitution this increase could not apply to his then present term. He resigned, and the governor at once appointed him till the vacancy could be filled by election. The Democracy were then organizing for the presidential campaign of

1868, and sought to make capital out of the fact that the chief justice had evaded the constitutional bar to increase of salary by a resignation and reappointment. They ran Judge Charles Dunn against him in the judicial election of 1868, but he was elected by a large majority. He was chief justice until 1874, when he resigned, in the midst of his term. The meagre salary ($5,000) drove him to seek more lucrative employment at the bar. The bench and the bar greatly regretted to lose his judicial work, for he stood admittedly among the foremost judges in the Union. His reputation had become national.

His decisions are always interesting reading. They are notable for their logical strength, and are never wanting in an unstudied eloquence and beauty of expression. He was a man of original mind. He did his own thinking and reached his own conclusions. Free from pride of opinion, he could review his own decisions, acknowledge errors, and reverse or overrule himself. Usually of a serious and solid tone and style of discussion, there occasionally crept into his opinions some quaint phrase or metaphor or illustration revealing the wealth of humor which bubbled out in his private conversation. In one case, where he was compelled to hold that the "married women's act," allowing the wife to hold and control her separate estate, had not absolved the husband from liability for the ante-nuptial debts of his wife, he said: "The modern husband is twice happy. First, he is happy as the quiet spectator of his wife's enjoyment of her property; and again he is happy in paying her debts, or, if he refuses, in being sued and compelled to pay." (19 Wis. 336.) In another case he was combating the position that a person could build a store building, rent the lower floors, and live with his family in the fourth or fifth story, and claim the whole building as an exempt homestead, and he illustrates the absurdity, as it seemed to him, of the position. He says: "We are told in history that Diogenes, the celebrated cynic philosopher, at one time took up his abode in a tub belonging to the temple of Cybele. I suppose the tub became *ipso facto* a dwelling-house, in the ordinary sense of that word; and that hereafter strict propriety of language will require us to say that he lived in a dwelling-house belonging to the temple instead of a tub. Nay, more, I suppose the moment the philosopher got into the tub, that he might, had he been so inclined, have claimed it as exempt under the operation of a statute like ours." In a case under the statute forbidding the selling of liquors to minors, the point urged in defense was that the defendant did not know that the vendee was a minor, and that the statute ought to be construed as if the word "knowingly" were in it. Judge Dixon took the other view, and succinctly states the law to be that the saloon keeper "must know that the person to whom he sells is a *qualified drinker*, within the meaning of the statute; and, if not, he acts at his peril."

During the war he very much desired to leave the bench and enter the military service, as he had received in his youth a military education, but his services were so much needed in the Court in that crucial period that the governor dissuaded him from it, and from a sense of duty he remained in judicial drudgery, when all his inclinations were towards the field.

Judge Dixon, after leaving the bench, entered upon a lucrative practice. He settled in Milwaukee and organized a strong law-firm and was retained in much important litigation. One of his first appearances was in the famous "granger cases." The Patrons of Husbandry had become a strong order among the farmers. Strongly impressed with the idea that the railways were charging exorbitantly for freight and passenger carriage they made a special effort to carry the legislature in the fall of 1873 and the following winter. The Democracy were shrewd enough to nominate for governor a

prominent farmer and leader in the granges. The legislature and the governor were elected on the "boom" of this new issue, and at the following session a law was passed fixing a limit to railway freights and fares within the State. The railway companies took advice from distinguished sources, and having the written opinions of B. R. Curtis, William M. Evarts and George F. Hoar, that the law was unconstitutional, refused to obey it, and so notified the governor. Thereupon suits were instituted — one by the State to enjoin the companies from disregarding the law, one in the Federal court by some non-resident landholders to enjoin the State railroad commissioners from taking any step to enforce the law. An able array of counsel appeared on both sides with ponderous printed arguments. Judge Dixon was retained in behalf of the State, and his friends were out in great force to hear "the effort of his life" at the bar. They were a little surprised and disappointed when he began. He had no brief; he hesitated. He pulled first from one pocket and then another little scraps of paper on which he had jotted down points and authorities. His effort to the audience seemed a flat failure; but, it is told that, when the judges met in the consultation room, Judge Davis remarked, "Dixon has told us the law of this case," and the Court, and later the Supreme Court of the United States, followed his exposition, and settled the then burning question as to legislative control over corporations. The case in the Supreme Court of the State was argued the same summer, and there the validity of the law was upheld in one of the most interesting and able opinions of the late Chief-Justice Ryan, which is read, far and wide, for its masterly style and close judicial reasoning.

Judge Dixon would never be drawn into partisan politics. In 1875, in a dead-lock between candidates for the United States Senate, Dixon could have been elected if he had but consented. "I cannot afford it," he said.

In 1879, he was obliged to leave Wisconsin and seek higher altitudes on account of an asthmatic trouble that debarred him from refreshing sleep. He was banished by the rigor of our climate. He there built up a large practice, and gradually disengaged himself from his Wisconsin clientele. On his leaving for the West, the bar of Milwaukee tendered him a banquet, which he gracefully declined. He detested notoriety and preferred to work quietly and unostentatiously at his professional labors, and to meet his friends in social intercourse in an informal way.

His malady wore upon him and sapped the foundations of a constitution of great strength and vigor, but he labored constantly and successfully in Colorado, feeling always an exile from Wisconsin. He came home to Milwaukee in the latter part of November, 1891, after a professional visit to Washington, worn down by his long struggle with the cruel malady. On the 6th of December he died, lamented by all, and by his professional brethren honored and beloved as but few are. In the memorial proceedings held in court and given in the eighty-first volume of Wisconsin reports are many eloquent and tender tributes to his memory.

His work is found in the twenty-six volumes of reports beginning with the ninth and closing with the thirty-fifth. He has indelibly impressed his name upon the jurisprudence of the State. "His judgments are among its jewels," said one of his eulogists, Hon. Charles E. Dyer, himself of long service as a Federal Judge. "Without exception they bear the stamp of his penetrating and vigorous mind. None fail in that lucidity of statement, strength of diction and cogency of argument which were his happy gifts. If his intellect was not what may be called brilliant, it was comprehensive and powerful." "The name of Dixon is the synonym of Justice, Integrity, Truth and Honor. These were virtues which illumined

his character, radiant as the sunlight, shining as the stars."

BYRON PAINE was born in Painesville, Ohio, October 10, 1827. His father was General James H. Paine, a lawyer of good ability, and prominent as one of the leaders of the great antislavery movement. He was from Puritan stock, and at one time lived in Vergennes, Vermont, though born in Connecticut. He settled in Painesville, Ohio, in 1821, and became prominent as a lawyer and as one of the sterling abolitionists of the time. He died, some eight years after his son's death, at the advanced age of eighty-seven years.

BYRON PAINE.

General Paine removed to Milwaukee, Wis., in 1847, with his family, and there practiced law. His son, Byron, studied law with him, and was admitted to the bar in 1849. He received in youth a thorough academic education, but was not learned in the Greek or Latin. He became a fine German scholar, and in his youth made political speeches in that language, and during his later judicial life loved to refresh his mind with the productions of Lessing, Schiller and Goethe. He was fond of sports, and in his boyhood, deer-hunting was his delight, and the woods near Milwaukee afforded this noble game. He was a strong, athletic, manly youth, vigorous in body and mind. He found great pleasure in billiards and chess.

During the leisure of his early practice, he wrote for the public press on the subject of slavery and the great controversy between the sections then waging. He frequently entered into popular discussions. Thus he acquired facility of composition, great readiness in the clear and forcible expression of ideas, and an eloquence rarely equalled and never excelled by any public man of the State. His name became prominent in the events following the seizure of Glover, the fugitive slave, of which an account is given above. With all his soul Byron Paine hated slavery, and the arrest of the poor black man aroused all the sympathies of an ardent nature and all the powers of a mind singularly strong and gifted. In 1854, he made an argument against the constitutionality of the fugitive-slave law, which started him on the road to fame as a jurist and advocate. Of his labors in that case, his opponent, Edward G. Ryan, said: "When I first met Judge Paine at the bar he was still a very young man, but he had already given unmistakable evidence of the power that was in him. The first opportunity I had of forming an estimate of his high ability was in the famous case under the fugitive-slave act, in 1854 and 1855. He was employed for the defendant; I, for the United States. We both brought to the case, not only ordinary professional zeal, but all the prejudices of our lives. He was a frank and manly aboli-

tionist. I was as decidedly what was called pro-slavery. We were both thoroughly in earnest. The case was attended with great popular excitement; it was one of many muttered sounds of troubled elements foreboding the great storm which has since passed over the country. He died undoubtedly believing that the results had justified his views. I shall probably die believing that they have justified mine. I thought him a fanatic. He probably thought me one. Possibly we both were. But in all that antagonism and excitement, I could not fail to see and do justice to the integrity of his motives, or the ability of his conduct. I then conceived an estimate of the beauty of his character, and of his great professional ability, which has never since changed, and which will probably be among the last and dearest memories of my professional life. The printed brief which he submitted in that case was the ablest argument I ever met against the constitutionality of the fugitive-slave act. It established in my mind his great learning and resources as a cultivated lawyer. And yet I remember well the modesty of his demeanor on the argument, so admirably accompanying such high ability, in so young a man."

The great champion of the antislavery cause, Charles Sumner, wrote to Paine, pronouncing his argument admirable. "You touch the question to the quick," said he. "For a long time I have seen it as you do. I congratulate you, my dear sir, upon your magnificent effort, which does honor not only to your State but to the country. That argument will live in the history of this controversy."

"I recall," says the great jurist, Ryan, who was pitted against him, "the singularly able management of the defense, on the trial of the indictment in the Federal court. He disputed every inch of ground with signal address, and with all the hearty ability of a man who believed he was in the right. I shall never forget his closing argument. It has been my lot during a long professional life to encounter many able advocates. But I never listened to an argument before a jury more perfect for the case than that was. No man, not thoroughly able and thoroughly earnest, could have made it. The court adjourned just as it was finished; and I remember well the noisy congratulations which were offered to the modest young advocate. He merited far more discriminating praise. It established his reputation as an orator and advocate of a very high order."

His services in this contest were rendered without compensation, and at a time when his professional income was small.

In 1856 he was clerk of the Senate, and in 1857 he was elected the county judge of Milwaukee County. The election tested the popular qualities of the brave, out-spoken champion of antislavery in a county strongly Democratic and conservative. He served here until 1859, when he was elected as associate justice of the Supreme Court, on the antislavery and *quasi* state-rights issue. In his argument in the Booth trial he had insisted and argued with great force, that "the States should have the right to judge in the last resort, when their sovereignties are encroached upon, and to take measures for their protection." He was called out as a candidate on this issue, and after an exciting campaign—for a judicial office—he received some two thousand majority in a vote of eighty thousand. His radicalism and his youth led some of the conservatives to fear that he would be "a bull in a china shop" on the bench; but he soon became one of the ablest of judges, and all classes of people came to honor and esteem him. The beauty of his character, his perfect honesty, bravery in advocating what he believed to be right, his loyalty to truth and perfect honesty of purpose, added to mental endowments of a high order, made him universally trusted and beloved. Chief-Justice Dixon spoke of him as "the strong light

and chief ornament" of the bench. Certain it is, that in his massive strength, simplicity and sweetness of character, his chivalric devotion to his convictions, he was a most interesting and lovable character. Strong in body, robust, frank, sympathetic, keenly enjoying life in temperate ways, a model for imitation in all the duties of social life, he was a "marked man." Says Ryan, his opposite in political opinion and in general views of life and its duties, "His character was uncommon. There was no possibility of confounding him with the crowd of respectable mediocrity. He was a high type of manhood, physical, mental, and moral. He was strong in all the nobler attributes of humanity; singularly free from all its meaner weaknesses. . . . But, above all his intellectual capacities, towered in him a singular purity of life and character. Able as he was, and equal to every position of life in which he was placed, the man's character was as transparent and simple as a little child's. In him, everything was open, direct and unaffected. The taint of imposture never sullied his mind; the shadow of guile never fell upon it. His passionate love of truth was a mere instinct of his native disposition."

In 1864, he resigned from the bench to take part in the great struggle in which the country was then engaged. He was commissioned Lieutenant-Colonel of the Forty-third Wisconsin Infantry, and served in the field until the close of the war. He then resigned, returned to Milwaukee, and entered upon the practice of the law.

Judge Paine was not a man to seek the bubble reputation at the cannon's mouth. His nature was too humane, too philanthropic for him to regard killing people a desirable vocation. But he was of the stuff, morally and intellectually, that makes men walk the path of duty though swept with mitrail. He served in Tennessee in command of the Forty-third Wisconsin Infantry. It was stationed at Johnsonville, on the Tennessee River, guarding a western outpost to keep Forrest and other Confederate raiders from tapping the long line of railroad that carried supplies to Sherman's army, while it was fighting, inch by inch, its way to Atlanta in the bloody summer and autumn of 1864. "That infernal cracker line," as General Sherman called it, kept thousands of troops on the alert, and stretched along from Louisville to the front. Colonel Paine's command may be said to have stood listening, month after month, for the approach of Confederate cavalry. It came at last while Hood was marching on Nashville, in November, 1864; and for three days the command was under the fire of the enemy's artillery, planted across the river. Later it marched to Decherd, Tennessee, on the Nashville and Chattanooga railroad, and there finished its year of service.

On the 10th of September, 1867, he was recalled to the bench. Judge Downer having resigned, Governor Fairchild but anticipated the general wish in appointing him to fill the vacancy. The following election he was elected by the people for the residue of the term.

But his career, so full of success and bright with promise of future usefulness, was soon to close. He appeared in the consultation rooms for the last time, November 23, 1870. An attack of pneumonia was followed by a virulent form of erysipelas. On the 13th of January, 1871, he died, honored and esteemed by the bar as few are, beloved by his brethren of the bench, and most affectionately regarded by thousands for his goodness.

An instance of his courage and loyalty to conviction was shown amid the fiercest excitements of the war. He, with his brethren of the bench, discharged on the writ of *habeas corpus*, prisoners held in military camps on military warrants, denying the doctrine that martial law could prevail, or the writ of *habeas corpus* be suspended anywhere in the country where the laws were

not silent in the midst of arms. (16 Wis. 359.)

An example of Judge Paine's incisive style is found in State *ex rel.* Field *v.* Avery, 17 Wisconsin Reports, 672. The case was one involving the legality of an election on the question of removing a county seat, a contest in which frequently fraud, and sometimes violence and bloodshed, are incidents in our western life. In commenting on the point before the court, the Judge says: "The material question of fact involved in the issues was whether the frauds were committed in the election at New Lisbon, on the county seat question, as alleged in the relation. With other evidence to show those frauds, the relator offered the deposition of one Holden, who testified directly that a large number of spurious ballots were fraudulently placed in the box containing the votes on that question. This deposition was objected to for several reasons, and among others, the respondent offered a subsequent deposition of the same, tending to show that he had been tampered with, and was intoxicated at the time his first was taken. Judging the character of this witness from his two depositions, it is perhaps probable that the second sufficiently explains how he happened to tell the truth in the first. *In vino veritas.*"

One of the memorable cases in which Chief-Justice Dixon and Judge Paine "locked horns" is reported in the 25th Wisconsin Reports (p. 167). The question was whether a county could raise a tax to give a "bonus" to a railroad company. The majority of the court ruled that the tax was void, unless the municipality subscribed for stock. Judge Paine dissented, taking the view now more generally prevalent, that the railroad was of such public utility that a tax to secure it was for a public purpose. In the dissenting opinion he used these words often quoted: "Railroads are the great public highways of the world, along which its gigantic currents of trade and travel continually pour — highways compared to which the most magnificent highways of antiquity dwindle into insignificance. They are the most marvelous invention of modern times. They have done more to develop the wealth and resources, to stimulate the industry, reward the labor, and promote the general comfort and prosperity of the country than any other and perhaps than all other mere physical causes combined. There is probably not a man, woman or child whose interest or comfort has not been in some degree subserved by them. They bring to our doors the productions of the earth. They enable us to anticipate and protract the seasons. They enable the inhabitants of each clime to enjoy pleasures and luxuries of all. They scatter the productions of the press and of literature broadcast through the country with amazing rapidity. There is scarcely a want, wish or aspiration of the human heart which they do not in some measure help to gratify. They promote the pleasures of social life and of friendship. They bring the skilled physician swiftly from a distance to attend the sick and the wounded, and enable the absent friend to be present at the bedside of the dying. They have more than realized the fabulous conception of the Eastern imagination, which pictures the genii as transporting inhabited palaces through the air. They take a train of inhabited palaces from the Atlantic coast, and with marvelous swiftness deposit it on the shores that are washed by the Pacific seas. In war they transport the armies and supplies of the government with the greatest celerity, and carry forward, as it were, on the wings of the wind, relief and comfort to those who are stretched bleeding and wounded on the field of battle." The whole opinion is in a similar vein, and is "mighty interesting reading," as Horace Greeley would say.

It is related that when this opinion was announced, and the above sentences attracted much attention, Harlow S. Orton, then at the bar, indulged in this comment:

"Humph! So it *seems* that a great question of constitutional law is to be determined on the point that railroads *can deliver us early vegetables.*"

JASON DOWNER. Upon the resignation of Judge Byron Paine to enter the military service, in 1864, Governor Solomon appointed Jason Downer of Milwaukee to fill the vacancy. This gentleman was born in Sharon, Vermont, September 9, 1813. His father was of English stock. The first ancestor in this country came from Salisbury, England, and settled in Hartford, Connecticut. On the mother's side was the blood of the Huntington's, a sturdy English stock, numerous and prominent in New England. Downer was a farm-bred boy of the old New England type. He had plowed among the rocks, mowed with the scythe on the hillsides and about stumps; he broke steers, wallowed in the snow to gather sap in March and made sugar in the woods, had his three months of schooling in the winter, worked early and late in all seasons; breaking roads when the snowdrifts of a Vermont winter were higher than the stone walls on the roadsides, put there mainly to be rid of the boulders. In this tough tussle with the hardest of work among the busiest of workers, he developed as a boy. It was well calculated to take poetry and romance out of youth.

JASON DOWNER.

When nineteen years of age, he entered Kimball Academy at Plainfield, New Hampshire to prepare for college. Two years later he entered Dartmouth College, from which he graduated in 1838. Soon after, he went to Louisville, Kentucky, and there read law, and was admitted to the bar and began practice.

Preferring a new country and the class of people that came from the Eastern states, he established himself in 1842 in Milwaukee, in the territory then rapidly filling up with New England and New York people. His career at the bar was successful. He was a hard worker, managed his cases well, fought persistently for his client, asking and giving no quarter. He rather enjoyed driving his adversary to the shelter of the statute of jeofails and amendments. For a short time in his youth, about 1845, he gave attention to journalism, and was the first editor of the Milwaukee "Daily Sentinel," now one of the strongest and most influential newspapers of the Northwest. But law had greater rewards, and he soon sold out his interest in the paper and gave his energies to practice. Frugal and a good saver, with a tact for making money, he accumulated what, for a lawyer, may be deemed a handsome fortune. He stood high as a lawyer of force, learning and ability. He had few, if any, intimates among the lawyers, and was regarded by them a persistent, pushing practitioner, a formidable antagonist, who kept opposing counsel on the alert.

Governor Edward Solomon, himself a lawyer of the Milwaukee bar, deemed the cool, exact, methodical cast of Downer's mind to be the beau ideal quality of the judge. Matt. H. Carpenter predicted that he would make a model judge. He entered upon his duties in November, 1864. He was elected by the people, unopposed, in the following April, for the term of six years. After serving nearly three years he voluntarily resigned in September, 1867, finding the labor too confining and less congenial than he had expected. He was regarded as a fair, just judge. His mind clung rather closely to the strictness of the law, and was inclined — at least such was the belief of the bar — to underestimate the equitable aspects of the case in hand.

His judicial labors are reported in the 19th, 20th, and 21st Wisconsin Reports. The two opinions most important and longest to be remembered that he gave are worthy of mention here. One was the case of Gillespie *v.* Palmer (20 Wis. 544), which arose as follows: The Wisconsin Constitution, adopted in 1848, conferred the right of suffrage on white citizens, and white persons who had declared intentions to become citizens, etc. It was provided that "the legislature may at any time extend the right of suffrage to persons not therein enumerated, but no such law shall be in force until the same shall have been submitted to a vote of the people, at a general election, and approved by *a majority of all the votes cast at such election.*" In 1849, a law was passed conferring the right of suffrage on colored persons, otherwise qualified, and this law was submitted to the people at the next general election. A majority of the votes cast *on that question* were in favor of the law, but many voters did not vote at all upon this measure, though voting for officers, and the law did not receive a number of votes sufficient to be a majority of all the votes cast at the election. The State Board of canvassers construed the Constitution to mean that a majority of all the voters voting at the election must have voted for the law in order to give it force, and declared that it had been defeated for lack of sufficient votes. This decision was accepted at the time, and the matter rested for sixteen years, and persons of color were not allowed to vote. But in 1865, when negro suffrage became a burning question, the decision made by the canvassers in 1849 was challenged. Byron Paine, then home from the war, and ever the friend of the oppressed but recently liberated race, made up a case to test the question. Gillespie, a mulatto, otherwise qualified, presented himself at the polling place of one of the wards in Milwaukee, and demanded that the inspectors receive his ballot. They refused to allow him to vote, solely on the ground that he was a colored man. He brought an action on the case against the inspectors of election, the facts being set forth in the complaint so as to raise the whole question on demurrer. From the order sustaining the demurrer, the case came on appeal to the Supreme Court. Judge Downer delivered the opinion deciding that the proper construction of the constitutional provision was, that if a majority of the votes cast on the question were in favor of the law, it became operative, and hence that the law being in force, the inspectors had illegally refused the plaintiff's vote, and were liable on the case stated. Thus Wisconsin anticipated the great constitutional amendment giving negro citizens the right to vote — really in 1849, but practically in 1866.

The other case is reported as Druecher *v.* Solomon (21 Wis. 621). This was an action for false imprisonment. Druecher was charged as being one of a number of rioters who had resisted the draft in 1863. The draft commissioner appointed by the governor, under the act of Congress, had been attacked at Port Washington in Ozuakee County, stoned, cruelly beaten and compelled to flee for his life. His house was

gutted and much injured by the mob. Other loyal citizens had been set upon, their persons injured and houses damaged in like manner. The governor sent a detachment of troops to this scene of domestic insurrection. The soldiers were fired upon by the mob, and a little outcropping of armed rebellion was in full activity in this County, largely settled by foreigners, who deemed a draft the worst of despotism. Druecher with others was arrested by order of the governor and after a few days turned over to the United States military authorities, by whom he was kept some weeks in confinement. For this he brought action against the governor. The court below directed a verdict for the defendant, and Judge Downer in a strong opinion justified the governor's action.

An incident or two must here be related. When Downer was at the bar he was a bold, aggressive champion of his client's cause, and when he tried a case against John J. Orton, the contest had some of the elements of a personal quarrel. On one occasion they were arguing a case in the Supreme Court, Downer had finished his argument and was packing up his papers to leave by an early train, while Orton closed on his side. Missing his spectacles, which he had closed in a book, Downer was hunting for them, first on one side of Orton then the other, looking on the floor and table with the air of a man making a search when in a hurry. Orton, visibly annoyed by this bustling about him, paused in his argument, glared at Downer, then putting hand in pocket, drew out a bit of coin, threw it down before Downer, saying: "There! take that, I am tired of this mercenary hunt."

The lawyers and judges still laugh at a ludicrous incident which happened in court while Judge Downer sat on the bench. He was quite familiar with law cases and it was his habit while a case was in argument to recall some reported case he had read bearing on the point under discussion. He would suddenly throw up his hands, rise quickly, leave the bench and step into the library for the book. Chief-Justice Dixon had a favorite dog, who was his constant companion, and had the liberty of the consultation room — in those days the three judges sat together in a large room, wrote their opinions and had their consultations all together. Everybody but Judge Downer loved Old Dick, as bench and bar knew the dog. The old fellow during the argument of cases would lie at his master's feet under the bench, dozing away with one eye askant on Judge Downer's feet, from which sundry kicks had made him distrustful and shy of the stern associate justice. One day, while the judges were listening to argument, Old Dick lay at his master's feet, rejoicing in his dozing way that it was beneath a dog's dignity to pay attention to a legal argument. Suddenly Judge Downer arose with the peculiar flop of the arms that showed how a case in the books had occurred to him, which he must consult. The dog, startled from his doze by this sudden movement, also darted out to make his escape in the same direction, running between the Judge's legs. Down came dog and Judge in a promiscuous heap on the floor. The Judge gave a grunt, and the dog gave a yelp; and it was a question which expressed the most indignation, the aspect of the Judge or that of "Old Dick." Never, I ween, did court or bar find it more difficult to maintain due gravity than on this occasion.

After his retirement from the bench, Judge Downer returned to practice, and to the management of his estate. Though twice married he had no children. But he planned for the perpetuation of his name in the spirit of the broad-minded benefactor. He gave liberally to the church, but made the special object of his bounty the Wisconsin Female College at Fox Lake, Wisconsin. He contributed most of the funds to build its principal building known as "Downer's

Hall." Giving liberally during his life toward the support of this institution, he left a large part of his fortune, by his will, to its endowment. It has been removed to Milwaukee, and its name changed to Downer College in recognition of the generosity of its benefactor. It is now a flourishing institution.

During the later years of his life, he gradually withdrew from practice, and traveled extensively in the United States and Europe. He was through life respected and esteemed as a just, honorable citizen. Less sympathetic in manner than some, less popular in those manners and graces that are called "personal magnetism," he had the genuine regard of all classes of people as a strong, forceful, upright man, safe counselor and loyal advocate.

He died at Milwaukee, September 1, 1883, having almost reached his three-score and ten.

THE DEATH PENALTY IN THE UNITED STATES.

THE bill introduced by Representative N. M. Curtis, of New York, "to reduce the cases in which the penalty of death may be inflicted," has now become a law. Roughly summarized, it abolishes the death penalty as to all crimes within the jurisdiction of the Federal courts, except treason, murder, rape, and capital offenses enumerated in the articles of war for army and navy; and even in murder and rape cases a jury is permitted to qualify its verdict of guilty by adding, "without capital punishment," the penalty then being changed to life imprisonment at hard labor. The report of the House Judiciary Committee carries an appendix, in which are grouped the fruits of a painstaking inquiry of Mr. Curtis into the state of the law concerning capital punishment in all civilized countries, from which he concludes that the United States "have undoubtedly the bloodiest code in the world."

The Federal statutes covering this subject may be said to have been inherited from the English criminal code, and have undergone little change in their century of existence. They enumerated sixty offenses punishable by death. One of President Jackson's messages contains statistics which show that, during the first thirty-seven years of the republic, conviction of a crime easily capable of proof was not hard to obtain, and that death was pretty sure to follow conviction of those crimes most revolting to public sentiment. Thus we find that of thirty-nine persons tried for murder thirty-five were convicted and twenty-two hanged; and of nine tried for treason six were convicted and five hanged, witnesses in such cases being presumptively abundant and public sentiment strong. On the other hand, of four persons tried for rape only one was convicted, and he was hanged, conclusive evidence of such a crime being hard to get, but public sentiment very strong. In the cases of crimes committed on the high seas, we find the differentiation following the same lines yet more plainly; for murder, there were three trials and two convictions, both followed by death; for sinking a vessel at sea there was one trial, the accused being convicted but pardoned; while for piracy there is the remarkable record of sixty-seven trials, sixty-six convictions, and only eight executions — a contrast which may be explained by the fact that most of the acts of piracy committed in those days were phases of the slave trade, which, though formally condemned by statute, were winked at by the populace, and hence commonly pardoned.

Coming down to very recent times, we find, in a report from the attorney general, that in the years 1890, 1891, and 1892, of a total of 271 persons indicted in the United States courts for murder, only sixty-three were convicted, and only thirteen of the convicts put to death. In other words, taking for our index the commonest of capital offenses, and that which has preserved in all epochs the most constant measure of public abhorrence, we must be struck with the great change which had come over the operation of the law; for the ratio of convictions to trials had declined, in the course of sixty-five years, from about ninety per cent to twenty-three, while the ratio of executions to trials had declined during the same period from more than fifty-six per cent to less than four.

It was the steadily increasing disproportion between trials, convictions, and executions which convinced Mr. Curtis that public sentiment has been undergoing a

marked change. A first hasty glance at the figures might lead one to infer a lowering of the value commonly set on human life, since the penalty for taking it has been of late so seldom enforced. Second thought, however, will suggest the inquiry whether the valuation has not risen, rather, since the life even of a person convicted of a heinous crime is considered too precious to be taken by organized justice itself, except in rare instances.

These considerations led naturally to the question whether a law which received apparently so feeble a support from public sentiment was not worse in its effect on social morals than no law at all. The fling of a murderer arrested several years ago, that "hanging is played out in New York," is often quoted as proof that there ought to be no more mistrials or acquittals or pardons till the notion cherished by this fellow has been rooted out of the minds of all his class. Some extremists have gone even to the point of urging the extension of the death penalty to a larger list of crimes. But the alternative suggestion is seldom broached — that a moderate law rigidly enforced may carry more terror to the heart of the criminal than a rigid law moderately enforced. Is it not the absolute certainty of punishment of some sort, rather than a mere possibility of extreme punishment, which takes the spirit of bravado out of him? To the discussion of this phase of the problem Mr. Curtis has made an interesting contribution in his collection of data concerning the abolition of the death penalty for common crimes in other countries and in several of the United States.

From Brazil comes the report that "capital punishment has been abolished for all crimes, and no increase has been noted in criminal statistics"; like reports come from Costa Rica, Italy and Russia; while from Portugal comes the statement that "the number of homicides formerly punishable by death has actually diminished since the abolition of the death penalty in 1867." No reports as to the effect of the change come from Guatemala, Venezuela, or the fifteen cantons of Switzerland, where the death penalty has been abolished. On the other hand, Colombia reports "a marked increase of atrocious crimes"; and a five years' experiment of abolition in Ecuador appears to have resulted in so considerable an increase of crime that the death penalty was restored for four offenses.

In only four of our States — Maine, Michigan, Rhode Island, and Wisconsin — has the death penalty been wholly abolished. In the other forty-one States it ranges in application from one offense, as in Pennsylvania, to ten, as in Georgia. No statistics are given as to the resulting increase or decrease of crime, but a record of the number of legal executions of the death penalty, and the number of lynchings from 1890 to 1895, might be supposed to throw some light upon the general social influence of an ultra-rigid criminal code. For convenience we reduce these statistics to tabular form: —

State.	Offenses punishable by death.	Legal executions in six years.	Lynchings in same six years.
Georgia	10	75	96
Alabama	7	47	116
Louisiana	7	32	104
Maryland	7	17	7
Arkansas	4	40	73
Missouri	4	29	21
North Carolina	4	20	14
South Carolina	4	47	34
Virginia	4	30	44

That too broad an inference must not be drawn from this comparison is evident from the fact that Mississippi, though recognizing only one offense as capital, has a record of thirty-two legal executions and ninety-eight lynchings, while Michigan, without power to inflict the death penalty lawfully, inflicted it lawlessly three times during the period under consideration. It is obvious that differences in social organization in the various sections of the country must be taken

into account. Density and character of population, race antagonisms, and, in the older communities, respect for tradition, are all important elements. A hard and fast code well adapted to one part of the country might prove a failure in another. The Federal statutes cannot, of course, recognize sectional lines in prescribing penalties for crime. Hence the wisdom of such an elastic system as the Curtis bill proposes, whereby, in all save a few instances, the degree of severity with which a crime should be punished for the best interest of society in any particular district is left to the discretion of a jury of the vicinage.

—*Harpers' Weekly.*

LONDON LEGAL LETTER.

LONDON, Feb. 1, 1897.

THERE is nothing in connection with practice at the English bar which is so puzzling to the visiting American lawyer wandering curiously through our courts as the distinction between the Queen's Counsel and the ordinary barrister. It is, indeed, very difficult to explain to him the difference that divides the functions of the solicitor from the barrister, and when once he has finally mastered this intricate boundary question, it is discouraging to be told that there is still another and even more subtle division, although a very grave and practical one, that separates the members of the so-called upper branch of the profession into two classes of advocates. At the last Thanksgiving Day dinner of the American Society in London, a witty woman who responded to one of the toasts suggested that American women ought properly to give thanks that they were not English lawyers, "for they are such incomplete sorts of men. There are the solicitors who have learned the law, but who have to get the barristers to practice it for them; and the barristers who practice law, but can't do so until the solicitors give them the chance. So that it really takes at least two legal minds in this country to constitute one active intelligence." The speaker might have gone one step further and invoked the aid of still another mind — that of the Queen's Counsel — before the actual intelligence is perfect.

If, for example, a layman desires some wrong, under which he fancies he suffers, righted, he must go, in the first instance, to a solicitor. He cannot take the advice of counsel directly. The barrister who may ultimately be brought into the case may be his most intimate friend and trusted companion. Nevertheless he must, for the moment at least, pass him by and go to a solicitor. The solicitor, after hearing all the facts will then set them out in a "statement of case for advice," and lay this statement before counsel. If the latter advises that an action will lie, the advice is given to the solicitor, who in turn communicates it to the lay client. The next step is for the solicitor, if the matter is one of any technical importance, or involves any responsibility, to ask counsel to "settle" the indorsement that is to be made upon the writ. Thus indorsed, the writ is issued. It is returnable in eight days. Then the plaintiff has six weeks in which to deliver his "statement of claim." This the solicitor likewise asks counsel to settle for him. If, after the defendant has delivered his defense, any question arises as to the reply, the solicitor again submits the matter to counsel. The same course is pursued with regard to any interlocutory proceedings — applications to inspect documents, for particulars, and the like. It is within the province of the solicitor to attend in person at the disposition of such matters, but as the costs of briefing counsel to look after them will be allowed in the final taxing of the case, he delegates the duty and the responsibility to the barrister. Finally, when the issues have been joined, and the case has been set down for hearing, the brief proper is delivered, — a voluminous document reciting a history of the antecedents of the parties, the occasion of their dispute, and its circumstances. With it are submitted what in America would be known as a "trial brief," that is, a list of the points involved, citations of authorities on questions likely to arise, and elaborate "proofs" of the witnesses, or what, after examination by the solicitor, they are expected to testify to. There are also copies of the pleadings, the correspondence between the parties before the writ was served, and of such documents as bear on the case. These voluminous papers, all of a uniform size, generally fourteen inches by eighteen inches, are all neatly folded and indorsed on the back with the title of the case, and the fee of counsel; and then, if the matter is of more than very ordinary importance, appear the words "With you Mr. Blank, Q. C." Here is where the Queen's Counsel for the first time appears. He has not been consulted at any preliminary stage of the proceedings, and his brief, identical in all respects with that of his junior, will probably not have been delivered to him more than three or four days before the case is called for trial.

When at last the case is reached, a "consultation" is held, sometimes in the lobby outside the court, but generally on the morning of the trial at the leader's chambers, when the matter is hurriedly run over. Upon assembling in court, the leader occupies a place in the front row of the benches

reserved for counsel, and at both ends of this row there is a wicket gate to prevent intrusion upon these reserved seats; the space is known as being "within the bar." His costume differs from that of his "junior," who takes a position immediately behind him, in that his gown is of silk while the junior is restricted to one of alpaca or bombazine, or, technically, "stuff." Hence the Queen's Counsel is known as the "silk," and his being admitted within the bar as "taking silk." The case being called, the etiquette between counsel provides that the junior shall briefly — in literally a sentence or two — announce the contents of the pleadings. The leader then makes the opening statement. This opening, particularly if a jury has been sworn, is a long and elaborate presentation of the case, in which everything, including the correspondence between the parties and what the witnesses are expected to prove, is set out in detail. Immediately at the close of the statement, which not uncommonly occupies an hour or two, the junior calls into the witness-box the first witness and takes him through his direct examination. At the close of the plaintiff's case, the leader on the other side opens in a similar way for the defense, and his witnesses are examined by his junior. The silks or leaders reserving to themselves the right of cross-examination. When the evidence is all in, the leaders address the jury in turn, and then the case is summed up by the Court.

It will thus be seen that what the barrister is to the solicitor, so the Queen's Counsel is to the barrister. To the solicitor all rights of advocacy, at least in the high court, are absolutely denied, while so far as the barrister is concerned, although he has the right, he exercises it only in the absence of his leader. In some respects, the division of the work is an advantage to the client, as it enables him to avail himself, when the case is actually before the Court, of an advocate who, by reason of his engaging in no other work, and devoting his whole time to it, becomes specially trained in the most skilful and acceptable way of presenting the points in dispute. Unfortunately, these peculiar powers are not possessed by all Queen's Counsel. The result is that most of the important work is done by half a dozen men who are naturally very much sought after. They find their tables loaded with briefs which they cannot possibly read. These briefs are therefore read and noted up for them by "devils," or young barristers who are only too anxious to handle the papers of a fashionable Q. C. If the notes are well made, the case is comparatively easy, and the opening statement is well delivered. But too often a solicitor who has marked fifty or seventy-five guineas on a brief which he has delivered to one of the prominent leaders, is in an agony of apprehension lest the papers have not been read or the leader has only a general idea of their contents. It is needless to say that the junior is also on pins and needles as to the result, for he has no way of knowing how much the leader knows. Then, if the statement is well made, — and I must say that it is only rarely that the contrary happens, — the leader is as like as not to leave the court at its conclusion to go off to another case in another court to "open" there, or to cross-examine a witness, or to address a jury. In his absence the junior goes on with the case, resigning it at once to the leader upon the latter's return.

Another disadvantage of the system is the cost it entails. The rule is that the junior shall have his brief marked with a fee which is two-thirds of that of his leader. If, therefore, the leader gets fifty guineas, the junior must have somewhere in the neighborhood of thirty-two guineas, whereas, if he was alone in the case, he would be quite content to take fifteen or twenty guineas. This, in some instances, is avoided by giving the leader a special fee which is not taken account of in arranging the fee of the junior. It is hardly to be wondered at, with a knowledge of these facts, that the costs of litigation are so enormous in this country. In a probate case which has just been finished, no less than four Q. C.'s and five juniors represented the parties in interest in the contest of the will. It is open gossip that the costs will amount to close upon £15,000, — or $75,000! Of this amount, counsel will receive perhaps a tenth, the residue being expended in the solicitor's work.

There is one word that I may perhaps add to this attempt to enlighten American lawyers as to a feature of practice which I believe is confined exclusively to English and Irish Courts, and that is how or under what circumstances a junior may "take silk." This privilege, generally speaking, can be obtained from the Lord Chancellor, who alone confers it only after ten years of service at the bar as a junior. Exceptions are, however, made. Judah P. Benjamin took silk, if I remember correctly, after only three years' practice, and Mr. Carson, who came over very recently from Ireland, where he had been the attorney-general, and a leader at the Irish bar, was granted silk after only about a year's service as a junior. It must not be assumed, however, that all barristers who have been called ten years apply for silk. On the contrary, many successful men never desire to take it. It thus happens that the "junior" in the case may be a man of fifty or sixty years of age, with a large and lucrative practice, while the "leader" will be of thirty-five or forty years, and of comparatively small experience. Such cases, however, do not often occur.

STUFF GOWN.

The Lawyer's Easy Chair.

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

BY IRVING BROWNE.

CURRENT TOPICS.

AN UNIQUE LAW SCHOOL. — The Law School of the University of Buffalo is unique in one respect: the lecturers, with one exception, are active practitioners, and with four exceptions serve without compensation. The board comprises many of the ablest and busiest men in the city, and they make it a point to prefer their lecture engagement to professional business except when they are actually engaged in trials. The result is thus described in a recent circular issued by the board of control: —

"In the course of the arguments at Albany it was discovered through the report of Mr. Franklin M. Danaher, Secretary of the State Board of Law Examiners, that of the seven law schools in the State, the Buffalo Law School stands at the head in point of standard; that in percentages of successful examinations taken for admission to the Bar, our school is first, and a larger proportion of our graduates are successful than of any school. This fact itself was a powerful argument against any proposed change in our system of instruction, and it indisputably established the truth that instruction in law is best secured from lawyers in the active practice of their profession."

DEFINITIONS. — We have recently gleaned a few legal definitions, new and old: —

At. — A meeting of supervisors in a building 100 feet from the court house is not "at the court house." Harris *v.* State, 72 Miss. 960.

Lottery. — A horse-race for stakes is not a lottery. Matter of Dwyer, 14 Misc. 204.

Mineral Ore. — Granite is not a "mineral ore," but it is a "mineral." Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495.

Museum. — A "museum" may comprehend an exhibition of "living animals." Bostwick *v.* Purdy, 5 Stewart (Ala.), 505. The question was one of the necessity for procuring a license under a statute requiring a license for any exhibition of "any museum, wax works, feats of activity, sleight-of-hand or plays." Taylor, J., delivered a learned and interesting opinion, in which he traced the word to its Greek root "to amuse." The first museum, he says, was the Alexandrian library. He can see no difference between a collection of large animals and of one of small animals, nor can he see that there is anything "peculiarly deleterious" in the exhibitions specified in the act, nor any good reason why Mrs. Jarley should be taxed and Mr. Barnum go free. So Bostwick, who waged this *qui tam* action, took one hundred dollars to himself. It seems also that another act was passed by the Legislature, reciting the instituting of an action against one Baldwin for a similar unlicensed exhibition, and the meritorious services of Reuben Chapman, attorney-at-law, in procuring judgment therein against Baldwin, and giving Chapman twenty-five dollars for his services. This act the Court deem an indication that the Legislature meant to include menageries in the term "museum."

Peddler. — A peddler is an itinerant vendor of goods which he carries with him and delivers. State *v.* Parsons, 124 Mo. 436; 46 Am. St. Rep. 457; State *v.* Lee, 113 N. C. 681; 37 Am. St. Rep. 649; State *v.* Moorehead, 42 S. C. 211; 46 Am. St. Rep. 719.

Physician. — A dentist is not a physician, who may prescribe liquor on Sunday. State *v.* McMinn, North Carolina Supreme Court, 24 S. E. Rep. 523. Nor a "practitioner of medicine" exempt from jury duty. State *v.* Fisher, 119 Mo. 344; 12 L. R. A. 799; People *v.* De France (Mich.), 28 L. R. A. 139.

Picture. — It is held in People *v.* Ketchum, 103 Mich. 443, that a photographic negative is a "picture" within the meaning of a statute prohibiting the procuring of obscene pictures. But is a stereotype plate a print?

Prowl. — This means "to rove or wander stealthily, as one in search of plunder." So where a magistrate issued a warrant against one on a deposition that a burglary had been committed, and that the accused was "prowling" around the premises about the time, it was held sufficient to afford reasonable ground of belief that he was the guilty person, and that no action of false imprisonment would lie. Swart *v.* Rickard, 148 N. Y. 264.

Public Address. — A sermon is a "public address" within a statute prohibiting public addresses on Boston Common. Com. *v.* Davis, 162 Mass. 510.

Yearlings. — A yearling is "any animal in the

second year of its growth." Therefore an indictment for stealing a "yearling" was held bad, in Stottenwerk *v.* State, 55 Alabama, 142. *Non constat* it might have been a baby. But in Berryman *v.* State, 45 Tex. 1, it was held that "as understood in common language a 'yearling' comes under the denomination of cattle," and so an indictment for stealing a "bull yearling" was good. The Century Dictionary defines it, "a young beast one year old or in the second year of its age."

THE VOLUNTEER BARBER.

Duffie *v.* Mathewson and others, 1 City Hall Recorder, 167.

With crown and trident,
And accents strident,
A pseudo-Neptune reared his head,
And planned to wrestle
With an English vessel
That off the Banks was heaving lead.

With frisky motion,
From out the ocean
Her side with all his rout he boarded,
And loud demanded
There should be handed
To him to drink of spirits hoarded.

Of every station
All made oblation
Of rum or eke of cognac,
Except one duffer,
A British bluffer,
Who fought them till his face was black.

But quick they brought a
Tub of salt water,
And on a plank across, a-straddle,
They held him raving,
Gave him a shaving,
And tipped him in the brine to paddle.

That ruthless shaver
The usual favor
Of asking if the razor hurt,
Had quite omitted,
And all unpitied
The victim struggled *sans* his shirt.

Nor did he chatter
And ceaseless patter
Of weather and of politics,
Nor nostrums sell him,
Nor falsely tell him
His falling hair they soon would fix.

To such a scoffer
He made no proffer
Of "our sea foam" or "ocean spray,"
Nor tiresome wooing
To try champooing
And things to stop his growing gray.

At length upstarting,
And sorely smarting
From scrape of rusty iron hoop,
Eyes full of lather,
He swore he'd rather
Die than to treat that lawless group.

So when that barber
Arrived in harbor,
He and the eight who shared the sport,
In spite of flattery,
Were sued for battery,
And haled before a landsman's court.

A Gotham jury,
In righteous fury,
Declared such conduct was not nice;
Though meant for funny,
'T would cost them money —
Forty-six dollars was the price.

Extremely risky
Such actions frisky
Toward passengers by carrier,
For some get huffy,
Like Mr. Duffie,
And raise a legal barrier.

Artists tonsorial
In regions boreal,
This famous case lay to your soul,
For sure the fact is
'Tis ill to practice
Your trade at sea beneath the Pole.

A QUESTION IN CAMERA. — The London Law Journal has an entertaining department devoted to accounts of Moot Courts. In a recent number we find the following, which we commend to the attention of law-school professors: —

"The eighth general meeting of the Newcastle-upon-Tyne Law Students' Society was held on December 16. Mr. H. S. Mundahl, barrister-at-law, in the chair. The subject of debate was as follows: 'Mr. Kodak takes, without permission, a snapshot of a lady and a gentleman in a boat, under some trees. The gentleman has his arm round the lady's waist. This photograph Mr. Kodak is in the habit of showing to his bachelor friends who visit him at his chambers. Major Sprightley has for some time past been very suspicious of a certain Mr. Brown, who, he considers, is too attentive to Mrs. Sprightley. A Mr. Smith, in company with Major Sprightley, calls at Mr. Kodak's chambers one evening, and Major Sprightley is introduced to Mr. Kodak. Eventually Mr. Kodak shows his collection of snapshots, including that of the lady and gentleman in a boat. Major Sprightley recognizes his wife and Mr. Brown, and Mrs. Sprightley, when charged, has to admit that she has carried on a foolish but innocent flirtation with Mr. Brown. Major Sprightley declines to cohabit any longer with his wife. Has Mrs. Sprightley a right of action against Mr. Kodak?' Messrs. E. C. Sanders and J.

W. Parrington opened in the affirmative, and Messrs. B. Townshend and S. D. Cole took the negative side. The following members also spoke: Messrs. Senhouse, Brown, Chapman, Lemon, Hadaway, and Brandling. The chairman having summed up the debate and reviewed the law on the point, put the question to the meeting, when it was decided by a majority of six that Mrs. Sprightley had a right of action against Mr. Kodak; but on a further motion being put as to whether she could recover damages from him, it was unanimously decided that she could not."

This would seem to be hard on the lady; she had a right to sue but not to recover! But it is probably explainable on the theory that on the first question the tribunal sat as a court, on the second, as a jury. It reminds us of that decision, in the New York Court of Appeals, that a wife had at common law right of action for the seduction of her husband by another woman, but that she could not maintain the action without joining her husband as plaintiff, because the damages belonged to him alone, and therefore the right was barren (in two senses).

NOTES OF CASES.

ANIMAL DEFAMATION. — There is a good deal of amusement in the law-books on the subject of defamation by likening one to a dumb beast. The latest authority on this point is to the effect that it is not necessarily libellous to call a man a hog. (There is a considerable class who esteem it no libel to call Shakespeare, Bacon.) Much depends on the context, for it may often appear that the charge was made only in a Pickwickian sense. In Urban *v.* Helmick, decided by the Supreme Court of Washington in July, 1896 (44 Pac. R. 747), it appeared that a publication referring to plaintiffs, who were hotel keepers, was as follows: "In some localities there are hogs, called 'business men,' that want it all. I believe in buying at home, and building up our own trade and town as much as possible; as the more business we do, the more money there is circulated at home." It was held that the meaning attributed to the word "hogs" by the article itself did not render the publication libelous *per se*. But in Wisconsin, it has been actionable to call a man a hog. (Solverson *v.* Peterson, 64 Wis. 198; 54 Am. Rep. 607.) The exact charge there was that the plaintiff was "an enormous swine, which lives on lame horses," *i. e.*, the carrion of lame horses. The Court quite warmly said: "How could a man be lower, meaner, or more filthy than to have the character, habits and ways of a swine?" "The plaintiff is compared with this low and filthy animal to indicate that he has fallen to the very lowest degree of human degradation, morally, intellectually, and physically. It was supposed that the prodigal had fallen to the very lowest condition, when he became the associate of swine, and lived upon the same food." No wonder that the plaintiff bristled up!

It will not answer to call one's neighbor "a frozen snake" (Hoare *v.* Silverlock, 12 Q. B. 624), for that plainly refers to the fable about ingratitude. "An itchy old toad" is quite objectionable (Vellers *v.* Mousley, 2 Wils. 403). So of "skunk" (Massuere *v.* Dickens, 70 Wis. 83 [although phrased in Latin]; Pledger *v.* State, ; nor to compare a lawyer to a bull or a goose (Baker *v.* Morfue, 1 Sid. 327). Nor to charge that a woman had been bitten by a cat and thereafter acted like one, mewing and posing to catch mice, etc. (Stewart *v.* Swift, 76 Ga. 280); nor to call an editor "a mouse most magnanimous," or "a vermin small" (Child *v.* Horner, 30 Mass. 510); nor to call one "a black sheep" (McGregor *v.* Gregory, 11 M. & W. 287; Barnet *v.* Allen, 3 H. & N. 381); nor to call a schoolmistress a "dirty slut" (Wilson *v.* Runyon, Wright, 651); nor a man "a thieving son of a bitch" (Reynolds *v.* Ross, 42 Ind. 387); nor "a thieving puppy" (Pierson *v.* Steorbz, Morris [Iowa], 136); nor a broker a "lame duck" (Morris *v.* Langdale, 2 B. & P. 284); nor a detective officer in making an arrest, "a big brute" (O'Shaughnessy, *v.* Morning Journ. Ass'n, 71 Hun. 47); nor an insurance company a "wild-cat company" (Delaware etc. Ins. Co. *v.* Croasdale, 6 Hourt. 181), nor a "scalper" a "whelp" (Mauget *v.* O'Neill, 51 Mo. App. 35).

On the other hand, in old England it was safe to call a justice "a logger-headed, a slouch-headed, and bursen-bellied hound" (1 Keb. 629), or an innkeeper a "caterpillar" (Vin. Abr. "Act for Words," U. a. 34). And so, in the celebrated case of Tom Fenn's beer, it was held not actionable to say, that if the defendant should give his mare a peck of malt, and let her drink water, she would produce naturally as good beer as his. (Fenn *v.* Dixe, 1 Rolle, Abr. 58.)

In modern America it has been held not actionable to call a woman "a bitch" (Shrinck *v.* Kollman, 50 Ind. 336; K. *v.* H. 20 Wis. 239), "although a very coarse and ruffianly expression," yet not equivalent to "prostitute."

In the celebrated Mezzara case (2 C. H. Recorder, 113) it was held libellous for an artist to append asses' ears to a portrait of a legal gentleman who sat to him and would not pay for the work.

RESTRAINT OF MARRIAGE. — Is it the policy of the common law to look with disfavor on the remarriage of widows? Such would seem to be the inference from Herd *v.* Catron (Tennessee Supreme Court, 37 S. W. Rep. 550), in which it was held that a condition in a will, that if testator's widowed daughter

marry again, the share bequeathed to her shall go to her son, is valid, as the rule forbidding conditions in general restraint of marriage does not extend to second marriages. The Court said that one of the exceptions to the rule that conditions in general restraint of marriage are void, —

"Recognized by the general current of authority, and by the almost universal concurrence of modern judicial opinions, is that such a condition in restraint of marriage does not extend to the case of a second marriage. The principle itself was borrowed from the civil law, in which widows, as observed by Lord Thurlow in the principal case on that subject, were excepted from the Novels (Barton *v.* Barton, 2 Vern. 308); and this exception has been continued throughout modern English and American authorities. Further, on this question, Mr. Beach, in his work on the Law of Wills (section 234), says: 'The present state of the law as regards conditions in restraint of the second marriage of a woman is this: that they are exceptions to the general rule that conditions in restraint of marriage are void, and the annunciation of that law has been gradual. In the first instance, it was confined to the case of the testator being the husband of the widow. In the next place it was extended to the case of a son making a will in favor of his mother. Then came the case of Newton *v.* Marsden (2 Johns. & H. 356, decided in 1862), in which it was held to be a general exception, by whomsoever the bequest may have been made (Allen *v.* Jackson, 1 Ch. Div., 399).' The whole subject will be found discussed by Mr. Beach, in sections 233–237; in Schouler on Wills, sect. 603; Story's Eq. Jur., sect. 276–291; in Pritch. Wills, sect. 155–160; and in the case of Scott *v.* Tyler, 2 White & T. Lead Cas. Eq., 429–512, and note."

SURGICAL DISCRETION.— A very novel case regarding the right of a surgeon to go beyond his specific authority in performing an operation was recently tried in London. Miss Beatty, a hospital nurse, submitted herself to Mr. Cullingworth, an eminent surgeon of London, for an operation of ovariotomy. It was admitted by the defendant that she forbade him to go beyond the single operation, but he testified that he refused to perform the operation under that condition and told her she must submit to his discretion. This she denied. Finding it necessary, in his opinion, to perform the double operation to prolong her life, he did so. He testified that in view of the patient's wish he had hesitated, but he concluded to overrule her objection. In consequence she felt compelled by conscientious scruples to break off her marriage engagement. The most eminent surgeons testified that they would refuse to operate under such a restriction. Sir Thomas Wells, however, the greatest expert, testified that he thought that the double operation in this case was unnecessary, but he had no doubt the defendant acted conscientiously. The defendant and his assistant testified that the plaintiff would not have lived ten years without the double operation. There was a verdict for the defendant. This of course may have been based on a finding that the defendant had refused to submit to the condition, and that consequently the plaintiff had tacitly assented. If any inference is to be drawn from the case that a surgeon may exceed his specific instructions, not dessented from by him, even if he deems it necessary to prolong or save life, it is bad law. Miss Beatty had a perfect right to prefer to live for only ten years, and to be for that time a wife and possibly a mother, rather than to live the ordinary length of time unmarried, or be a barren wife. The matter is probably less serious to the female sex than a somewhat analogous operation would be to the male but we believe that it would be rather difficult to induce a judge and a jury to justify a surgeon in disregarding explicit instructions of a similar purport on the part of a man. If a second operation in the case under consideration should have proved necessary, it would have been easy to make it, and not unsex the sufferer at the outset. We confess that we are surprised at the verdict, and that in any view we regard the result as wrong. We have a sympathy with a woman who demands to have her sexual physiology respected despite the custom of surgeons. We fully agree with the New York Law Journal that: "Where a proposed operation is as clearly the subject of definite agreement as the one under consideration, and especially where the worst that could result from following the patient's directions would be the necessity of submitting to a second operation later, we think such directions should be accepted as morally binding upon the surgeon, and held legally controlling by the Courts." If that case had arisen in this country the result would certainly have been to the contrary. The English Courts are tenderer toward dogs, but less considerate of women than the American Courts.

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.

LEGAL ANTIQUITIES.

PERHAPS the two most remarkable instances of judicial combat upon record are the following, which took place in Spain in the eleventh century: Alphonso, King of Leon and Castile, in the year 1038, meditated the introduction of the Roman law into his dominions; but being uncertain whether this or the customary law which had hitherto prevailed was the best, he appointed two champions to determine the question with their swords in actual conflict; and the result was that the chevalier who represented the civil law was beaten. During the reign of the same monarch, the question was agitated whether the Musarabic or Roman liturgy and ritual should be used in the Spanish churches; and the decision was referred, as in the former case, to the sword. Two knights in complete armor entered the lists, and John Ruys de Matanca, the champion of the Musarabic, *i. e.* Gothic ritual, was victorious. The queen and archbishop of Toledo, however, were dissatisfied with the result, and they had influence sufficient to have the matter submitted to a different kind of ordeal. A large fire was kindled, and a copy of each liturgy was thrown into it. The Musarabic (perhaps being bound in some species of asbestos) stood the test, and remained unscathed, while the rival volume perished in the flames. But it is not easy to convince an opponent in a theological controversy, and because it was discovered, or asserted, that the ashes of the latter had curled to the top of the flames and leaped out of them, the victory was claimed for the Roman ritual. The result was that both liturgies were sanctioned; but as the Roman was chiefly favored, it gradually superseded its competitor.

FACETIÆ.

MAGISTRATE: "The gamekeeper declares that he saw you taking this pheasant. What have you to say to that?"

Prisoner: "I only took it for a lark."

Magistrate: "Six months for making such an ornithological error. Consult your natural history in future."

JUDGE CLOUD, of North Carolina, in sentencing a prisoner to death, solemnly adjured him to look to the Supreme Being for support, for "He has said, 'Come unto me, you who are heavily laden, and — and — and — *I will do the best I can for you*,'" — here, seeing the Bar was attentive, he covered his retreat by adding, "*or words to that effect*, for the Court is not accurate on Scripture."

IT was before an Irish trial justice: The evidence was all in, and the plaintiff's attorney had made a long, eloquent, and logical argument. Then the defendant's attorney took the floor.

"What you doing?" asked the Justice, as the lawyer began.

"Going to present our side of the case."

"I don't want to hear both sides argued. It has a tindincy to confuse the Coort."

So the defendant's lawyer sat down.

LUCAS S. BEECHER, a prominent lawyer in Ohio some years ago, toward the end of his professional career became somewhat hard of hearing. A farmer who lisped called at his office one day to employ him to bring an action against a railroad corporation to recover damages for negligently killing some of his pigs. Mr. Beecher understood the farmer to claim that the company had killed three thousand of them, and said to the client interrogatively: "*Three thousand, and all at one fell swoop?*" Whereupon the farmer shouted: "No! no! Good Heavens, no! Three thows *and* pigths."

NOTES.

"How Successful Lawyers Were Educated" is the title of a recent treatise by George A. Macdonald of the New York Bar. But its title is somewhat faulty in view of an old legal saying that "the lawyer is never educated, but until the day of his death is constantly educating himself and dies with an education never complete." Perhaps "valuable aids to legal progress" might have proved a more appropriate title. All "successful lawyers" will agree that object-lessons for legal practice and progress are of higher value than even books. The Benchers in the Inns of London advise their students to frequent the Courts and Assizes and there to study the strong points in cases therein arising, as well as the play of barristers and Q. C.'s in managing trials or presenting arguments. Treatises and reports will store the memory of the law student or young practitioner with learning; but observation of human nature, of the various pursuits of life, and of the conduct and methods of judges and successful lawyers must best supply the carte and tierce of forensic fencing. When the young lawyer asks, How can I be most successful in my profession? the answer will best come by his embracing some specialty in it and perfecting himself in that. And in all varieties of life pursuits, professions and business, the trend of the times is towards specialties. As a character in Shakespeare's play of "All's well that ends well," says

> "—'Twere all one
> That I should love a bright particular star
> And think to wed it."

Sir Albert Pell, a verbose and prolix, but very successful English advocate, who made havoc of syntax and pronunciation every time he opened his mouth in court, is admitted to have owed his forensic victories largely to his iteration. When a gentleman criticised a jury address of his in an important cause, Pell "confessed and avoided" the justness of the criticism. "I certainly was confoundedly long," he replied; "but did you observe the foreman, a heavy-looking fellow in a yellow waistcoat? No more than one idea could ever stay in his thick head at a time, and I resolved that mine should be that one; so I hammered till I saw by his eyes that he had got it. Do you think I cared a —— for what you young critics might say?" Lord Brougham was so impressed by this advocate's style of speaking that he said "it was not eloquence, — it was *pell*oquence, and deserved to have, in books of rhetoric, a chapter to itself."

The largest police office in the world is New Scotland Yard, in which 3,000 officers can be accommodated.

In spite of the odium which is supposed to be attached to the office of the hangman in Europe, there is a great rush for the position of high executioner of Prussia, now that Herr Reindell, the present incumbent, is about to retire. The post pays $37 "a head" and traveling expenses.

A German court has decided that electricity cannot be stolen. A man was arrested on the charge of having stolen several thousand amperes of current by tapping a light company's mains and using it to run a motor. The Court, on appeal, ruled that "only a movable material object" could be stolen, which electricity was not, and therefore the man was acquitted. — *Electric Review.*

An agitated lawsmith of Minnesota has introduced a bill to the State legislature which is styled "A bill for the suppression of female fools." It provides that "women, or men, or neuters who send flowers, and candy, and angel-cake, and plush-bound copies of Keats to wife-murderers and thugs, shall be punished by imprisonment or fine, unless the wife-murderer or thug be a near relative." The latest dispatches do not say that the measure has been acted upon decisively as yet.

CURRENT EVENTS.

Dr. Schroer, the eminent German professor, advocates that means be taken to make English the one language of the world. He says the need of a universal language has long been felt, and any attempt to introduce an artificial language is unnecessary. The English language is universal by its spread over the entire globe and by the ease with which it may be learned. It has, he declares, reached a position far in advance of all other tongues.

English is spoken by most of the people of North and South America, it is spoken by the most powerful nation of Europe, it is spoken in India and in Australia. Since the beginning of the nineteenth century, the number of English-speaking people has

grown from twenty-five million to a hundred and twenty-five million, and there is no prospect of any check to its increasing triumph.

WITH the completing of the Chicago Drainage Canal one of the greatest engineering feats of modern times will have been successfully performed. The work would have been comparatively simple if drainage alone had been considered, but the eventual welfare of the nation was thought of, and it was recognized that a ship-canal between the Mississippi and the Great Lakes would be of great advantage to the entire nation. Within a year from the present time, there will be a river, formed by the hand of man, diverting from the St. Lawrence to the Mississippi system 300,000 cubic feet of water per minute, this amount to be doubled when the growth of the population requires it. It is seriously believed by some people that the flow through the canal will permanently lower the level of the Great Lakes. On this account there is a possibility that the canal will be made the subject of international diplomatic correspondence.

LITERARY NOTES.

THE March CENTURY is an "Inauguration Number," devoted especially to articles on life in the White House and at the Capitol, illustrated with a great number of interesting pictures.

THE February number of CURRENT LITERATURE has in addition to its well-filled and interesting regular departments a signed article by Hamilton W. Mabie; a page of verse, the work of Johanna Ambrosius, Germany's Peasant-Poet; and a reading from Paul Leicester Ford's new book. Mr. Geo. W. Cable has become the editor of this periodical.

IN HARPER'S MAGAZINE for March there is a significant and timely paper, "Preparedness for War," by Capt. A. T. Mahan, U. S. N., the leading writer on American naval topics, which outlines a scheme for defense by sea.

Other interesting articles are "The Decadence of the New England Deep-Sea Fisheries," by Joseph William Collins, and "Henry E. Marquand," by E. A. Alexander, which chronicles the bequests of the most intelligent and liberal American patron of Art, and describes the Marquand collection in the Metropolitan Museum of Art, New York. The short stories are "Separ's Vigilante," by Owen Wister; "La Gommeuse," a character sketch by Charles Belmont Davis; and "Perdita," by Hildegarde Hawthorne, a story with a supernatural implication.

THE public seems never to grow weary of hearing about Rudyard Kipling and his achievements, and it will find in the February REVIEW OF REVIEWS a candid and unpretentious, but not the less exhaustive, critique of Kipling by Mr. Charles D. Lanier. He has given us an interpretation of Kipling which is frankly sympathetic and at the same time irresistibly attractive.

This number also contains a most complete account of the many-sided career and public services of the late Gen. Francis A. Walker who died so suddenly, early in January. It reviews General Walker's life as a student, lawyer, soldier, adjutant-general on Hancock's staff, journalist, teacher, government statistician, census commissioner, writer on economics, historian and educational administrator.

LATE issues of THE LIVING AGE have been enriched by many valuable productions, selected not from the British press alone, but embracing translations from leading Continental authorities, including Emilio Castelar in a review of the Spanish-Cuban relations, a paper on De Goncourt, and a discussion of "Political Ideals and Realties in Spain"; Jules Lemaitre on a "Modern Morality"; Alfred Fouille in "As Others See Us;" and Anatole le Braz in "All Soul's Eve in Lower Brittany."

WHAT SHALL WE READ?

This column is devoted to brief notices of recent publications. We hope to make it a ready-reference column for those of our readers who desire to inform themselves as to the latest and best new books.

(Legal publications are noticed elsewhere.)

ALL the horrors of the Indian mutiny are most thrillingly set forth in *On the Face of the Waters*,[1] the latest novel by Mrs. Steel. The story is of absorbing interest and is written by one who has lived where the exciting events depicted took place, and who is well informed as to both sides of the question. The book as a whole is the best which has come from Mrs. Steel's pen.

Students of political history will find much of interest in the selections of orations delivered by our ablest American statesmen which are being published in a series of volumes entitled *American Orators*.[2] The selections have been made not only as examples of eloquence, but with reference to their historical value. The series will be completed in four volumes.

We are in doubt as to whether "*The Beginning of the End*,"[3] is intended to be taken seriously. The

[1] ON THE FACE OF THE WATERS. By Florence Annie Steel. The Macmillan Co., New York.

[2] AMERICAN ORATORS. Edited by Alexander Johnson. G. P. Putnam's Sons, New York.

[3] THE BEGINNING OF THE END. Little, Brown & Co., Boston. Cloth.

writer, who by the way is anonymous, takes for a motto "Life is love, and love is the beginning," but the book deals mostly with ideas on death rather than love, though it finally leads up to it. The story begins and ends in a graveyard, even the declaration of love being made there. The author is extremely fond of queer words. "Resilience," "nescience," "unaxiomatically," are among the most unusual, but "unmitigable" is the favorite which occurs at least twenty times, "relentless" evidently being too simple for the author's style. The book is interesting as a literary curiosity.

Dr. Fridtjof Nansen's *Farthest North*[4] is a work which, in addition to its popular interest, has a scientific value beyond that to be found in other records of Arctic exploration. The expedition was not a mere feat. In physical geography, in biology, meteorology, the results obtained will mark a new departure in the various sciences concerned. The continuous observations made during three years on the meteorology of the Arctic regions, when combined with other observations, will be of the highest practical importance in relation to the climatology of Europe and North America. In 84° 4′ north, this intrepid explorer, finding his vessel, the *Fram*, solidly frozen in the ice, started with one companion, Johansen, for the unknown regions of the North Pole. They left their vessel, equipped with three sledges, two kayaks, and twenty-eight dogs, with provisions for the dogs for thirty days, and for themselves for one hundred days. When this stock was exhausted, they lived on seal, walrus and bear meat, when they could get it. The account of the months these two hardy men spent in the polar regions, even in such fragmentary statements, is most thrilling. When a dog died or fell by the way, he was served as food by the survivors. Nor were the chances of death by starvation the only dangers they had to face. Yet the experiences of peril were mere incidents, breaking the monotony of Nansen's scientific observations, during those many months of hardships and privations, the results of which are of incalculable value to the scientific world. Many of his observations were taken in latitude 86° 14′ north.

[4] FARTHEST NORTH. By Dr. Fridtjof Nansen. Harper & Brothers, New York.

NEW LAW-BOOKS.

THE LAW RELATING TO PRIVATE TRUSTS AND TRUSTEES. By ARTHUR UNDERHILL, M.A., LL.D., of Lincolns Inn. Fourth Edition enlarged and revised. First American Edition by F. A. WISLEZENUS and ADOLPH WISLEZENUS of the St. Louis Bar. F. H. Thomas Law Book Co., St. Louis, 1896. Law sheep. $5.00 *net.*

This work, so far as we have been able to examine it, seems to us admirably adapted to the needs of both practitioner and student. Mr. Underhill's treatise has been most favorably received in England, and with the full and exhaustive American notes added by the editors it should be heartily welcomed here.

MORTUARY LAW. By SIDNEY PERLEY. George B. Read, Boston, 1896. Law sheep. $3.00.

This little volume sets forth in a most interesting and exhaustive manner the general principles which underlie all law concerning dead human bodies. The subject is one of importance in these times of ostentation and lavish expenditure over the remains of the departed. That even after "we have shuffled off this mortal coil" we still are liable to be the subject of litigation is evidenced by the fact that the author cites some seven hundred authorities to support his propositions.

The work covers almost every point likely to arise from the last sickness, death and burial.

THE LAW OF RAILWAY ACCIDENTS IN MASSACHUSETTS. By G. HAY, Jr. Little, Brown & Co., Boston, 1897. Law sheep. $4.50 *net.*

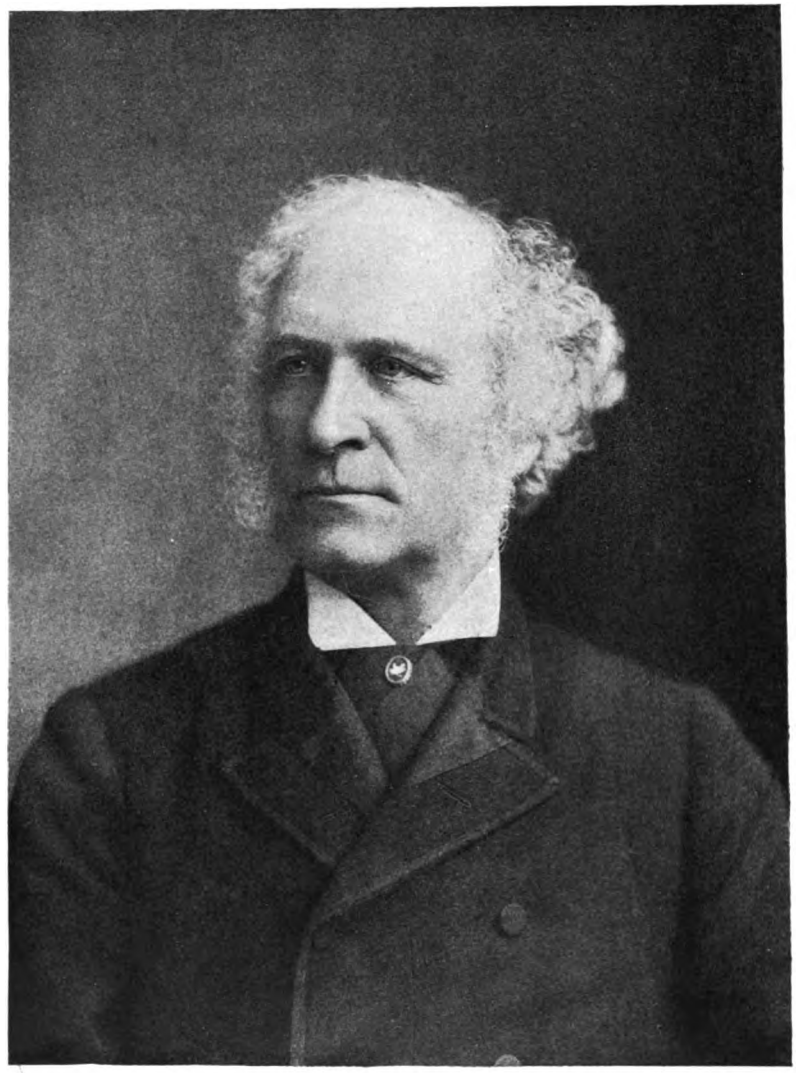
Mr. Hay's treatise, although based upon Massachusetts decisions, covers the question of the liability of Railway Corporations in case of accidents so thoroughly, that the work will prove exceedingly useful to the profession at large. It is evidently prepared with great care, and is an exhaustive resumé of the law upon the subject.

A PRACTICAL TREATISE ON THE LAW OF RECEIVERS, with extended consideration of Receivers of Corporations. By CHARLES FISK BEACH, Jr., of the New York Bar. Second Edition, with elaborate additions to the text and notes, and material changes therein, by WILLIAM A. ALDERSON of the St. Louis Bar. Baker, Voorhis & Co., New York, 1897. Law sheep. $6.00, *net.*

Probably no subject, recognized by the law, has developed such a rapid growth as that covered by the treatise before us. It is sad that it is so, but, such being the fact; a thorough and reliable work upon the Law of Receivers cannot but be welcomed by the profession. The original treatise by Mr. Beach we have already spoken favorably of. This new edition contains many additions and alterations judiciously made by Mr. Alderson, and in its present form the volume is a clear presentation of the law governing receivers, and brought fully down to date. We cheerfully commend it to our readers.

THE CRIMINAL LAW. By JOHN G. HAWLEY and MALCOLM MCGREGOR. The Collector Publishing Co., Detroit, 1896. Law sheep.

This volume does not purport to give anything more than a mere outline of the principles of criminal law, and is useful only as an elementary work for law students. For this purpose it seems admirably adapted, and we commend it to the consideration of our law teachers.



Daniel D. Lyke

The Green Bag.

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DANIEL DOUGHERTY AND THE PHILADELPHIA BAR.

BY A. OAKEY HALL.

"WHY, it would puzzle a Philadelphia lawyer," has been from Colonial times a colloquial expression, that originated primarily in the State of William Penn, but gradually extended far and wide and even crept into tales and sketches. The writer has even heard the phrase used in far away western settlements. But whenever used, the utterance in its reference was, and remains, complimentary; and it evidences that at an early period the Philadelphia lawyer had a fame for shrewdness, and perhaps for the hair-splitting ingenuity of the old race of special pleaders, whom statutes, codes, and a march of simplicity in the affairs of modern life have driven into historic caste. Nor in the progress of time has the Philadelphia lawyer lost any significance in his profession, although compared with his illustrious brethren in other cities.

Recently the writer interviewed a retired counselor of the Philadelphia bar who was encountered at the recent funeral of Charles W. Brooke in New York City, where the latter had practiced his profession, with the approbation of clients and the bench, for a quarter-century after graduating from the Philadelphia bar.

"Brooke's departure for New York in his younger days," said the Philadelphian, "was the result of a longing for broader honors; for a mingling with more extended litigations, and an attainment of proverbially higher fees. Indeed, Philadelphia has often contributed great lawyers to that city, as, for instance, George Wood, John W. Ashmead, Edmon Blankman, William B. Reed and Daniel Dougherty — each of whom have joined the majority. All of these, except Wood, had a fancy for criminal jurisprudence, and in that specialty won their best honors in their adopted city. Ashmead and Blankman made their mark in procuring, on a third trial, the conviction, for a low degree of manslaughter, of an Italian named Michael Cancemi, who had been once found guilty of murder in the first degree and sentenced to death. Reed came to the New York bar after having been district-attorney in Philadelphia; and Dougherty took to his new home oratorical honors before jurors which had already made him renowned in the city of his birth."

"I came to the Philadelphia Bar," continued the octogenarian lawyer — who sturdily bore his years by reason of the "superior strength" that the Biblical authority said was necessary for the mortal who exceeded nature's span of three score and ten; and who happily had escaped the attendant "labor and sorrow" which the Biblical author imposed upon the long-lived mortal — "I came to the bar when the memories of those, now dead and gone, great lawyers, Chief-Justice M'Kean, Judges Shippen and Bushrod Washington, William Tilghman, Jared Ingersoll, Alexander James Dallas and William Rawle, were yet fervid to younger attorneys; and while the afterwards Judge Grier of the Federal Supreme Court, Jeremiah S. Black, Horace Binney, David Paul Brown, William M. Meredith, George Sharswood and John Sergeant, were in the plenitude of their legal activity before the

Pennsylvania and Federal Courts. The Philadelphia bar in Colonial and infant Republican times, and all throughout my own career, as well as in this present time, would not surrender in point of learning, tact and honors to the bar of any other city, abroad or at home. My favorite member, when I was a youngster, was David Paul Brown, who lived long enough to be known to thousands of the present generation. He was a born orator; and if hypnotism had been then a current explanation for moulding the will-power of men, he could have been termed a Svengali, if we assume the jurors to be Trilbys. Were he now living, he would have been a centenarian by two years. He had the good fortune to have a father with fortune who could give him a liberal education, and of a social and business standing to afford his only son a fine launch upon well oiled professional ways. In his school days, David Paul was taught drawing and painting in oils, all the modern languages and fencing. He was termed by his legal preceptor, the famous William Rawle, an Admirable Crichton. Like Thomas Addis Emmet, Brown first began the study of medicine and with the great Doctor Benjamin Rush, who said to his father, 'David will make a great physician, but I think he would make a greater lawyer.' Brown always said, referring to this remark of Dr. Rush, 'I was rushed into the study of jurisprudence.'

"Not a client nor a fee came to him during his first year after admission, but, at the beginning of his second year, luck came to him in the person of an apprentice-girl, whom he found standing in the center of a street-crowd that was sympathizing with her for having been in their sight beaten by her master. Brown escorted her before a magistrate, who took her complaint. Her volunteer advocate soon pressed her wrongs before a jury and obtained the punishment of her barbarous master, after a display of oratory which became Brown's start in his profession, and thereafter, young as he was, he never lacked clients. He possessed a remarkable flow of language, a musical voice of varied tones, logical as well as simply persuasive methods of presenting a case, readiness at cross-examination, seemingly innate knowledge of human nature, and intimate acquaintance with history and the varieties of literature. But to his genius he added intense industry, for he was always a disciple of Plod, even after he had made his mark. Like Daniel Webster, Brown was ever fastidious in his dress (as well as in address), and his blue dress-coat and moleskin trousers became as much his personal trade-mark as did the Websterian coat-collar of velvet, the brass buttons, and the buff vest of what is now known as the Li Hung Chang yellow color. In one of Brown's speeches, after having heard himself taunted by an adversary before a jury as a mere flowery orator, he thus burst forth: 'Oratory is not a castle in the air or fairy palace of frost-work, destitute of substance and support. It may be compared to a magnificent temple constructed of Parian marble, sustained by pillars that shall endure for ages, exhibiting exact and admirable symmetry, and combining all orders, varieties and beauties of architecture.'

"I have always fancied that Daniel Dougherty took David Paul Brown as his model, for never were two orators so much akin in methods. Brown had Quaker blood in him, which somewhat restrained his bursts of passion, but Dougherty's veins held Milesian blood, and in invective as well as in pathos and imagery I found Dougherty to be Brown's superior. When Brown died, Dougherty's star in the legal firmament grew brighter, and he became his admitted successor for extorting verdicts. Excepting those two, there was little other grand oratory at the Philadelphia bar, but there were more deeply learned lawyers, for instance, John Sergeant and Horace Binney or William M. Meredith, and Jere-

miah T. Black and Robert C. Grier, who often left their country circuits to practice in Philadelphia. These, like Brown, were remarkable for stringently upholding the ethics of the profession. I feel sure that the Philadelphia bar has always equaled, if it did not surpass, all other bars, in freedom from pettifoggers and from chicanery.

"In such regard I recall an anecdote once current about Dougherty. A client called with a retainer, which he laid upon the table together with process served upon him, and said, 'I am the defendant here. I have made the fee large, for I want you to treat the opposite party with the same great severity that he has practiced upon me.'

"'Before I accept retainer,' returned Dougherty — as any Philadelphian advocate would also have said — 'let us understand each other; do you wish me to use the severity whether I may think he deserves it or not? If I thought it deserved, I should exercise it without your stipulation, but if you fancy that I shall be severe when I believe its exercise unjust, I could not be unjustly severe for any fee you might bring.'

"The test of the relations between advocate and client, laid down by Brougham in his Queen Caroline address, was never adopted by the Philadelphia bar, but rather the well known rule of Lord Hale, viz., 'I never thought my profession should either necessitate one of its members to use his eloquence to make anything look worse or better than it deserves, for to prostitute rhetoric in such a way is basely mercenary, and below the worth of a Christian man to do so.'

"What may be termed the ethics of the Philadelphia bar can be described in an opinion of Chief-Justice Gibson, as reported at page 189 of 2 Barr's Pennsylvania reports, and that is on all fours with Hale's view.

"William D. Kelly obscured great legal attainments, as did Samuel J. Randall, with political preferment. But while at the Philadelphia bar, Kelly was distinguished for his success before juries. His long career in Congress — wherein his advocacy of tariff protection was so prominent — made even his townsmen sometimes forget his triumphs at the bar. But Jerry Black (everybody called him Jerry) never allowed his political entanglements to obscure his legal fame, as his attorney-generalship at Washington and his labors as reporter abundantly testified.

"Our Philadelphia bar has always been remarkable for its *esprit de corps* and absence of jealousies. Its intercourse with its always brilliant bench was profoundly courteous and fraternal, and never fell into that atrocious obsequiousness which London barristers and Q. C.s display toward their 'Ludships.'

"I shall claim," concluded my octogenarian lawyer, "that our Philadelphia bar is, for personal dignity, purity in Saxon expression, and in professional courtesy and decorum, exquisite models for all other bars. I have visited courts in many cities, but I never found one approaching so near as in Philadelphia this Baconian description — 'the place of Justice is a hallowed place, and therefore not only the bench but the footplaces and precincts and purprise thereof ought to be preserved without scandal and corruption.'

"Another peculiarity of our Philadelphia bar is that its members nearly all excel in *belles lettres*. Was not the author of the patriotic hymn of 'Hail Columbia' a Philadelphia lawyer? How many of its members have written plays? David Paul Brown himself produced a tragedy on the boards of a theatre, and he wrote excellent verse.

"Dougherty, too, was a poet and an amateur playwright. Like Brown he was a noted wit and wag. One evening at the Union League Club, of which he was founder, a discussion arose in his presence touching a coming fancy ball in society. One of the club group remarked that he would not go, because a ball made his head giddy.

Interposed Dougherty, 'Go as Charles the First and your head will not be required.' On another occasion, pleading for a client who, when he stood before the jury, showed six feet and three inches of height, Dougherty referred to him as a man of great responsibility, because nine-tenths of the citizens were compelled to look up to him.

"Dougherty was a great student of Shakespeare. On one occasion, in a capital case, when answering his opponent — who had claimed that the law relating to dying declarations was of modern made law — he felicitously quoted these lines from the second act of Richard II, to show that the doctrine was valid as far back as in Shakespeare's time: —

> Have I not hideous death within my view?
> What in the world should make me now deceive,
> Since I must lose the use of all deceit?

And Dougherty argued that in those poetic lines the reason for the admissibility of hearsay dying declarations was better stated than even in the prose of Starkie, Phillips, Greenleaf or Taylor on evidence.

"Upon another occasion, his opponent, contesting some of his theological views, was met by the pleasant conceit in allusion to the monogram of his name, Daniel Dougherty: 'My friend must remember that my parents at the very baptismal font conferred a D.D. upon me.' It was always a treat, even to the oldest judge or lawyer to have Dougherty and Ben Brewster — he who was President Arthur's attorney-general — meet each other in a case for a keen encounter of wits. After this was over they would retire to their club for a cold bottle and bird; for be it understood that every Philadelphia lawyer is both gourmand and gourmet in the best sense of those words. As longevity is a mark in bench and bar in our city, so dieting is for each very exceptional.

"Our Philadelphia bench will from its inception compare grandly with that of any other. Our judges ever bore in mind the saying of Socrates: 'Three things belong to a judge: to hear courteously, to consider soberly and to give judgment without partiality.' To which may be added for modern times: the judge should be humane as well as just, conciliatory and forbearing with the bar, indulgent to the young and inexperienced, and especially sympathetic towards strugglers for advancement in their profession under sullen influences and against adverse circumstances. I recall with delightful reminiscences, as judges before whom I practiced, those Federal Judges Baldwin and Grier and District Judge John Kintzing Kane. The latter was the Chesterfield of the bench: physically handsome, and well dressed even to the verge of dandyism, his proverbial politeness was sorely tried by the lawyer who came before him in a slovenly dress. I must not pass by Judge George Sharswood, who is perhaps best considered by the profession beyond Pennsylvania, by reason of his legal writings and legal professorship in the State University. His career on the bench was remarkable for the fact that he was never known to imply in any degree his personal opinion about the facts before him. Supreme Court Judge Woodward became remarkable for being many years on the bench in banco without ever having asked a question of counsel during argument or having interrupted him. Of how many judges could that be said?

"It must not be forgotten that the Philadelphia bar has furnished two illustrious legal authors, Wharton and Brightly. The latter grandly illustrates his name in his speeches and writings.

"Other cities are wont to chaff Philadelphia as a sleepy, slow city. Perhaps so in some respects, yet even in these the City of Brotherly Love is safe and sure. Especially so in its bench and bar. And it holds historic place with Boston as a cradle of patriotic jurisprudence."

And so the writer and the octogenarian lawyer parted at the bier of the deceased

Philadelphian. He to his home to indulge in further reminiscences, and I to make notes of a pleasant meeting.

Much might be interestingly added to the views of the veteran Philadelphian about Dougherty and the Philadelphia bar. His portrait, which forms the frontispiece — taken a few years before his death — shows in the contour of his massive head and in his expressive eyes why he was so grand an orator. But the portrait cannot, unfortunately, indicate the graceful pose that he always occupied in speaking, nor the grace and appropriateness of his gesture, nor the mobility of feature which interpreted emotions. Spurzheim and Lavater alike, having been shown Dougherty's head, would have agreed that it belonged to a born orator. Which indeed he was; for while a schoolboy he was accustomed to declaim in his walks abroad — not like Demosthenes, facing the roaring sea from its pebbly shore, but in the quietude of nature. Many a schoolfellow of his in after life must have recalled the astonishment of their pedagogue on the occasion when young Dougherty pronounced, as his "piece for speaking" before him and the school, Marc Antony's address over the body of Julius Cæsar. There are veterans at both the bar of Philadelphia and New York, and in many other cities in which he gave his renowned lecture on Oratory, or his various political addresses, who will assert that Daniel Dougherty stood as an orator on the plane of greatness in eloquence beside such Americans as Patrick Henry, William Wirt, Daniel Webster, Rufus Choate, Edward Everett, Charles Sumner, Wendell Phillips, and Roscoe Conkling. It was his grand burst of oratory in his closing address in a New York court-house in behalf of his client's alleged briber, Alderman Cleary, made while the advocate was yet resident of his native city — specially engaged — that impelled his change of professional venue to the metropolis in which his career closed. Several of his client's aldermanic comrades had been previously convicted of bribery under much popular and press clamor, and Dougherty's moral courage was called into play to stem the clamorous tide. He did not entirely succeed, but he equally divided his jury and substantially acquitted the alderman; for Dougherty's dissection of the evidence was so able when read in the newspapers, although divested of oratorical glamor, that it turned the popular adverse opinion, and it practically acquitted another alderman who was next arraigned.

Oratory, like a musical instrument, has a gamut, and Dougherty sounded in turn every note of it as occasion demanded; gliding from the persuasive conversational tone before a jury into impassioned declamation that fell impressively upon eager ears, and alternating tender pathos with breezy rhetoric or anon with impetuous arraignment or invective. The orator who merely delights without also persuading his hearers misses his cue and his vocation. Daniel Dougherty also had the logical power that convinces, as well as the mellifluous power that steals persuasion upon the senses. His widow, Cecilia Dougherty — who was throughout his professional triumphs a valued helpmeet — speaks enthusiastically of his persuasive powers, even in domestic and social life, as well as in court circles. Like David Paul Brown and Rufus Choate, Dougherty's brilliancy never weakened his plodding and patient investigation in preparing his cases. Yet he was matchless in oratory for any sudden occasion — such as, for instance, when summoned for a speech suddenly in an assembly or postprandially. Few public banquets, therefore, were held without a guest invitation being sent to him in hopes to challenge his brilliancy in an after-dinner speech.

Many lawyers who listened in 1888 to Daniel Dougherty's address at the annual festival of the New York State Bar Association, with the theme, "The integrity and independence of the bar," sorrowed, when

they knew of his decease, that such eloquence as they heard on that memorable occasion from him should have been so untimely hushed. A recent writer in an English law periodical bewailed the decadence of bar eloquence in his country; and he will find therein many fellow sympathizers at the American bar. When, therefore, bar eloquence such as was possessed by Dougherty and Roscoe Conkling (who shortly preceded him into eternal rest) perishes, and the profession becomes prosaically utilitarian, and grubs for wealth rather than fame, the result is an injury to bench and jurors who listen, as well as to bar traditions. It is therefore wise for the legal profession not to lose sight of olden beacons of eloquence that have thrown illumination over the life journeys of both lawyers and laymen. And Daniel Dougherty was pre-eminently such a beacon light. The memory of which, as lit in Philadelphia and trimmed in New York, but imparting brilliancy to the entire American bar, may well be ever kept in sight.

WHY THOMAS BRAM WAS FOUND GUILTY.

By Charles E. Grinnell.

THE celebrated case[1] here referred to requires for its appreciation a study of its details in the order of time. It is believed that no attempt has been made publicly to state the facts of the voyage of the "Herbert Fuller" as they occurred from day to day. Consequently many persons fail to comprehend the evidence. Therefore, the present writer, having heard the testimony of all the witnesses, has tried to tell the story clearly by following the actual succession of events from the time of loading the vessel at Boston in June, 1896, to the sentence of death in Boston on the ninth of March, 1897.

[1] The United States, by indictment *v.* Thomas Bram *alias.* The trial was in Boston, Massachusetts, in the Circuit Court of the United States for the First Circuit, before Circuit Judge Colt and District Judge Webb. The United States was represented by the Hon. Sherman Hoar, its attorney for the District of Massachusetts, and John H. Casey, Esq., and Frederick P. Cabot, Esq., assistant attorneys for the said District. The prisoner was represented by James E. Cotter, Esq., and Asa Palmer French, Esq.

The rough sketches herewith presented are not drawn to scale. The plans used at the trial did not contain the axe and the spots; but they are added here to aid the reader to understand the description.

In the month of June, 1896, Captain Charles I. Nash, of Harrington, Maine, an experienced sailor, was fitting out the barkentine "Herbert Fuller" for a voyage to Rosario, in the southeastern part of South America. She was being loaded with lumber, which was laid five feet above the deck and reached from the forward part of the forward house to the forward part of the after house. Thus it made a new deck between those points. These houses were only five feet high above the deck, and the top of each made a part of the new deck formed by the lumber. The vessel was lying at a wharf in Boston, Massachusetts; and the captain engaged there, as first mate, a man named Thomas Bram. He was a native of Saint "Kits" (Christopher's), one of the Windward Islands. He served on vessels as a boy. At sixteen he had run away from home, and managed to reach the city of New York. After serving a year on a schooner, he became a waiter in eating houses, rose to be a manager of one, served as a baker in an emergency, and was

interested in religion at a mission house. Afterwards he was sent to Boston to manage what was called "a religious restaurant" there, — an eating-house where religious services were held. He was engaged to be married to a girl in Brooklyn, New York, and went back there, married her and brought her to Boston, and lived in East Cambridge. After a while they returned to New York, where he managed another restaurant, and before long he was sent to Chicago to manage one there. He returned to New York, and tried to run an eating-house on his own account, but, not succeeding, sold out and went to sea in the year 1888, the same year in which he was naturalized as an American citizen. He served in several vessels and became mate and captain. He had three children, but had lived apart from his wife and them for some time. They lived in Brooklyn, New York. He saw his wife last on the fourth of July, 1895. He had followed the sea steadily up to the time of meeting Captain Nash on the ninth of June, 1896. He told the captain that he came from Nova Scotia. But he never was there for longer than a month, and that was four years before. On the tenth, Bram was employed as first mate of the "Herbert Fuller," and went aboard of her to live. The captain's wife, who also came from Harrington, was going to sea with her husband, but she was then absent, and the captain left the vessel in charge of the first mate, a part of the time, in order to join his wife. The first mate then lived alone in the after house, and his meals were there served by the steward, a mulatto named Jonathan Spencer, a native of the British West Indies, who was the cook and had his galley and bunk in the forward house.

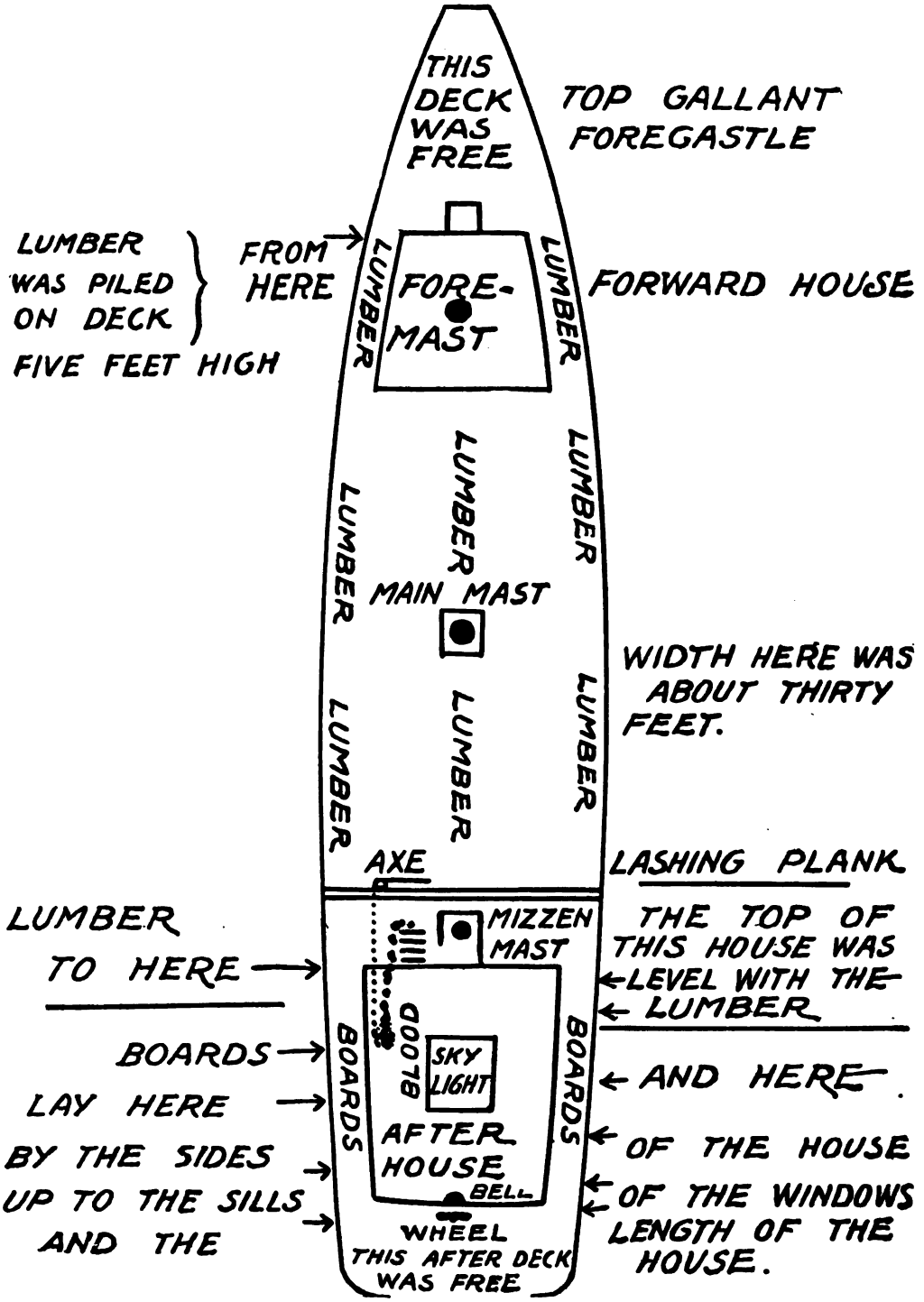
In the latter half of June, a young man of twenty years, named Lester Hawthorne Monks, of Brookline, Massachusetts, a student in Harvard University, who was intending to take a sea-voyage for his health, visited the "Herbert Fuller." There he found the first mate, who advised him not to go on a sailing vessel. Monks, however, decided to go on that vessel and succeeded in engaging a passage from the captain, who let the passenger have his own cabin. Therefore the captain used the chart-room for his cabin and slept there on a cot which was placed on the starboard end of the room, with the head towards the stern and the foot towards the door of the passenger's cabin, which opened into the chart-room. The chart-room was about 12 ft. 3 in. athwartships by 9 ft. 4 in. fore and aft.

The passenger, in preparation for a long voyage, brought with him, a bottle of brandy, a bottle of whiskey and sixty bottles of beer, besides necessary clothing; and a couple of his trunks were laid in his cabin, one against the door between his cabin and the cabin of the captain's wife, and the other near the door and partly in front of it. This door was locked when the passenger took the room and remained so while he was on the vessel.

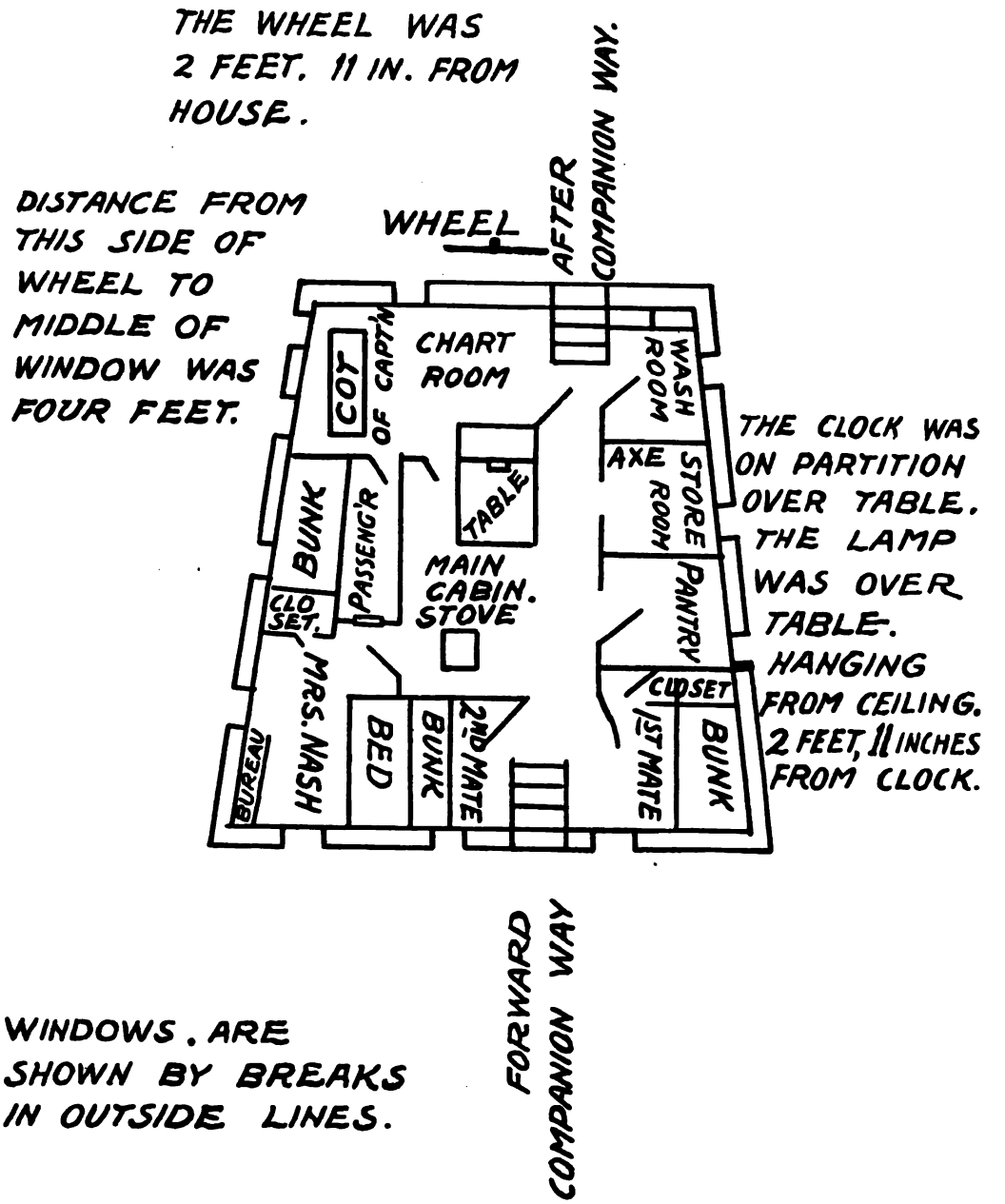
A man named August Blomberg, a Russian Finn, was engaged as second mate. The steward said he saw the second mate drunk before the vessel sailed.

One day when the captain's wife had gone ashore and returned with a new dress on, the first mate said to the steward, "Calico makes a great change with a woman."

There were six men in the forecastle. Julius Leopold Westerberg, a Swede, was called Charley Brown for short. He had had a curious experience after one of his voyages. He went ashore at Antwerp and was paid off, and started by train for Rotterdam. On the way there in the cars he was seized with a terror of the people about him, and on reaching Rotterdam and going to bed he laid awake and the next he knew was that he waked up in the ward of a hospital. The attending physician told him that he had been out of his head for a fortnight, and that when some-



ROUGH SKETCH OF THE DECK.



ROUGH SKETCH OF THE AFTER HOUSE INSIDE.

one came into the room where he laid down to sleep he had shot his revolver and put a bullet through a window. Since then he had recovered and had continued to go to sea. He had a habit of talking to himself and gesticulating. He was talkative and jolly with the crew. Folke Wassen was a young Swede of twenty-two, a fellow countryman of Charley Brown. Francis M. Loheac was a Frenchman and was said to have run away from the French navy. Henry J. Slice, a German, Oscar Andersson, a Swede, and Hendrik Purdok, a Dutchman, were sturdy looking sailors. And all these six were strangers to each other and to the officers.

The captain and his wife came aboard, and the wife occupied her cabin, which was at the forward starboard corner of the after house, and opened into the main cabin. The door, however, swung inward into her room and concealed her bunk even when the door was open. The floor of all the after house was nearly two feet lower than the outside deck. Hence the ceiling was almost seven feet from the floor. There were two windows in her cabin, one opening forward and one on the starboard side. The deckload of lumber was piled up opposite the forward window, about three and one-half or four inches from it. The regular deckload did not extend aft by the sides of the after house, but stopped at its forward end. There were some boards piled along the sides of the house under the side windows just up to the sills.

The second mate occupied the cabin between the forward end of Mrs. Nash's cabin and the forward companion way. His door opened upon the narrow passage at the foot of the steps. His window opened on the forward end of the house and was not so obstructed as the forward window of Mrs. Nash's room, because the lumber was drawn away in the form of steps near his window, so that persons could walk up and down between the top of the deckload and the top of the regular steps of the companion way.

Directly opposite to the door of the second mate's cabin and across the narrow passage was the door of the first mate's cabin, which occupied the forward port corner of the house. That passage was only two feet, four and one-half inches wide.

The vessel with its twelve people sailed from the wharf in Boston upon its fateful voyage on the morning of Friday, the third of July, 1896. On reaching Nantasket Roads she was delayed by a thick fog and a head wind, and laid there until four o'clock of the morning of Wednesday, the eighth of July, when she got under way and put out to sea.

The captain's wife made the beds and took care of the rooms of herself, her husband and the passenger. The two mates made their own beds and took care of their own rooms. The steward cooked for all hands, waited on the table in the main cabin, and at night put luncheons in the cabins of the mates for them to eat on their watches. Soon after going to sea the first mate ordered a sailor to clean brasses. Charley Brown took the occasion to say to his shipmates, "None of those G— d— blue-noses moves with me." Charley Brown washed the paint of the outside of the after house and about its windows daily until and including Saturday after sailing. On Monday, Charley Brown was set to scrubbing the after-deck aft of the after house. The first mate ordered him to scrub with both hands. Charley was angry at the way the first mate spoke to him.

Meanwhile the two mates had been making each other's acquaintance. Folke Wassen heard high words between them, and Charley Brown heard the following conversation: First mate's voice, "I want you to do what I tell you to do — don't intend to run me." Second mate's voice, "I don't want you to run me either." On Saturday, the day after sailing, Slice heard the second mate say: "I wish you would let me go about my work." The first mate made some reply, to which the second mate said that he had once had charge of a vessel with twenty-four in the crew. The first mate answered, "I don't

care where you have been or what you have done." Then the steward, who saw more of all the persons aboard than any other one, heard the two mates quarrelling, and the first mate's voice saying, "That d—d sarcastic talk of yours is the only thing I would kill a man for;" and upon the second mate's replying, the first mate's voice said, "Don't you get excited."

The days spent on board by the first mate and the steward seem to have made them somewhat familiar with each other, for the first mate said to the steward one day about the captain: "Here is a man who has a good wife and is not deserving of her." He then spoke of the captain's money: "Some other sport will dash his money up against the wall." "But he didn't explain it that way, but he explained it vulgar," said the steward, as he told the story.

In the afternoon of Monday, the thirteenth of July, the steward was down in the main cabin and saw the captain standing before the pantry door drinking; but what, or how much, he did not say. Mrs. Nash was in the chart-room at the time. That evening, about seven o'clock, the captain and his wife walked on deck together. The first mate spoke to them, and upon the captain's saying something and walking away, the first mate was noticed by the steward to look offended, and heard to say: "That ain't natural." The steward said that when the captain's back was turned, the first mate looked at the captain from head to foot with an angry scowl.

The captain and his wife went below. The chart-room was lighted, and the captain sat there reading. The lamp in the chart-room did not burn well, and Mrs. Nash brought it into the main cabin to fix it. The steward was there and fixed it for her. He had come down to leave the lunches for the night in the mates' rooms. There was always a lamp in the main cabin in the evening, which lighted the clock that hung there. The clock hung on the partition which separated the main cabin from the chart-room, and under it was the dinner-table. The lamp hung over the table from a beam in the ceiling about two feet eleven inches from the clock.

The passenger went to bed about eight o'clock. At nine o'clock, the captain came up on deck and spoke to Henry Slice, who was at the wheel, about a rain squall. While Slice was at the wheel, the captain returned to the chart-room and laid down on his cot after putting out the light there, The only light that shone in the window near the wheel, then, was from the lantern in the main cabin, which was turned down on what the steward graphically called "a half-blaze." The wheel was about two feet eleven inches from the house, and the extreme starboard handle of the wheel was four feet diagonally from the center of the window. The window inside the frame was eleven inches by sixteen inches, including the casing and glass. There were seven iron guards in front of the window, from three-eighths to one-half inch in diameter and one and five-eighths inches apart. There was a ladder about three feet from the house in front of the window. Slice, with both hands on the wheel, leaned over to the starboard, and saw through the window the captain lying there. Mrs. Nash had gone to her room.

The steward went to bed, about half-past nine o'clock, in his bunk next to his galley, in the forward house. At ten o'clock everything was going along as quietly as usual at night; the first mate was in his room, the second mate was on his watch on deck, Wassen had just relieved Slice at the wheel, and two men were on the lookout, as the custom was, one looking and the other waiting; the rest of the crew were in the forecastle, the only exception being that Charley Brown had brought his bed out of the forecastle because of what he, with unnecessary delicacy, called "insects," and was sleeping on deck under the longboat in the forward part of the vessel.

Between eleven and twelve o'clock the steward woke up, soaked some fish, and went back to his bunk. The second mate was standing on deck near the wheel, leaning on the after house, apparently asleep, until Folke Wassen, at the wheel, made a noise with his feet which waked the second mate. Then the second mate went up onto the house and down into it and soon returned to the deck.

At midnight, which was eight bells, it was time to change the watch. Therefore the first mate came on deck and relieved the second mate, who went down to his room. Charley Brown came aft and relieved Folke Wassen at the wheel, who went forward to the forecastle. Loheac was on the lookout. Purdok was called, came up from the forecastle, sat on the forward house and went to sleep.

It was a dark night, and when Charley Brown took the wheel the only lights near him were the light in the binnacle for the compass just before him, and a dim light in the window of the chart-room. A man with both hands on the wheel could lean over to his right and look into the chart-room, as Slice did when he was there, and as Charley Brown did when he arrived, and Loheac also. Charley Brown saw the feet and legs of someone whom he supposed to be the passenger lying on the cot, for Charley had never been into the after house, and supposed that the cot was in that place for the passenger.

At one o'clock, the first mate says that he went to his room, and took a drink of his own whiskey, of which he had several quarts, got his luncheon, and returned to the deck.

During the next hour, there was a stiff breeze blowing on the starboard quarter. Most of the sails were set. The sea was in waves, which made it necessary to move the helm constantly. The vessel was sailing about six or seven knots an hour, but the first mate gave her about eight on the log-book because of the current. She was about eight hundred miles from Boston, out at sea.

The first mate walked athwartships, and from time to time disappeared from Charley Brown's sight. Before two o'clock, and not long before it, the first mate was not in sight on deck, and a noise in the chart-room startled Charley Brown. He was standing, as the regular custom was, to the starboard of the wheel, with both hands on it, and his feet were on a grating two and a half inches above the deck, which was placed under the wheel for the helmsmen to stand on. He looked through the window and saw the first mate in the act of striking with something that had a handle like an axe. He struck down towards the head of the person whom Charley had seen on the cot. But the cot had been upset, and the man was lying on the floor. Charley saw only that blow. Then the first mate immediately went forward into the main cabin, and in half a minute or less, Charley heard a shriek from the direction of Mrs. Nash's cabin. Charley was much frightened, and watched the after companion-way of the after house, the starboard side of which was only four feet from the center of the wheel, for fear that he would be attacked from there. In five or six minutes from the time when Charley missed the first mate from the deck, he returned up the forward companion-way and walked across the top of the after house, which served as part of the deck, towards the port side, about as far as the after part of the mizzen rigging. There he had to step down onto the boards at the port side of the house in order to walk aft. He walked aft, turned the corner of the house and walked up to starboard, passing between the wheel and the binnacle, and going near the window. He smelt of liquor. Charley was terribly scared, and looked to see whether the first mate carried a weapon. He even thought of jumping overboard to get out of the way. But the first mate merely turned and walked back to the port side and aft of the house, and soon went to starboard.

During this time, Purdok, on the lookout on the topgallant forecastle, heard nothing, and noticed nothing peculiar in the vessel's sailing.

Soon the first mate called out to Frank Loheac, "four bells," and Loheac came aft and went by the port side to the after deck and relieved Charley Brown at the wheel. Charley Brown said nothing of what he had seen, but walked forward to the forecastle where he felt chilly and pulled on a thick shirt and some thick trousers over the clothes which he had on. Then he lit his pipe and went out to be with Purdok, who was on the lookout.

Meanwhile, Loheac, at the wheel, heard what he called a "gurgling noise" from the chart-room. Then he saw the first mate walk down the steps of the deckload and disappear in the forward companion way. Immediately, however, up came the first mate, the same way, running for the deck. He had hardly reached the deck when Loheac heard the passenger call, "Mr. Bram! Come down!"

The passenger was a heavy sleeper, but had been half wakened by the woman's shriek. Slowly coming to his senses he heard also a horrible stertorous breathing in the chart-room where the captain was. Both of these shocks gradually brought him to himself, and fearing some danger he took from under his pillow a new revolver which he had never used, opened a drawer under his mattress, broke open a package of cartridges and loaded the revolver. He called out, "Captain Nash!" No answer came. Then he got out of bed, thrust his feet into slippers, and having on a suit of pajamas for night-clothes, unlocked the door into the chart-room and rushed out. There before him lay the captain on the floor, gasping. The cot was upset. The dim light of the lantern in the main cabin shone into the chart-room, but as the passenger went in he was between the light and the captain's head. The passenger hastened to the captain's side. Going the length of his body, the passenger put a hand on the captain's shoulder which was wet with the death sweat. At once the passenger ran out of the chart-room into the main cabin to Mrs. Nash's door to call her to her husband. But he found the door open, and looking in he saw but a part of the bed, the rest of it being in the dark behind the door, and did not see Mrs. Nash. On the bed he saw dark patches of what he supposed to be blood, but which was afterwards found to be chopped hair, and, turning in terror again into the main cabin, he ran across it to the forward companion-way. The young man then displayed that presence of mind and ability to act with decision in spite of fear which soldiers used to call "two o'clock in the morning courage." He avoided the after companion-way because it was less open and he might be more easily struck on the head while going up its steps, and he chose the forward companion way because it was quite open with the sliding cover shoved back. Pointing his revolver before him, he approached the deck and looked for what he might see. There, on deck, about twenty feet away from him, he saw through the darkness the first mate, and called out the words which Loheac heard at the wheel, "Mr. Bram! Come down!" adding, "The captain is killed." The first mate, seeing the revolver pointed at him, took up a board and held it before him and replied, "No! No! No!" The passenger asked the first mate to come below to the passenger's cabin until he could put on some clothes. So they went down the forward companion way together, passing the second mate's room on the left without either of them trying to find the second mate, although the first mate went into his own room directly opposite and got a revolver. The second mate's room was dark, since its door did not face the lamp. Then they walked through the main cabin, taking the lamp with them and turning it up,

and walked into the chart-room at the starboard end, where the captain's body lay, in order to get into the passenger's room, the door of which was nearly opposite the captain's feet. The captain was still breathing with what was described as a death-rattle. Yet the first mate did nothing to try to help him or to make his death somewhat easier. As the passenger wished, the first mate followed him into his room and remained there while he took off his pajamas and pulled on a shirt and a pair of duck trousers. Loheac, with both hands on the wheel, looked through the window there and saw the passenger dressing. While there, the first mate said nothing about Mrs. Nash or the second mate and nothing even about the captain, who lay within a few feet of them with the lamp shining through the passenger's door upon him.

So soon as the passenger was dressed the two went out of his room, by the captain's feet, out of the chart-room into the main cabin, passing Mrs. Nash's open door, and passing the second mate's door, through the forward companion way to the deck. Then the first mate seemed to be at a loss what to do. He went aft and asked Loheac where Charley was. Loheac replied, "Forward." Then the first mate stood looking at the compass for a couple of minutes, and Loheac saw by the light of the binnacle that his naturally dark and ruddy face was very white. Apparently he was meditating upon a policy, for as he returned to the deck between the mizzen and mainmasts he said to the passenger, "There is a mutiny." The passenger said, "Where is the second mate?" and started to go below to the second mate's room to rouse him; but the first mate stopped him by replying, "He has gone forward with the men." Then he exclaimed, "The whole crew has mutinied and may rush on us!" After that he whined and knelt before the passenger and took him by the knees. He begged the passenger to protect him against the crew because, as he said, he had been hard upon them and feared that they would kill him. He also staggered about the deck and vomited upon it. He said that he thought the second mate had drugged him; that the second mate had given him a drink of whiskey which the second mate claimed had been given to himself by the passenger, and that after the drink of the first mate the second mate threw the flask and cup overboard. In brief, he seemed to put the young passenger in command for the moment. In this trying situation the passenger was, to quote his own words when cross-examined, "excited but not nervous."

There was a temporary rail made of boards which ran around the vessel since the deck-load was higher than the proper rail. This temporary rail they could lean against, and the passenger took the first mate to the starboard rail, which was then on the windward side of the ship, where they could see both fore and aft so far as the darkness of the night would permit. There they crouched side by side, the passenger being aft of the first mate. The passenger pointed his revolver forward to guard against any attack from there and told the first mate to cover with his revolver the man at the wheel. The first mate did so, and there they sat from shortly after two o'clock until about four o'clock in the morning with their revolvers pointed crosswise. Purdok and Charley Brown, who were on the lookout, one on the topgallant forecastle and the other on the forward house, saw the two men there, but could not recognize them until daylight. Purdok recognized the passenger about three o'clock in the morning.

At four o'clock it was so light that the passenger said, "Let's go and wake up the steward." Accordingly they walked forward to the galley, which was in the after starboard corner of the forward house, and the first mate rapped on the door. The steward came out with only a pair of trousers on and gave a semi-military salute with his

hand. The passenger said, "The captain has been murdered." The steward in the easy-going speech of the blacks replied, "Oh, I guess not;" but he ran to the after house, looked through the window near the wheel and saw, in the chart-room, lighted by the lamp on the floor of the passenger's room, the dead body of the captain. He was about to go down at once to investigate, but the first mate said that the second mate was forward with the men and that one should not go down into the after house without a revolver. With that he thrust his own revolver into the steward's hand. The steward, however, had served upon many vessels, and had the traditional shrewdness of a ship's cook. So he tried the revolver to find whether it would go off. He snapped it several times in vain until at last it went off, and the first mate jumped. Upon examining the breech, the steward found that every shell in it was nicked and had apparently been tried before. When the first mate handed his revolver to the steward, the first mate turned to Monks and asked him for his revolver. But Monks refused. The steward went down into the after house. He had no sooner got there than he came rushing back, exclaiming, "I saw the second mate lying dead in his bunk!" Thereupon the passenger turned to the first mate and said, "I thought you said that the second mate was forward." The first mate replied, "Well, he was forward." At the trial upon cross-examination the prisoner admitted that he saw the second mate go down to his room at midnight and that he had not seen him come up from there or go forward afterward. From this time on the first mate had two masters, the young passenger and the mulatto steward. Neither of them was afraid of him, and he was afraid of everyone on the ship. He told the drugging story to the steward also. The steward suggested having the vomit analyzed when they got ashore. Immediately the first mate slid down from the rail, where he was sitting, into the vomit and wiped it up with the seat of his trousers. The steward exclaimed, "J— C—, you ain't left enough to carry ashore!"

Soon afterwards the three were standing near the starboard rail nearly opposite the mainmast, when the first mate pointed diagonally across the deck to a point about thirty feet off, about eight feet forward of the port corner of the after house, and called out, "There is the axe that did it." Both the passenger and the steward looked, but neither could see the axe. Thereupon they all walked across, and when the passenger was about ten feet from it he saw an axe with its face and part of its handle shoved under a lashing-plank which ran across the deckload to keep it down and under which there was room enough to hide part of the axe. The first mate took it up and held it before him and cried and grinned over it in a hysterical way. The head and the handle were stained with blood, and on the handle were finger marks. He said, "Shall we throw it overboard?" The passenger, still influenced by the suggestion of a mutiny, said, "Yes, for fear the crew might use it against us." But the steward, with a more level head, the result of a hard experience, said, "No." But the first mate cried out something about having an old mother, gave vent to his pent-up feelings with a yell and tossed the axe into the sea. The steward said, "You should not do that." The first mate stood still a moment, and then said, "But we don't find no axe." The steward burst out upon him with, "What do you take me for? A G— d— fool?"

The passenger found blood-spots staining the deckload and the top of the after house. The largest spots were at the companion way, and from there dotted the top of the house diagonally towards the port side to about opposite the after part of the mizzen rigging, then they turned and went forward to the forward side of the lashing plank, under which the axe was found. There was a rather broad place stained at the point of

turning opposite the mizzen rigging, as if the axe had been laid there. This seemed to him to indicate that the murderer had come up the companion way with the axe dripping with the blood of his three victims, had turned to the left and walked with it diagonally across the top of the house, which was on a level with the deckload, had left the axe on the house to the leeward of the mizzen boom, had stepped down upon the boards, as Charley Brown afterwards said the first mate did, had gone aft as Charley described, saw that no disturbance was made there, had returned by the same route, picked up the axe, carried it to the forward side of the lashing plank and shoved it under that to await what might happen.

The steward was a man of action, and walking aft with his two companions he put his pistol to the head of Loheac, the man at the wheel. The passenger did likewise as the steward demanded of the sailor whether he had heard anything in the night. Loheac promptly replied that he had not. When cross-examined at the trial as to this answer he suggested that the chief meaning of the answer was that two revolvers were pointed at his head.

When the steward started to go forward to call the men, the first mate was overcome with nervous fright, hung about the steward, cried with dry eyes, and begged, "You will look out for me, steward, won't you?"

The steward proceeded, the passenger and first mate with him, towards the bow. Brown and Purdok were still on the lookout. The steward, showing his revolver, asked, "When did you see the second mate last?" Brown answered, "At twelve o'clock, when I went to the wheel, walking fore and aft on the starboard side." The steward said, "Call all hands. Hurry up." Brown sang out for the men in the forecastle, and they came right up. The steward said to the crew, "Come aft. The people are killed in the cabin." The first mate kept on whimpering, and said, "The captain was a Freemason, I am a Freemason and I have an old mother." The passenger told him to brace up. The steward ordered all the men, except Loheac, who was at the wheel, to go down into the after house.

They went, and the first thing they saw was on their left as they reached the foot of the companion way — the door of the second mate's room open and his dead body on his bunk, bloody with ghastly wounds. He was lying on his back with his feet crossed. His head was cut open in several places, his hand was gashed, and one of his fingers was cut off. The sight was too sickening for the passenger, who had never seen a dead body before. He turned back and went on deck, thinking, as he said, that he had had his share. The door into Mrs. Nash's room was open, and the men then went in there. There on her bed they saw her mutilated corpse. She laid on her side with one leg straight and the other bent at the knee. The only thing she had on was a night-gown, which was pushed up to her knees. Charley Brown, with instinctive respect, pulled it down. The back of her head had been knocked in by some blunt instrument, such as the back of an axe, the bones on the right side of her head were broken, there was a cut three inches long on the front of her head; and all of these wounds reached into the brain. Her upper and lower jaws were completely smashed. There was a wound on the right of her breast, reaching over her right breast. There was a cut four inches long on her left arm above the elbow. She was lying upon this wound and it was not discovered until afterwards when she was lifted up. A wrist and forearm and thumb were broken and her right thumb was cut off. Her right hand was merely hanging by the flesh. Appalled by this horror the men went aft through the open door of the chart-room, and there on the floor lay the dead captain. There were seven or eight axe-wounds in his head. One of them was three and a half inches long. This and another went into

the brain. His jaw-bones also were broken. As they stood there the first mate said, "Look at the captain — I'd die for him." In each of the three rooms there were marks in the woodwork which looked as if an axe had been swung against it. Spots of blood stained the floors and led to the forward companion way.

Then they went up on deck again, and the first mate looking around on them all said, "You will stand by me, boys, won't you?" and tried to shake hands with them. But they would not shake hands with him. The first mate continued to snivel, and the men retired to the forecastle. There Charley Brown lit his pipe, and they waited a while until they felt ready to go on deck again.

It was a time of awful uncertainty. Everyone in the ship was watching everybody else, and knew that everyone was watching him. Every motion, every look, every word was criticized, and each man gloomily revolved in his memory what he knew of anything that anyone on board had done during the past night. Purdok and Wassen told Slice that he was suspected. But he had not then begun to suspect the first mate. The first mate at the trial swore upon the stand that he never suspected the passenger. The passenger had not then any suspicion of the first mate. There was more talk among them than can ever be known. To draw testimony from sailors is like fishing in the deep sea. One can get something, but it is not certain exactly where it comes from.

The steward made some coffee for the first mate, the passenger and himself. When the men came back on deck every person, in one way or another, disclaimed any knowledge of the killing. The first mate accepted this as indisputable truth and accordingly expressed the following cheerful view of the situation: "We musn't blame the living for the dead. The dead can't speak for themselves. We will take the bodies up and throw them overboard and wash up the blood." But this was too optimistic for Henry Slice, who doggedly responded, "Us doesn't throw 'em overboard and us doesn't wash up." Likewise, the steward, knowing that the fatal axe was irrecoverably lost in the ocean, said, "No, we will leave them just where they are." The passenger said, "Of course we have got to make the nearest port possible," and he asked the first mate what was the nearest. The first mate replied, French Cayenne, which is a place in French Guiana, in the northeastern part of South America.

There was still talk about who killed the people, and what was the best way to take care of the bodies. At last Slice suggested putting them into the jolly-boat. All agreed to this, and the boat was taken from its regular place and set on its keel just forward of the mainmast and there lashed. Canvas was wanted to cover the boat with, but it was down in the after house. The steward had gone down there to make some investigation. No one made a move to go except Charley Brown, who volunteered and went down. The steward gave him a bundle of canvas, which he took up to the men. Sewing materials were needed, and the first mate told Charley Brown that the bag of sewing things was in the second mate's room. So Charley went in there and got it, its bottom being soaked with the second mate's blood. He brought them to the men, who sewed the canvas cover. As he brought it up some of the blood was rubbed onto one leg of his trousers. Charley called the attention of the men to this, saying that it might make some people say he did the killing.

While the sewing was being done, the first mate suggested to all his shipmates, for there was then no discipline on board, the following theory, and asked the passenger, because of his better literary training, to write it down after they had discussed it, so far as they could discuss it in their excited frame of mind.

Accordingly the passenger wrote this re-

markable paper. The spelling is attributable to the excitement of the moment.

Tuesday, July 14, 1896.

Monday night everything on board of the barkentine Herbert Fuller was perfectly quiet and peaceful. The crew had no fault to find with anything on board. The second mate had the watch from 8 until 12. I went to bed about 8 o'clock. The steward says the captain had been drinking, but I did not notice it. I am naturally a very heavy sleeper, so the murders which were committed might have happened before I woke up.

My first recollections are these: I heard a scream, followed by a gurlling noise, as if someone was choking. I reached down and got a box of shells, took my revolver and filled the pistol, which I kept under my pillow, as fast as possible. Then I called, "Captain Nash." As I got no answer I unlocked my cabin door and stepped out into the after cabin.

The captain slepted on a cot placed against the starboard wall. The captain was lying on the floor with the couch tipped upon end. I went up to him and shook him. I found he was covered with blood. I ran into Mrs. Nash's room to call her.

I could see that sheets of her bunk were covered with blood. I then ran forward to the forward companion way and looked on the deck. I saw the mate, Mr. Bram, on deck. I called to him and held my revolver pointed toward him.

When he saw me, he picked up a board to throw at me, but I called out: "It's me — Mr. Monks; come below for God's sake."

He came below, and we took the lantern in the foreward cabin and went into the after cabin. I slipped on a pair of trousers and a shirt; he grabbed his revolver, and we ran on deck. We did not know who were our friends or foes. We crouched down on the deck to windward just abreast of the mizzenmast.

Mr. Bram covered the man at the wheel, and I kept my revolver pointed forwards. It was very dark. In this way we sat waiting for daylight. We then —

(Then written above a line across the page is: "We found a bloody axe on the deck which we threw overboard, as we feared the crew would use it against us." And then the sentence goes on from the first page.)

We then went forward and banged on the galley door for the steward, J. Spencer. He came on deck, and we told him what had happened. He went aft and went into the cabin, while Bram and myself kept on deck with our revolvers.

He came running out of the cabin in a few minutes and said the (something scratched out) second mate, Mr. Blum, was lying dead in his berth. We then went aft in a body and questioned the man at the wheel. He said he didn't know anything had happened, and had heard no unusual noises.

We then went forward and woke up the crew. They all appeared greatly astonished and all protested they knew nothing.

We all then went aft in a body and went into the cabin. The second mate was lying dead in his bunk. Mrs. Nash was lying in her bunk with her clothes pulled up. Captain Nash was lying on the floor dead. We went on deck and at once decided to steer for French Cayane, that being the nearest port.

My theory of the tragedy is this: —

The second mate, Mr. Blum, had been drinking, and went below and tried to rape Mrs. Nash.[1] Captain Nash woke up and went and got an ax (the one we threw overboard) and attempted to kill Blum and his wife. Blum must off gotten the ax and hit the captain and then staggered on deck and then back to his bunk.

Lester Hawthorne Monks.

The second mate offered Mr. Bram a drink at about 12 o'clock. This whiskey made Mr. Bram very sick while on deck with me, and he acted as if he had been drugged.

Lester Hawthorne Monks.
Thomas H. Bram, Mate.
Jonathan Spencer.
Charles Brown.
Frank Loheac.
Falke Wassin.

On the back:

"Henry J. Slice, Oscar Andersson, Hendrik Perdok."

This writing was then read aloud to everybody by the passenger, and everyone signed it.

When the men had finished sewing the

[1] There was no evidence of this, and it was not discussed at the trial. Nor did anything appear against Mrs. Nash.

canvas and had fixed it to the jolly-boat, they went to the forecastle, lit their pipes and talked about how to place the bodies in the boat. Charley Brown proposed to put the captain in the middle, and his wife next his heart, and the second mate on his right. They assented to this and went out and told Bram that they were ready to remove the bodies. He said, "Have you heart enough to do it?" They asked the steward for sheets and for towels to cover the heads of the dead, for they could not stand and look at their faces. Five men took out the body of the second mate. Bram was in the after house when the second mate's body was taken out, but not afterward when Mrs. Nash and the captain were taken. The second mate's body was sewed into bedclothes on deck by Charley Brown. Then Charley Brown and Andersson went in to get Mrs. Nash. Charley Brown decided to sew her body up in her room to avoid exposing her to the men. She was heavy and was lying so far back in the bunk that Charley could not lift her forward. So he took off his slippers, stepped onto the side of her bunk, and with Andersson's help lifted her into a sheet. They then pulled the sheet around her, and Charley sewed her up. Then she was carried on deck. The captain's body was also taken and sewed up in bedclothes on deck by Charley. The captain, his wife, and the second mate were all large people, and their bodies were very heavy. Hence five sailors carried one after another, and meanwhile the passenger took the wheel. As soon as the bodies had been all put into the boat, and before pulling the tarred canvas cover over it, the passenger said, "I don't pretend to be very religious, but we might do a little praying." Bram responded to this suggestion by proposing to bring up the organ from the chart-room. The passenger said, "That's nonsense," and proceeded reading the burial service from the Episcopal prayer-book. Then the jolly-boat was covered, and the canvas fastened down.

Bram had the vessel's course changed to carry out his plan of going to Cayenne. This did not please Loheac, who feared to go to French Guiana because of his relations with the French navy. Nor was the passenger satisfied. He had had some yachting experience and naturally examined the chart to find out for himself what their chances were. He found that while Cayenne was between fifteen hundred and two thousand miles away, Bermuda was only about four hundred, so he said, "What do you say, boys, shall we go to Bermuda?" The men agreed, and the course was for Bermuda. But the wind was dead ahead, and upon the passenger's finding that Halifax was only about seven hundred and fifty miles off, he told them all so, and they decided to go there, and this was the course they finally kept.

The passenger brought up a box of cigars, and Bram passed them around, saying to the men, "We all here is one." This sentiment evoked no response.

The first mate, being then master of the vessel, appointed Charley Brown to be first mate, he having acted as second mate on other vessels, and Frank Loheac to be second mate.

About the middle of the day, the clothes that were expected to be needed on deck were brought up, and the doors in the after house were locked. In the afternoon, Charley Brown threw overboard his overalls, which were covered with blood and dirt from his work on the bodies. As the day wore on, the passenger and the steward consulted together. The steward said, "The mate killed them people." But Bram was then the master of the vessel, and they were cautious. Towards dark the handles of all the sharp instruments in the carpenter-shop in the forward house were cut off, and the shop was nailed up. The men were very superstitious, and no one would stay at the wheel alone. That night there was no discipline, except that no one was allowed to go below. Ev-

eryone slept on deck as he pleased, if he slept at all. Neither the passenger nor the steward slept. They were the actual commanders of the vessel, from the fact that they rose to the occasion and showed strong staying qualities.

The next day, Wednesday, there was much talk. Purdok and Andersson complained that while they were trying to sleep, Charley came to them and peered into their faces. Loheac reported that Charley Brown had said that there was a barrel of kerosene in the forecastle, and if it were spread over the lumber it would be very easy to set the vessel afire; also that Charley had told him, shortly before the murders, that he had shot a man in Rotterdam, four years ago, because he had lost his money and his girl, and afterward locked the door and drank a bottle of beer and smoked his pipe before he let the police in, and then got off by playing insanity. A shirt of Charley's had been drying, and one of the men said that Charley had changed his clothes the night of the murder. This was regarded by the passenger and the steward, and Bram, whom they consulted, as a suspicious circumstance. Bram said that he told some of the men that he saw Charley leave the wheel and go to the mizzen-peak jig about the time of the murders. The inference suggested was that such action connected Charley with the axe which was found not many feet from the port forward corner of the after house. Bram said that when Loheac was to relieve Charley, Bram saw Charley putting on his slippers at the wheel. Charley's manner had changed. He was very quiet, and would not talk much. Therefore they decided to put Charley Brown in irons the next morning. They also searched all the men in trying to find the captain's revolver, which was missing. But they let each man keep his sheath-knife, as part of his necessary equipment as a sailor. They ordered all the men to spend the night on top of the after house. Thus they could watch the crew better, and the man at the wheel would not be alone.

About the middle of the night all the men were huddled on the top of the after house, and the passenger, the steward and Bram were taking turns in keeping guard over them, the passenger and the steward sharing the passenger's revolver. Charley Brown, it then being his watch, rose and took off his hat, coat and boots, and walked from side to side and looked overboard; then he walked quickly forward, but was stopped by the steward, who put the pistol to his head and told him the men were not allowed to go forward without permission. Charley then asked leave to go aft, and went aft and sat over the rail to relieve himself. Then he returned, laid down and went to sleep. At daylight he was still sleeping, with his oil-skin jacket over his head. It was arranged that, if he resisted arrest, the passenger should take the wheel, so that the man there could help. Then the steward fell upon him, cursing him, calling him a robber, and charging him with stealing the captain's revolver. The irons were fetched and put upon Charley Brown, who did not resist, but merely said, "Oh, steward, you do wrong."

There was a space left in the lumber around the mizzenmast, and in this hole they tied Charley. After Charley was in irons, Bram repeated to the steward that at about the time of the murders he saw Charley leave the wheel and go to the mizzen-peak jig on the port side. The steward testified that, after arresting Charley, he asked Charley, "You had a mate in this, didn't you?" and Charley answered, "Yes," with a foolish laugh. Whereupon the first mate exclaimed, "What!" After Charley had been tied at the mizzenmast, which was not far from the window of the second mate's cabin, Bram said to him, "You will see the second mate's face come to the window to-night. You thought you would be smart, and put me in it. And I am too clever for you." When Charley was asked what his reply was, he said, "I only looked at

him. . . . I know that we have to come to the United States port and tell the truth." The men came and talked with him. He said, on cross-examination at the trial: "I tell my shipmates to keep quiet; everything will be all right as soon as we come to port. Never mind me suffer. Never mind me. . . . I told everybody on board that I didn't know nothing about it." But before that day was over he told Andersson that he knew something.

Bram, with his fatal facility, was then ready to abandon his original theory that the dead people killed each other. He said to the passenger, "Now we've got the murderer we had better tear up that paper." But the passenger this time said, "No, we have not got the murderer; we'll keep it." He had learned something from seeing the axe thrown overboard.

Bram asked the passenger to write out in the log book an account of Charley's arrest. But the passenger refused, telling Bram that he was the commanding officer, and it was his duty to write it. So Bram wrote:—

WEDNESDAY, day of 15 July, 1896.

On this day, at 5.30 p. m, the steward of said H. Fuller came to me and told me that the sailors all came and made an open statement to him in reference to one of the sailors (whose name is Charles Brown) conduct of guilt in regard to the murder which took place on board said vessil. I at once got each men's statement; then upon the strength of these statements we concluded to put him in irons at daybreak. At 7 p m all hands was musterd aft and thoroughly searcht. No other wepon was given them but their knives. Each man was then placed a certin distance apart from each other untop of the after house. Myself, the steward and passenger was stationed amidships well armed, and kept a good lookout untile daybreak. At 5 a m Charles Brown was mancled and put in irons. His actions all night was very suspicious and got himself all ready, as it were, to jump over the side, but he was well guarded by all hands on board. At 1.30 he mad an effort[1] rush for the forward part of the ship, but was instantly stop by the steward upon a pointed revolver towards him.

Thomas M. Bram, Mate,
Jonathan Spencer, Steward,
Lester Hawthorne Monks,
Frank Loheac,
Folke Wassene,
Oscar Andersson,
Henry Slice.

All on board signed this statement in the log book except Purdok, who was at the wheel when it was signed.

After another miserable night, Friday came. The general suspicion and fear were such that most of them were unwilling to do anything of importance alone. The steward had opened Bram's trunk and searched there for the captain's revolver, but it had not yet been found anywhere. It was about this time that the passenger asked the steward and Wassen to go and hunt for it in his room, that having been the captain's cabin. They went, and Wassen found it under the mattress on the bunk.

Since it was the middle of July, the heat continued, and after one more night the bodies had become so offensive that on Saturday they lowered the jolly-boat overboard and towed it astern.

Bram occupied himself in making what he called at the trial "duplicates" of those leaves of the log book which belonged to the days from the eighth to the fourteenth of July, inclusive. But these papers were loose leaves which contained different accounts of those days from the accounts given on the fixed leaves. And the condition of the book suggested the question whether the loose leaves were not the original statements which had been cut out and the fixed leaves the subsequent garbled statements. Bram insisted that this was not so and said he found the leaves loose and "I started to make duplicates of the occurrence from the 13th, for the vessel may go away with the log book, and we won't have anything to guide by."

Bram talked to Wassen and said, "If we

[1] "desprate" scratched out and above it is written effort.

don't get Brown guilty we'll get two years each."

That afternoon, when about one hundred miles from Halifax, they sighted a steamer, when this significant conversation took place between the passenger and Bram.

The Passenger. We'll signal her.

The Commanding Officer. Why, what good will it do us?

The Passenger. We can get a navigator on board here.

The Commanding Officer. Don't you think I am a good enough navigator?

The Passenger. No.

The Commanding Officer. If we signal her it will take all the glory away from us.

The Passenger. I don't care anything about glory, I want to get ashore.

The men seemed to agree with the passenger, and they blew the fog-horn while the passenger and the steward got the code signals. Bram said, "I don't see what you want to run up the code for." But he got the book for them as they wished. Since he seemed to be half-hearted in looking for the signal needed, the passenger took the book and found the code word for "Mutiny — need assistance." Then the American flag was run up union down. The steward at the same time got up into the mizzen rigging with a large sheet and waved it. The steamer stopped and lay about two miles off and in about half an hour steamed off again.

Almost five days had now passed since two o'clock the last Tuesday morning. They were all excited, tired and distressed. The passenger said at the trial that he did not get more than six hours' sleep before reaching Halifax, and that the steward slept even less.

The next day was Sunday. Loheac went towards the mizzenmast and talked with Charley, who was in the hole there. After Charley had said something, Bram, who was standing near, called out to Charley, "What is that you said to that man? You told that man — everything will be all right the time she come to port, if no more things happen aboard." Charley did not answer. He said at the trial that Bram's "face was red as fire," and Bram went on, "Don't you be afraid, there is plenty more yet going to happen." Charley was tortured with fear, and had stood five days of bullying, but he drew the line at such a threat as that. He said at the trial: "I never intend to tell anybody about him until the ship came to port. I was scared for my life." Then he told Andersson that he had seen Bram strike the captain. Andersson told the steward. The steward went to Charley and heard his story from his own mouth. There was a conference, exclusive of Bram, with all the others. No spots of blood had been seen on Bram, but after the murder some of his clothes were seen soaking in a bucket. And after dinner, as Bram was sitting on the after house looking astern, the steward, with the men behind him, walked aft and threw his arms from behind around Bram's arms, pinning him there. Bram made no resistance and merely asked, "What is this for?" The steward said, "For killing the captain." A man was sent below to get the irons, and they were put upon Bram, who was then led past the mizzenmast, where Charley was, to the mainmast, where Bram was tied. As he walked along he said, "I am an innocent man."

Late on Sunday they sighted land and found that they were off Beaver Island about fifty miles from Halifax. It rained that afternoon, and Bram and Charley were untied from their masts and permitted to go into the galley. At night they were kept at their masts, but were allowed to have plenty of clothes and their oilskins.

On Monday it rained also, and they were allowed to come into the galley to get dry. The wind was dead ahead for Halifax and soon there came a fog. They got into a fishing fleet and signalled one of the vessels and learned that they were forty-five miles from Halifax. They had to keep out to sea all Monday.

At daybreak on Tuesday they got a pilot. As soon as he came on board the young passenger went below to try to go to sleep. It was then more than seven days since he was waked by the shriek of the murdered woman.

Terrified, sleepless and exhausted, they arrived at Halifax towing the boat with the three dead bodies. They landed in charge of the police. They were examined about the murders by the local magistrate of the country and by the consul of the United States. A detective in Halifax told Bram that Charley saw him strike the captain. Bram asked where Charley was, and when told, at the wheel, said: "He could not see me from there." When accomplices were suggested, Bram said: "I think there are many others on board the ship that think Charley is the murderer, but I don't know anything about it." The bodies were examined by the local medical examiner. Then all the persons from the "Herbert Fuller," with the bodies, were sent in another vessel to Boston where they were taken in charge by officers of the United States, assisted by the police of the City of Boston. Bram and Charley Brown were imprisoned in the Charles Street jail in Boston, and the others, excepting the passenger and the steward, were kept there also to make sure that they would be present as witnesses at the trial. The steward was bailed out, and the passenger released on his personal recognizance.

Afterwards the grand jury met. They found no indictment against Charley Brown. He was accordingly released from his former imprisonment, but was detained with his shipmates who were kept as witnesses. An indictment was found against the first mate, Bram, for the murder of the captain.

His trial began on the morning of the fourteenth of December, 1896, and continued daily, excepting Sundays and Christmas, until the afternoon of the first of January, 1897, when the case was given to the jury. After being out for more than twenty-six hours they brought in a verdict of guilty.

Apparently the jury did not believe the denials or the assertions of Bram. His testimony seemed to be directed towards raising a probability that Charley committed the murders. The theory of the defence was that Charley was seized with a sudden attack of homicidal mania and, after lashing the wheel, went down and quickly killed the three people and returned to the deck, hid the axe under the lashing plank, and returned to the wheel. Bram's testimony that he saw Charley at the mizzen-peak jig, away from the wheel, was used to support this theory. Bram testified that he himself during most of the hour between one and two o'clock on the morning of the murders sat on the lee rail forward of the mizzenmast and aft of the mainmast, looking out for vessels which might pass. He admitted that the two lookouts were forward on deck. He claimed that the steward as well as the passenger consented to his throwing the axe overboard. He claimed that he said to the passenger, after the murders, "If the second mate ain't in his cabin he is forward with the men," but he admitted that he did not look into the second mate's room for him, although he passed its door twice within a few minutes after the passenger called him, and although its window was on deck next to the forward companion way. He said he started on deck to call the second mate, but the passenger called him back—him, the commanding officer! He admitted that although he found his own trunk broken open, he merely asked the steward about it, and "said no more about it." He claimed that he had a lot of nicked cartridges because his revolver was not properly made. He said he did not go home to see his family because he had not money enough. He claimed that he asked the passenger while in the passenger's room to go into Mrs. Nash's room, and that he gave up the plan because the passenger said she was dead. He denied jumping when his

revolver went off in the steward's trial of it. He denied asking the passenger for his revolver. He denied seeing the steward try his own revolver. He denied that he spoke angry words to the second mate. He admitted that there were blood-spots on the top of the after house. He claimed that the axe was stuck under the after side of the lashing-plank, not under the forward side, as the passenger and the steward testified. He claimed that the steward found it. He denied asking Loheac where Charley was after coming up with the passenger soon after two o'clock on the morning of the murders. He admitted that he did not go near enough to the captain's body to see how it was cut. Although he gave very minutely detailed testimony about the sails, ropes, boats and other things above the deck, he was very vague about what he did and saw below. His mind seemed to shun any mental view of the bodies and the places of the murders. When closely pressed with questions, he said, "I was not in my right senses. I was so excited I could not remember all I did. . . . I lacked grit, courage."

His testimony stood alone and uncorroborated by that of any other witness. The testimony of the other witnesses was in some important respects conflicting, but in many essential things they corroborated each other directly and indirectly. Every witness except the one testifying was excluded from the court-room.

The case was interesting to students of human nature because it was certain that the right problem was before us. The murders were committed by someone who was on board of the vessel. And everyone who was on board was a witness before the jury. Therefore the jury and all who attended the trial saw the murderer. It was a challenge to our knowledge of human nature. The question was soon narrowed down to the living persons who were in the after part of the ship between one and two o'clock on the morning of Tuesday, the fourteenth of July. They were the passenger Monks, the sailor Charley, and the first mate Bram. All the others were forward.

There was no evidence against Monks. It does not appear that anyone on board ever suspected him. Bram swore at the trial that he never had suspected Monks. The bearing of Monks at the trial was unexceptionable. He endured a torturing cross-examination in a manner which probably strengthened the jury's belief in his testimony.

Charley Brown, who swore that he saw the prisoner strike at a man lying where the captain lay with something which looked like an axe-handle, was a strong witness, and the jury evidently believed that he did see it. He was of short stature, with fair hair and a great moustache, from behind which sounded a voice trained to do service in storms. A large, muscular neck held his head up straight and tossed it back now and then as he talked. His manner was that of a seafaring man who had ceased to expect luck, and was not enthusiastic in the hope of justice. There was no pretension to virtue above the habits of his class. He spoke freely of the time when in Rotterdam "I lost my money and my girl." He admitted that he lied in telling yarns. He seemed to be a man who could and would tell the truth in emergencies, and he gave the impression that he was telling it on the stand. It was an impressive moment in the court-room when he was asked whom he saw striking at the captain, and he, looking straight at the prisoner, replied with a tone of solemn energy, "Mate Bram." It was in vain that the defence tried to prove him insane, and to argue that because he was unconscious several years before, and had the peculiarities already mentioned, he had had an attack of homicidal mania, and did the murders perhaps without knowing it. He had never been in the after house, and there was no evidence that he knew where the axe was, or even that there was an axe. It was hung on the after wall of the storeroom in the after

house, and the only attempt made to show that he may have seen it was to prove that he had washed the outside of the after house. The inference desired was that he had put his head down to the level of the boards at the side of the house and looked into the window and descried the axe on the wall at the after end of the storeroom. This suggestion was rather too labored for the jury. Nor did he know where the people in the after house slept. He supposed that the man whose legs he saw on the cot in the chart-room was the passenger.

There was much testimony as to the effect of lashing the wheel of a vessel. At each side of the wheel there was a rope with a loop at the end for this purpose. The most sensible thing said was that every vessel must be examined for itself upon that point. Nevertheless, it was a part of the theory of the defence that the alleged homicidal maniac had carefully lashed the wheel before making his first excursion into the house. The testimony of experts was conflicting as to whether the wheel of that vessel could be lashed or not for a few minutes, in a stiff breeze with the waves moving her about, without her coming to or falling off noticeably. But it probably did not seem to the jury to be likely that a lashed wheel in such a wind and sea would give time enough for a homicidal maniac to find his way down the after companion-way, forward into the main cabin to the storeroom, to open the storeroom, to find the axe, to take it down, to find where the second mate slept, to open his door, to chop him up, to leave him, to go across the main cabin, to enter the chart-room, to find out who the man was on the cot in there, to brain him so deeply as to knock over the cot and pitch him to the floor, to leave the chart-room, to find out where Mrs. Nash slept, to go to her door, to open it (unless she opened it when she shrieked), to attack her, to knock in the back of her head, and then to cut her up in front, to kill her, to leave her room, to go to the forward companion way, to ascend its steps, to ascend the lumber steps, to walk aft across the top of the house to the place where the axe had apparently rested, from the look of the broad bloody space, to go forward from there to the lashing-plank, to find a place where the axe could be shoved under it and hide the axe under the forward side of it, not very far from where the first mate was, and to return to the wheel, without a sail's flapping or the vessel's giving any sign to the first mate or to the lookout that there was anything peculiar.

Charley's testimony that he got wet by water dashing over the bow and therefore hung up his clothes to dry was corroborated by a shipmate. His gloominess and taciturnity after the murders are well accounted for by his having seen one of them.

The blood-spots from the forward companion way make it most improbable that anyone but the first mate could have done the murder unless there was some collusion between him and Charley. But there is no evidence of any collusion, unless Charley's silence be regarded as such evidence. That theory is not in the case. But it is more than counterbalanced by the improbability that more than one person would contrive such crimes. To add another is to contribute a new difficulty to the case. It is significant that the arrest of Charley was made under the influence of Bram, and that Bram, although he claims to have seen Charley at the mizzen-peak jig, does not claim to have then asked Charley to explain what he was doing, or why he left the wheel.

If arguments are entertained which are outside of the evidence and are founded upon probabilities of opportunity and motive, they bear more heavily against Bram, the commanding officer, thirty-two years of age, whose business it was to know the whole ship, and who might have a piratical ambition, than against Charley, the sailor, forty-two years of age, who lived in the forecastle,

scrubbed the deck, and spoke but little English. The prosecution offered to prove, by a man named Nicklass of Baltimore, that the last sailing voyage which Bram took before he went upon the "Herbert Fuller," was on the schooner "White Wings"; that Nicklass was first mate, and Bram was second mate; that Bram proposed to Nicklass that they should kill the captain of the "White Wings," and sail her off and dispose of the cargo; that Nicklass laughed at the proposal; that then Bram said, "If you don't want to kill this particular captain, let us go on board a Norwegian vessel, where they have fewer men before the mast, where they don't talk our language, and where they are bound with coffee, which is a better cargo than lumber,"—the cargo of the "White Wings" was lumber,—"and, she going round Cape Town, we can give the crew knockout drops, so that they will not know anything about it, and then kill the captain, and the crew of the vessel will obey our orders;" that Bram then stated how he had already succeeded in sinking a vessel, and pretending that freight money, which he kept, had gone down in her, and in selling a cargo of cocoanuts from another vessel at a profit, and pretending that he got only a price for a damaged lot; that all these vessels were in the South American trade, and that Bram was employed on each. The district attorney claimed, in a learned and interesting argument, that these acts were all a part of a piratical business and tended to show the state of mind of the prisoner, and were admissible to prove his motive. But the court excluded the evidence as not connected with or bearing upon the issue in this case, under the principle that one crime, or the offer to commit one crime, does not tend to prove another crime. The offer, argument and ruling on this subject were made out of the presence of the jury, so that they should not be influenced thereby.

Bram was of average height, and had a habit of standing erect with his shoulders thrown far back. He was very alert. His naturally dark complexion was darkened by exposure. When his face was quiet it had a solid, businesslike look—quite calculating. But when he spoke, a strange mixture of qualities was disclosed. His voice was resounding. Everyone could hear him everywhere. When speaking to a friend, his black eyes would shine and sparkle, he would show his white teeth under his thick lips, and would put his hand in a persuasive manner on the person to whom he was talking. But when he was under cross-examination, his eye became steadily fixed and hard to a startling degree, his mouth grew confidently firm, and he carried his head in a way that brought into prominence a very long under jaw. His manner when questioned about the murders was that of doing a piece of business that he must attend to very carefully and which was wearying everybody except himself. He testified with the air of quite willingly delivering a lecture upon a subject about which no one knew anything but himself, and he knew everything. He was very patient with his hearers and was effusively apologetic to his cross-examiner. His nerve, coolness, and power of endurance made him apparently the freshest man in the court-room at the end of day after day. And his presence and conciliatory habit were so effective that many spectators who believed him guilty were sure that twelve men would not find such a smooth talker guilty of such a crime as murder. But there were times during that long trial when more than one observer thought his expression remorseless.

Bram did not claim to have been drunk or asleep at the time of the murders. He testified that he had had only one drink at midnight and one drink an hour afterwards, both of whiskey. He swore that he saw Charley at the mizzen-peak jig, where there was no light, and that he could not see whether he was at the wheel or not, because there was a bell in front of the wheel that he

often mistook for a man's head. Yet there was a light in the binnacle just in front of the wheel, and the helmsman stood, as the custom is, to the windward of the wheel, which then was on the starboard side. He swore that he heard the boards aft of the mizzen rigging move, but that he did not hear the shriek that woke Monks, although at least one window of Mrs. Nash's room was open an inch, and her door was open for the murderer's entrance, and was only a few feet from the open forward companion way. He swore that when he went down with Monks he felt the captain's feet, but Monks swore that Bram did not touch the captain. He swore that while Monks was dressing he stood at Monks's door and looked out into the chart-room and around into the main cabin in order to see any person coming there, and that he could see easily there although the light was in Monks's room, and although it was a very dark night. He swore that he did not go about in the little chart-room or the little main cabin while Monks was dressing for fear someone was hiding there. One of the striking things in the trial was his reply to the district attorney's question why he did not go out there. "What, alone?" This from the commanding officer of the vessel who at the time had a revolver in his hands!

Bram did not look for Mrs. Nash. He did not look for the second mate. He did not have the room of either of them visited. He called back Monks, when Monks started, after going on deck, to go down "alone" to call the second mate, by saying that the second mate was forward. He admitted that he did not see him go forward and that he did see him go down to his room at midnight. He admitted that he wiped up his vomit, but claimed that he did it by sliding through it in his slippers and not by sitting in it, as Monks and Spencer, the steward, testified. He swore that it was less than several others said it was. He swore that Monks invented the theory of the dead persons mutually killing each other, and that he adopted it from Monks. Monks's testimony was directly opposite. He swore as to Charley, "My suspicions were aroused first myself, but I never said anything until all hands came to me." And when asked why he did not act he replied, "I did not think it was quite advisable just then." This from the commanding officer of the vessel who had said to the second mate, "That — sarcastic talk of yours is the only thing I would kill a man for." "Not advisable," more than twenty-four hours after the murders and after he had seen Charley, as he swore, away from the wheel, at the mizzen-peak jig, and afterwards putting his slippers on. The inference suggested being that Charley had committed the three murders in his stocking feet and crept about the deck in them afterwards.

Bram took no measures to discover who the murderer was. Although there were finger-marks on the axe, he threw it overboard. He promptly advised — not ordered — he did not really order anything after the murders had been discovered — throwing the bodies overboard and washing up the blood. He made no careful investigation into the possible or probable circumstances of any one of the murders. He swore that, when everyone else disclaimed any knowledge of the murders, he said, "Then I cannot blame anyone for this occurrence," as if it were not an uncommon thing anywhere to have three murders before breakfast on a week day. When the boat with the bodies was to be towed, he had to be reminded by one of the sailors that the kinks should be taken out of the rope to prevent the chance of its parting. He bullied Charley after Charley was tied up with handcuffs on. He obeyed the young passenger of twenty, he obeyed the mulatto steward, he was at the service of the crew upon whom he said he had been hard and who he feared would kill him. He did not wish to signal the steamer, but yielded to the others. He became of less and less importance on the vessel, until the

mulatto arrested him, and then he made no resistance. These were some of the circumstances which helped the jury to believe Charley when he said that he saw "Mate Bram" strike the captain.

The task of the jury required careful attention, knowledge of human nature, the power of judgment and a resolute exercise of it. They were generally expected to disagree, because of the unusual and vigorous attack upon Charley Brown by the defence. Mr. Cotter had boldly claimed that since all three murders were evidently the act of one person,—he must have been a madman,—and Charley Brown had been proved to be that man. Besides, people took it for granted that the jury would welcome any excuse to avoid the responsibility of finding the prisoner guilty. But Mr. Hoar, by an exact and brilliant analysis of the evidence, showed that it did not tend to prove Charley guilty, that it proved that he could not have done it without the knowledge of Bram, and that Charley was not a "madman." There was a powerful climax when, after reciting the proofs of how it was done and who did it, he asserted that it was the work of a devil,—Bram. His argument was sound and convincing. The charge to the jury by Judge Webb was impartial, and showed them that a man who was morally certain of a thing was free from reasonable doubt about it. And there were grown men on that jury.

A motion for a new trial was denied by the judges before whom the case was tried, after arguments citing interesting cases. Their opinion, which was read by Judge Colt, contained the following words: "We do not see how any intelligent, conscientious and painstaking jury, having listened to the whole trial, and having seen the various witnesses, could have reached any different verdict."

The court has sentenced the prisoner to be hanged on the eighteenth of next June.

The learned counsel for the prisoner, continuing an acute and indefatigable defence, have taken exceptions which they are expected to submit under a writ of error to the Supreme Court of the United States.

Whatever the result may be, it is hoped that this study of the evidence may serve to show a part of the public gratitude to the distinguished district attorney and his able assistants for their efficient service to the profession of the law, and to their countrymen on land and sea, in an extraordinarily difficult case.

THE SUPREME COURT OF WISCONSIN.

By Edwin E. Bryant.

IV.

WILLIAM PENN LYON. This veteran jurist was born October 28, 1822, in the town of Chatham, Columbia County, New York. His father, Isaac Lyon, lived to a great age, hale and hearty to the last, and made his last days happy by the studies of the naturalist. The family were of English stock, their first ancestor in this country coming over in about 1640. Judge Lyon's parents were Quakers, and he was brought up in that faith. His early opportunities for education were meager. He attended the district schools, such as they were, of the inland, rural settlements, until eleven years of age. Afterwards, he had one year's study at an academy in his native town. At the age of fifteen, he taught school in Columbia County. His youth made it a little hard for him to be sovereign over the unruly elements found in a country school, and his experience led him to conclude that "teaching was not his forte." In those days the clerk in the store was looked upon by the farm rustic as an important personage; and young Lyon sought employment in that field of enterprise.

He was clerk in a grocery store in Albany, New York, something near three years. Given a little leisure, he attended the sessions of the legislature and the courts, as his tastes turned in those directions. He heard with delight the speeches of such men as Erastus Root, Samuel Young, Judge Peckham the elder, Judge Harris, Ambrose L. Jordan, and many others then and since famous in New York law and politics. Their eloquence was a stimulant to his young ambition and led him to pursue a course of reading.

In 1841, when in his nineteenth year, he came with his father's family to Wisconsin and settled in what is now the town of Lyons, Walworth County, where he resided until 1850, working on a farm, and teaching school two winters. He began the study of law with George Gale, at Elkhorn, having read Blackstone and Kent in the intervals of toil and teaching. Close application to study brought on an inflammation of the eyes that drove him from his books, and he returned to manual labor. Working on a mill, then building, at $12 per month, he earned $100, and after a year of outdoor life, he returned with zest and good eyesight to the study of law, in the office of Judge Charles M. Baker, one of the lawyer pioneers of Wisconsin. In the spring of 1846, Lyon was admitted to the bar, in the district court of Walworth County, held by Judge Andrew G. Miller. That spring he was elected justice of the peace of the town of Hudson, now Lyons, and at once opened an office, and exercised his magistracy and practiced law, "in a small way," as he says. It was the day of small things then, and one could live on a small income measured by the money standard. His first year's income was sixty dollars, his second one hundred and eighty. This encouraged him to take a wife — a partnership which he always advises young lawyers to form. His third year's receipts were $400, and when in his fourth year's review $500 were in sight, it seemed that he was on the highway to affluence. In those days of cheapness, these receipts provided amply for the modest needs of his household. He sedulously pursued his studies, and his justice's

duties gave to his mind early the judicial cast. With few books, he reasoned out principles and sought to judge justly. In 1850, he removed to Burlington, a small growing village, and formed a partnership with a lawyer already established in practice. Business increased, and, as his capacities expanded by study and experience, he sought a broader field, and in 1855 he removed to Racine, on the lake shore, then and ever since a growing town, with a large commercial and manufacturing business to afford work for lawyers. He served as a district attorney for the county of Racine four years. In 1859 he was elected to the "Assembly," that is, the lower house of the State legislature. Although without parliamentary experience he was elected speaker, because everyone relied on his perfect fairness and candor. He applied himself to the study of the "manual," and acquitted himself so admirably that on the following year he was returned and again the unanimous choice of his party for the speaker.

Perhaps no man in the State was better fitted to succeed in politics than he when at thirty-eight years of age he finished his second term as speaker. Popular with all, with a kindly manner, suggestive of perfect sincerity, courteous and affable, he enjoyed a measure of confidence and personal regard which argued brilliant success in the future, and all the roads to political honors seemed opened to him.

But the war came on. With no taste for military display, none of the impulses or ambitions that lead many to the field, he felt it a matter of cold, disagreeable duty to do his part. He enlisted one hundred splendid citizen soldiers, tendered their services to the governor and was commissioned captain of one of the companies of the 8th Wisconsin Infantry, which was quite famous in the army as "the Live Eagle" regiment—as its pet was "Old Abe," a Wisconsin eagle borne upon a perch beside the colors. He entered the military service in September, 1861. With this regiment he served in the campaign against New Madrid and "Island No. 10," afterwards in the battles of Farmington, Corinth and Iuka. This was one of the marching, fighting regiments of the Army of the Tennessee, constantly in the most active of service. Captain Lyon served until August, 1862, when promotion took him from this regiment. He then consented to accept the colonelcy of a later regiment, and became commander of the 13th Wisconsin infantry, a splendid organization, recruited largely from his section of the State. His talent as an administrative officer kept the regiment in the rear. It had a laborious and hard service, doing an unusual amount of marching, picket duty, and guarding of lines. Such confidence was placed in Colonel Lyon that his command was usually detached to guard some outpost, or exercise a military government over a conquered district, where a just, merciful and watchful commander could be trusted. Hence, the fortunes of war cast upon Colonel Lyon with his command the duty to preserve what had been gained, to hold positions upon the safety of which great movements depended. It performed laborious garrison, patrol and picket duty and scouting. For over two years, its men were on detail about half the time. While suffering little in actual battle, it suffered heavily from the hardships of the service in malarial districts. Colonel Lyon's duties were vastly greater and more trying than that of a colonel brigaded in a compact army at the front; and he performed them with strictest fidelity.

Among the important posts commanded by Colonel Lyon was the post Stevenson, Alabama, in the fall months of 1863, before and after the battle of Chickamauga. It was at that time the depot of supplies of the Army of the Cumberland at and about Chattanooga. After the battle of Chickamauga, for many days the post was in hourly expectation of attack; and the im-

portance of the place and its supplies made the responsibility of the colonel commanding among the most weighty that can give anxiety to the soldier. Returning northward, the regiment wintered near Nashville, and the following summer saw arduous marching service and guarding at Claysville, Ala., at Stevenson again, at Huntsville, Ala., with a line of sixty miles of railroad to protect, at Brownsboro, and again at Stevenson, during Hood's battles of Franklin and Nashville. Later in the war the regiment, having "veteranized," was sent to Texas and there saw arduous service and endured much hardship.

WILLIAM P. LYON.

Colonel Lyon remained in the service till the end of the war, and was serving in Texas in 1865 when at the judicial election held in the spring he was elected circuit judge of the southeastern judicial circuit of the State. He entered upon the duties of the bench in 1865. He made an admirable *nisi prius* judge; and his popularity with the bar and suitors, jurymen and the public generally was matter of universal comment. His circuit embraced the counties of Racine, Kenosha, Walworth, Rock and Green, in the southeastern portion of the State. In his time the court week was an important event in the inland counties. The well-to-do farmers came in, visited, attended court, listened to the trials and arguments, and invariably took sides early in the trial. At a sharp repartee of a lawyer or a good hit back of a witness to a badgering cross-examiner they were wont to laugh heartily, and were demonstrative to the eloquence of some gifted lawyer. Judge Lyon indulged them within reasonable limits; and his kindness on the bench, blended with dignity and judicial ability, made him immensely popular with the people. His successor on that circuit was a man in some respects entirely different. A good judge and a just, he tolerated no laughter or levity in court. If a man came in with squeaking boots, the judge would say, "Suspend! Mr. Sheriff, you will protect the court from the noise of squeaking boots." If a titter ran through the court room at some witticism, the stern tones of the judge were heard: "Suspend; Mr. Sheriff, arrest and bring to the bar all persons disturbing the proceedings by laughter." The old settlers soon found the restraint unendurable, and gave up their custom of attendance. "Judge Conger is too strict," they said. "It's a contempt in his court to sneeze or to smile. But it was mighty pleasant thar in Judge Lyon's time."

The death of Byron Paine — narrated above — having created a vacancy, in January, 1871, Judge Lyon was appointed by Governor Lucius Fairchild as associate justice of the Supreme Court. In the following spring judicial election, he was elected to the unexpired term and the full term; was re-elected without opposition, in 1877,

for the term that expired in 1884. He was again elected in 1883, for another term of ten years — the Constitution meanwhile having been amended to extend the term from six to ten years. He served out his full term, which expired January 1, 1894, and although no opposition to his re-election was heard from any quarter he retired from judicial service, declining to be considered candidate for a further term. Upon the retirement of Chief-Justice Cole in 1892, he became, by reason of seniority of service, the chief justice of the court, and so served until his own retirement. His work on the bench of the Supreme Court is embraced within sixty volumes — beginning with the twenty-seventh and closing with the eighty-sixth of the Court Reports.

It is said to be "unsafe to praise the living," but it is but stating a truth to say that no man ever stood higher than Judge Lyon for all the qualities and the equipoise of qualities that constitute the just judge. Confidence in his integrity is universal. His mind is happily constituted to see the right of the case. Calm, patient, unbiased, he brought to investigation that sincere desire to be right that opens the mind to perceive justice. His professional labors covered a period of forty-eight years. He was judge twenty-eight years, and twenty-three years on the bench of the Supreme Court. His style is remarkable for its simple directness, lucidity and freedom from ornament. His invariable practice was to write a statement of the case out of which the points arose; and this gives his opinions a special value for case study. He still resides at Madison, in perfect health, preserved by regularity of life and physical exercise. He spends part of his winters with his children in California; and all the promises are that the late afternoon of his life will be as serene and full of cheer, as the long day has been full of usefulness and honor.

EDWARD GEORGE RYAN was born in the village of Enfield, County Meath, Ireland, November 13, 1810. On the maternal side he was grandson of John Keogh, of Mount Jerome, the chairman of the famous Catholic Committee, whose services to the Catholics of Ireland endeared and immortalized his name. Keogh's efforts were untiring to secure the emancipation of Catholics in Ireland; and Grattan said that he did more than any other individual for that body. In his own words, the chairman "devoted near thirty years of his life for the purpose of breaking the chains of his countrymen." From him doubtless the grandson inherited the lofty independence of character and eminent talents, which gave him such unique distinction.

When Ryan was born, his father was prosperous; but between the peace of 1815 and the passage of the corn laws he was ruined, as he owed money on his estate. Grandfather Keogh left an annuity for the education of his grandchildren, and Ryan received his at Glengowes, Wood College, where he remained for seven years. He was destined for the law, but he says he was "nominally engaged" in its study in 1828 and 1829, but was "an expensive and improvident youth and a great burden to his father."

He came to the United States in 1830, having the prevalent idea that anyone could get on in this country. He studied law in New York, supporting himself meanwhile in teaching, too proud to let his father know of his straitened circumstances. On his admission to the bar in 1836 he came to Chicago. There he suffered much from miasmatic disease. In 1839, he edited the "Chicago Tribune," which was the Democratic paper, designed to reach the intellectual classes. He wrote long and able editorials in a forcible and elegant style, but they were too elevated in tone, and too philosophical to be appreciated by the masses in the rough-and-tumble of political controversy in the West in those days. In 1840 and

1841, he was prosecuting attorney for the county of Cook, in which Chicago is.

In 1842, he removed to Racine, a prosperous lake town in southeastern Wisconsin. While here he was elected a delegate from Racine County to the first constitutional convention. His great ability was soon recognized in the deliberations. He was the chairman of the committee on banks and banking, and made an able report designed to prohibit banks of issue, and withhold from corporations the exercise of any banking powers. This called forth a lively debate, and with some alteration his view was finally adopted by the first convention. Ryan also vigorously opposed an elective judiciary, and was for permanence in the terms of judges. He was the second member of the committee on judiciary and also a member of the committee on education. The constitution proposed by that convention was rejected by the people at the polls, largely because of opposition to its strict anti-bank provisions; and he was not returned to the second convention.

EDWARD G. RYAN.

He gained great prominence in several murder trials, then considered the greatest field for display of legal ability; but the effort that lifted him into something more than a State reputation was his eloquent argument in the Hubbell impeachment, of which mention is made in earlier pages. He was not on the winning side, but his argument was read with admiration for years after, not alone for the denunciation of the accused, but for the lofty ideal of judicial purity it held up. It placed Ryan's fame far above the ordinary levels, and it was common to speak of him as "the Burke of Wisconsin." For several years he was city attorney of Milwaukee. He was on one side or the other in the greatest trials in the history of the State. In the fugitive slave law cases, he fought with all his legal ability and all his intensity of political conviction, for in everything he was intense.

He was counsel for Bashford in the celebrated case of the disputed governorship, and though a political friend and supporter of Barstow, the Democratic claimant, he took strong grounds against the counting of illegal votes. The contention of Barstow was that the question of his right to the office of governor had been conclusively settled by the State board of canvassers, and that the Supreme Court could not interfere with a co-ordinate department and go behind the certificate of election. This position Matt. H. Carpenter and the other counsel for Barstow mantained with great ingenuity. They also insisted that the court had no jurisdiction of *quo warranto* in a disputed gubernatorial election; but Ryan tore their arguments in pieces. One passage in his argument is so pertinent to present times that it may here be quoted: —

"In this world there have never been but

two kinds of governments, — a government of force without law and a government of law without force. In the main, the governments of the world have been governments of force without or above law. We attempted the experiment of a government of law without force. We complain of and criticise and grumble at our system of government. The truth is, it is far above us. We are not educated up to it within a century. Here the law is the mere letter. There are no embattled armies to enforce it. It is a mere word, acting by its own vitality. How shall this system be preserved? Only by the universal submission of all men, high and low, strong and weak, the highest official as well as the humblest member of the community, to that simple letter paramount and supreme.

His argument demonstrated that the court had jurisdiction; that the notion, that the executive was so far an independent co-ordinate department of the government that the court could not try the title of a usurper and oust him from the office of governor, was a monstrosity.

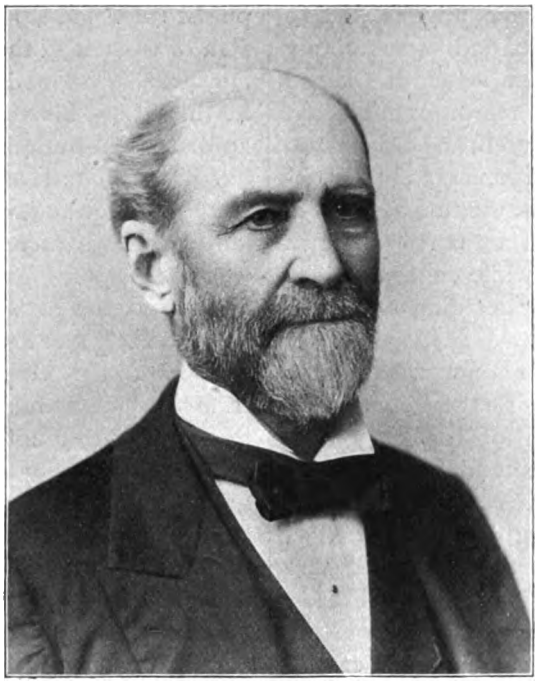
Ryan was for a short time in partnership with Matt. H. Carpenter, subsequently of national fame, but the two were not adapted to work well together. Indeed, Ryan's infirmity, and the bar to his highest success as a practitioner, was an easily provoked and uncontrollable temper. It was one of the infirmities of genius. He was true in friendship; when gentle, the gentlest; when kindly, the most considerate and just; but, when irritated by annoyance or physical ailment, his anger blew a gale. This limited the number of his clients, and unfitted him for the annoyance and perplexities of a numerous clientage and miscellaneous practice. It rendered it difficult for him to get on with partners. But no lawyer ever lived with a higher sense of professional ethics and etiquette, or a loftier ideal of the duties of the lawyer and the judge.

Says Judge Jenkins, once his partner, now one of the able judges of the seventh judicial circuit of the United States: "The life of Judge Ryan was one long struggle — a struggle against himself, a struggle against untoward fortune, a struggle against infirmity which the world knew little of and allowed not for. And so to most men he seemed arrogant and proud; whereas, to those who knew him best, when quit of infirmity, companionable and considerate. He seemed of different mould from other men; above the need of sympathy or too proud to claim it."

He had on so many occasions evinced his powers, that the bar of Wisconsin, generous and appreciative as the profession ever is, acknowledged him as a giant intellect without rivalry and without envy. "He stood by common consent for twenty-five years at the head of the Wisconsin bar, as its highest ornament and most distinguished advocate," says Chief-Justice Cole. "His knowledge of the principles of law in all its branches was at once varied and profound. And he made such a brilliant use of that knowledge in all his great efforts as to secure the high distinction which he attained in his profession."

In politics he was a Democrat, but of too lofty a cast to be widely popular. He possessed none of the arts of the courtier. During the war he was much criticised as the author of the "Ryan Address," which was adopted by a Democratic convention in 1862, which censured the authorities in Washington for the course pursued in prosecuting the war. He was denounced as a Southern sympathizer, yet the address contained these words: "The defeat of the Democratic party, in 1860, has been followed by the present terrible civil war, because it was defeated by a sectional party. We reprobate that revolt as unnecessary, unjustifiable, unholy! Devoted to the Constitution, we invoke the vengeance of God upon all who raise their sacrilegious hands against it, whether wearing the soft gloves of

peace or the bloody gauntlets of war." The address was a lengthy review of the causes of the war. It denounced the Republican party as revolutionary, censured the abolition of slavery in the District of Columbia, and the emancipation and confiscation measures adopted; denied the power of the Executive to suspend the writ of *habeas corpus* in the loyal States, or to make arrests therein, or to trammel the freedom of the press, or transport citizens arrested in one State to another, and demanded that the war be carried on for and under the Constitution. It was a very able presentment of the views entertained by many of the Democratic leaders. Their tone of censure and fault-finding then assumed against the war policy. could not be distinguished, in the minds of the upholders of the Union, from downright sympathy with the South; and the "Ryan Address" was denounced most bitterly as the very essence of that spirit which, in war-times, was called "copperheadism." Matt. H. Carpenter wrote a review of the address, in which the "war powers" of the government in a struggle for self-preservation were discussed with clearness and force, and great light was thrown on the juridical aspects of the great contest by the two papers. Carpenter soon became a Republican. Ryan would have remained by the doctrines of his address if he had remained alone, and had stood alone for a generation. He was so constituted that he held to a political opinion without regard to the rest of mankind.



JOHN B. CASSODAY.

An incident may here be told that shows much of the quality of the man. He was once arguing a cause before the Supreme Court of the United States. Chief-Justice Chase presided; and during Ryan's argument, the great chief justice turned to an associate and began a whispered conversation. Perceiving this, Ryan paused, and waited until the chief justice turned as if to inquire the cause of his silence. Then Ryan said, with great dignity but significant impressiveness, "What I am saying is worth hearing." It is said that the chief justice blushed deeply, and afterwards gave perfect attention. Indeed, no lawyer could listen to Ryan with a wandering mind after he had warmed up to his subject.

He had long had an ambition to be chief justice; and this distinction came after long waiting. In 1874 there happened to be a Democratic governor in Wisconsin, and the office of chief justice became vacant by the resignation of Chief-Justice Dixon. Ryan was appointed, and served until his death. His appointment was generally approved by the bar, for all knew his splendid endowments for the place. But it was feared by many who acknowledged his high ability that his one infirmity, his temper, would render the consultations of the court unpleasant. But in this respect the fears were not realized. Says Chief-Justice Cole, one

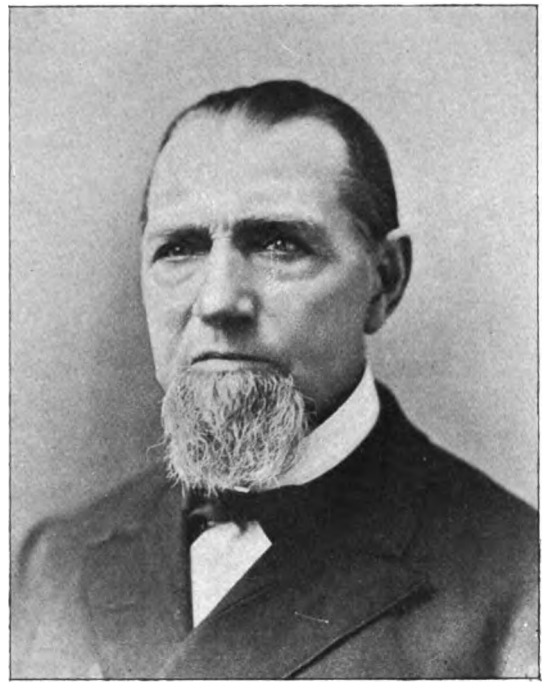
of his associates in all his judicial work: "In consultation, while engaged in the labor of considering and deciding causes, the deportment of the chief justice toward his associates was uniformly kind, respectful and courteous. No irritating word, no offensive language, fell from his lips while thus employed. He often made up his mind quickly how a cause should be ruled, but he was not impatient of hesitation or opposition on the part of others. On the contrary, he listened with attention to whatever anyone had to say adverse to his views, and often readily came to their conclusion when it seemed supported by the better reason or authority. Indeed, I can say for myself, and I trust also for my associates, that I never expect or desire to be treated in consultation with more consideration and respect than was shown me by the chief justice while engaged in the work of examining and deciding causes in the consultation room."

This one infirmity of temper was the only one to mar a character otherwise so admirable. He was the soul of honor, and he hated all unprofessional conduct. He came to the bench in the ripeness of years and experience, laden with profound knowledge, and with an ambition to make his work there the crowning glory of his professional life.

Soon after taking his place upon the bench, the memorable "Granger cases" came on for argument. Of these, mention has been made in the sketch of Chief-Justice Dixon, in an earlier part of these memoirs. The cases were of great importance, vitally so to railway corporations, and great public interest was aroused. After an able array of eminent counsel had illumined the subject by exhaustive argument, the newly installed chief justice gave his first opinion, reported in the Attorney General *v.* The Railway Companies (35 Wisconsin, 425). It is but to echo the general expression to say that this is a remarkably able opinion, settling the power of the State to control the corporations of its creation, and to regulate the tolls of railway companies for carrier service. It was the forerunner of like decisions in the Supreme Court of the United States.

He had much of the positive conservatism of a gentleman of the old school and of the old country. He had a contempt for strong-minded women of the notoriety-seeking class. In a popular lecture which he gave while at the bar, on "Mrs. Jellyby," he drained dry the vials of quaint sarcasm on the women who neglect home life to play a public role. He stoutly opposed the admission of women to the bar. In a legal opinion given *In re* Goodell (39 Wisconsin, 232), he thus states his views: "This is the first application for admission of a female to the bar of this court, and it is just matter for congratulation that it is made in favor of a lady whose character raises no personal objection; something perhaps not always to be looked for in women who forsake the ways of their sex for the ways of ours. . . . There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualified for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court-room as for the physical conflicts of the battle-field. Womanhood is moulded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that women should be permitted to mix professionally in all the nastiness of

the world which finds its way into courts of justice . . . . all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society. . . . This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written, *le commencement de la vie est sans secours, le milieu sans plaisir, et le fin sans consolation,* voluntarily to commit it to such studies and such occupations."



HARLOW S. ORTON.

In the social circle, when in genial mood, his companionship was delightful. His conversation sparkled with the readiest Irish wit; his sentences were epigrammatic and seasoned with Attic salt. His sarcasm was biting, but it could be kindly. On being told that a legal acquaintance had married a fortune and obtained a fine Federal appointment, he exclaimed: "God bless him! The lucky, lazy dog! He never opened his mouth but to yawn, and never opened it but a sugar-plum fell into it." When in the full glow of social feeling, with congenial, appreciative company, all the fields of literature seemed to be open to him to adorn his conversation with quotation, imagery or simile.

As a judge, he aimed to be such as he thus describes: "Summary judgment is judicial despotism. Impulsive judgment is judicial injustice. The bench symbolizes on earth the throne of divine justice. The judge sitting in judgment on it is the representative of divine justice, but has the most direct subrogation on earth of an attribute of God. In other phases in life, the light of intelligence, purity of truth, love of right, firmness of integrity, singleness of purpose, candor of judgment, are relatively essential to high beauty of character. On the bench they are the absolute condition of duty — the condition which only can redeem judges from moral leprosy. . . . The judge who palters with justice, who is swayed by fear, favor, affection or the hope of reward, by personal influence or public opinion, prostitutes the attribute of God, and sells the favor of his Maker as atrociously and blasphemously as Judas did. But the light of God's eternal truth and justice shines on the head of the just judge and makes it visibly glorious."

His judicial opinions are found in the 35th to 50th volumes of Wisconsin reports. Among them — all of which the lawyer and student are sure to read to the end — some are notable. In the case of State *v.* Doyle, 40 Wis. 175, the opinion in which he compelled the Supreme Federal Court to recede from its former declaration that a statute of this State was void under the Federal Constitution, and to suffer its enforcement by the State under the mandate of our Supreme Court, is an admirable example of his powers.

As a lawyer of learning and eloquence, as a writer of force, strength and clearness, and with a style of grace and beauty, he has had few superiors. It was not altogether the gift

of nature, for he wrote with the greatest care, with all the dictionaries at his hand, and he selected words with the greatest precision. If ever betrayed from the purely judicial style, it was to enrich the thought with some gem of beauty, or some illustration which his fertile imagination thrust in. He reveled in all that is rich in literature, and could hardly suppress, in his opinions, the evidence of the fine play of his powers when attempting to simply state, reason and decide. His opinions have been chosen, it is said, by one of our great universities as models, to be commended to students, of the beauty, purity and strength of the English tongue.

The Chief Justice was in belief profoundly a religious man — in faith of the Protestant Episcopal Church — faithful and trusting. "As for myself," he said, "I know I possess a soul — an intellectual and moral part which is immortal. I believe that I shall have a conscious personal existence after death; that I shall meet beyond the grave friends and those loved here; that I shall know them and they will know me. All this I as firmly believe as I believe that I shall see the sunlight to-morrow if I live." His faith in the Christian religion was strong; and he believed it the "true ambition of the lawyer to obey God in the service of society; to fulfill His law in the order of society; to minister to God's justice by the nearest approach to it, under the municipal law, which human intelligence and conscience can accomplish."

He loved to talk with friends on sacred themes, and then his words, clothed in the grand and sombre imagery of the Bible, with which he was profoundly familiar, seemed like those of the prophets of old. His faith knew no doubts. His keen intellect indulged in no speculation as to things beyond the veil. That within the ken of his strong intelligence he saw clearly. Faith to him was "the substance of things hoped for, the evidence of things not seen."

He died suddenly. On the 13th of October, 1880, a case was called in which he had been of counsel for one of the parties, and he withdrew from the bench, expecting soon to return to it. The next day he sent word that he did not feel quite well. On the 19th he died, having hardly reached his three score and ten years.

JOHN B. CASSODAY, the present chief justice, was born in Herkimer County, New York, July 7, 1830. His father, Dennis Cassoday, died when he was about three years of age. Soon after, he removed with his mother and her parents to Tioga County, Pennsylvania, living first in the town of Charlston, and afterwards in the town of Middlebury. He attended common schools from time to time, and at different places, generally working for his board, until sixteen years of age, when he attended for one term a select school in the village of Tioga, and one term at Wellsboro Academy, at the county seat. When twenty-two years of age, being in impaired health and having acquired a little means, he resolved upon obtaining an education. He attended school one year at Knoxville Academy, in Pennsylvania, two years at Alfred Academy, in Allegheny County, New York, from which he graduated in 1855, and then spent one year in a special course at the University of Michigan. In the fall of 1856 he entered the law school at Albany, New York, then a very popular school, much sought by students from the West, or intending to practice in the West. He then returned to Wellsboro, Pennsylvania, and continued his studies in the office of A. P. Cone, a local celebrity, until July, 1857. He then removed to Janesville, Wisconsin, and continued his studies with Hon. Harmon S. Conger, who had been a member of Congress from New York, and was afterwards judge of the twelfth judicial circuit in Wisconsin. On his admission to the bar, in November, 1857, Mr. Cassoday entered upon practice, and a year

later became a member of the firm of Bennett, Cassoday & Gibbs, which connection continued until 1866. He practiced alone for two years and then formed the firm of Cassoday & Merrill, which continued until 1873. Then the firm of Cassoday & Carpenter — a half-brother of the famous Matt. H. Carpenter — was formed.

Though never seeking political preferment, Cassoday was a zealous and public-spirited citizen and active in political matters. He was delegate to the Baltimore convention, which renominated Mr. Lincoln in June, 1864. He was a member of the Wisconsin Assembly, the lower house of the legislature in 1865, and again in 1877, when he was unanimously elected speaker of that body. He was delegate to the national Republican convention of 1880, and chairman of the Wisconsin delegation. He was "on the stump" for the Republican party from its organization down to and including the campaign of 1880. He declined a circuit judgeship in 1870, and the nomination for attorney-general of the State five years later, devoting himself with untiring zeal to a large and important practice.

DAVID TAYLOR.

On the death of Chief-Justice Ryan, in 1880, Associate-Justice Cole became chief justice, and Mr. Cassoday was appointed by Governor William E. Smith associate justice to fill the seat vacated by Cole. He at once entered upon duty, and in the spring judicial election of 1881, was elected without opposition. Again, in 1889, he was re-elected, unopposed, to a ten-year term, which abundantly attests the perfect confidence of the people and the bar in his work. Since 1885 he has lectured in the College of Law of Wisconsin University, upon the subjects of Wills and Constitutional law. His lectures on Wills were published in 1893, and are much in use as a text-book. At present he lectures exclusively on constitutional law, every phase of which he carefully considers.

On the death of Chief-Justice Orton, in 1895, he became chief justice, by seniority of service, and has since presided. The predominant characteristics of Chief-Justice Cassoday are earnestness, thoroughness and an industry that never flags. His body, light, lithe and spare, is one of those which seem adapted to constant mental labor, and he is always fresh and eager in the investigation of a legal question, and never content, when it is raised, until he has analyzed the question and noted all that has been decided or written upon the topic. His opinions, often commenting and distinguishing on many cases in the course of decision upon the topic in hand, attest how thoroughly he has examined all the cases bearing on the question to be decided. He takes great interest in the law department of the State University, and in the subject of legal education, is helpful to young men struggling against adverse fortune in the study of the

law, and is held in high esteem by the students of the College of Law.

His judicial work is found in the last forty-three volumes of Wisconsin reports — the 50th to the 92d inclusive. He has written addresses and papers, outside of judicial topics, of great interest; and when at the bar was regarded as a forcible and able speaker, and in the legislature one of its most accomplished and powerful debaters.

HARLOW S. ORTON, a native of New York, was born in Niagara County, November 23, 1817. His paternal ancestors in America came from England in the middle of the eighteenth century. His grandfather, Rev. Ichabod Orton, was a chaplain in the Continental army. On the maternal side, his grandfather, Nathaniel Marsh, also bore arms in the same cause. His mother, Grace Marsh, was of Puritan stock, a woman of great talent and beauty of character, and ambitious for her sons; and three of them, Myron H. Orton, John J. Orton, and Harlow S. Orton, the subject of this sketch, were eminent at the bar of Wisconsin. The father, Dr. Harlow N. Orton, was an able physician in western New York.

Harlow S. was educated in his native State. After the common schools and a course at Hamilton Academy, he graduated from Hamilton College before he was twenty years old. He then went to Kentucky, in 1837, and taught school, beginning there the study of law. He then removed to La Porte, Indiana, and was there admitted to the bar in 1838, and began practice on the northern circuit.

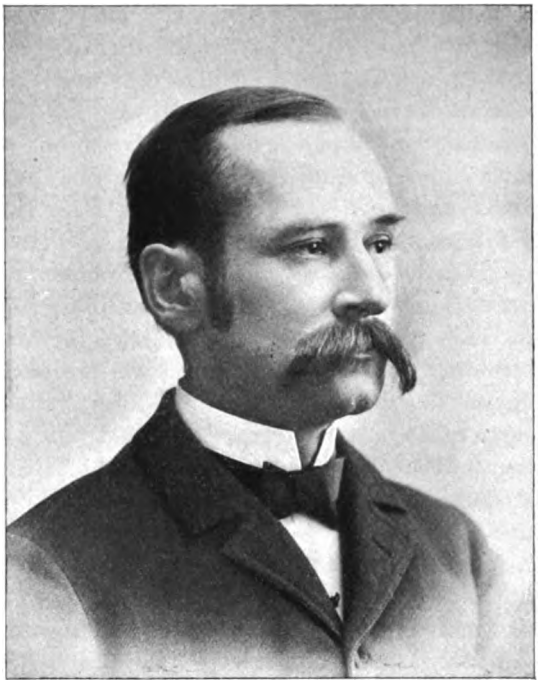
Naturally gifted as an orator, he was warmly enlisted in the campaign of 1840. He "stumped" several States, and was styled the "Hoosier Orator," being everywhere regarded as one of the best Whig speakers in that day of splendid stump oratory. He made over one hundred speeches in various States, and was everywhere sought for in the campaign. He was appointed by the governor of Indiana as probate judge of Porter County, and held the office for several years.

In 1847, he removed to Milwaukee, Wisconsin, and there practiced law. In 1852, he became private secretary to Governor Leonard J. Farwell, and removed to Madison. Returning again to practice, he served in the Assembly in 1854; in 1859, he was elected circuit judge of the ninth (Madison) circuit, and was re-elected in 1864 without opposition. He resigned this office in 1865, and returned to the practice of his profession. In 1869, he was again the Madison member of the legislature, and re-elected in 1871. In 1876, he was candidate for Congress on the Democratic ticket in a district strongly Republican. The same year, he was appointed by the Supreme Court as one of the commissioners to revise the statutes of the State. From 1869 to 1874 he was dean of the law faculty of the Wisconsin University, during which service the degree of LL.D. was conferred upon him by that institution. He served one year as mayor of Madison. When the constitutional amendment adopted in 1877 added two judges to the bench of the Supreme Court, Judge Orton was elected as one of the additional judges and served on the bench until his death. He was then a Democrat, and the State was strongly Republican.

Judge Orton was a remarkable man. As an advocate before a jury he had few equals in the profession. Possessing fertile imagination, great felicity of expression, an impassioned manner, he led captive all who heard him. Some of his arguments before juries were remarkable for oratorical power. His power of denunciation of wrong, fraud, or anything base, was terrible; and he could appeal to the emotions with a delicacy and power almost irresistible.

There are many incidents relative of his power and tact with juries. On one occasion he was counsel for the plaintiff in an action against the State brought by a lawyer for legal services in codifying the tax laws,

which, by frequent and botch-work amendment, had become a bewildering maze of uncertainty. The lawyer charged what the attorney-general regarded as too large a fee. The question of the value of the services was submitted to the jury. On that jury there happened to be a colored man, the first to sit on a jury in that county. The other side had commented on the subject of large fees of lawyers, and Orton, in closing, must satisfy the plain farmer juryman that fifty dollars a day or upwards for several weeks' work was a reasonable charge. He dwelt, of course, upon the great services of the profession to the cause of civil liberty, naming one after another of the great legal lights, from St. Paul down. When he closed the array by naming Abraham Lincoln, the lawyer "who had penned in the language of a lawyer that immortal proclamation which had stricken the shackles from four million bondsmen and made them free," his tones and manner and his climax thrilled the audience, for none could listen to Harlow S. Orton unmoved. The colored man, in his ecstasy, could hardly keep in the jury-box, and was with difficulty checked from shouting words of thanksgiving, as his people would do at an outdoor camp-meeting. It is needless to say that the verdict gave the plaintiff the last cent of his claim.



JOHN B. WINSLOW.

He was of counsel for the defendant in the case of Bashford *v.* Barstow, mentioned in a preceding page of these sketches. Of his work in that celebrated cause — involving the ousting of a governor by *quo warranto* — ex-Chief-Justice Cole, who sat on the bench at that trial, says: "He was associated with such eminent and accomplished lawyers as Jonathan E. Arnold and Matt. H. Carpenter, but the burden of the argument upon all motions and questions of law arising in the preliminary proceedings rested mainly on the shoulders of Judge Orton, who seemed by consent to be given the management of that cause in court. The questions involved were certainly new — I might say almost of first impression, under our form of government. They could not, of course, arise under any other form. Judge Orton met and discussed these questions with wonderful learning and ability. He was called upon often to discuss them on the spur of the moment, without any time for reflection, examination of authorities, or even to make preparation, and against such lawyers as Judge Timothy O. Howe and E. G. Ryan, whose supremacy at the bar will be questioned by no one. But Judge Orton was not surpassed by any lawyer in the case in the efforts he put forth, or in the intellectual powers he exhibited."

He was conspicuously connected with the most important and celebrated causes which have been tried in the State, as well as those where the argument was to the court, as those in which his power as an advocate was so potent before the jury.

A man of high spirit and feeling, he was genial and companionable, yet very sensitive and easily elated or depressed, as such natures are apt to be. While at the bar, he stood in the foremost ranks. He was a man of most gracious courtesy, and especially charming and gentle in his intercourse with young men.

When elected to the bench the measure of his ambition was satisfied. Its duties were congenial to his tastes, and he devoted himself with great assiduity to judicial labor. As his associate, the venerable Chief-Justice Cole, said, "He was an able, honest and upright judge, trying always to do the right and to administer his high office with impartiality and firmness, never yielding to any popular prejudice or partisan feelings. He seemed to desire above all things to see justice done in all business matters; and he sought to settle all controversies on the eternal principles of equity and right."

Upon the retirement of Chief-Justice Lyon, he became chief justice, and so presided until his death, July 4, 1895.

In his judicial work there were at times traces of strong personal conviction, if not feeling. It would be unfair to call it prejudice for or against persons, for in decision he was above that; but he disliked to see a seeming hardship in an individual case wrought by the application of a general rule of law, and he had some views and convictions not perhaps supported by the weight of judicial authority. This intense personality, not to say eccentricity, crops out here and there in his opinions. They are always interesting, always readable, both for matter, style, vigor and lucidity, even when they fail to carry conviction.

In the case of Duffie *v.* Duffie, 71 Wis. 236, he held that a wife could not maintain an action against the woman who seduced or one who induced her husband to leave her and alienated his affections. In other words, the wife had no action for loss of *consortium*. She, who, of the two, suffers most keenly the loss of the affections and society of her spouse, "the pangs of despised love," was remediless in the olden time, he reasoned, and therefore, until some statute had interposed, she is remediless now. He seemed to think that the old Aryan idea of the wife's station and relation to the husband still inhered in our law, and that she is —

> "Something better than his dog,
> A little dearer than his horse."

So thought some who dissented from the opinion. The decision called forth very spirited criticism. Several courts had decided the other way. Indeed, in this case, Mr. Justice Cassoday handed down a forcible dissenting opinion. Among other articles evoked was one by Irving Browne in 26 "American Law Review," which attracted wide attention. His decision, severely as it has been criticized, must not be taken as indicative that Judge Orton did not perceive "in the general light of modern times, the true situation and position of the wife in the marriage relation." Of all that is humane in the law, and all which has mitigated its ancient harshness, all that tends to protect and exalt women or shield the helpless of any class, he approved, not only with the intellectual assent of the judge, but with the warmth of heart of a chivalrous gentleman.

Serving twenty-three years as judge, and thirty-four years at the bar, he was, and will always be, remembered as an interesting figure in the profession. Standing as the peer of Ryan, Carpenter, Arnold, Whiton, Howe, and a long line of worthies in their palmiest days, he was a giant at the bar, with whom none could strive unprepared, nor without being "put up to all he knew."

DAVID TAYLOR was born in Carlisle, Schoharie County, New York, March 11, 1818, of a blending of Irish and Dutch blood. He graduated from Union College in 1841, and was admitted to the bar at Cobleskill, in 1844. He practiced for two years in his native State and then came to

Wisconsin Territory, and established himself in practice at Sheboygan, on the shore of Lake Michigan. The firm of which he was the head enjoyed a large practice. A still, reticent, but patient man of untiring industry and capacity for long-continued labor, Mr. Taylor, though not an orator, was engaged in nearly all the important cases in his circuit. He served one term as district attorney. In 1853 he was member of the Assembly. In 1855 and 1856 he was senator from his county. In 1858 he was appointed by the governor as the judge of the fourth judicial circuit, and served until 1869, having twice been elected by the people to that office. He was in 1856 appointed a member of the commission appointed to revise the general statutes of the State, which produced the revision of 1858. On retiring from the bench he removed to Fond du Lac, and there entered into practice. But while engaged at the bar, he gave to the profession a compilation of annotated statutes in 1871, which became known as "Taylor's Statutes." In 1876, he was appointed with William F. Vilas, late senator from Wisconsin, as a commissioner to again revise the statutes. On this work he was engaged for part of the time for two years, upon the revised statutes of 1878. Other members of the bar, including Judge Orton, also served upon the commission, but the greater part of the work was done by Judge Taylor and Colonel Vilas.

In 1878, a constitutional amendment having been adopted to increase the number of judges of the Supreme Court from three to five, Judge Taylor was selected by a legislative caucus as a candidate for one of the two additional judgeships, and was elected in the spring of 1878, and took his seat in April of that year, and served till his death, April 3, 1891.

Judge Taylor's life was remarkable for its industry. He was not brilliant; he was not what is called a sociable man. He always appeared pre-occupied, — cared little to stop and converse. But he was a man of kind and generous sympathies; and in every relation of life a just, exemplary citizen. As a circuit judge he took high rank for sound judgment and as one who dispatched business promptly and faithfully. As a member of the Supreme Court he was invaluable for his perfect knowledge of the statutes and the history of the legislation of the State. His opinions, often a little more prolix than need be, were clear, and always gave out plainly what was decided and the reason for the decision. In the solid qualities of the judge, he was recognized as a strong, safe man. He loved justice and was anxious to be right. All agree that he strove to decide each case according to its own equities, and while some have thought that he did not always realize the value of a steadfast and uniform comprehensive system of law, yet but few of his opinions can be criticised as tending to variableness or uncertainty of rule. He evinced in all a painstaking desire to do justice. He had no fondness for technicalities and pushed them aside when they stood in the way of substantial justice. He aimed to always decide on the merits.

His love of labor was such that he enjoyed those tasks from which most men shrink. "To him severe mental labor was a joy and delight." He loved to elucidate all the points of a complicated case, and often wrote a long opinion, when a short one could as well have disposed of the case. His investigation was exhaustive, and his exposition, possibly unduly extended, was always clear, and sought to reach justice; and the people respected him and honored him, though they found him a reserved, busy man, never seeking to win regard by the social arts and affected interest and friendliness of the politician. He was cut off in the midst of his labors, leaving a void on the bench which was difficult to fill, because no man in the State had the full and accurate knowledge of the local law which he

possessed, every line of which had received his careful scrutiny.

A solid, practical, thoroughly honest man, the record of his life is unmarred by a stain, a weakness or an infirmity. In every relation in life, he performed his full duty, and left no record of mistakes, derelictions, or frailties, to compensate for the brilliancy of genius. As the annals of a land of peace are not always the most entertaining, so a life that is poor material for biography is yet the one that may be most useful to the day and generation by which its labors are benefited.

JOHN BRADLEY WINSLOW was born in Nunda, Livingston County, New York, October 4, 1851. He is a descendant of Kenelm Winslow, the second brother of Governor John Winslow of Plymouth Colony, and one of the prominent inhabitants, who came over about 1632.

The father of Judge Winslow removed with the family to Racine, Wisconsin, in 1855, and there the son grew up, receiving his education in the city schools, graduating with the degree of A.B., in 1871, from Racine College. He then studied law in the office of Judge E. O. Hand, and with Fuller & Dyer, prominent lawyers of Racine, and graduated in 1875 from the law department of the University of Wisconsin. He then began practice in Racine, for a time associated with Henry T. Fuller, Esq., afterwards with Charles A. Brownson, Esq., and later with Joseph V. Quarles, one of the most prominent lawyers of the State. He was for four years city attorney for Racine. In 1883, he was elected circuit judge of the first circuit comprising the southeastern three counties of the State. Although a Democrat in politics he was requested to be a candidate by a quite general call of the members of the bar, and was elected in a circuit strongly Republican. In 1889, he was re-elected without opposition, and served with the general approval of the bar and the people.

While serving at the circuit, he delivered a course of lectures in the law department of the University, with great acceptability to the students, who caused them to be printed.

In May, 1891, upon the death of Judge David Taylor, he was appointed by Governor Peck as associate justice of the Supreme Court. The following spring he was elected without opposition for the residue of that term, which expired in 1896. In the April election, 1895, he was re-elected. Contrary to usual practice, a Republican candidate was called to run against him; but many of the Republican journals and leading men strongly supported Judge Winslow, in deprecation of partisan division in the judicial elections, and in testimonial of their confidence in him.

The people and the bar have such full confidence in Judge Winslow's integrity and true judicial temper, that his position on the bench is now regarded as permanent; and such high estimate of his ability that they predict for him a long career of usefulness.

THE LEGAL ASPECT OF THE MAYBRICK CASE.

By Clark Bell, LL.D., of the New York Bar.[1]

THE report of the Woman's Committee of the Psychological Section of the Medico-Legal Society, presented for discussion at the October meeting of that body for action, presented the following propositions: —

"Your committee are of opinion that the case of Mrs. Maybrick is one that is fairly within the realm of the Medico-Legal Society and notably of the Psychological Section.

"We are of the opinion that the verdict of the jury was not supported by the evidence of that case.

"We concur in the opinion expressed by Sir Charles Russell, now Lord High Chief Justice of England, in commenting upon the unfair charge of Sir James Fitz James Stephen, the trial justice, in his charge to the Jury. 'He passionately invited the jury to find a verdict of "Guilty," taking two days to sum up, the first day as a judge, and on the second day raged like a violent counsel for the prosecution.'

"We believe that the language of the charge of that trial judge was in violation of that principle of the law of England which forbids a judge to permit a jury to ascertain, from either his language or manner, the judge's opinion of the merits of the controversy they are to decide upon. While we recognize the extraordinary power conferred upon the trial judges in homicidal cases in England, and the right sometimes exercised by the British judges upon what may be fairly deemed their discretionary or even paternal power, either over the accused or the majesty and spirit of the law, we are still of the opinion, that among all English-speaking people there will be no two opinions among jurists throughout the world, that Sir James Fitz James Stephen on this trial transcended the true spirit of the law of England, in his animadversions against the accused before the jury who had to decide her fate.

"We believe that if the evidence in the Maybrick case could be under English usages submitted to an English Court of Review the verdict of the jury would be set aside, and judgment reversed for Errors of Law.

"We concur in the opinion expressed by the eminent English counsel, Sir Charles Russell (now chief justice), Fletcher Moulton, Q. C., Mr. Poland, Q.C., and Mr. McDougal, after a careful review of the evidence with a view of determining whether, in their opinion, the verdict was justified by the evidence, that the verdict of the jury was not justified by the evidence.

"We are of the opinion that the action of the Home Secretary in commuting this sentence fell short of what it should have been, because if the verdict was right and legal it should not have interfered with the proper punishment of a poisoner, and that if the Home Secretary intervened at all it should have been for a full release.

"We are of opinion that the verdict of judicial opinion throughout all Christendom will be: That if, under the law of England, an illegal conviction cannot be remedied under existing forms and usages under the British Constitution and laws, then that the right of appeal should be engrafted, in all cases where human life is at stake, upon the present English system, to prevent miscarriage of justice in future cases.

"We rejoice that under the British Constitution there is one woman in England who has the power and the right to interfere and do justice in this case. We remember her long and splendid reign, unsullied by one unwomanly act; her strong sense of justice, her fearlessness in doing what she believes to be right; and we appeal to her to end this unfortunate controversy by granting a full pardon to this unfortunate woman."

That report, after an animated discussion, received the endorsement and approval of the Medico-Legal Society at the October session of 1896.

The decision of Mr. Matthews, Q.C., the then Home Secretary, in the case of Mrs. Maybrick, was thus announced (except italics, which are mine): —

"We are given to understand that the Home Secretary, after the fullest consideration and after taking the best medical and legal advice that could be obtained, has advised her Majesty to respite the capital sentence on Florence Maybrick, and to commute the punishment to penal servitude for life: inasmuch as though the evi-

[1] Read before the Medico-Legal Society of New York, March 17, 1897.

dence leads clearly to the conclusion that the prisoner administered, *and attempted to administer*, arsenic to her husband *with intent to murder*, yet it does not wholly exclude a reasonable doubt whether his death was in fact caused by the administration of arsenic."

In the subsequent biography of the presiding judge, the late Sir James Fitz James Stephen, by his brother, Mr. Leslie Stephen, the matter is thus stated (it will be seen that Mr. Leslie Stephen, who no doubt had legal assistance in this part of his narrative, omits all reference to the words which are italicized, and which were, of course, not italicized by the Home Secretary) : —

"The sentence was afterwards commuted to penal servitude for life, with Fitz James' approval, and, I believe, at his suggestion, upon the ground, as publicly stated, that although there was no doubt that she administered poison, it was possible that her husband had died from other causes."

And in a new edition of his "General View of the Criminal Law of England," published some months after the trial, the judge describes the case of Mrs. Maybrick "as the only one out of a large number tried before him in which there was a doubt as to the facts."

Mr. Lincoln, the American ambassador, had an interview with Lord Salisbury on the subject, before the decision was publicly announced, and he reported to his Government as follows: —

"His Lordship at once replied that the subject had been anxiously considered, and that he believed he could say that the death-sentence would not be executed, as all the medical evidence attainable left a reasonable doubt as to the death having been caused by the arsenic administered by Mrs. Maybrick."

And in his subsequent answer to an American petition Lord Salisbury said: —

"Taking the most lenient view which the facts proved in evidence and known to her Majesty's Secretary of State admit of, the case of this convict was that of an adulteress attempting to poison her husband under the most cruel circumstances while she pretended to be nursing him on his sick-bed."

In the face of these declarations by the judge, the Home Secretary, and the Prime Minister, the idea may be dismissed that the Government was convinced that the prisoner had really murdered her husband, but looked for some excuse to avoid an execution which would have created a popular outcry. I was in England at the time of this trial, and I was in a situation to come more or less in contact with public opinion there outside of Liverpool, and I then formed the opinion that great doubt existed in the public mind as to the guilt of the accused.

There was also felt in English circles, a strong sense that the trial justice had not dealt at all fairly with the accused in his charge to the jury.

I then formed the opinion, which I still entertain, that, had not the Home Secretary interfered and prevented the public execution of Mrs. Maybrick, the public feeling then ran so high, that a change in the English system would have been insisted upon by the general public clamor, giving the right of appeal in capital cases, as a matter of strict right to all condemned to death. It seems clear that the doubt whether Mr. Maybrick had died of arsenic was really and generally entertained.

What seems to have been wanted was, not an excuse for sparing her life, but an excuse for not setting her at liberty. And a perusal of the medical evidence given at the trial will satisfy any impartial reader that there were very grave reasons for doubting whether Mr. Maybrick died of arsenic; while the difference of opinion on that subject continues to agitate the medical profession up to the present.

It will further, I think, be conceded that no evidence tending to prove that Mr. Maybrick died of arsenic has been procured since the trial, but that, on the contrary, a good deal of evidence has been procured which increases the doubtfulness of the cause of death.

WHAT THEN IS THE LEGITIMATE RESULT OF A REASONABLE DOUBT AS TO THE CAUSE OF DEATH IN A CASE IN ENGLISH COURTS WHERE THE PRISONER HAS BEEN CONVICTED OF MURDER?

Mrs. Maybrick was tried on a single count, which charged her with having "at Garston on the 11th of May, 1889, feloniously, wilfully, and of her malice aforethought killed and murdered one James Maybrick by the administration to him of poison."

Arsenic being the poison relied on by the Crown, the judge told the jury: —

"It is essential to this charge that the man died of arsenic. This question must be to the foundation of a verdict unfavorable to the prisoner that he died of arsenic."

Therefore, if the jury had entertained the same doubt as to death by arsenic which the judge, the Home Secretary, and the Premier entertained, it is clear that they must have found the prisoner not guilty of the only charge with which they had to deal. And on any principle of reason and justice, why should the fact that the jury had arrived at a wrong verdict on the evidence before them have militated against the prisoner? The Home Secretary should have dealt with the prisoner as if the right verdict had been found. This was done in the famous case of Dr. Thomas Smelhurst, which in many of its features closely resembled that of Mrs. Maybrick. The report on which he received a free pardon stated that, "though the facts were full of suspicion against Smelhurst, there was not absolute and complete proof of his guilt." And only four years before the Maybrick trial the then Home Secretary, Sir William Vernon Harcourt, granted a free pardon to Mr. John Hay because there was "a doubt as to his identity." Since the Maybrick trial, too, the Home Secretary refused to admit that there was anything more than a reasonable doubt in the case of John Helsall, whom he released. The detention of Mrs. Maybrick on the conviction for murder cannot therefore be sustained after the admissions of the judge, the Home Secretary, and the Premier. The only question is whether a life-sentence can be justified on the ground relied on by the then Home Secretary, viz.: That the evidence clearly leads to the conclusion, that she had administered and attempted to administer arsenic to her husband with the intention of murdering him.

DID THE JURY FIND THIS, OR OUGHT THEY TO HAVE FOUND IT?

That the jury did not find it is clear. No doubt in finding that Mrs. Maybrick "feloniously, wilfully, and of her malice aforethought" killed her husband by administering poison to him, they found that she "administered poison to him feloniously, wilfully, and of her malice aforethought." Probably the reason why they arrived at this finding was that they thought the poison killed him. They did not think that even if he was an habitual arsenic-eater he would take enough to cause death, or else they thought that if he did chance to do so, he would at all events have told the doctors and asked them for an antidote. The part of the verdict which the Home Secretary upheld was therefore in all probability dependent on that which he rejected; and, in fact, if it were conceded that Mr. Maybrick's death was not caused by arsenical poisoning, the evidence of any wrongful administration of arsenic would be very weak. But what the jury found was that the arsenic was administered by the poisoner "feloniously, wilfully, and of her malice aforethought." The Home Secretary substituted, for these words, "with intent to murder." But the import of the phrases in English law is altogether different, and the difference materially affects the prisoner's punishment.

It has recently been held in England, that killing a woman by means of an illegal oper-

ation is wilful murder. Performing an illegal operation is a felony, and if the woman dies in consequence the operator has killed her feloniously, wilfully, and of his malice aforethought.

In another well known case, killing a policeman in the discharge of his duty was held to be wilful murder. In both these cases there was no intention on the part of the convict to kill his victim. This distinction, indeed, is not only pointed out, but defended in Sir J. F. Stephen's works on the Criminal Law (see, for instance the article *Murder* in his "Digest of the Criminal Law." And in the case of Reg. *v.* Cruise, reported in 8 Carrington and Payne, Mr. Justice Paterson told the jury that a crime which would be murder if the victim died might not be an attempt to murder if he recovered — the distinct intention to kill which was essential to the latter crime, not being essential to the former.

The popular distinction sometimes drawn, that murder is a successful attempt to kill, while attempt to murder is an unsuccessful attempt to kill, has no foundation in English law.

Murder may not be an attempt to kill at all. The person who performs an illegal operation on a woman does not intend to kill her, but quite the reverse. He wishes for many reasons that the patient will recover, but if she dies the crime is murder, notwithstanding, under English law. And comparing the decision as announced by Mr. Matthews with that which Mr. Leslie Stephen attributes to his late brother in his life, we at once notice that the latter has omitted the words "with intent to murder." The judge knew that the jury had not found anything of the kind, and evidently confined himself to what they did find; but the Home Secretary went beyond what the jury found and added a finding of his own — a finding on which he afforded the prisoner no opportunity of producing either evidence or argument, pronouncing sentence.

But why did the Home Secretary thus go outside of the verdict of the jury? The answer is plain. In order to obtain an apparent justification for the sentence of penal servitude *for life* which he meant to impose. Had the prisoner been convicted of feloniously, wilfully, and of her malice aforethought administered poison to her husband, with the intention to injure, aggrieve, or annoy him, the maximum sentence would have been three years' penal servitude. Mrs. Maybrick has been in penal servitude for upwards of seven years. If, indeed, the jury had gone on to find that her husband's life had been endangered by the administration, ten years' penal servitude (which in the case of a female convict in England is reducible by one-third for good conduct) would have been possible as the maximum sentence. It might perhaps be argued that the jury, in finding that the man died of the arsenic administered, found that his life had been terminated by the administration. But it seems inconceivable that any reader of the medical evidence could have arrived at the conclusion that life had been undoubtedly endangered by the administration of arsenic, though it was doubtful whether death had resulted from it. The doctors who ascribed the symptoms of disease to arsenic also ascribed death to it, and the doctors who said that death had not resulted from arsenic made the very same assertion about the preceding illness. It seems clear that the arsenic (whoever administered it) either killed Mr. Maybrick or did him no perceptible harm. But even if we waive the point, the difference between a life-sentence and one for ten years is immense. And what reason have we to think that, if the jury had convicted Mrs. Maybrick of a criminal administration of arsenic which endangered her husband's life, the presiding judge would have imposed the maximum sentence on a delicately nurtured woman in feeble health and a first offender?

As regards the Home Secretary's charge

of attempting to administer arsenic with intent to murder, the case is still clearer. The finding of the jury related to actual administration only. They made no finding whatever as to what the prosecutors themselves described as "an unsuccessful attempt." Still less, of course, did they find that the unsuccessful attempt was made "with intent to murder." And here again Sir Leslie Stephen is silent as to the judge's concurrence. He probably saw that the Home Secretary was again traveling outside of the verdict — looking for something that might tend to satisfy the public mind — without regard to whether it could be legally justified or not.

The Home Secretary has not, I think, ventured to cite an English statute which enables a jury, on a trial for certain offenses, to convict the prisoner of an attempt to commit these offenses. I am not aware that this statute has ever been applied to a trial for murder, and, judging from the preamble, I do not think it was intended to apply to such a trial. At all events, if it was competent for the jury to have found a verdict of guilty of attempt to murder in general terms, they could not have returned a verdict in the terms of the Home Secretary's decision, which does not charge Mrs. Maybrick with attempt to murder, in general terms, but charges her specifically with two distinct kinds of attempt, which come under two distinct sections of the corresponding statute (24 and 25 Victoria, Chapter 100, sections 11 and 14). But whether it was or was not competent for the jury to have convicted her of an *attempt to murder*, they did not either in terms or by implication convict her of that crime. And if the Home Secretary claims the right of substituting for the actual verdict of the jury that which in his opinion they ought to have found, but did not in fact find, how does this differ from punishing the prisoner for an offense of which he or she has never been convicted?

Let me now call attention to Lord Salisbury's answer to the American petitioners — the only attempt that has hitherto been made to define the new charges and supply the particulars that would be absolutely necessary in framing an indictment on them. She made the attempt relied on, he stated, when pretending to nurse her husband on his sick-bed. Now I think Lord Salisbury will have the honesty to admit that there was practically no evidence of any actual administration of arsenic while Mr. Maybrick was confined to his bed, and his wife was in attendance on him as a nurse. But it was contended that during this stage of his illness she made an unsuccessful attempt to give him some meat-juice, with which she had meddled, and in which arsenic was subsequently detected. As regards this attempt, as already stated, the jury made no finding whatever. Their finding, such as it was, related to actual administration only. But we now learn from Lord Salisbury that this charge of actual administration is in fact abandoned, and that the English Government places its whole reliance on an incident quite outside the finding of the jury.

Moreover, it will be seen that Lord Salisbury is not satisfied to rest this charge upon the evidence given at the trial only. He refers also to certain "facts known to her Majesty's Secretary of State." These alleged facts have never been communicated to the prisoner nor her advocates, although they are relied on as proofs of a crime for which she had never been tried, much less has the public been informed of them, but so far as can be ascertained they are wholly unimportant.

As the charge of murder of which Mrs. Maybrick was convicted by the jury does not include the charges of administering and attempting to administer poison with intent to murder, on which the Home Secretary relied, so a conviction or acquittal on the former charge would not in any way exclude a trial by judge and jury on these latter charges. It need hardly be said that,

even irrespective of evidence procured since the former trial, the defense against these new charges would assume a new aspect. New questions would be put to the witnesses, and new arguments addressed to the jury. The trial for murder did not in any respect fulfil the conditions of a fair trial on Mr. Matthew's charge of attempt to murder. As regards the meat-juice, for instance, the counsel for the defense thought it sufficient to point out that, as Mr. Maybrick had taken none of it, it could not have conduced in any way towards the death which the prisoner was accused of having caused. The question whether anything took place which amounted in law to an attempt to administer the meat-juice was not made the subject of cross-examination or argument, because it was not relevant to the issue before the jury; and a material item of evidence on that point, which had been given at an earlier stage, was not repeated at the trial. But the Home office has persistently refused not only to submit its new charges to a jury, but even to hold a public inquiry into them where the witnesses could be further questioned, and arguments arising on their testimony addressed by counsel to the Home Secretary or the presiding officer. If the charges in question are really distinct from the charge on which alone she was tried and convicted, she had never had even the faintest semblance of a fair trial for them. Indeed, they have never been defined by such particulars of place, time, and circumstances as to inform her advocates of the points to which their arguments ought to be directed. An admittedly wrongful conviction for one crime is kept alive for the sole purpose of enabling the Home Secretary to punish the prisoner, without any trial whatever, for totally different offenses, without violating the letter of the law, but in complete violation of the spirit and intention of Magna Charta itself.

Finally, though the crimes charged against Mrs. Maybrick by the Home Secretary are punishable by penal servitude for life as the maximum penalty, I know of no instance in which any woman — not to say a lady in delicate health and a first offender — has been sentenced to penal servitude for life on a conviction for them. In a recent case, where the attempt to murder consisted of poisoning, and the man's life was endangered, the poisoner (who had received some provocation) escaped with three years' penal servitude.

The severity of Mrs. Maybrick's sentence is in fact as unparalleled as the supersession of both judge and jury in passing it. Instead of being a necessary consequence of Mr. Matthew's finding, it is a most unusual one, though just within the limits of possibility. The principles of mercy have been violated almost as flagrantly as the principles of justice. A sentence of penal servitude for life is indeed often passed by the Home Secretary — in cases of infanticide, for instance — without any intention of enforcing it.

Many persons thought that this was so in Mrs. Maybrick's case, and that she would have been liberated before the present juncture. And most probably this was the intention of Mr. Matthews at the time. But Sir M. W. Ridley has informed us that the sentence is to be rigorously enforced, and that this was also the intention of Mr. Asquith. The sentence must, therefore, now be treated as meaning what it says. Was it a fair or a just sentence to pass behind the prisoner's back without hearing a word in defense or extenuation on undefined charges never submitted to any jury, and which at most only rendered it possible as the extreme penalty in the statute book? Mr. Asquith was always merciless, but Sir M. W. Ridley's action in the matter is simply astounding. He literally seems to contemplate mercy for everyone except the convict whom "the head of the criminal justice of England" has officially declared "to be entitled to an immediate release." He is neither a barrister nor a solicitor; but probably for that reason

attaches undue weight to the opinions of his predecessor and his subordinates. A strong protest from the members of the legal profession on both sides of the Atlantic would perhaps open his eyes to the quagmire into which his adherence to officialism and routine has in this instance led him; but even if it were certain that such a protest would fail to procure life and liberty for this victim of Home Office mismanagement and obstinacy, it is imperatively required for the honor and dignity of the legal profession itself. What will posterity think of its members if they permit the intended judicial murder to be perpetrated, without once raising their voices in the interests of justice and humanity?

While I think Mrs. Maybrick ought to have been liberated at once, that is not now the question. The questions that now arise when we consider the case in its purely legal aspect are these: —

1. Can we, after finding the crime of murder proved, spell out of the verdict of the jury any minor crime punishable by penal servitude for life, and, if so, was the sentence of penal servitude for life, passed on the prisoner for this minor crime, the distinct act of the judge, as the law requires, and not that of the Home Secretary? (With regard to all such minor offenses the presiding judge exercises the widest discretion under the English system, but his sentence, if too severe, may be moderated by the Home Secretary, who cannot, however, increase it.)

2. If so, can we, in consistency, reject the finding of the jury as to the crime of murder, while retaining it as to the minor crime in question? In other words, is this minor crime established by satisfactory independent evidence?

3. Is there in the evidence given at the trial such conclusive proofs of a minor offense punishable by penal servitude for life, and not included in the verdict of the jury, as to justify the Home Secretary in dealing with the charge himself, instead of submitting it to a second jury? And did he, in so dealing with it, do so without allowing the prisoner all reasonable facilities for defending herself against the new charge, both by evidence and argument? And did she receive the benefit of every reasonable doubt that could be raised in relation to it, as a second jury would have been bound to give her, if she had been tried upon such new charge, notwithstanding her previous conviction upon the charge of murder?

4. Was the minor crime or crimes, thus conclusively proved, of such a nature as to make it certain that the presiding judge would in the event of a conviction have imposed the maximum sentence of penal servitude for life? And, if not, did the Home Secretary consult any, and what judges, as to the proper sentence to be imposed for such crime or crimes? Had Mrs. Maybrick been convicted by a jury of any crime not punishable by penal servitude for life she would now be free. Had she been convicted by a jury of a crime punishable by penal servitude for life she would very probably be free also; for the sentence might not exceed ten years' penal servitude, and good conduct would in that case have procured a release in somewhat less than seven. Lastly, the ambiguous utterances of Mr. Asquith and Sir M. W. Ridley suggest another question.

5. After the Home Secretary, with the concurrence of the presiding judge and the premier, has declared that the crime of which the prisoner was convicted has not been proved beyond reasonable doubt, is a new Home Secretary justified (without any new evidence against the prisoner, and in spite of any new evidence in her favor) in punishing the prisoner for the very crime which had been publicly declared to be unproved? Sir M. W. Ridley's language, though evasive, went far to show that he regarded the crime of murder as completely established. Otherwise, indeed, the strength of his declarations on the subject is inexplicable. If the only crime that was proved against the prisoner

was one for which a life-sentence went to the extreme limit of the law, and was almost unparalleled in its severity, why should he declare that he had come "most emphatically" to the conclusion that it ought not to be interfered with? Or why should he say that he had as little intention of releasing the prisoner as his immediate predecessor had, avoiding all reference to the Home Secretary, who originally passed the sentence, and who most probably *did* intend to modify it, like the similar sentences which he passed on unfortunate child-murderesses?

Prisoners of this kind usually receive a life-sentence from the Home Secretary and are set free in seven years at the utmost. It was generally thought that Mrs. Maybrick's sentence was of the same kind, until Sir M. W. Ridley declared the contrary in the House of Commons. But now that the life-sentence in her case is declared not to be a matter of precedent and routine, but one to be carried out to the full extent usual in such cases (for if an English "lifer" lives long enough he or she is ultimately released), we have a right to demand, what offense punishable by penal servitude for life has been established with perfect conclusiveness? And if penal servitude for life is the maximum sentence for the crime in question, we have a right to ask further, why, and by what authority, has this extreme penalty been imposed? In England, a jury is the proper tribunal to decide questions as to the prisoner's innocence or guilt in respect of any specified crime; and, except in the case of the conviction for murder, where the laws compel the judge to pass sentence of death, the judge who presides at the trial is the proper person to fix the penalty. Is Mrs. Maybrick being punished for any crime of which she was convicted by the jury? Was her present sentence deliberately passed on her for that crime by the judge who presided at the trial? And, if so, did it exceed the legal penalty for the crime of which she was thus convicted?

NOTE. — The opinions of the eminent counsel to which reference is made in the report of the committee, which received the endorsement of the Medico-Legal Society, are appended: —

"*Re* MRS. F. E. MAYBRICK.

"Having carefully considered the facts in the elaborate case submitted to us by Messrs. Lumley and Lumley, and the law applicable to the matter, we are clearly of the opinion that there is no mode by which in this case a new trial, or a *venire de novo*, can be obtained, nor can the prisoner be brought up on a *habeas corpus* with the view of retrying the issue of her innocence or guilt.

"We say this notwithstanding the case of Regina *v.* Scaife (17 Q. B., 238; 5 Cox C. C., 243, and 2 Drew C. C. 281). We are of the opinion that in English criminal procedure there is no possibility of procuring a rehearing in the case of felony where a verdict has been found by a properly constituted jury upon an indictment which is correct in form. This rule is, in our opinion, absolute unless circumstances have transpired, and have been entered upon the record, which, when there appearing, would invalidate the tribunal and reduce the trial to a nullity by reason of its not having been before a properly constituted tribunal. None of the matters proposed to be proved go to this length.

"We think it right to add that there are many matters stated in the case, not merely with reference to the evidence at and the incidents of the trial, but suggesting new facts which would be matters proper for the grave consideration of a court of criminal appeal if such a tribunal existed in this country.

(Signed) C. RUSSELL.
J. FLETCHER MOULTON.
HARRY BODKIN POLAND.
REGINALD J. SMITH.

LINCOLN'S INN, 12 April, 1892."

"*Re* MRS. F. E. MAYBRICK.

"I agree with my learned friends that the evidence at the trial of this case did not justify the verdict, and I further think that this is a case where every possible means of procuring a rehearing should be resorted to; but I am unable at the present period of English law to assent to their proposition that in a case of felony, even if it is assumed that there is an innocent woman in an English prison, the rules of criminal procedure debar the courts from applying any remedy unless some error making the trial itself a nullity can be shown to exist on the record; and I moreover

feel that such an avowal, if made, should be made in the form of a judgment of the court and not in the form of an opinion of counsel.

"In reference to the questions put to us by Messrs. Lumley and Lumley in this case, I am of opinion that, assuming the facts of the case and irregularities of procedure, both by judge and jury, set forth in the instructions, can be conclusively proved, the court should be invited *ex debito justitiae* to set aside the verdict and order a new trial, especially as there is no recorded case of a refusal by the Courts to grant a new trial in a case of felony. While, on the other hand, the case of Regina *v.* Scaife (17 Q. B., p. 258, and 18 Q. B., p. 773) stands unreversed, in which case the prisoners were convicted of felony at the assizes by a properly constituted jury, upon an indictment which was correct in form, and where, notwithstanding this, the Court of Queen's Bench, consisting of four judges sitting *in banco*, ordered that the verdict be set aside and a new trial granted, and where the prisoners, having been again convicted at such new trial, underwent a fresh sentence of the law.

"I deem it therefore presumptuous in me, as counsel, to advise that any court would overrule that case, or would regard the Rules of Criminal Procedure to be so inelastic as to compel the court, under such circumstances as those set forth in the instructions, to refuse to set aside the verdict and order a new trial, in Mrs. Maybrick's case, upon the bare ground that it is a case of felony.

"Having regard to the provisions of the Judicature Act, 1873, and the Rules of the Supreme Court, I am of opinion that the High Court has jurisdiction to entertain an application for a new trial of a case tried at the assizes, which are thereby constituted a court of the High Court, inasmuch as there is now no necessity for having the case removed by *certiorari*, or otherwise, into the Queen's Bench previous to the making of such application. (See Regina *v.* Dudley, 14 Q. B., p. 280, and Mellor *v.* Royal Exchange Shipping Company, the 'Times' Reports, p. 663.)

"I am further of opinion that, in the event anticipated by my learned friends, of the Court refusing to follow the precedent of the Scaife case, an application should be made to the Court to follow the precedent of the Murphy case (L. R. 2 P. C. 535), where the record was allowed to be amended, and that the Court should be asked on Mrs. Maybrick's behalf to direct that an entry of the conduct of the Jury, and other irregularities mentioned in the instructions, be endorsed on the record (See 2 Hale's Pleas of the Crown, 308, where Lord Hale says that an irregularity 'is to be, as it ought to be, endorsed on the record'), and that this application should be made for the purpose of putting such an error upon the record as would form a foundation for a writ of *venire de novo*.

"I am further of opinion that the advice given to the Queen by the Home Secretary as to exercising Her Majesty's prerogative, on the ground that the evidence left a reasonable doubt whether his death was, in fact, caused by the administration of arsenic (which in this case is equivalent to a reasonable doubt whether murder had, in fact, been committed), and also the course taken, in consequence of that advice, of applying to and obtaining from the Court an order under the provisions of 5 George IV., cap. 82, directing that Mrs. Maybrick be kept in penal servitude for life, are unconstitutional, and that her imprisonment is consequently illegal; and, therefore, that an application can be properly made for a writ of *habeas corpus* with a view to obtain her discharge on the ground that she is illegally detained.

"In reference to the special question put by Messrs. Lumley and Lumley thus: 'Does the evidence disclose any sufficient grounds for the statement made by the Home Secretary in his advice to the Queen, viz. "the evidence leads clearly to the conclusion that the prisoner administered, and attempted to administer, arsenic to her husband with intent to murder"?' I can, after careful perusal of the evidence, find no sufficient ground for such a statement, which is, moreover, contradictory to the summing up of Mr. Justice Stephen, who pointed out (*e.g.* p. 36), 'The theory is that there was poisoning by successive doses, but I do not know that there was any effort made to point out the precise times at which such doses may have been administered.'

A careful perusal of the evidence makes it clear to me that no such occasion of administration, or attempted administration, of arsenic by Mrs. Maybrick, either with or without felonious intent, can be pointed out as would afford the Home Secretary any sufficient ground for the representation he made to the Queen; and further, that the only ground to be found in the entire proceedings for such a representation is what Mr. Justice Stephen described as 'the theory' of the prosecution as distinct from 'the evidence.'

(Signed) ALEXANDER W. MCDOUGAL.

LINCOLN'S INN, April 12th, 1892."

Whatever may be thought or said by counsel, of the views of Mr. McDougal, by those skilled in English criminal procedure, and concerning which his associates do not seem to have assented, these opinions do

show that this case would have been one in which an appeal would have resulted in a new trial in any State of the American Union; and that "the certificate of reasonable doubt" required under American practice on an appeal in riminal procedure would have been granted by any impartial judge.

LONDON LEGAL LETTER.

LONDON, MARCH 6, 1897.

A MATTER of very great importance to Americans having business relations with England has been decided within a few days past by Mr. Justice Kekewich of the Chancery Court, in a trade-mark case. As American lawyers know, the registration of trade-marks is now regulated by statute, and, as not infrequently happens, the act of the legislators, conceived in a desire to simplify the law, has in this instance only added to its complexity — at least if the amount of litigation which it has provoked is any criterion to judge by. The Trade Marks Act of 1888 provides *inter alia*, that a trade-mark "must consist of or contain at least one of the following particulars"—"A word or words having no reference to the character or quality of the goods and not being a geographical name." So rigidly has this provision been construed, that the word "camel," relating to the humped-backed quadruped of the desert and used in connection with belting made of camel's hair, has been refused registration by the Registrar because it was discovered that there was a small hamlet or parish in the west of England by that name! And the decision was sustained on appeal to the Board of Trade. So, too, a word was successfully objected to when it was discovered that it was identical with the name of a little-known place in Italy. Mr. Justice Chitty, now Lord Justice Chitty, two or three years ago, very truly said (in the Eboline case, 189 & 3 Ch. 169) that "the object of the Legislature was to prevent a trader from acquiring a monopoly on the name of a place, and from thereby suggesting that the goods had a local origin or a local connection, which in fact they might not have." It was also necessary to illustrate the danger by pointing out the harm that might be done if the proprietors of a sauce should be allowed to register the trade name "Worcester Sauce," which would prevent any other sauce maker in Worcester calling his sauce by that name, or the still more pertinent case of a merchant in Staffordshire registering the name "Newcastle coals," when in fact his coals did not come from Newcastle, and thus prevent any colliery proprietor in Newcastle calling his coals by their true and proper name. Notwithstanding this *dicta* of Lord Justice Chitty, the mere fact that a name was geographical, no matter what its primary signification, has heretofore been sufficient to keep it off the register.

Relying upon this, certain parties moved to rectify the register by removing the word "Magnolia," and the design of the magnolia flower, which had been registered in connection with anti-friction metal, on the ground (i) that the word was geographical; (ii) that it was descriptive; and (iii) that the flower had been registered in the wrong class. In support of the first contention, Lippincott's *Gazetteer* was relied upon to show that at the time the word was admitted to the register, there were twenty-two villages and towns in the United States, and Rand & McNally's Atlas to prove that the number has since been increased to over forty. Notwithstanding this, Mr. Justice Kekewich refused to sustain the motioh on this ground. He said, "Was the word 'Magnolia' here a 'geographical name' in the sense of that being the primary meaning of the word, or the meaning which would occur to an Englishman of ordinary intelligence and education? If the word had a double meaning, the question was whether the primary meaning was the meaning that would occur to people in ordinary society." He therefore decided that, as no Englishman in the general walk of life had ever heard of the two score Magnolias in the United States, and that everyone knew of the magnolia tree and blossom, the latter was the true meaning of the word.

While the decision will be gratifying to the commercial world, the trade-marks were nevertheless expunged, and for a reason that will doubtless cause no little perturbation among Americans whose goods, protected by trade-marks, are sold in this country. And this was because those who registered the design of the flower, the Magnolia Anti-friction Metal Company, a New York Corporation, had not any good-will in the goods or class of goods in respect of which the trade-mark had been registered. It appears that the New York Company had sent over samples of bearings to an agent in this country who took orders for them, and then instead of ordering the goods themselves from New York, ordered the metal of which the bearings are made and had it made up into bearings in Cardiff. From this it appeared that the New York Company had never sold any bearings, as such, in England, although it had sold hundreds of thousands of dollars worth of the Magnolia metal here. Therefore, as the design was registered in Class 6, which is for "parts of machinery," it must be taken off the register. If, however, the design had been registered as for metals or alloys, in Class 5, it would have been good.

The moral of this to the American manufacturer is that the strictest caution must be exercised in the registration of a trade-mark, as the severest test of technicalities will be invoked to prevent the registration or to rectify the register if once admitted to it.

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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.

WE have given up a large portion of this number to an interesting description of the "Bram Trial," written by one who was present during all the proceedings and has drawn his deductions from personal observation of the witnesses and a careful analysis of the evidence. No trial since that of "Prof. Webster" has aroused greater general interest or excited more comment, and we are glad to be able to give our readers an accurate and unprejudiced account of it.

LEGAL ANTIQUITIES.

THERE is a curious case in Fortescue's Reports relating to the privilege of peers, in which the bailiff who arrested a lord was forced by the Court to kneel down and ask his pardon, though he alleged that he had acted by mistake; for that his lordship had a dirty shirt, a worn-out suit of clothes, and only sixpence in his pocket, so that he could not believe that he was a peer, and arrested him through inadvertence.

FACETIÆ.

"I REMEMBER the time," said a Maine attorney, "in the days when Col. Littlefield was sheriff, that Judge Walton was presiding, and the jury were out on a rum case.

"They had been out a long time, and Judge Walton was rather nervous and wanted a verdict. To his clear and far-seeing mind, the most remarkable, in many ways, that ever held jurisdiction in New England, there was no excuse for any prolonged consideration of the case by any jury.

"Leaning back, seemingly lost in thought, he suddenly sat bolt upright and beckoned to Col. Littlefield, and the sheriff walked up in that quiet way of his.

"'Colonel,' said Judge Walton, 'Mr. Sheriff, I should say, see if that respondent won't plead guilty provided his fine is put at $50.'

"Col. Littlefield smiled, and went over and talked with the prisoner. It took but a few minutes, and in less time than it could be told, he had retracted his plea, pleaded guilty, and had been fined.

"Then the Court sent out for the jury.

"'Gentlemen,' said he, 'it seems that some of you are not yet satisfied in your minds that the prisoner is guilty?'

"The jury looked at each other.

"'Is that a fact, gentlemen?'

"'It is, may it please the Court,' said the foreman.

"'Well, then, for your edification I will say that the prisoner himself is quite well satisfied that he is guilty, for he has pleaded guilty and has been fined. You are excused from further consideration of the case.'"

DANIEL WEBSTER was once sued by his butcher, and the man did not call upon him afterward to trade with him. Webster met him in the course of a few days, and asked him why he didn't call. "Because, said the man, "I supposed that you would be offended, and wouldn't trade with me any more." To which Webster replied: "Oh, sue me as many times as you like, but, for heaven's sake, don't starve me to death."

VISITOR. — "Johnnie, what do you want to be when you grow up?"

JOHNNIE. — "A man on a jury."

VISITOR. — "And why do you want to be a man on a jury?"

JOHNNIE. — "'Cause papa says that the lawyers give the jury taffy at almost every trial."

NOTES.

HIRING a house in England is not the simple, straightforward process which it is in America. So many and deep are the pitfalls of the law, that the unwary are sure to fall into one before long if they trust to their own devices. There is a useful member of society here called the family solicitor. He will do almost anything short of buying tooth-brushes for the family. He is so clever that he can generally, by dint of a vigorous correspondence with the real estate agent, or owner of the house, reduce the demands of the landlord, and secure the property for his client at a much smaller figure than that originally named. Even then the affair is not at an end; the drawing of the lease is a solemn and complicated performance, involving considerable expense. In it the lessee engages to paint the house every few years, and to pay a certain rent; or he pays what is called a "premium," and takes over a long lease, sometimes for as much as ninety-nine years, so that, having bought the lease, he virtually owns the house during his life, and can will it away to his heirs. — *Harper's Bazar.*

A MEMBER of the Kansas Legislature has taken the revised version of the Ten Commandments as found in Exodus and incorporated them in the form of a legislative bill, which he wishes to have made part of the Criminal Procedure of that State. The preamble to the measure is as follows: —

PREAMBLE.

AN ACT TO GIVE STATUTORY FORCE TO THE TEN COMMANDMENTS.

Whereas, The men of the present generation have become doubters and scoffers; and,

Whereas, They have strayed from the religion of the fathers; and,

Whereas, They no longer live in the fear of God; and,

Whereas, Having no fear of punishment beyond the grave, they wantonly violate the law given to the world from Mount Sinai.

The bill which follows is composed of ten sections, each of the Commandments constituting a section, and as our readers have the Decalogue by rote, it is not necessary to reproduce it.

Section 11 of the bill provides for the punishment of violators of the Commandments. The penalties are visited on men only. They are: —

For having another God, fine . . . . $1,000.
For making a graven image, one year in the penitentiary, and a fine of . . . . . $1,000.
For taking the name of the Lord in vain, and for not observing the Sabbath day, fine . . . $500.
For not honoring father or mother, six months in the penitentiary, and a fine of . . . . $500.
For committing murder, hanged by the neck until dead.
For adultery, penitentiary for life.
For stealing, fine or imprisonment in the discretion of the Court.
For bearing false witness, imprisonment in the discretion of the Court.
For coveting thy neighbor's house, his wife, his servant, his maid or his ass, fine and imprisonment in the discretion of the Court.

Section 12 provides that "this act shall take effect and be in force from and after its publication in the statute book."— *Ex.*

IN a case in the Circuit Court, city of St. Louis, in an action to quit title, a rule to show cause was directed to be issued and served on one of the defendants in the cause, who was then thought to be resident near the central part of Missouri. It was accordingly sent to the sheriff of the proper county with request to make personal service on the gentleman in question. The sheriff made the following unique return: "Executed the within writ on the 14th day of November, 1896, *by not finding* 'A. B.' in *my* county.

BILL SMITH, *Sheriff*."

A RECENT trial in France brought to light some curious details of the capital that may be made in attacking capital, and of the good things that even a corrupt and bourgeois society may afford to its fiercest denouncer and enemy. It was a suit in which the profits of Rochefort from the *Intransigeant*, in the seven years 1889–1896, were put in evidence. When he went to Belgium with Boulanger in 1889, he left his paper in charge of M. Vaughan, with whom he has since quarrelled, and who has sued him for services rendered. An accounting was demanded, and from it it appears that Rochefort in the seven years mentioned received a salary of $20,000 a year besides dividends amounting, all told, to $200,000 more — or nearly $50,000 a year. This was not bad for a paper

black in the face every day over the injustice and oppression of a bourgeois society. However, Rochefort will have more reason than ever to think badly of a bourgeois society since a bourgeois tribunal has condemned him to pay a good round sum to the employees whom he was proposing to cheat. — *The Nation.*

CURRENT EVENTS.

THE Paris tribunals have decided that the habit of gambling in the wife is valid ground for divorce.

Two-thirds of the mail that passes through all the post-offices of the world is sent by and directed to English-speaking people.

THE Japanese government, instead of presenting medals to the soldiers who took part in the war against China, is to give them excellent Swiss watches.

IT would be difficult to know just what we would do with Cuba if we had it. Its population is mongrel in character, and its climate does not invite the hardy independent white man. It might be well for annexationists to halt a little before "taking in" Cuba and Hawaii, and ask if we might not be taken in ourselves.

A bill is now pending in Congress providing for the establishment at Washington of a permanent census office to undertake the work of making the twelfth and succeeding censuses and the collection of other essential information. There is a great waste in organizing a new office for every census, and there can be no doubt that the service would be greatly improved by placing it in the hands of a permanent bureau. A permanent bureau with a force of trained men in control could do much better work, and with the same expenditure of money, or at most a small increase, could largely increase the scope of investigation. Much of the material collected would be of incalculably more value for being collected yearly rather than decennially.

THE capital of Brazil, Rio de Janeiro, has a notoriously bad climate. It is a fastness of yellow fever and other tropical ailments, and the death-rate is high enough to seriously affect the commercial prosperity of the city. Recently the Brazilian government decided to remove the capital, and appointed a commission of local scientists to fix a site. The commission has selected a plateau four thousand feet above the sea-level somewhat north of the present capital. The temperature of the plateau resembles that of middle France. There is plenty of water and no yellow fever. The journey by rail from the coast will take eighteen hours. This is believed to be the first occasion on record in which science has been called in to choose the site of a capital.

THE anti-trust law just enacted in Georgia is a very comprehensive and thorough one. It prohibits and declares void all contracts, agreements or arrangements made with a view to preventing or obstructing free competition in the importation or sale of foreign articles, or the sale of articles of domestic growth or domestic raw material. It declares unlawful and void all trusts or combinations between persons or corporations which are designed to have a tendency to advance, reduce, or control the prices of such products to producers or consumers. It provides for the forfeiture of the charter and franchise of any domestic corporation violating any of its provisions, and prohibits offending foreign corporations from doing business in the State. The attorney-general is required to institute legal proceedings against any corporation that violates the law in any way, and to enforce the prescribed penalties. Any person or corporation damaged by a trust is authorized to sue for the recovery of such damage, and for other purposes. There are several additional provisions intended to facilitate prosecution and to prevent the defeat of the law by the technical means to which corporation lawyers habitually resort in the interests of their clients.

The law is based upon the theory that free competition in all forms of business is a personal right and a public advantage, and that a wrong is done whenever it is suppressed or obstructed. There seems to be no room left for the escape of any combination designed to control prices or to interfere with the general laws of trade. It remains to be proved, if a law so stringent and far reaching can be enforced, and its power and usefulness will depend very largely upon the ability and integrity of the officers and the friendly disposition of the courts. However, the legislature has done its part in a determined manner, and there does not seem to be any reason to doubt that the law can be made effective.

LITERARY NOTES.

IN the April number of CURRENT LITERATURE, Mr. George W. Cable, who has recently assumed editorial charge of that excellent magazine, gives us a new

department, which he calls the "Editor's Symposium." In this, he chats pleasantly and instructively of books and criticism and kindred subjects. A very delightful department is the result.

Among other well-known names attached to selected articles, we note those of Andrew Lang, Grant Allen, John Watson ("Ian Maclaren"), Herbert Spencer, Beerbohm-Tree and John Burroughs.

HARPER'S MAGAZINE for April contains "Washington and the French Craze of '93," a popular historical paper, by Professor John Bach McMaster, "Wild Things in Winter," a sympathetic study of bird life, by J. H. Kennedy, and "Our Trade with Brazil and the River Platte Republics," by Richard Mitchell, U. S. N. In the leading short story of the number, "The Wisdom of Fools," Margaret Deland raises the question of personal responsibility in the existing social order. Other stories are: "A Realized Romance," by Mary M. Mears, and "A Solo Orchestra," by Brander Matthews.

THE CENTURY for March is an "Inauguration Number," and is one of a series of special issues which will make the present year of that magazine of more than ordinary interest to its readers. It contains several articles which have special interest to Americans at this time. One, "Our Fellow-Citizens of the White House," by Mr. C. C. Buel, describes the official life of a President. Three frontispiece portraits are given with the number — two of President-elect McKinley, and one of President Cleveland at his desk, all of them made from photographs specially taken for THE CENTURY. Mr. J. B. Bishop contributes an article on "Inauguration Scenes and Incidents," with stories and pictures relating to some famous inaugurations in the past. The Librarian of Congress describes the splendid building just completed for "The Nation's Library," and Mr. William A. Caffin, the art critic, writes of its decorations.

DR. EDWARD EVERETT HALE begins in the April issue of the NATIONAL MAGAZINE a serial to be entitled "Some Recollections of the Century. It also contains "The Story of an Armenian Refugee," describing, with photographs, the recent Armenian massacres. The leading illustrated article is "Chicago Artists and their Work."

MCCLURE'S MAGAZINE for April contains a series of unpublished letters written by General Sherman to a young lady between whom and an Army officer the General undertook to re-establish a broken romantic relation. It contains also a series of life portraits of Alexander Hamilton and his wife, and a study of Hamilton's life and public services by his chief biographer, the Hon. Henry Cabot Lodge. The stories in this number are by Ian Maclaren, Octave Thanet, and Cy. Warman.

THE April number of the ATLANTIC contains an article by Prof. Frederick J. Turner, of Madison, Wisconsin, on "Dominant Forces in Western Life," wherein he traces the origin of the institutions and ideas which make the great Northwest what it is. A pretty colonial love story is told in the love letters of the widow of Governor Spottsford of Virginia, "The Parson who Won her Hand,"— old letters now for the first time published.

THE editor of the REVIEW OF REVIEWS comments in the March number on the Spanish program of reforms in Cuba, the United States Senate's attitude toward the arbitration treaty with England, the immigration bill, the proposed international monetary conference, President-elect McKinley's cabinet selections, the recent Senatorial elections, the New York Trust investigation, the famine situation in India, the affair of the Greeks in Crete, the foreign policy of Russia, the position of England, France, and the other great powers, and many other matters of current interest.

An Englishman's study of the longest reign in British history is contributed in this diamond jubilee year of Queen Victoria's rule, by Mr. W. T. Stead, who traces the growth of imperial dominion and the influence of the royal family from the point of view of the typical British subject. Many of the portraits are rare, and are now published for the first time in America.

AMONG the more noteworthy contents of THE LIVING AGE for March, are the following: "The Psychology of Feminism," an entertaining contribution to the discussion of the "New Woman"; an essay on "Victorian Literature," by Andrew Lang; a paper on "Recent Polar Exploration" by Prince Kropotkin; and "Two Cyclones," a clever sketch by Ludovic Halévy, translated for the LIVING AGE.

THE opening pages of the NORTH AMERICAN REVIEW for March are devoted to a timely and elaborate paper from the pen of Sir Edwin Arnold on "The Famine in India." In "The History of a Poem," Mr. Edmund Gosse recounts the circumstances connected with the production of the late Coventry Patmore's work, "The Angel in the House." A writer,

under the signature of "A London Police Magistrate," gives a description of "Drink and Drunkenness in London," dwelling especially on the class known as habitual drunkards.

PRESIDENT DAVID STARR JORDAN contributes to APPLETON'S POPULAR SCIENCE MONTHLY for March an article on "The Stability of Truth," in which he opposes the contention of Salisbury, Balfour and Haeckel that "belief" may rest on foundations unknown to "knowledge."

Under the title "A Year of the X-Rays," Prof. D. W. Hering tells in what directions progress has been made upon Röntgen's famous discovery.

THERE is nothing that Richard Harding Davis describes with more skill than a gorgeous pageant, and "The Banderium of Hungary," which leads the March SCRIBNER'S, is one of the brightest exhibitions of his pictorial ability.

A new serial begins in this number — "The Story of a Play," by W. D. Howells. This is a humorous presentation of theatrical life of the better kind, and records the experiences of an American playwright in producing his first play.

THE complete novel in the March issue of LIPPINCOTT'S is "Dead Selves," by Julia Magruder. "Farming under Glass," by George Ethelbert Walsh, is a clear and instructive exposition of what has been done — which is very much — for human food by means of hothouses. John E. Bennett writes of "The Deserts of Southeast California," and Prof. L. Oscar Kuhns of the "Origin of Pennsylvanian Surnames." D. C. Macdonald tells what is to be seen "In the Manuscript-Room of the British Museum."

WHAT SHALL WE READ?

This column is devoted to brief notices of recent publications. We hope to make it a ready-reference column for those of our readers who desire to inform themselves as to the latest and best new books.

(Legal publications are noticed elsewhere.)

PROF. CHARLES G. D. ROBERTS, in his new novel *The Forge in the Forest*,[1] has demonstrated that it is possible to write a story of absorbing interest and at the same time keep it pure and wholesome from beginning to end. An accomplishment which is worthy of note in these degenerate literary times. The scene of the story is laid in that region immortalized by Longfellow in "Evangeline," and the dramatic events described are based upon historical facts. The author's style is delightfully simple and at the same time unusually impressive. His delineation of the characters who are participants in the exciting drama shows the touch of a masterhand. We will not mar the reader's enjoyment by a description of the plot, but we can safely say that he who commences this book will not lay it down until he has read it to the very end. It is one of the very best stories of the day, and we are glad to learn that it is but the first of a series of historical novels which Professor Roberts has in preparation. The publishers are to be commended for the exquisite manner in which the book is made up.

The man who garners and preserves in an abiding form the folk-lore of his country is a public benefactor, and the American people should pass a vote of thanks to Mr. Charles M. Skinner for his *Myths and Legends of Our Own Land*.[2] With infinite pains he has collected a vast number of American legends which, but for his ferreting them out, would doubtless have passed into oblivion. The book is as interesting to the mature mind as a fairy-book is to children. There is not a dull page in it. There are legends of the Hudson and its hills, of the Isle of Manhattoes, tales of Puritan land, of the South, the Central States and Great Lakes, the Rocky Range, the Pacific slope, etc.

King Noanett[3] is a most interesting love-tale, the scene of which is laid, in the beginning of the book, in Exmoor, England, in the time of Cromwell, and then changed to Virginia and later to Massachusetts. It gives a very vivid and, we should judge, faithful picture of early life in the colonies. The Indians play an important part in the plot as the title indicates. It is an extremely pretty story, and the ending is totally unexpected and surprising. The story reminds one of "Lorna Doone," especially in the first part, though the development of it is very different.

One of the most important publications of the month is *The Life of Nelson*,[4] by Captain Mahan of the United States Navy. The distinguished author has examined with patience and with care Nelson's voluminous correspondence and despatches, and many

[1] THE FORGE IN THE FOREST. Being the narrative of the Acadian Ranger, Jean de Mer, Seigneur de Briard; and how he crossed the Black Abbé, and of his adventures in strange fellowship. By Charles G. D. Roberts. Lamson, Wolffe & Co., Boston and New York, 1896. Cloth. $1.50.

[2] MYTHS AND LEGENDS OF OUR OWN LAND. By Charles M. Skinner. J. B. Lippincott Co., Philadelphia, 1896. Two Vols. Cloth. $3.00.

[3] KING NOANETT. By F. J. Stimson. Lamson, Wolffe & Co., Boston and New York. Cloth.

[4] THE LIFE OF NELSON. The Embodiment of the Sea Power of Great Britain. By Capt. A. T. Mahan, D. C. L., LL.D. Little, Brown & Co., Boston, 1897. Two Vols. Cloth. $8.00.

other sources of information. His aim has been *to make Nelson describe himself, — tell the story of his own inner life as well as his external actions*. He states that he has carefully analyzed Nelson's letters "to detect the leading features of temperament, traits of thought, and motives of action; and thence to conceive within himself, by gradual familiarity even more than by formal effort, the character therein revealed." The work is admirably illustrated with portraits, plates in photogravure, maps and plans. It is a book that will afford the reader great pleasure and profit.

We have received a copy of *Caliban*, by Ernest Renan, translated by Eleanor Grant Vickery, published by the Shakespeare Society of New York. The author has taken the characters in "The Tempest" and placed the scene in modern times and adapted to the ideas of the present day. It is supposed to be a continuation of "The Tempest" and will prove most interesting to thoughtful and philosophic readers.

Lovers of Henry James will eagerly welcome his latest book, *The Spoils of Poynton*.[5] There are few characters in his story, but those few are delineated strongly. The idea is well worked up, and the *denouement* quite startling.

NEW LAW-BOOKS.

The Law of Married Women in Massachusetts. By George A. O. Ernst. Second Edition. Little, Brown & Co., Boston, 1897. Cloth, $2.00; Law sheep, $2.50.

The married women of Massachusetts, with this volume of Mr. Ernst for a guide, need feel no doubt as to their legal rights and liabilities; and a careful perusal of it by those who consider that they are still downtrodden and oppressed, will convince them that they really are not so badly off as they think. While written in a style which will appeal to the popular mind, the treatise is a thorough and exhaustive presentation of Massachusetts law regarding married women, and will be found a most valuable text-book for the profession. Mr. Ernst begins his work with a discussion of the delicate question, always interesting to the sex, of engagements to marry; he then treats of breach of promise to marry, of marriage itself, and then follow chapters upon the rights of a married woman to her person, to her children, to support from her husband, and to support under the pauper laws. Her right to hold office and positions of trust, to contract and do business, to sue and be sued, to acquire and hold property independently of her husband, are treated at length, and the book draws to an end with chapters upon Separation by Agreement, Separation by Divorce, Separation by Death, and their effect upon Property Rights.

[5] The Spoils of Poynton. By Henry James. Houghton, Mifflin & Co. Boston and New York, 1897. Cloth. $1.50.

Practice in Special Actions in the Courts of Record of the State of New York under Code of Civil Procedure and Statutes, with forms. By J. Newton Fiero. Second Edition. Matthew Bender, Albany, N. Y., 1897. Two vols. Law sheep, $11.50.

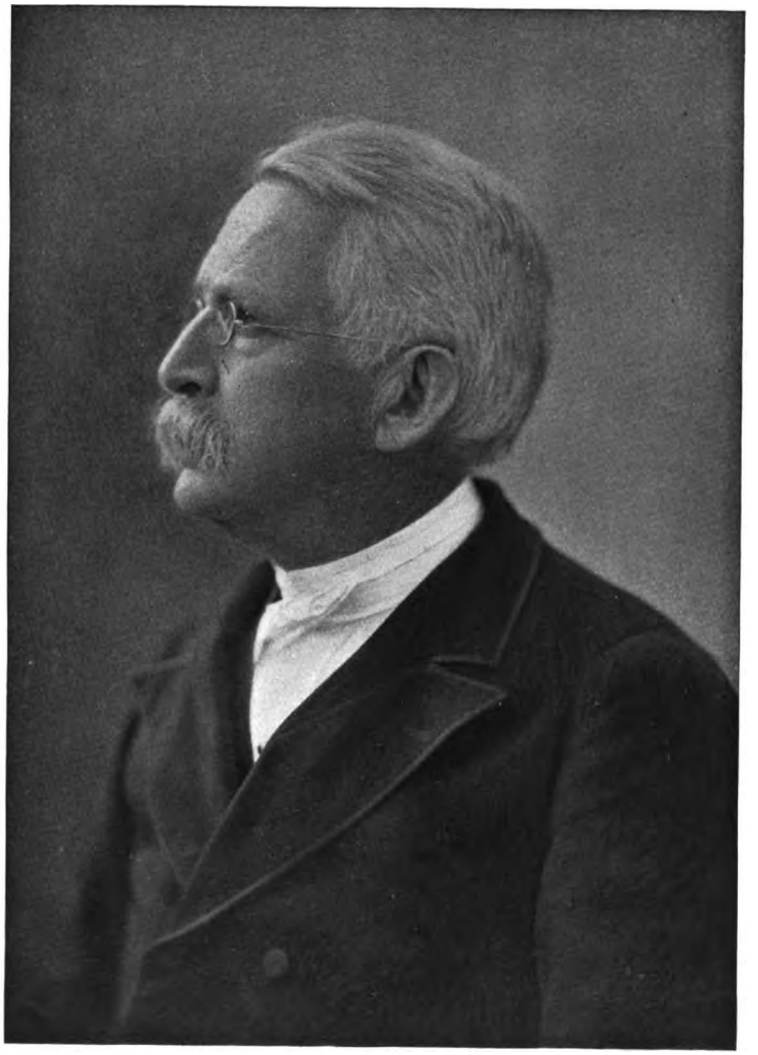
New York practitioners fully appreciate the value and usefulness of this work of Mr. Fiero, and a second edition, thoroughly revised and made conformable to the many changes which have taken place in the Code, should receive a warm welcome. It is really almost indispensable to lawyers practicing under the New York Code.

The American State Reports. Vol. 52. 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. Bancroft-Whitney Co., San Francisco, 1897. Law sheep, $4.00.

This volume, like its predecessors, is to be commended for the excellent judgment shown by Mr. Freeman in his selection of cases, and for the full and exhaustive annotations which accompany them.

The Historical Development of Code Pleading in America and England. By Charles M. Hepburn of the Cincinnati Bar. W. H. Anderson & Co., Cincinnati, 1897. Cloth, $3.00; Law sheep, $3.75.

Practitioners and students of jurisprudence will find this work of Mr. Hepburn of great interest. As the author says, code pleading is essentially a science of historical development, and to comprehend clearly what it is, one must see how it came to be so. After considering the nature and extent of code pleading in general, Mr. Hepburn discusses the causes which led to the overthrow of common law pleading, and narrates the historical movement in England and America for a statutory reform of pleading. The codes of the different States are carefully examined, and the cardinal points of agreement and contrast pointed out. Altogether, the work is one which should appeal to all lawyers interested in the changes which have been brought about in our system of legal practice.



The Green Bag.

VOL. IX. No. 5. BOSTON. MAY, 1897.

JOHN RANDOLPH TUCKER.

BY SUSAN P. LEE.

JOHN RANDOLPH TUCKER, who died at his home in Lexington, Virginia, on the 13th of February, 1897, was a man of distinctive and marked personality worthy of special mention and honorable remembrance.

In his characteristics and his career, Mr. Tucker furnishes a fine illustration of the important influence of heredity. His grandfather, St. George, the first of the Virginia Tuckers, came to the colony from Bermuda, as a youth, in 1770. He received his education at William and Mary College, and became a lawyer in the Ancient Dominion. When the War of the Revolution opened, the young Bermudian not only took up arms in defense of the country of his adoption, but headed a secret expedition to his native island, which seized and brought off a quantity of military stores, which served to eke out Washington's scant supplies at the siege of Boston. As a colonel of cavalry, St. George Tucker also distinguished himself in Green's campaign, and was wounded at the siege of Yorktown.

American independence once established, Colonel Tucker resumed the practice of his profession. In 1786, he was a member of the Annapolis Convention, the precursor and originator of the Constitutional Convention of 1787. The next year he was appointed a judge of the general court, and law professor at William and Mary College. He also performed excellent service as one of the revisers of the Virginia Code. These honors came to him before he was forty years old. Later on, Judge Tucker succeeded the eminent jurist, Edmund Pendleton, as president of the court of appeals.

Judge Tucker's legal decisions all tended to uphold and strengthen constitutional power as stronger and farther reaching than the laws of legislatures, or of Congress.

His annotations of Blackstone's Commentaries are noteworthy for their discussion of the principles of government, and especially of constitutional government. They offered the first disquisition upon the origin and nature of the Federal Constitution, and upon its character and interpretation.

Judge St. George Tucker's first wife was Mrs. Frances Bland Randolph, mother of the eccentric statesman, John Randolph of Roanoke. The first son of this marriage, Henry St. George Tucker, and a younger son, N. Beverley Tucker, were, like their father, educated at William and Mary College; and both of them became lawyers, and afterwards, like him also, judges and law professors.

Henry St. George Tucker, with his body-servant Bob, left tide-water Virginia for the newer country beyond the mountains, and began the practice of law in Winchester, in 1802, when he had just come of age. His father promised to support him for three years, and during that time, the young lawyer called upon the parental purse for three hundred and seventy-five dollars. At the age of twenty-six he married Miss Anna Evelina Hunter, through whom their children inherited a strain of Scotch-Irish blood.

In the War of 1812 Henry St. George Tucker took up arms, as his father had done

in the Revolution. After the peace, he was sent to Congress before he was thirty-five, where he showed himself an able debater, and held positions on several important committees. Mr. Tucker was then elected judge of the chancery court in his own and the adjoining districts, and, in 1830, was appointed by the legislature president of the court of appeals, although he was the youngest member of that august body. He filled this position for ten years, when he resigned it to accept the chair of law at the University of Virginia. He had, previously to leaving Winchester, conducted a private law school there, many students of which became leaders in their profession. While this school lasted, this second Judge Tucker wrote and printed for his class a series of "Notes on Blackstone," more at length than those of his father.

JUDGE ST. GEORGE TUCKER.

The third son of Henry St. George Tucker was born in Winchester, Virginia, in 1823, and was named for his distinguished half-uncle, John Randolph. He received his education at the University of Virginia, and studied law there under his father. He first settled in Richmond, but soon removed to Winchester, and became the partner of Robert Y. Conrad, an eminent lawyer of that day.

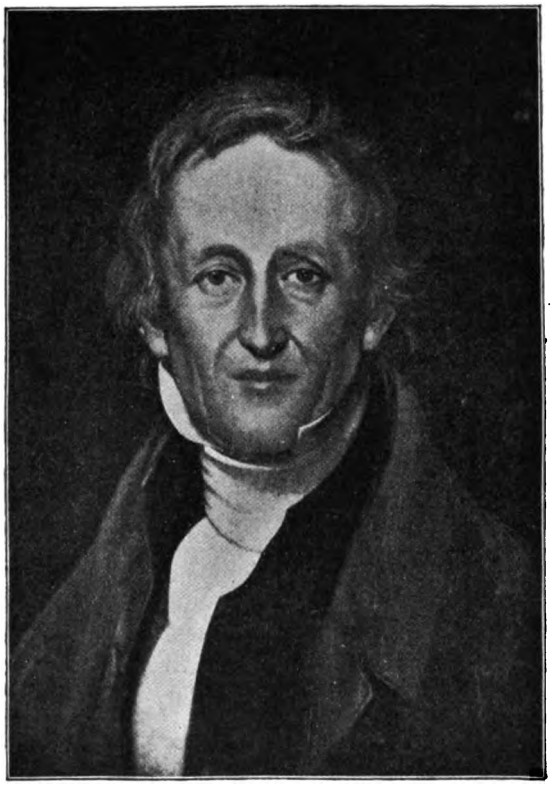
John Randolph Tucker was a diligent student, and a ready and skillful debater. With a clear insight into legal and political questions he combined a musical voice, a free flow of language, a graceful manner and ready wit, which made him on all occasions a pleasing and forcible speaker. In politics he was a State Rights Democrat, and took considerable part in public affairs. In 1852, and again in 1856, he was one of the Democratic electors from Virginia, and in a canvass against the "Know Nothings," in 1855, he gained a reputation as a popular speaker whom few in the land could equal.

In recognition of his ability, Mr. Tucker was appointed, in 1857, attorney general of Virginia, that office having become vacant by death. He was twice re-elected to this position, and continued to hold it during the four years of the Civil War. He then resumed the practice of his profession, and was associated with other distinguished lawyers in the defense of the Hon. Jefferson Davis. In 1870, Mr. Tucker was elected one of the law professors in Washington College, of which General Robert E. Lee had become president, and from that time was a leading and honored citizen of the little town of Lexington.

Four years after this, and for six successive terms, Mr. Tucker was elected to Congress by a very large majority, and it was only when he publicly declined renomination, in 1886, that his constituents consented to turn their thoughts to any other representative. His popularity during these twelve years was due to the confidence felt by the people in his honest fidelity to

what he believed right; for on many public questions — tariff reform, sound money, and the Blair bill — he was opposed to the opinions generally held in Virginia.

From his first appearance in Congress, John Randolph Tucker was recognized as one of the foremost members of that body for ability, integrity, and accurate legal knowledge. He had honestly believed that, under the Constitution of 1788, a State had the right to secede. He now acknowledged that the arbitrament of the sword had destroyed any such right; but he stood manfully forward in defense of the South, and made forcible and brilliant replies to attacks upon her, especially those made by Blaine and Garfield.



HENRY ST. GEORGE TUCKER.

Following the example of his father and grandfather, John Randolph Tucker devoted his attention especially to constitutional law, and had scarcely an equal in the house in that department of legal learning. His great speeches on the Electoral Commission bill; on the constitutional doctrine as to the presidential count; the Hawaiian treaty; the use of United States soldiers at the polls; the reduction of the tariff, and Chinese immigration, were all based upon the ground that the action proposed was contrary to the Constitution.

In 1880, Mr. Tucker introduced a rule for the counting of a quorum to prevent a deadlock in the house. Speaker Reed justified his action in 1890 by Mr. Tucker's argument of ten years before, and the last Democratic house practically engrafted his proposition in its rules. Mr. Tucker also did good work upon various important committees. As member for eight years — at one period chairman — of the Ways and Means Committee, he gave diligent study to the tariff question, which he embodied in his great argument upon the tariff in 1878. During his last two terms he was chairman of the Judiciary Committee.

After his retirement from Congress, John Randolph Tucker practiced his profession, and was engaged in very important cases. His splendid argument before the Supreme Court of the United States, in the debt case of Virginia, elicited high praise from the justices and lawyers who heard it, and won his cause over the brilliant rhetoric of the opposing counsel, Roscoe Conkling. His distaste for the strife and wire-pulling of political life induced Mr. Tucker to withdraw from Congress.

In 1870, he gave up his large and lucrative practice to take once more the law professorship in Washington and Lee University, formerly Washington College. Teaching was as congenial to him as it had been to his father and grandfather, and he felt it a noble work for his advancing years to instruct his young countrymen in the principles of law and government. He was untiring in study,

and labored always to have such thorough knowledge of his subject as to present it in the clearest and most striking manner to his classes. In addition to his lectures, he devoted much time and effort to a work on constitutional law. This he left so nearly completed that his son, the Hon. H. St. G. Tucker, expects soon to put it in press.

John Randolph Tucker's legal reputation was national. He was in 1892 elected president of the National Bar Association, before which he delivered, on four occasions, splendid addresses. The three oldest colleges in the Union, — Harvard, William and Mary, and Yale, — each conferred upon him the degree of LL. D. Union University, in New York, added a fourth similar honor. Among many public addresses which he was called on to make, we must mention one before the Social Science Association in 1877; another, ten years later, before the Law School of Yale; and a third, delivered in Richmond, Virginia, two years ago, on the Old Court of Appeals of the State.

Mr. Tucker's individuality was even more brilliant and admirable in social and private life than in his public career. He had a fine physique, courteous, charming manners, a genial disposition, a marvelous gift as a raconteur, and a spontaneous, inexhaustible flow of wit and humor, which brightened the dark places of life, and brought smiles to the faces of all whom he met. He was the center of attraction at every social gathering, and young and old listened eagerly for the mingled fun and pathos which fell from his lips. He saw what was ludicrous even in his best and dearest, and with unusual mimetic power would reproduce it before them as with a flash of the kinetoscope, but it was always done lovingly, and without a trace of malice. To his friends he was always "Ran." His boys knew him affectionately as "old Ran." The humblest of the neighbors among whom he lived for twenty-six years honored and revered the stately, white-haired man who had a kind word and cheerful smile for each of them. Of late years it was his custom to stop and chat for a few moments with the friends he met in his daily walks, and many an anxious spirit felt lightened of its care after one of these kindly, witty talks.

At the age of twenty-five, John Randolph Tucker married Miss Laura Holmes Powell, who survives him after an unclouded union of forty-seven years. The assistants at their wedding were wont to declare that they were the handsomest couple who ever stood before a parson. As husband and father, Mr. Tucker was irreproachable. He took the keenest delight in the society of his family. His wit played more freely there than elsewhere. He was the most beloved and charming companion to his children and grandchildren, sympathizing alike in their joys and their sorrows.

Early in life Mr. Tucker connected himself with the Presbyterian Church, of which he was for many years an elder; and he led in his different vocations the life of a consistent Christian man. After returning to Washington and Lee, he added to his labors as law professor the teaching every Sunday morning of a large Bible class of young men. The words and doctrines of Holy Writ were as familiar to him as those of Blackstone and the Constitution, and he took even greater delight in setting them clearly and impressively before his youthful audience.

The grip attacked this noble, useful man, in December, 1896, and his beneficent life ebbed slowly away. His Christian faith was unwavering amid the sufferings and prostration which attended his last days. Flashes of his old humor sparkled from time to time. When told by one of his daughters that the consulting physician thought his constitution much in his favor, he whispered, with a twinkle in his eye, "I always was good on the Constitution."

Four daughters and one son, Hon. H. St. George Tucker, are still living. This son

has filled his father's seat in Congress — except for one term — since 1886.

This brief sketch imperfectly describes a man who led so pure, useful and honorable a life as Mr. Tucker, and who will be so long and truly reverenced and mourned.

CONDEMNED TO THE NOOSE.

RALPH SUTHERLAND, who early in the last century occupied a stone house a mile from Leeds, in the Catskills, was a man of morose and violent disposition, whose servant, a Scotch girl, was virtually a slave, inasmuch as she was bound to work for him without pay until she had refunded to him her passage money to this country. Becoming weary of bondage and of the tempers of her master, the girl ran away. The man set off in a raging chase, and she had not gone far before Sutherland overtook her, tied her by the wrists to his horse's tail, and began the homeward journey. Afterward, he swore that the girl stumbled against the horse's legs, so frightening the animal that it rushed off madly, pitching him out of the saddle and dashing the servant to death on rocks and trees; yet knowing how ugly tempered he could be, his neighbors were better inclined to believe that he had driven the horse into a gallop, intending to drag the girl for a short distance, as a punishment, and to rein up before he had done serious mischief. On this supposition he was arrested, tried, and sentenced to die on the scaffold.

The tricks of circumstantial evidence, together with pleas advanced by influential relatives of the prisoner, induced the court to delay sentence until the culprit should be ninety-nine years old, but it was ordered that, while released on his own recognizance, in the interim, he should keep a hangman's noose about his neck and show himself before the judges in Catskill once every year, to prove that he wore his badge of infamy and kept his crime in mind. This sentence he obeyed, and there were people living recently who claimed to remember him as he went about with a silken cord knotted at his throat. He was always alone, he seldom spoke, his rough, imperious manner had departed. Only when children asked him what the rope was for were his lips seen to quiver, and then he would hurry away. After dark his house was avoided, for gossips said that a shrieking woman passed it nightly, tied at the tail of a giant horse with fiery eyes and smoking nostrils; that a skeleton in a winding sheet had been found there; that a curious thing, something like a woman, had been known to sit on his garden wall, with lights shining from her finger-tips, uttering unearthly laughter; and that domestic animals reproached the man by groaning and howling beneath his windows.

These beliefs he knew, yet he neither grieved, nor scorned, nor answered when he was told of them. Years sped on. Every year deepened his reserve and loneliness, and some began to whisper that he would take his own way out of the world, though others answered that men who were born to be hanged would never be drowned. But a new republic was created; new laws were made; new judges sat to minister them. So, on Ralph Sutherland's ninety-ninth birthday anniversary, there were none who would accuse him or execute sentence. He lived yet another year, dying in 1801. But was it from habit, or was it in self-punishment and remorse, that he never took off the cord? for, when he drew his last breath, though it was in his own house, his throat was still encircled by the hangman's rope.— *Myths and Legends of Our Own Land.*

AN UNPUBLISHED LETTER OF CHANCELLOR JAMES KENT.[1]

This letter was recently found in the Old Capitol at Jackson, Miss. There is no record showing how it got there. The Thomas Washington to whom it is addressed was a lawyer of some note who lived at Nashville, Tenn.—Ed.

NEW YORK, October 6th, 1828.

DEAR SIR:

Your very kind & friendly letter of the 15th ult. was duly received, and also your argument in the Case of *Ivey vs. Pinson.* I have read the Pamphlet with much interest & pleasure. It is composed with masterly ability, of this there can be no doubt, & without presuming to give any opinion on a great case, still *Sub Judice*, & only argued before me on one side, I beg leave to express my highest respect for the law reasoning & doctrine of the argument, & my admiration of the spirit, & eloquence which animate it. My attention was very much fixed on the perusal, & if there be any lawyer in this State who can write a better argument in any point of view I have not the honor of his acquaintance.

As to the rest of your letter concerning my life & studies, I hardly know what to say, or to do. Your letter & argument, & character & name have impressed me so favorably, that I feel every disposition to oblige you, if it be not too much at my own expense. My attainments are of too ordinary a character, & far too limited, justly to provoke such curiosity. I have had nothing more to aid me in all my life than plain method, prudence, temperance & steady persevering diligence. My diligence was more remarkable for being steady & uniform, than for the degree of it, which never was excessive, so as to impair my health or eyes, or prevent all kinds of innocent & lively recreation. I would now venture to state briefly but very frankly & at your special desire, somewhat of the course & progress of my studious life. I know you cannot but smile at times at my simplicity, but I commit myself to your indulgence & honor.

I was educated at Yale College & graduated in 1781. I stood as well as any in my class, but the test of scholarship at that day was contemptible. I was only a very inferior classical scholar, & we were not required, & to this day I have never looked into a Greek book but the New Testament. My favorite studies were Geography, History, Poetry, bellesletter, &c. When the College was broken up & dispersed in July 1779 by the British, I retired to a country village & finding Blackstone's com. I read the 4th volume, parts of the work struck my taste, & the work inspired me at the age of 16 with awe, and I fondly determined to be a lawyer. In November 1781 I was placed by my father with Mr. (now called Judge) Benson, who was then attorney general at Poughkeepsie on the banks of the Hudson, & in my native County of Dutchess. There I entered on law, & was the most modest, steady, industrious student that such a place ever saw. I read the following winter *Grotius & Puffendorf* in huge folios, & made copious extracts. My fellow students who were more gay and gallant, thought me very odd and dull in my taste, but out of five of them four died in middle life drunkards. I was free from all dissipation, and chaste as pure virgin snow. I had never danced, or played cards, or sported with a gun, or drank anything but water. In 1782 I read *Smollets* history of England, & procured at a farmers house where I boarded, *Rapins History* (a huge folio) and read it through; and I found during the course of the last summer among my papers, my M. S. abridgment on *Rapins* dissertation on the laws and customs of the Anglo Saxons. I abridged Hales history of the common law, and the old books of practice, and read parts of Blackstone again & again. The same year I procured *Humes*

History and his profound reflections & admirable eloquence struck most deeply on my youthful mind. I extracted the most admired parts and made several volumes of M. S. S. I was admitted to the bar of the Supr. Court in January 1785, at the age of 21, and then married *without one cent of property;* for my education exhausted all my kind father's resources and left me in debt $400.00, which took me two or three years to discharge. Why did I marry? I answer that.

At the farmers house where I boarded, one of his daughters, a little modest, lovely girl of 14 generally caught my attention & insensibly stole upon my affections, & I before I thought of love or knew what it was, I was most violently affected. I was 21. and my wife 16 when we married, *& that charming lovely girl has been the idol & solace of my life*, & is now with me in my office, unconscious that I am writing this concerning her. We have both had uniform health & the most perfect & unalloyed domestic happiness, & are both as well now & in as good spirits as when we married. We have three adult children. My son lives with me and is 26, & a lawyer, & of excellent sense, & discretion, & of the purest morals. My eldest daughter is well married, & lives the next door to me, with the intimacy of our family, my youngest daughter is now of age, she lives with me, & is my little idol.

I went to housekeeping at Poughkeepsie, 1786, in a small, snug cottage, & there I lived in charming simplicity for eight years. My practice was just about sufficient to redeem me from debt, & to maintain my wife & establishment decently, and supply me with books about as fast as I could read them. I had neglected & almost entirely forgotten my scanty knowledge of the Greek & Roman classics, & an accident turned my attention to them very suddenly. At the June Circuit in 1786, I saw Ed. Livingston (now the codifier for Louisiana) & he had a pocket Horace & read some passages to me at some office & pointed out their beauties, assuming that I well understood Horace. I said nothing, but was stung with shame & mortification, for I had forgotten even my Greek letters. I purchased immediately Horace and Virgil, a dictionary & grammer, and a Greek Lexicon & grammer and the testament, & formed my resolution promptly and decidedly to recover the lost languages.

I studied in my little cottage mornings and devoted an hour to greek and another to latin daily, I soon increased it to two for each tonge in the 24 hours, my acquaintance with the languages increased rapidly. After I had read Horace and Virgil I ventured upon Livy for the first time in my life, & after I had completed the Greek Testament I took up the Iliad, & I can hardly describe at this day (1) with which I progressively read and studied in the original *Livy* & the Iliad. It gave me inspiration, I purchased a French Dictionary & grammer & began French & gave an hour to this language daily. I appropriated the business part of the day to law, & read Co. Litt, & made copious notes. I devoted evening to English literature in company with my wife. From 1788 to 1798 I steadily divided the day into five portions, & alotted them to *Greek, Latin, law and business, French* & *English*. I mastered the best of the *Greek, Latin* and *French* classics, & as well as the best English & law books at hand & read Mackiavel & all collateral branches of English history, such as Libeletines H. 2nd Bacons H. 7th. Lord Clarendon on the great Rebellion, &c. I even sent to England as early as 1790 for Warbertons divine legation Lusiad.

My library which started from nothing grew with my growth, & it has now attained to upwards of 3000 volumes, & it is pretty well selected, for there is scarcely a work, authority or document referred to in the 3 volumes of my commentaries but what

[1] Words omitted in original.

has a place in my own library, next to my wife, my library has been the solace of my greatest pleasure & devoted attachment.

The year 1793 was another era in my life, I removed from Poughkeepsie to the city of New York, with which I had become well acquainted, & I wanted to get rid of the incumbrance of a dull law partner at P, but though I had been in practice nine years, I had acquired very little property. My furniture & library were very scanty, & I had not $500 extra in the world. But I owed nothing, & came to the City with good character & with a scolar's reputation. My newspaper writings, & speeches in the assembly had given me some notoriety. I do not believe any human being ever lived with more pure and perfect domestic repose & simplicity & happiness than I did for those nine years.

I was appointed professor of law in Columbia College late in 1793 & this drove me to deeper legal researches. I read that year in the original Bynkersheek Quinctillion & Ciceros rhetorical works, besides reports & digests, & began the compilation of law lectures. I read a course in 1794 & 5 to about 40 gentlemen of the first rank in the City. They were very well received, but I have long since discovered them to have been slight & trashy productions. I wanted Judicial labors to teach me precision. I dropped the course after one term, & soon became considerably involved in business, but was never fond of, nor much distinguished in the contentions of the bar.

I had commenced in 1786 to be a zealous Federalist & read everything on politics. I got the Federalist almost by heart, and became intimate with Hamilton. I entered with ardor into the federal politics against France in 1793, & my hostility to the French democracy, & to French power beat with strong pulsation down to the battle of Waterloo, now you know my politics.

I had excellent health owing to the love of simple diet, & to all kinds of temperance, & never read late nights. I rambled daily with my wife on foot over the hills, we were never asunder. In 1795 we made a voyage through the lakes George & Champlain. In 1797 we run over the 4 New England States. As I was born and nourished in boyish days among the highlands East of the Hudson, I have always loved rural & wild scenery, & the sight of mountains & hills, & woods & streams always enchanted me, and do still. This is owing in part to early associations, & it is one secret of my uniform health & chirfulness.

In 1796 I began my career of official life. It came upon me entirely unsolicited & unexpected. In Feby 1796 Governor Jay wrote me a letter stating that the office of *Master in Chancery* was vacant, & wished to know confidentially whether I would accept. I wrote a very respectful but very laconic answer. It was "That I was content to accept of the office if appointed." The same day I received the appointment, & was astonished to learn that there were 16 professed applicants all disappointed. This office gave me the monopoly of the business of that office, for there was but one other master in N York. The office kept me very busy in petty details and outdoor concerns, but was profitable. In March 1797 I was appointed *Recorder of N. York.* This was done at Albany, & without my knowledge that the office was even vacant or expected to be. The first I heard of it was the appointed announced in the papers. This was very gratifying to me, because it was a judicial office. I thought that it would relieve me from the drudgery of practice & gave me a way of displaying what I knew; & of being useful entirely to my taste. I pursued my studies with increased appetite & enlarged my law library very much. But I was encumbered with office business, for the governor allowed me to retain the other office also, & with these joint duties & counsel business in the Sup Court, I made a great deal of money that year. In Feby 1798 I

was offered by Gov Jay & accepted the office of youngest *Judge of the Supreme Court.* This was the summit of my ambition. My object was to return back to Poughkeepsie, & resume my studies, & ride the circuits, & inhale country air, & enjoy *otium cum dignitate.* I never dreamed of volumes of reports & written opinions. Such things were not then thought of. I retired back to P in the Spring of 1798 & in that Summer rode all over the Western wilderness & was delighted. I returned home and began my Greek & Latin, & French, & English, & law classics as formerly, & made wonderful progress in books that year.

In 1799 I was obliged to remove to Albany, in that I might not be too much from home, *& there I remained stationary for 24 years.* When I came to the bench there ([1]) no reports or State precedents. The opinions from the bench were delivered *ore tenus.* We had no law of our own, & nobody knew what it was. I first introduced a thorough examination of cases & written opinions. In Jany T 1799 the 2d case reported in 1st Johnsons cases, of *Ludlow vs. Dale*[2] is a sample of the earliest. The judges when we met all assumed that foreign sentences were only good prime facie. I presented and read my written opinion that they were conclusive & they all gave up to me & so I read it in court as it stands. This was the commencement of a new plan, & then was laid the first stone in the subsequently erected temple of our jurisprudence.

Between that time & 1804 I rode my share of circuits, attended all the terms, & was never absent, & was always ready in every case by the day. I read in that time ([3]) and completely abridged the latter, & made copious digests of all the English new reports and treatises as they came out. I made much use of the *Corpus Juris,* & as the Judges (Livingston excepted) knew nothing of French or civil law I had immense advantage over them. I could generally put my Brethern to rout & carry my point by mysterious want of French & civil law. The Judges were republicans & very kindly disposed to everything that was French, & this enabled me without exciting any alarm or jealousy, to make free use of such authorities & thereby enrich our commercial law.

I gradually acquired preponderating influence with my brethern, & the volumes in Johnson after I became Ch. J in 1804 show it. The first practice was for each judge to give his portion of opinions when we all agreed, but that gradually fell off, but for the two or three last years before I left the bench, I gave the most of them. I remember that in 8th Johnson all the opinions one Term are *per curiam.* The fact is I wrote them all, & proposed that course to avoid existing jealousy & many a per curiam opinion was so inserted for that reason.

Many of the cases decided during the 16 years I was in the Supr. Court were labored by me most unmercifully, but it was necessary under the circumstances in order to subdue opposition. We had but few American precedents. One judge was democratic, and my brother *Spencer* particularly, of a bold, vigorous, dogmatic mind, & overbearing manner. English authorities did not stand very high in those feverish times, & this led me a hundred times to attempt to bear down opposition, or flame it by exhausting research & overwhelming authority. Our Jurisprudence was probably on the whole improved by it. My mind certainly was roused, & was always kept ardent and inflamed by collision.

In 1814 I was appointed Chancellor. The office I took with considerable reluctence. It had no claims. The person who left it was stupid, & it is a curious fact that for the nine years I was in that office, there was *not a single decision, opinion or dictum of*

[1] Word omitted in the original.

[2] Probably January, 1806, 1st Case in 1 John. Ludlow *v.* Bowne.

[3] Blank in the original.

either of my two predecessors (*Ch. Livingston & Ch.* (1)) from 1777 to 1814 cited to me or even suggested. I took the court as if it had been a new institution, & never before known to the U. S. I had nothing to guide me, & was left at liberty to assume all such English chancery powers and jurisdiction as I thought applicable under our constitution. This gave me great scope, & I was only checked by the revision of the Senate & court of Errors. I opened the gates of the court immediately, & admitted almost gratuitously the first year 85 counsellors, though I found there had not been but 13 admitted for 13 years before. Business flowed in with a rapid tide. The result appears in the seven volumes of Johnson's Ch. reports.

My study in Equity jurisprudence was very much confined to the topics elicited by the cases. I had previously read, of course, the modern Equity reports, down to the time, & of course I read all the new ones as fast as I could procure them. I remember reading Pear Williams as early as 1792 and made a digest of the leading doctrines. The business of the court of chancery oppressed me very much, but I took my daily exercise, & my delightful country rides among the Catskill or the Vermont mountains with my wife, & kept up my health and spirits. I always took up the cases in their order, & 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 & accurately (mathematically accurately) master of the facts. It was done by abridging the bill, & then the answers, & then the depositions, & by the time I had done this slow & tedious process I was master of the cause & ready to decide it. I saw where justice lay and the moral sense decided the cause half the time, & I then sed down to search the authorities until I had exhausted my books, & I might once & a while be embarrassed by a technical rule, but I *most always found principles suited to my views of the case*, & my object was to discuss a point (2) as never to be teazed with it again, & to anticipate an angry & vexatious appeal to a popular tribune by disappointed counsel.

During those years at Albany, I read a great deal of English literature, but not with the discipline of my former division of time. The avocations of business would not permit it. I had dropped the Greek as it hurt my eyes. I persevered in Latin, & used to read Virgil, Horace, Juvenal, Lucan, Salust, Tacitus, &c & Ciceros offices, & some of them annually. I have read Juvenal, Horace & Virgil eight or ten times. I read a great deal in Pothiers works and always consulted him when applicable. I read the Ed & 2 reviews & Annl register *ab initio* & thoroughly, & voyages & travels & the Waverly novels &c, as other folks did. I have always been excessively fond of voyages and travels.

In 1823 a solemn era in my life arrived. I retired from the office at the age of 60, & then immediately with my son visited the Eastern States. On my return the solitude of my private office & the new dinasty did not please me. I besides would want income to live as I had been accustomed. My eldest daughter was permanently settled in N York, & I resolved to move away from Albany, & I ventured to come down to N. Y. & be Chamber Counsel, & the trustees of Columbia College immediately tendered me again the old office of professor which had been dormant from 1795. It had no salary, but I must do something for a living, & I undertook (but exceedingly against my inclination) to write & deliver law lectures. In the two characters of Chamber Counsellor and College lecturer, I succeeded by steady perseverance beyond my most sanguine expectations, & upon the whole the five years I have lived here in this City since 1823 have been happy & prosperous, & I live aside of my daughter, & I take excursions every Summer with my wife & daughter

1 Blank in original.

2 "So" omitted.

all over the country. I have been twice with he (1) Canada & in every direction. I never had better health. I walk the battery uniformly before breakfast. I give a great many written opinions, & having got heartily tired of lecturing I abandoned it, & it was my son that pressed me to prepare a volume of lectures for the press. I had no idea of publishing them when I delivered them. I wrote over one volume & published it as you know. This led me to remodel & enlarge, & now the 3rd volume will be out in a few days, & I am *obliged to write a 4th to complete my law.*

My reading now is as you may well suppose, quite desultory, but still I read with as much zeal and pleasure as ever, I was never more engaged in my life than during the last Summer. I accepted the trust of receiver to the Franklin (insolvent) Bank, & it has occupied, & perplexed, & vexed me daily, & I had to write part of the 3rd volume, & search books a good deal for that very object, and I have revised the proof sheet.

If I had a convenient opportunity (though I do not see how I can have one) I would send the 3rd volume out to you, & another to our excellent friend, Governor Carroll, to whom I beg you will be so good as to present my best respects & the expression of my great esteem.

Your suggestion of an Equity treatise contains a noble outline of a great & useful work, but I cannot & will not enter on such a task. I have much more to lose than to gain & I am quite tired of Equity law. I have done my part, & choose to live more at my ease, & to be prepared for the approaching infirmities of age. — On reviewing what I have written, I had thoughts of burning it, I speak of myself too entirely, & it is entirely against my habit or taste, but I see no other way fairly to meet your desires.

I am with great respect and good wishes,

James Kent.

Thomas Washington, Esq.

1 So in original.

TEAR SHEDDING BEFORE THE JURY.

IN a recent case decided by the Supreme Court of Tennessee a very novel question was raised with reference to the behavior of counsel in his argument to the jury.* On appeal from a verdict and judgment for the plaintiff, among other errors assigned was that discussed and disposed of by Judge Wilkes, who delivered the opinion of the court, in the following language: "It is next assigned as error," said the Judge, "that counsel for plaintiff, in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, shed tears, and unduly excited the sympathies of the jury, in favor of the plaintiff, and greatly prejudiced them against defendant. Bearing upon this assignment of error, we have been cited to no authority, and after diligent search we have been able to find none ourselves. The conduct of counsel in presenting their cases to juries is a matter which must be left largely to the ethics of the profession and the discretion of the trial judge. Perhaps no two counsel observe the same rules in presenting their cases to the jury. Some deal wholly in logic, — argument without embellishments of any kind. Others use rhetoric and occasional flights of fancy and imagination. Others employ only noise and gesticulation, relying upon their earnestness and vehe-

* Ferguson *v.* Moore, decided at Nashville, February 6, 1897.

mence instead of logic and rhetoric. Others appeal to the sympathies, — it may be the passions and peculiarities, — of the jurors. Others combine all these with variations and accompaniments of different kinds. No cast iron rule can or should be laid down. Tears have always been considered legitimate arguments before a jury, and, while the question has never arisen out of any such behavior in this court, we know of no rule or jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel which no court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege. Indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court. This must be left largely to the discretion of the trial judge, who has all the counsel and parties before him, and can see their demeanor as well as the demeanor of the jury. In this case the trial judge was not asked to check the tears, and it was, we think, an eminently proper occasion for their use, and we cannot reverse for this. But for the other errors indicated, the judgment must be reversed, and the cause remanded for a new trial."

Thus it will be seen that tear shedding by counsel before the jury has now distinct judicial sanction, so, however, they be not indulged in to such excess as to impede or delay the business of the court. It should also be observed that a new rule of professional ethics has been here introduced, in the declaration that it is the duty of a lawyer who has tears on tap, to give his client the benefit of them, whenever proper occasion arises. In woman, the convincing quality of this sort of argument has long been recognized, but its possibilities for the sterner sex seem to have been, until very recently, overlooked. Judge Wilkes' opinion in this case, which will be regarded by many as suggesting an additional resource in the matter of eloquence in jury addresses, should have the serious consideration of the profession at large.

It would not be surprising if the incident related, with the judicial comments upon it, gave rise to a very common resort to this practice. And, indeed, the time may not be far distant when upon lawyers' cards and signs will be found the words "Lachrymal Arguments a Specialty," and every law firm contain its "weeping partner."

A. R. W.

THE SUPREME COURT OF WISCONSIN.

By Edwin E. Bryant.

V.

SILAS U. PINNEY was born in Rockdale, Crawford County, Pennsylvania, March 3, 1833. His father was Justin C. Pinney, a native of Becket, Berkshire County, Massachusetts; his mother, a Miller, native of Pennsylvania, was of German descent. His father brought the family to Wisconsin in 1846, and settled in what is now Windsor township, Dane County. Here the son worked on a farm and received meager opportunities for education; but he was fond of books, an eager reader, and his memory was remarkably retentive; and the lack of school facilities did not prevent his mind becoming well stored. The old neighbors tell that he used to be a good boy to work on the farm, but he eagerly improved every opportunity in reading and studying, and not infrequently encroached on the hours of farm labor for that purpose. He was so robust and hardy that the farmer folk of the neighborhood thought it great waste to spoil so good a farm lad with book learning. At seventeen he taught school, and made this a means of aiding support and pursuing studies, for three winters. He had a natural predilection for the legal profession, and studied the standard books while on the farm and while teaching, until 1853, when he entered the law office of Vilas & Remington, in Madison, as a student. In February, 1854, he was admitted to the bar, and such was his industry and accuracy, his constant devotion to study and facility in acquiring legal knowledge, that he soon had an extensive practice, and took rank in the front row of lawyers. He devoted much time to acquiring knowledge of the correct methods of procedure, and was early noted for his correctness as a pleader and his mastery of every detail of practice in law or equity, in the State and Federal courts. The adoption of the Code of Procedure, borrowed from New York, in 1856, was a radical change in practice, and drove from it some of the older lawyers, who were too set in the old ways to learn a new practice. Mr. Pinney was one of the first to master the new method, and he became an authority on all questions of procedure under the Code. He continued in professional work and full practice till he went upon the bench of the Supreme Court, in January, 1892, having been elected in the preceding April. He was highly esteemed at the bar, and was retained in much important litigation. It is probably within the bounds of truth to say that no single lawyer in the State has been retained in more cases in number and importance than he. As a lawyer he was remarkably successful, and conducted cases involving great amounts of property with a professional skill and practical sagacity that kept him loaded with retainers and cares.

He was several years professor in the College of Law of the State University, but the demands of his practice compelled him to sever this connection. He conducted to successful result much of the important litigation growing out of the "land grants" made by Congress to aid in the construction of railroads. Out of these and the fickle legislation of the States in disposing of them arose a vast number of perplexing questions to be settled by State and Federal courts; and Mr. Pinney's labors in this field were extensive, and his services were sought by many parties in interest.

He never made the mistake so common to Western lawyers. He kept out of politics. His political status was with the Democratic party, but he was always independent

in politics. He served as city attorney in his youth, and, as a good citizen ought, he helped good local government by serving as member of the city council and twice as mayor, once without opposition, and to the great betterment of tax-payers; and in 1869 he was candidate for attorney general, without prospect of election. He also represented the Madison district for one term in the lower house of the legislature; but he has never sought office, nor allowed interest in politics to interfere in the least with devotion to his profession.

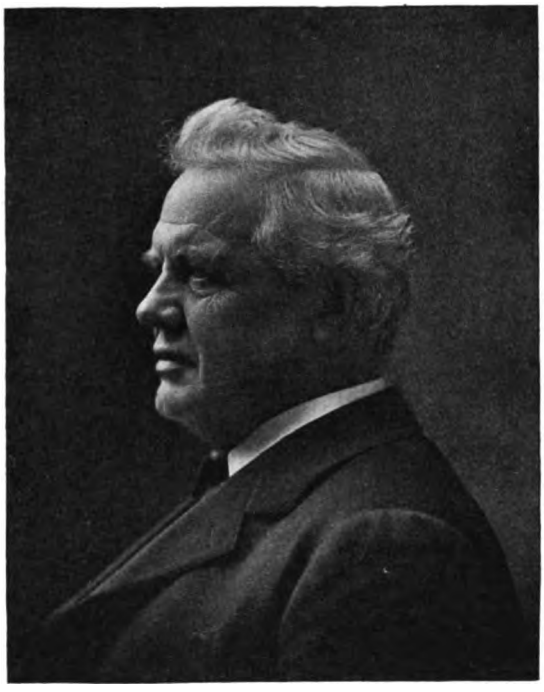
In 1891, as the term of Chief-Justice Cole drew near its close, and his advanced age rendered it just that he be relieved from further judicial labor, the legal profession throughout the State, irrespective of party, very generally signed a call on Mr. Pinney to stand as a candidate. He did so, and in the April election was elected. He entered upon judicial duty ripe in experience, and with a mind most thoroughly trained and equipped for successful labor on the bench. His work thus far has fully met the most sanguine expectation of friends. Careful and painstaking, he brings to this duty every quality of the judge. With a mind quick and subtle in its discrimination, with a memory of inexhaustible storage capacity, so to speak, with marvelous familiarity with the law books, he is a helpful man on any bench.

Outside of the professional range he has been a wide and careful reader. He is familiar with history, has traveled much in Europe, keenly enjoying everything of historic or biographical interest, and finding the best of it in every place. He has a taste and appreciation for art and architecture rarely found in the inland bred lawyer of America, and is familiar with most that is written of the various schools and stages of sculpture, painting and architecture. A most agreeable companion, full of incident and anecdote, well informed as to men and affairs, abounding with memories of the prominent men of his time, he derives from social intercourse and travel great pleasure and instruction, and imparts to others vastly more. As a writer he is clear and concise, and master of an excellent judicial style. Never an impassioned orator, his arguments were direct and clear, in good logical order, and they made plain to court or jury the most intricate matters. In his younger days he reported the 16th volume of Wisconsin Reports, and in 1872 he gathered up the unreported and imperfectly reported work of the territorial court and old Supreme Court, which was published in three volumes, as "Pinney's Wisconsin Reports." An important contribution to Wisconsin judicial history was given in the preface to the first volume, to which the present writer is much indebted for valuable historic material.

ALFRED W. NEWMAN was born at Durham, Greene County, New York, on the eastern slope of the Catskill Mountains, April 5, 1834. His ancestry was English; and his mother, Patty Rogers, was a descendant of John Rogers, the martyr burned at Smithfield, in the reign of "Bloody Mary," in 1555. It will be recalled by all who read the books of Martyrs that this distinguished victim of religious intolerance left ten children, "one at the breast." According to tradition handed down in the family, Patty Rogers descended from the youngest child.

Like most American boys of his generation, Newman was bred upon a farm, and taught in all the mysteries of farm work. At nineteen, he entered the Ithaca Academy and was there two years. He spent two years (1852–1854) at the Delaware Literary Institute, Franklin, New York. He graduated from Hamilton College, with the degree of A.B., in 1857. While in college he pursued extra studies in law under Professor Theodore W. Dwight. After graduation, he continued the study of law in the office

of John Olney, Esq., at Windham Center, in his native county, and in December, 1857, he was admitted to the bar. In the following winter, he came to Wisconsin and after a short sojourn at Ahnepee, Kewanee County, on the Michigan shore, he went further westward and settled at Trempeleau, on the Mississippi River, and there entered upon the practice of law. That beautiful and picturesque region of Wisconsin was then newly settled, and his practice extended to several counties, where a dry goods box covered with a blanket well served the purpose of a bench for the circuit judge. He was soon in fair practice. A modest man, never seeking official preferment, he has been selected by his fellow citizens to many positions of honor. In 1860 he was appointed county judge — which is the probate judge in the Wisconsin system — and was twice re-elected to this office by the people. In 1866 he was elected district attorney and served eight years. He was State senator in 1868 and 1869, and was elected circuit judge in 1876; in which office he served until elected to the bench of the Supreme Court. He won high reputation as a circuit judge. He listened patiently to arguments of counsel, seldom interrupting a proper argument, decided promptly and so concisely and clearly that his decision was readily comprehended, and it generally stood the test of review. His long and varied experience on the circuit, added to an excellent legal education, well fitted him for the labors of the Supreme Court, and directed public attention to his name in connection with that office.



SILAS U. PINNEY.

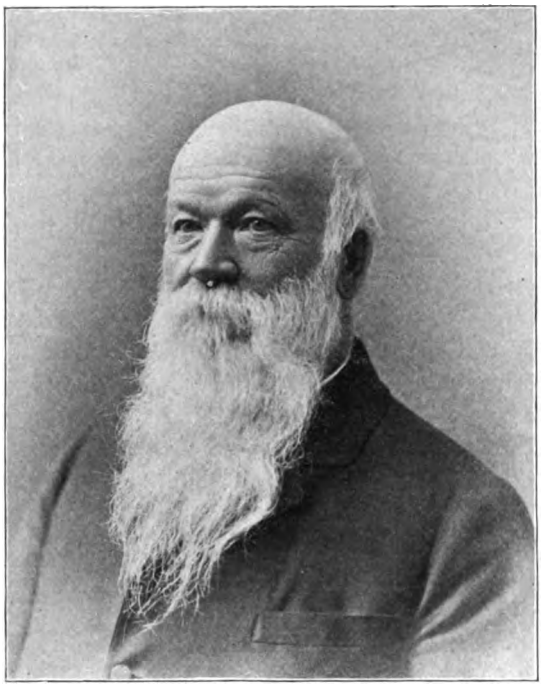
In 1892, he presided at the trial, in the Dane circuit, of the cases against the ex-State treasurers. The facts in these cases are peculiar, and worthy of mention here. The State treasurers of Wisconsin from its early days had adopted the practice of depositing the State funds in their hands in banks throughout the State and receiving for the deposit a small rate of interest, usually three per cent, which they regarded as a perquisite of their own, and did not account for the interest thus received. They construed the law as not requiring them to account for or turn over any more than the principal sums received, except where trust or educational funds had been loaned in the manner provided by law for their investment. This practice was quite generally known in the State, and as generally supposed to be lawful. The legislature and the people had winked at the practice much as had been done in England in the last century when the paymasters of the forces had amassed fortunes by receiving interest on the immense sums lying idle in their hands. Men of undoubted honor had followed this practice of making interest of the public moneys lying in their custody, and no steps had been taken to call them to account. Attorney-General, afterwards Chief-Justice Kenyon had tried to make head against the practice,

but he failed. Only Burke and Pitt had been too proudly honest to take this increment of the funds when they might have done so. In Wisconsin there were no Pitts or Burkes to deny themselves from twenty to thirty thousand dollars a year thus realized; and the system went on unchecked. But in 1890, the Democrats, eager for political capital, attacked the practice, and, having carried the State, suits were brought against the ex-treasurers, and several hundred thousand dollars of interest thus accrued were recovered. Judge Newman decided at the circuit that the interest belonged to the State. The blow fell with crushing force on some of the most prominent men in Wisconsin in business and politics, as they were principals or sureties on the bonds of the treasurers, and were adjudged to be liable. These cases were examples, alas! too frequent, that, in business and politics, men can easily become accustomed to wrong ways of doing things. The cases were appealed to the Supreme Court, and Judge Newman's judgments were affirmed. The cases were involved to some extent in political contention; and as Chief-Justice Lyon was resolved to leave the bench at the close of his term, there was an extensively signed call that Judge Newman be a candidate. Another circuit judge of Republican antecedents was supported for the same office, but Judge Newman received a large plurality, nearly fifty thousand. He entered upon his duties on the upper bench, January 1, 1894; and his service meets the full approval of the bar of the State. His opinions are found in the volumes of the Supreme Court reports beginning with the eighty-fifth number. His style is terse and his opinions are brief. Having acquired at the circuit the faculty of concise decisions, he does not indulge in lengthy disquisitions, but drives to the point to be decided and disposes of it in few and well-chosen words, briefly stating his reason. His mind is eminently of the judicial cast. In his patient devotion to duty and his calm resolution in its performance, it is easy to believe that he has inherited the sturdy characteristics of his great ancestor, the martyr of Smithfield.

ROUGET DE LISLE MARSHALL was born in the city of Nashua, New Hampshire, December 27, 1847. He is a descendant of Thomas Marshall, who settled in Boston in 1633, and kept a ferry "from the mill point unto Charlestown and Winnissimmet." The great-grandfather of Judge Marshall resided at Chelmsford, Massachusetts, and was called out as one of the minute men in the "Lexington alarm." He served in the Continental army at Bunker Hill, Bennington, and in other engagements. The father of the Judge was Thomas Marshall, formerly a manufacturer of cotton goods at Nashua. His mother, Emeline Pitkin Marshall, was the granddaughter of Captain Martin Pitkin, one of the early settlers of Marshfield, Vermont, and a descendant of William Pitkin, the first attorney general of Connecticut, in 1659, who is the ancestor of a family famous in New England, and now throughout the Union, in every honorable walk of life.

Thomas Marshall, the father, compelled to change his business because of ill health, removed with his family to Delton, Sauk County, Wisconsin, in 1854, and settled on a farm. Here the son resided until 1871, working on the farm, attending common school and the academy at that place, and then two years at the Baraboo Collegiate Institute, and one year at Lawrence University, Appleton, Wisconsin. Having a predilection for the legal profession, he began the study of law in 1868, was admitted to the bar in Baraboo, Sauk County, in January, 1873, and commenced practice at Chippewa Falls, a prominent point and county seat in the splendid lumber region of the Chippewa valley. He devoted himself to practice exclusively, and was remarkably successful. Untiring energy and great capacity for and thoroughness in work gave him prominence, a large clientage in a

region rapidly developing, and great familiarity with the litigation arising out of lumbering business conducted on a large scale by corporations. While carrying on a large practice, he was for six years the county judge of Chippewa county, and in 1888 was elected circuit judge of the eleventh circuit, then comprising six large, growing counties in the Chippewa valley and northwestern portion of the State. The business of this circuit was large, involving important litigation. It was greatly increased by the sudden growth of the city of Superior and the extension of numerous railroads into the northern portion of the State, resulting in increase of population and manufacturing interests. Judge Marshall performed this laborious duty with such ability, and such energy withal, as to indicate to the profession, and the public as well, that the State needed his services in the larger judicial field. He was re-elected to the circuit without opposition in 1894. Upon the death of Chief-Justice Orton, in 1895, Judge Marshall was appointed by Governor Upham to the resulting vacancy as associate justice, after nearly seven years' service in the circuit. He entered upon the duties of this place at the September term, 1895. He was elected by the people, without opposition, in April, 1896, to fill the unexpired term. In the recent April election he was re-elected for the full ten-year term by a unanimous vote, a testimonial of confidence which he has fairly earned. Young, strong, with a capacity for work such as few men possess, a long career of usefulness may well be predicted of this jurist, now junior on the bench.



ALFRED W. NEWMAN.

"THE GERRYMANDER CASES."

While the court was constituted of the Judges Lyon, Orton, Cassoday, Winslow and Pinney, the important litigation known as the "gerrymander cases" was had. Wisconsin had unhappily fallen into the bad political custom of so forming congressional, senatorial and assembly districts as to give the largest advantage to the party at the time dominant in the legislature. This had been so long practiced that the usage was hardly questioned. In the forming of assembly districts, the constitutional requirements that they should be "bounded by county, precinct, town or ward lines, to consist of contiguous territory, and be in compact form as practicable," were ignored in part, and counties were dismembered, unshapely districts made, with gross inequalities in population, though the Constitution also requires that they be made "according to the number of inhabitants."

When the Democrats came into power in 1891, after a long exclusion, they resolved to execute the villainy taught them, and that it should go hard but they would "better the instruction." They passed an apportionment act which was a palpable gerrymander. A suit was brought upon the

information in the name of the attorney general, in chancery, invoking the original jurisdiction of the court — which it will exercise in matters *publici juris* — to restrain the secretary of state from sending out notices of election to the several counties under the election laws, this being the initial movement in the election machinery. It was strenuously objected that the court had no jurisdiction; that the legislature had discretion in the matter which the court could not review; that it was a political, not a judicial question; the remedy retained by the people and not committed to the courts, etc.

The court unanimously decided that it had jurisdiction, and that the act was void for violation of the constitutional requirements. The governor then reconvened the legislature, and a new apportionment act was passed in July, 1892; but this act was not free from gerrymander features. A second suit was brought. This time the attorney general refused to file an information, or to allow his name to be used by the real prosecutor. The court ruled that it would entertain the suit upon the relation of any suitor who was an elector, and that its jurisdiction to entertain the suit did not rest upon the will or consent of the attorney general to the filing of an information. It assumed jurisdiction, allowed the attorney general's name to be used against his consent, heard the case, and decided the second apportionment invalid. A second extra session then passed an act which, though much complained of, was not attacked in the courts. These decisions gave a wholesome check to this unjust and vicious practice of the practical politician, and were hailed with satisfaction by the friends of good government throughout the country.

AN ELECTIVE JUDICIARY.

There was considerable opposition in the constitutional convention to an elective judiciary. Happily, however, the State has suffered thus far none of the evils prophesied as sure to follow such a system. In every case, the judge appointed by the executive to fill a vacancy until an election can be had has been elected by the people at the next election. In but one case — that of Judge Crawford, defeated on the fugitive slave law issue, — has a sitting judge been defeated at the polls. In only one instance has a judge desirous of remaining on the bench been dropped at the end of his term, — the case of Judge Abram D. Smith, above mentioned in his biographical sketch. In no instance has a sitting judge been candidate for re-election upon the nomination of a political party, and in but a few cases have any judges been opposed by candidates of the opposite party. Of late years, the better elements of both parties strongly deprecate any drawing of party lines in a judicial election, which, as a safeguard against partisan strife, is not held on the day of general election, but at the "freeman's meeting" held in the spring. Even in the election of circuit judges the politics of the candidate is rarely taken into account; and a judge reasonably satisfactory in the performance of his duty is usually re-elected at the end of his six-year term. Practically, an election in Wisconsin to the circuit or supreme bench means for life, if the incumbent desires to continue on it.

When the State was Democratic, a Whig chief justice — Whiton — was elected. When the State has been substantially Republican, four judges, who were prominent Democrats, have been elected. When Judge Pinney was a candidate in 1891, his rival was also a Democrat. When Judge Dixon was elected in 1860, his competitor was also a Republican. When Judge Winslow was a candidate in 1895 for the full term, he was opposed by a Republican, but many of the Republican leaders, journals and ablest lawyers, took strong ground in his favor, because the opposition to him was merely partisan. With the single exception above mentioned, no judge has ever been driven from the

bench because of any decision he has made; and with that single exception no judge has had other than practically a life tenure, if he so desired it.

The court has been happily free from partisan bias, and, what is more remarkable, from any general imputation that their decisions had been prompted by party predilection. Only in the fugitive slave law cases — already referred to — has there been a division of the court on what might seem to be political lines. Hence, there is no disposition in the State, even among the most conservative elements of the bar or people, to set aside the elective system. And the court has never yielded to those gusts of popular opinion that oftentimes sweep, tornado-like, over new communities, especially in times of financial distress. "The judges are not wont to look out of the window to see how the wind blew." The farm-mortgage cases were, among many, striking instances of the judicial steadfastness of the court. The facts in those cases may be briefly told: In the early era of railway building in the State, cash was scarce, and the farmers along the route could not raise ready money to pay their stock subscriptions. Roseate pictures of the fortunes that would come to them were painted by the promoters. They were induced by thousands to give their notes for stock, securing them by plump mortgages on their farms, such securities to be negotiated by the companies to raise funds to build the roads. When these mortgages fell due, the country was in the throes of a financial panic, and the luckless farmers found the shadow of foreclosure brooding over their homes. Easily persuaded that they were the victims of fraud, they sought for pretexts to escape the liability. There were not wanting lawyers of repute to advise them that they had a valid defense. They organized a league for mutual defense, and were resolved to have decisions of the courts that should annul these incumbrances. Judges were threatened with their displeasure. The league was strong, and had many sympathizers in the State; and the mortgages were mostly in the hands of Eastern capitalists.

R. D. MARSHALL.

A test case came to the Supreme Court in 1860, the court below having held the securities invalid. The court in Clark *v.* Farrington (11 Wis. Reports, 306), reversing the decision, held that the notes and mortgages were valid, such as the company had power to take, and such as in law might be made. Says Judge Paine in the Opinion (p. 320): "If the farm mortgagors, influenced, perhaps, by public spirit combined with the hopes of private gain, have mortgaged their farms for stock, the facts that those hopes have failed, and that financial ruin has fallen upon the enterprises, and that the execution of their contracts may prove hard and calamitous to many of them, furnish no reason in law why they should not be executed if they were in law such con-

tracts as might in law be made." He then considers the argument and contention of the counsel for the mortgagors that the company had no power to take such securities, and holds, in accordance with well-settled principles, often since applied, that the corporations had power as incidental to the powers given in their charters to take notes and mortgages in payment for stock, and to negotiate them to raise money to build the roads. The decision was a great disappointment to the "farm mortgagors," and they vowed vengeance on the judges at the next election. Some considerable show was made against Judge Cole in the next election, by combining the votes of farm mortgagors with some Democratic support; but the independence of the judiciary was vindicated by a handsome majority for Judge Cole.

Wisconsin had in her earlier days some, but not all, the infant diseases incident to young statehood in the West — land grant scandals, canal schemes, booms, collapses, wild-cat money, greediness to borrow but grudgingness to pay, clamor for stay-laws and laws to delay lenders from realizing on their loans, — but she has emerged from all these periods with no taint of repudiation. Her people have paid their debts. Her laws have protected property owners, and creditors, whether her own citizens or non-residents; and her courts have protected all alike from repudiation or unjust taxation, and from all fraudulent devices that have come under judicial scrutiny.

THE PRACTICE OF THE COURT.

The practice in the Supreme Court of Wisconsin is practical and simple. The State is a "Code State," and the methods of appeal are statutory, though the Constitution prevents the abrogation of the writ of error. Starting with the New York Code in 1857, the methods of appeal have been changed by subsequent legislation; and the system supplemented by court rules is well calculated to dispatch business and prevent the law's delay. As appeals are taken or cases come up on writs of error, they are entered upon the calendar and heard in their order, unless postponed for cause. When the time arrives, a certain number of causes are assigned for hearing, usually thirty or more. The counsel are then notified by the Clerk what causes are set down for the assignment. When the assigned causes have been argued, the court adjourns for about two weeks, announcing the next assignment. The cases heard at an assignment are, upon the adjournment, taken up, carefully studied by each judge, and a consultation is then held, the causes in that assignment are then decided, and the writing of the opinions assigned to several judges. The decision of the case speedily follows the argument by this method. After the opinions are written they are read and discussed in consultation. In this way great care is taken to give full consideration. Appeals are thus speedily disposed of, and the lawyers coming from all parts of the State to attend court are required to be absent but a short time from home. Usually a case can be taken to the Supreme Court, and be received and remanded in less than a year from the time of the rendition of judgment below. Rehearings may be moved for within thirty days after the filing of the decision, and for that time the *remittetur* is held back. The Wisconsin method is much commended for its simplicity, convenience and speediness. One imperfection has lately been partly remedied — that is, the allowance of appeals from intermediate or interlocutory orders. The Codes allow appeals to be made before final judgment from many orders made below in the progress of the cause, when these affect a substantial right, or necessarily affect the judgment. The number of appeals of this class has been much limited by recent legislation, and appeals on technical grounds cut off, leaving

the error, if substantial, to be reviewed on appeal from final judgment.

Wisconsin being one of the earlier States that adopted the New York Code of procedure, somewhat simplified, the Wisconsin decisions in settling the practice under the Code have taken high rank as authority. On many other questions, the Wisconsin reports are among those most generally and approvingly cited. In the later text-books it is observable that Wisconsin cases are much cited and discussed, and are constantly growing, it may truly be said, in the esteem of the legal profession.

In the very charming book lately published, "The Laws and Jurisprudence of England and America," by Judge John F. Dillon, he says that "the character of many of our American reports has deteriorated from several causes." These causes he specifies to be a too eager desire on the part of judges to clear their overcrowded dockets, and that "they begrudge the time necessary for full argument at the bar." "They prefer to receive briefs. As a result, two practices have grown up too generally, throughout the country, which have, as I think, done more to impair the value of judicial judgments and opinions than perhaps all other causes combined." These practices are: —

1. "That the submission of causes upon printed briefs is favored, and oral arguments at the bar are discouraged, and the time allowed therefor is usually inadequate."

2. "The practice of assigning the record of causes submitted in printed arguments to one of the judges to look into and write an opinion, without a previous examination of the record and arguments by the judges in consultation."

These criticisms do not apply to the court which is the subject of this imperfect sketch. Though confronted with a crowded calendar at the opening of each term, our judges do not "encourage the substitution of printer's ink for face-to-face argument," but allow the causes to be "pounded and hammered at the bar." The judges listen patiently to arguments sometimes wide of the point, and failing altogether to illumine what is dark. They resort to every precaution used by the Supreme Court of the United States to secure the fullest consideration except one, that is, the custom of the judges of the latter court to send their opinions to each other for solitary perusal and criticism, before consideration in final consultation. The Supreme Court of Wisconsin of five must decide and write opinions in eight cases, where the great court of the nation, of nine judges, decides three; and though the cases may be less important, many of them are not less difficult.

SALARIES OF JUDGES.

The salaries of the judges of the Supreme Court, under the law creating the three-judge separate court, were fixed at two thousand dollars per year. In 1857 they were raised to two thousand five hundred dollars for the judges thereafter elected. At this figure they continued during the war with its depreciated money and nominal rise in prices — actual to men who lived on salary. In 1867 the salaries were lifted to three thousand five hundred dollars; in 1868, to four thousand dollars, and, in 1873, to five thousand dollars, at which sum they are likely to remain. The average voter is not an expert on the value of judicial service.

TERMS OF COURT.

By the statutes of 1849, adopted soon after admission into the Union, the court was to hold two terms or sessions yearly — one called the January and one the June term — at the Supreme Court rooms in the city of Madison. Later laws have changed the June term to August, and in point of fact it begins in September. In 1868, the legislature was strongly pressed to remove the State capital to Milwaukee. As a sort of

tub thrown to the whole, the Supreme Court was made itinerant by a law compelling it to hold three terms annually, one at Madison, one at Milwaukee and one at Oshkosh. Probably no more foolish law could be passed, with less reason for its passage. For one year the Court became peripatetic; but the law was repealed at the next session, and no one has since suggested a repetition of its folly.

CONCLUSION.

It is a hard-working court. The five judges must each write more than double the number of opinions written by a judge of the Supreme Court of the United States. Most of them are difficult cases, involving questions which, if not important in the sense of involving large amounts or great Constitutional questions, are solved only with careful study. The cases and briefs are — and in most cases needlessly so — voluminous and too often illy digested, and but few cases can be summarily decided without writing a full opinion. For nine months in the year the judges are laboriously employed in hearing arguments, consultation, or the writing of opinions.

LAWYERS AND LAW PRACTICE IN ENGLAND AND THE UNITED STATES COMPARED.

By a Lawyer of Both.

I.

SOME points of comparison or of contrast between law practice in England and in the United States will be of interest to American lawyers. More than twenty years spent in an extensive practice of law in England, and ten years' observation of it in different parts of the United States may entitle the writer to say, "I know whereof I speak," and with that introduction the "ego" of this article ends as well as begins.

When we speak of the legal profession in England we must remember that it consists of two branches, which, though interdependent and essential to each other, are quite distinct and in many respects dissimilar. In addition to these there are some minor branches of it — "certificated conveyancers" and "special pleaders not called to the bar" — but these are now so small that we need not stay to notice them here. The two great branches of it are called "the higher" and "the lower." The lower branch is that of the attorney or solicitor. "Solicitor" is now the proper designation, and the word "attorney" is almost discarded; but it will be better to use it in this article, for it is the more ancient and historic, and is better understood in the United States. Until the Judicature Act of about thirty years ago "attorney" was the designation of one who practiced at common law, and "solicitor" of one who practiced in chancery. The Judicature Act fused common law and chancery into one "High Court of Judicature," and "solicitor" became the legal, as it was the preferred, description of those who constituted the lower branch of the profession. No one now calls himself, or allows himself to be called, an attorney. The higher branch is that of the barrister or counsel. Between these two branches "is a great gulf fixed, so that they who would pass" from the one to the other cannot, — by which quotation, however, I do not suggest conditions in other respects like those that were parted by the gulf of the parable. But the gulf is a very real and deep one, and every attempt to bridge or narrow it has been sternly resisted. The higher branch only is called "the bar." No attorney or solicitor is ever spoken of as "a member of the bar." Socially as well as professionally he is the inferior, and language is made to emphasize the distinction. His (the attorney's) legal rank is that of "gentleman," the barrister's is "esquire," and they are respectively so described in deeds and other legal documents. He is "admitted" to the rolls of the profession, but the barrister is "called to the bar." His place of business is his "office," that of the barrister is his "chambers." He is "employed" by his clients, counsel is "retained"; his remuneration is called his "costs and charges," that of counsel is his "fee." For ignorance or carelessness in the conduct of his cause the attorney is responsible in an action for negligence; counsel is under no such responsibility, however ignorant, or negligent, or careless. The terms "crassa negligentia," and "crassa ignorantia," are inapplicable to "the bar," and are the exclusive privilege of the lower branch of the profession. The attorney cannot open his lips in any of the superior courts, even to ask for delay until the arrival of counsel, while counsel has audience everywhere, from a police court to the House of Lords.

The attorney is undistinguished by dress from "the madding crowd," while counsel is clothed in wig, and gown, and bands, the insignia of his order. The attorney "instructs" counsel, but counsel follows the instructions only just so far as he pleases, the whole conduct of the cause from the moment at which the "brief" is delivered resting wholly in the discretion of the counsel. Counsel in court always speak of each other as "my learned friend," but never so speak of the attorney who instructs them; and even attorneys, speaking in the inferior courts in which they have audience, never presume to make use of the word "learned" in referring to each other, "my friend" being the nearest approximation to the language of the bar permissible to them. An attorney is stationary, practicing in the city or town in which he and his family reside, while the barrister (if practicing at common law), though having chambers and residing in London, or some other large city, attaches himself to a "circuit," and two or three times every year "goes circuit"; that is to say, he follows the judges from one assize town to another, for the trial of civil causes, or criminal cases, and is known and distinguished by the name of the circuit to which he belongs. Thus a barrister is described as "Mr. Jennings of the Northern Circuit," while an attorney has no such itinerant description, but is simply "Mr. Jennings of Manchester." "Respectable" is the word which marks the highest reach of the attorney's life, while "eminent" is the honored description of the successful counsel. No one speaks of an eminent attorney or of a respectable counsel, for *of course* all counsel are respectable, and of course also no attorney is eminent.

Until recently counsel on circuit never "put up" at the hotels of the assize towns (for that would have been to place themselves in contact with attorneys having business at the assizes), but took "lodgings" in private houses; and a list of "counsels' lodgings" was, and still is, always exhibited outside the assize courts in order to show attorneys where counsels' briefs might be delivered, and consultations appointed. During the last few years this rule of etiquette has been somewhat relaxed, and now counsels' "lodgings" are occasionally, though not generally, described as of a room in one of the hotels (e. g. No. 42, Queen's Hotel), especially in such large assize towns as Liverpool or Manchester; but even there no counsel would be found at the table d'hôte, or the bar parlor or smoking room. Yet notwithstanding this "gulf" of demarcation, counsel is wholly dependent on the attorney. There is not a single thing he can do in his profession, either in court or chambers, unless "instructed" by an attorney. He could not open his lips as the advocate of his own father, or write an "opinion" for his brother without an attorney's intervention, and the selection of counsel rests with the attorney. Whom *he* will he instructs and whom he will he neglects. But his instruction must be by delivery of a brief, and not merely verbal. Many a time I have seen an attorney in an emergency rush to counsel in court to instruct him to make an application or motion, but invariably he has had to prepare and deliver a "brief" as an essential requisite of the instruction, although the brief might be only a blank sheet of brief paper, indorsed with the name of the cause, the name of the counsel, the amount of his fee, and the name of the instructing attorney.

The word "brief" has a very different meaning in England from what we understand by it here. There it is a confidential, "privileged" document—the attorney's statement of the case for the "instruction" of the counsel. It usually consists of a copy of the "pleadings" (all printed now, formerly all written), a full statement of the facts, technically called "the case," and a full statement of the "proofs," i. e. the names of the witnesses and their testimony,

presumably taken down from their lips by the attorney or his clerk. Then the whole is folded in brief form, and indorsed, and this indorsement is to the counsel the most interesting part of the brief. Here is a specimen of it: —

YORK SPRING ASSIZES.
Lent, 1894.
Coram, Mr. JUSTICE WILLS.
JOHN THOMAS, *Plaintiff.*
JAMES TOMKINS, *Defendant.*
Action of Replevin.

BRIEF FOR PLAINTIFF.
Mr. Arthur, Q. C.
Retainer, 2 gnas.
Brief, 50 "
Consult. 2 "
with you, Mr. MALTBY and Mr. HORN.
MARCHAM & MARCHAM,
Attorneys for Plaintiff.

As many duplicates of this brief are made as there are counsel to be instructed, each brief being indorsed with the name of the counsel to whom it is to be delivered, and stating on the indorsement the names of the other counsel who will be "with him" and with whom the "consultation" is to be arranged. The consultation on circuit is usually held either in one of the consultation rooms of the court, or at the "lodgings" of the senior counsel. The fee must be indorsed on the brief before delivery, and cannot afterwards be altered save by the addition of "refreshers" or further consultations. Such a thing is unknown as a contingent fee or the increase of the fee by reason of the successful result of the trial. It can never be in any degree contingent on the result. If the trial be a protracted one, "refreshers" are usually marked *de die in diem* after the first full day, and further consultations are appointed at the request of any of the counsel; but what is called the "brief fee," as indorsed before the brief is accepted, is afterwards unalterable. It is the proper thing to pay the fees to counsel's clerk when the brief is delivered, but when the attorney is a regular client this is not always done, and, indeed, in some instances a "fee list" is allowed to accumulate against the regular client to the end of the assizes, or, in London, to the end of the term. All counsel's fees are still reckoned in "guineas although the guinea (equal to £1 1s. 0d. or $5.25) has disappeared from English coinage, and the payment is made in £. s. d. A counsel's fee of 1 guinea really means £1 3s. 6d., two shillings and sixpence being added for counsel's clerk, whether he has a clerk or not. Where the fee exceeds 5 gnas. the clerk's fee is higher, according to a well understood ascending scale. The fee of counsel is not *payment*, or *remuneration* but merely an "honorarium." There is no contract express or implied between counsel and his client (either the attorney client or the actual litigant), and therefore no action can be brought by counsel to recover the fees, on the one hand, or against him for breach or neglect on the other. But the advantage of this principle is wholly on the side of counsel. No attorney dare leave his counsel's fees unpaid. There is an *esprit de corps* among counsel, quite as effectual and arbitrary as any trades-unionism. Let an attorney be known to have repudiated his counsel's fees, and he will soon find his briefs declined and his business at a practical standstill, for if counsel are dependent on attorneys, the attorneys are helpless without counsel. In my early years counsel never complained of the smallness of their fees, and either were, or affected and were presumed to be, wholly indifferent to the amount of them, and I remember the haughty reproof which an eminent counsel — afterwards a distinguished chief justice — administered to an attorney for apologizing for the smallness of the fee, as if *he* were supposed to be working for money! But of late years counsel have come down from the high horse and become much more mercenary and practical. It would yet be quite a

breach of good manners for an attorney to speak to counsel about the fee, and quite impossible for counsel to speak to the attorney about it. All *that* is arranged with counsel's clerk; but what counsel cannot do himself his man Friday does with impunity for him. He draws the attorney's attention to the fact that the fee indorsed is disproportioned to the weight of the brief, or the importance of the case, or tells him that the briefs on the other side are much more "heavily" indorsed, and the attorney almost invariably alters the indorsement according to the suggestion. But the suggestion must be made when the brief is offered, or at any rate before the trial is begun, and cannot under any circumstances be made afterwards. This "marking" of counsel's fees is often a matter of great difficulty and delicacy with the attorney. He stands between counsel and the real client, who may probably be a poor man whose means the lawsuit is sorely taxing. Counsel know nothing of this. The lay client they have never seen, and to his anxieties they are indifferent; but the attorney has been seeing him daily, and knows his means and his struggles. With a rich client behind him he would gladly mark fees more liberal than those marked by his opponent, but perhaps his client is a poor man and the opponent's client a rich man, and in such case it is no easy thing to satisfy the suggestions of counsels' clerks, and at the same time to act considerately towards the client. But that is not the attorney's only difficulty. He lives in constant dread of the taxing master. If he succeed in his trial the losing party has to pay his costs. But these costs have to be taxed "as between party and party" as it is called. The officer taxes according to a published scale of "party and party costs," which, though it leaves him some discretion as to the amount of the counsel's fees to be allowed, does so only within a narrow range, and it is no uncommon thing for a third or even half the amount actually paid to counsel to be disallowed on taxation as between party and party. The amount so disallowed is then charged against the client; but here again the attorney is not free from peril. The client has the right to have the attorney's bill taxed again, and though in such a taxation, called "taxation as between attorney and client," the officer follows a somewhat more liberal scale and is allowed a wider discretion, it is by no means uncommon to disallow what he may regard as excessive or unnecessary counsel's fees if "marked" without the express consent of the client. The loss then falls on the attorney personally, for counsel never return fees. Bargains between attorneys and clients, such as payment by proportion or percentage of results, are wholly discouraged by English law, and the scale of fees is the same in an action for £10,000 as in an action for £1000. Rarely is the conduct of an action very profitable to the attorney. Business of that kind requires a much larger staff (outdoor clerks, chamber clerks, process servers, etc.), and is attended with much more worry and liability to reproach, and therefore many of the oldest and most reputable law firms refuse all contentious business, confining themselves to conveyancing or family work; and many others would gladly relinquish that part of their business if they could do so without offending their clients, or handing them over to other members of the profession. I know one firm who employ over 100 clerks, and yet their net income is not half that of some other firms with less than a fourth that staff. I have said enough to show that the position of counsel is not only much more enviable than that of the attorney in litigious business but it is also much more profitable. A young counsel, who has not married or become engaged to a solicitor's daughter and who has no relatives or friends in the lower branch of the profession, may wait long for his opportunity, attending court and "going circuit" year after year, without ever seeing his name

on the back of a brief, and may at length give up in despair; but when once a man of learning and eloquence does get a start his rise may be very rapid, and the income of an "eminent counsel" is larger than that of the most "respectable" solicitor. There are probably a score of men now at the English bar whose incomes exceed £10,000 ($50,000) a year. I don't know more than one or two solicitors who have any such income, although I know scores who have half of it. £3000 a year is a large income for a solicitor, but double that is not very large for a barrister, especially a Queen's Counsel, who has been long at the bar.

I ought to explain, for I am repeatedly asked how counsel attain the rank of Queen's Counsel, and what are its advantages. Every young man "called" to the bar looks forward to this promotion — although to many it proves ruinous, a mere shelving of themselves for life, — and I have known dozens of men who have bitterly rued the day on which the stuff gown was exchanged for silk, and the charmed letters Q. C. were added to their names. After a man has been a number of years, usually about fifteen as a minimum, at the bar, and has acquired a considerable amount of work, he may apply to the Lord Chancellor for "silk," i. e. to be advanced to the honor of a Queen's Counsel. It does not follow that he will get it at once, or indeed ever. The Lord Chancellor consults the judges, who are better acquainted with the merits of counsel, and then he from time to time creates a new batch of men, selected from among the applicants, who then don their silk gowns and furbelows, put on new or newly powdered wigs, and are formally "called within the bar" of the several courts. Thenceforward they occupy the front bench of the bar (the seats and desks assigned to counsel) and become "leaders" instead of "juniors." But a man should well weigh his chances before seeking this advancement; for a large, the larger, part of his work must be forever relinquished as soon as the change is made. Henceforth he can no longer draw or settle pleadings (which forms so large a part of the work of a junior), or advise on evidence — except in rare cases in consultation with a junior — or do very many things which brought him abundance of fees before. Henceforward he is a leader, and all men who are not Queen's Counsel, however much his senior in years, are his juniors. In most cases there are two or three counsel on each side of a trial. There may be two Queen's Counsel on one side, but this is rare (and in such case the "senior by call" leads), but in all cases a Queen's Counsel leads a stuff gownsman whatever their respective ages, and a Queen's Counsel almost invariably has a stuff gownsman briefed with him as his junior, and few Queen's Counsel will accept a brief *of any kind* without a junior. If, perchance, a Queen's Counsel for a plaintiff happens to be without one, the judge assigns to him the youngest counsel in the court, and he opens the pleadings, that duty being below the dignity of a Queen's Counsel. There are very many men, even at the bar, who are splendid lawyers and admirably equipped for junior work who are not at all adapted to the work of leadership; splendid as pleaders (that is, in settling pleadings), writing opinions on evidence, prompting leaders, searching for precedents, or even arguing questions of law in banc, who are quite unfit to cross-examine witnesses or address juries; and so it happens that with many men of enviable position as juniors, the silk gown has proved to be the professional shroud. The distinguished man who has become the Lord Chief-Justice of England, and a recent visitor to our shores, was full of fear as to whether such might not be his fate if he took silk, and ultimately left it to two or three chosen friends at the bar to determine the question for him. The judges are usually, but not always, selected and "raised to the bench" from among

the Queen's Counsel. But some of the very best of the judges never wore "silk" and were raised direct from the junior bar.

From what I have said it might reasonably be inferred that the bar is much more difficult of access than the lower branch of the profession, and requires a higher order of learning and attainment. But that is not so, at any rate not necessarily so. It is true that most of the members of the bar are graduates of one or other of the two great Universities, and also that most young men of the Universities who choose the law for their vocation go to the bar, and that the members of the bar are largely drawn from the upper or upper-middle classes, while the lower branch of the profession is more generally of "middle-class" origin (although as to both there are many exceptions); but the lower branch is quite as difficult and indeed more difficult of access than the upper. For the latter there was (and I believe still is) no *necessary* examination. A young gentleman desiring to go to the bar has only to procure testimonials as to character from two barristers, enter himself as a "student" at one of the Inns of Court, and eat a certain number of dinners each term at the hall of his "Inn" for about three years as evidence of his being in study and attendance at the lectures, and then he is entitled to be "called" to the bar without any examination or test of learning; and many young men did, and yet do so, without any intention to practice, and only for the sake of rank or good fellowship with old college friends, or to acquire some show of fitness for the county magistracy or chairmanship of sessions (both honorary positions), or for aid in diplomatic or parliamentary service. But young men who aspire to the bar as a profession, with intention to practice, study hard, and systematically attend lectures during their three years of studentship, and are ambitious for distinctions in the examinations, which embrace a wide range of subjects, and are real and somewhat severe tests of legal attainment. But *no one* can become an attorney otherwise than through a costly course of preparation, including two or three examinations. Unless he has graduated at one of the universities, or passed a university examination, he must undergo what is called the "preliminary" examination in general knowledge before he can be "articled" (i. e. bound apprentice) to an attorney, and an attorney may not have more than two such at the same time. This passed, he must be "articled" for five years (reduced to three or four years for university graduates and undergraduates and some others) and he must actually serve and study in the office of the attorney during the term of his articles. In the middle of the term he must pass another examination called the "intermediate," which is in elementary law, and at the end of the term he must pass the "final," which is a tolerably stiff examination in all the principal branches of law and practice, and failure in any of these examinations, or in any one branch of the "final," postpones his right to admission. This course is always a *costly* one. Each of these examinations involves some expense; but besides this he has to pay a stamp duty of £80 (reduced from £120) on being articled, usually a fee to the attorney of 250 or 300 guineas or more, and during the term of his articles he receives no salary or remuneration for his service. There are occasional opportunities of getting into the profession without all this cost, chiefly by means of prolonged service, or by reason of special qualifications; and special facilities for that purpose have been made by Statute for men who have occupied the position of managing clerk to attorneys for not less than ten years, an exception which, in the opinion of lawyers generally, has not tended to the good of the profession.

THE BURGOMASTER OF AMSTERDAM.

BY JOHN ALBERT MACY.

(An Incident in the Dutch Wars of Louis XIV.)

THE city council met in haste,
"The French are come," they cried.
"They're laying field and vineyard waste,
And burning far and wide."

"Let's throw a rampart up," cried some,
"Rebuild the city wall!"
"Repair the gates — the French are come!"
Fear ruled the council hall.

"The citizens must dig a trench
Before the host swoops down."
"Against the armies of the French
What hope to hold the town?"

The city council argued long,
And nearly came to blows.
Each swore the other man was wrong,
And half forgot the foes.

Meanwhile the Burgomaster snored
Upon the chair of state.
His solid common sense abhorred
All wrangling and debate.

At length fell silence in the hall
When throats were worn with cries;
The stillness roused him from the thrall
Of sleep. He raised his eyes.

"My friends, I've listened while you spoke
Of what we best would do."
(But that was just his little joke—
He'd slept the meeting through.)

"And from your talk this much I've learned,
You have not seen a sign
Of any foe. The French have burned
No land this side the Rhine.

"I think we best would save our fear
Until the truth is learned,
Until the Frenchmen do appear—
The meeting is adjourned."

Wise words! The French marauders stained
With wine their oriflamme,
And, drunk with pillage, never gained
The goal at Amsterdam.

. . . . . .

Oh, lawyers of the inner bar,
And in the halls of state,
How senseless half your wranglings are,
Your pleas elaborate!

And how much better would it be
If some wise man should sleep,
While legislators disagree
In logic strained and deep;

And, waking then, in judgment sane,
Should render his decree,
And quickly fall asleep again,
In wise complacency.

ELECTION PETITION TRIALS IN ENGLAND.

By Edward Porritt.

No parliamentary inquiry in recent years can have had a greater personal interest for English lawyers, solicitors as well as barristers, than that in the present session concerning the trial of parliamentary election petitions. The inquiry has its value also for students of constitutional history; for to them the determining of contested elections forms one of the most interesting chapters in the history of the House of Commons, and in that of our English parliamentary franchises.

As is of course well known, English election petition cases, since 1868, have been tried before judges of the High Court, without juries, who hold their inquiries in the constituencies concerned. After an election, a defeated candidate who is dissatisfied with the result, and conceives that it has been obtained by means which contravene the Corrupt Practice Act, files a petition in the courts. In the meantime the member returned by the sheriff or the mayor takes his seat in the House of Commons, and sits there until the petition has been adjudicated upon.

The judges report to the speaker. When their decision vacates a seat, a new writ is moved for in the House by the whip of the political party to which the unseated member belongs. In the United States, when a seat in Congress is contested, the costs attending the hearing of the case by a committee of the House are defrayed by the government. In England, except so far as the judges' salaries and the expenses of the Public Prosecutor are concerned, the government is at no expense. Costs follow the suit, as in ordinary trials in the law courts. In most cases costs are exceedingly heavy. Barristers appear for the petitioner and the respondent; solicitors and inquiry agents of the detective class are kept busy for months with the preliminaries; numerous witnesses are examined, and the trials are often very protracted. It is chiefly the cost of the trials, and the length of some recent petition cases, which have given rise to the present parliamentary inquiry.

Successive elections since the Reform Act of 1867 have seen a marked diminution in the number of election petitions. There was, of course, some falling off in the number after the first Reform of the House of Commons in 1832. But it was not so great as might have been expected; for, sweeping as the Reform Act was considered sixty years ago, it permitted scores of miserably small boroughs to escape. These continued to send members to the House of Commons, and although the act of 1832 had set up a uniform ten-pound franchise, most of them were really little less corrupt than in the two centuries between the reign of James I and that of William IV. During that period the parliamentary elections in the boroughs were controlled by self-elected corporations; by freemen; by the burgage holders; and in some places by the old-fashioned forty-shilling freeholders. After 1832 the electoral corruption and squalor which had so long characterized these municipalities became more widely extended as the number of voters slightly increased. The Act of 1867, which set up household suffrage in the boroughs and enfranchised the working classes living in them, tended in a measure to diminish bribery and corruption, out of which election petitions mostly spring. But for some years after the Reform of 1867, the judges on the rota for election cases usually had their hands full for months after a general election; and there was from 1832 to 1884 seldom a period when several boroughs were not undergoing punishment for

corruption. This took the form of withholding the writ, a course of action freely adopted when the parliamentary committees before 1868, and the judges of the High Court after that year, reported to the House that a borough was more than ordinarily corrupt.

The Reform Act of 1884, with the Redistribution of Seats Act of 1885, did more to lessen the election work of the judges than all the other electoral legislation since 1832. The small boroughs which, as their history between 1832 and 1885 made plain, had undeservedly escaped in 1832, were in 1885 thrown into the newly made county divisions. They ceased to be under the enervating and demoralizing patronage of the territorial aristocracy, or of the wealthy candidates for their suffrages. They ceased to be the plague spots of the electoral system. The Act of 1884 and 1885, with the existing Corrupt Practices Act, which preceded them by a year, lessened enormously the work of the judges, so far as the number of election petitions was concerned. These three acts —making household suffrage uniform in boroughs and counties, throwing the small towns into the county electoral areas, and penalizing corruption—tended at once to reduce the number of petitions. They made no change, however, as regards the duration of the petition trials; nor as concerns the legal expenses attending a petition case. Although the borough and county constituencies of England elect 495 of the 670 members of the House of Commons, after the general election of 1895 not more than nine or ten petitions were heard by the judges. Still these cases involved enormous expenses to the candidates concerned, and they have given rise to a feeling that, the experience of centuries notwithstanding, a reasonably inexpensive and that at the same time expeditious method of dealing with election petitions has still to be devised.

It is curious how, in the matter of election petition trials, as in other constitutional usages and practices, things work around as it were in a circle. Four centuries ago, as the statute books and literature like the Paston Letters show, controverted elections were tried much in the same way as they are today. They were dealt with then by the judges of assize, who heard them as the judges of the High Court nowadays do, in the counties where the disputed elections occurred. In those days, however, cases of disputed returns were comparatively rare. In the first two hundred years of its existence, few men were anxious to serve in the House of Commons. Service in Parliament, in the Lords as well as the Commons, was then regarded as burdensome; as concerned the Commons, by both elected and electors. Constituents were frequently ready to shirk electing either county or borough members, in order that they might save themselves the local charges for knights' and burgesses' wages. When members were chosen, bonds had to be entered into for their due appearance in Parliament much in the same way that witnesses are bound over to attend trials at quarter sessions or assizes. In the early days of the House of Commons there were few men who would put themselves to the expense of contesting in the courts their right to an election; but that such cases occasionally occurred in the fifteenth century, can be learned from the Paston Letters, which throw so much light on the political and social life of the period they cover.

Later on, disputed elections were determined in Chancery; then in Elizabeth's time the Commons claimed the right of determining elections. Early in James I's reign this right was insisted upon; and from 1604 to 1868, when election cases were returned to the courts, the Commons never parted with the right they had wrested from the Crown. For the first century or so after it was obtained, it was one of the most valued rights of the House of Commons. As long as the Stuart dynasty lasted, it was next to

the right of granting supplies, the most precious of the privileges of the Lower House. The whole course of English history might have been changed if the transference of 1604 had not taken place. Charles I's trouble with the Oxford Parliament in 1625 need not have happened if he could have seated whom he liked as the representatives of the people. Nor would there have been any need for the *quo warranto* proceedings of Charles II and James II, if these sovereigns could have appointed the judges of election.

Undertaking at parliamentary elections, or, as it would be called in this country, bossing the elections, can be traced much further back than the early years of the seventeenth century. It was practiced a little in the time of Henry VIII; it grew more common in the days of Elizabeth. But it became a business in the reigns of James I and Charles I. From the Restoration, to George III's reign, every sovereign, except George I, took a hand in it. The last king personally to engage in it, George III, was the greatest adept at electioneering that English parliamentary history can produce. He could boss an election, whether at Windsor or Westminster, with exceeding adroitness, and in his day George III had only two contemporaries who could approach him in this line of work. These were the first Earl of Lonsdale and Lord Melville. Melville bossed Scotland and its elections for two generations. Lonsdale, as Sir James Lowther, bossed the counties of Westmoreland and Cumberland, and in his best days could count on returning no fewer than nine of his adherents, privadoes or creatures they would have been called in Charles I's time, to the House of Commons.

The English sovereigns from James I to George III would have had but a small field for the exercise of these talents but for the transference of election cases from the law courts to the Commons in 1604. Some of the sovereigns enjoyed the work of manipulating the elections. George III certainly did, or he would never have economized in domestic life to save money to be spent in carrying his candidates. But to James I and Charles I it was somewhat distasteful work. For them it was attended at times with disheartening failures, and if the usage of the Tudor days had been continued, it would have been easier to determine the make-up of the House of Commons through decisions of election cases than to try to bring about the same result through self-seeking parliamentary borough masters or sordid and grasping aldermen and freemen. In short, English history would not have been what it is, perhaps not half so interesting, had it not been for the signal success of the House of Commons in the early days of James I.

For the first half century or so after the House possessed itself of the privilege of determining its own membership, election petitions were tried by the Committee of Privileges. This was a standing committee appointed at the commencement of each Parliament. On it usually served all the distinguished lawyers who were of the Lower House. Many of them added largely to their reputations by service on this committee, in whose records in the Journals of the House, their names and their services in the upbuilding of the parliamentary system of England are perpetuated.

About 1672, during the time of the Pensioner Parliament, when seats in the House of Commons were more in demand and cost more to obtain and hold than at any time previously in the seventeenth century, the work of hearing petitions was taken from the Committee of Privileges and Elections, and dealt with in Committee of the Whole House. As the eighteenth century advanced it became the practice to hear election cases at the bar of the House. From the Restoration until the Grenville Act of 1770, however, under which petitions were referred to a small committee chosen in a way calculated to ensure a fair report, it mattered little

where the cases were heard, by the Committee of Privileges, in Committee of the Whole House, or at the bar of the House with the speaker in the chair. They were usually decided finally by a strictly partisan vote, with little or no regard to equity or fairness as between the candidates, and with no regard to the common law rights of the English people in respect of the exercise and enjoyment of the parliamentary franchise.

The Parliamentary reformers of the period of the American Revolution imagined that they were launching an entirely new movement when they advocated an enlarged electorate, and the suppression of the rotten boroughs. If they had turned to the Journals of the House they would have learned that in scores of boroughs the movement for a wider franchise, for a return to the original scot and lot qualification of the first centuries of the House of Commons, had been going on almost from the days of the Tudors. The Journals make this clear; and in the reports of the Election Committees from the time of Glanville and Coke, as they are spread with much fullness of detail on the Commons Journals, there are some of the most valuable contemporary pictures of English municipal and social life to be found anywhere in English history. They have been drawn upon by the writers of Constitutional history, but ignored in the main by those authors who have sought to deal with social England during the last three centuries.

From 1770 to 1868 when, as has been stated, election cases were sent back to the courts, they were dealt with by a small committee appointed for each case, and so chosen as to guarantee for both sides a fair hearing. George III strongly opposed the bill establishing these committees when it was proposed in 1770, as a temporary measure. He opposed it again in 1774, when it was made permanent. The reasons for his opposition are not far to seek. The Grenville Act made electioneering and parliamentary management of the kind in which the king was so proficient much more difficult, and made the results less certain. Hence the dislike of George III to the Act. He was defeated in his opposition on both occasions; but the Letters and Memoirs of Walpole show that even after the Act, the king was not loyal to it, and at times exerted his influence to prevent a quorum being made in the House, in order that no progress might be made in the selection of a Grenville Committee. As between candidates, the Grenville Act wrought a change immensely for the better. In every case it did not and could not bring justice to the constituencies concerned; for the Act of Parliament as to the last determinations in election cases passed in the reign of Queen Anne, stereotyped the variety of borough franchises then existing, and effectually closed the door in most boroughs to any attempt to get the franchise back to its ancient democratic level.

Occasionally there have been protests against the decisions of the election judges under the Act of 1868, and sometimes an election petition, rightly or wrongly, leaves a local feeling of injustice and soreness which lasts until the next general election. I well remember on the morning after Parliament was dissolved in 1874, seeing written in chalk on the walls of a Lancashire borough "No Baron Martin this time." It was the first electioneering literature locally published in that contest; and was evidently written by a supporter of the Tory candidate who had been the unsuccessful petitioner in a trial following the general election of 1868. As a rule, however, people in England accept the decision of the judges in these cases without much criticism. The parliamentary inquiry held this session may result in some recommendations for the shortening of election trials and economizing law costs; but no one for a moment entertains the idea that election petitions will be taken again out of the hands of the judges.

The Lawyer's Easy Chair.

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

BY IRVING BROWNE.

CURRENT TOPICS.

PROMISE TO MARRY. — The New York Court of Appeals has struck a hard blow at woman in its recent decision in Yale *v.* Curtiss, to the effect, quoting the language of the judge who wrote the opinion, that "Mere courtship, or even an intention to marry, is not sufficient to constitute a contract. 'There must be an offer and an acceptance, sufficiently disclosed or expressed to fix the fact that they were to marry, as clearly as if put in formal words.'" The plaintiff was 28, the defendant was 46. He had been a bank clerk for 19 years in New York, and then returned to Norwich, having inherited property from his father, and went to live with his married sister. He and the plaintiff both sang in the same church choir, and she taught music. For three years he "saw her home" from prayer meetings, took her to public entertainments, took her riding once or twice, and frequently went into her house on her invitation on their return from these exercises, but never remained later than 11 o'clock. He never called except in this way, and did not always accept her invitations. He sometimes escorted other young ladies to public entertainments. His discourse was not pointed in the direction of matrimony. He once asked her if she would be afraid to cross the ocean, remarking that "husband and wife is party enough for me if I go." Once he asked her which of two vacant town lots she preferred, but said nothing of the lonesomeness of his lot. Sometimes he told her he liked to take her to the entertainments she best liked. But he never spoke any word of endearment to her, always called her Miss Yale, and — fatal omission — he never hugged nor kissed her. He never begged her for a Yale lock. At length he met the Other Girl. Then her mother informed her that she had heard that he had said he had just been fooling. Then she called him to book, and according to her account, he strenuously denied the base accusation, but admitted that he admired her greatly — none more greatly — longed to make her happy, would do anything to rescue her from trouble, and would always protect her, and would make her happy. She said she didn't care what people said if he was "true," and he said he was "true." But she meant love, and he meant friendship. Fine words, but they buttered no parsnips. He came no more. He sharply denied much of this parting interview, as testified to by her, but the jury believed her, and gave her damages, $3,000. But the Court of Appeals now hold that so unenterprising a young woman, who could not warm up a man more than that with all her opportunities, did not deserve him as husband. Haight, J., who is, we fear, a cold-blooded man, says here is no evidence of a contract, or even an intention to marry; that the minds of the parties did not meet on matrimony; that Miss Yale probably meant business as conducted by Cupid, but Curtiss was a Platonist, and, recalling his banking days, merely intended to secure an option on his co-vocalist. A girl who sang in the choir ought to have recalled "Pickwick Papers," and profited by Mrs. Bardell's example, or sung with him the half-hour-long love duet from Tristan and Isolde. But after all, she only failed where greater ones have failed before; the Fates were against her as they were against Dido, and it was recorded in their book that her Æneas was to build on one of those lots for that Other Girl.

SHAKESPEARE IN THE INNS OF COURT. — "Twelfth Night" was enacted in the Middle Temple Hall, on the 11th of February last, by the Elizabeth Stage Society. It was 296 years since its last presentation at the same place, namely February 2, 1601! That seems a pretty long wait.

SPORTING JUDGES. — The following is clipped from the London "Law Journal": "'It is now possible,' says the 'Westminster Gazette,' 'to form a Court of Appeal of old "Blues." Both Lord Esher and Lord Justice Smith won their blue at rowing, while Lord Justice Chitty gained his in the cricket field.' As a matter of fact, all three learned judges are old 'Varsity oars, the Master of the Rolls and Lord Justice Smith having rowed for Cambridge, and Lord Justice Chitty for Oxford. There are those who say that Lord Justice Chitty just managed to carry the constituency of Oxford City by the help of his boating acquaintances along the river. His majority was but ten." These judges continue to be handy with their skulls.

THE DANGERS OF PIE. — A reporter of the "New York Times" has published a tale of a Pittsburg burglar, who was detected by means of a copy in plaster of the impression of his teeth on a pie, found on the premises, from which he had taken a bite. This should be a lesson to persons of his profession not to be hasty, or to employ one of the forks which they carry away, or to eat the whole pie. At the same time the incident furnishes an answer to Ralph Waldo Emerson's question to his guest who declined pie at breakfast: "What is pie for?" — it is to detect burglars. Professor Webster was detected by means of his victim's artificial teeth. But in the case of the pie-eating burglar there must have been a forcible comparison of the cast with his teeth, and thus, as we conceive, a violation of his constitutional immunity against furnishing evidence to convict himself. This poor fellow was a victim to his piety.

THE IMPAIRED OYSTERS.

(Sheffer *v.* Willoughby, 61 Illinois Appellate, 263; 163 Ill. 518; 34 L. R. A. 464.)

Maggie Sheffer, for a dinner
  Sought defendant's restaurant,
Hesitating not to pin her
  Faith on that enticing haunt;
Ordered there a stew of oysters,
  Succulent, and smelling good,
Quite enough in frugal cloisters
  To sustain the monkish brood.
But those oysters took to rising,
  Like uneasy employees;
With vivacity surprising,
  Leaped from their imprisoned seas,
Left the artless, trusting Maggie
  Feverish, with retching sore,
Pallid, tottering, and baggy,
  Scarcely fit to reach the door.
When she from her pains recovered,
  Sued she for this grievous tort,
Round about the court she hovered,
  With the waiting, anxious sort,
Till from lower court ejected,
  As when Eve, the devil's sport,
Ate the apple, she expected
  Justice from an appellate court.
But the learned Justice Gary,
  O'er that midway court presiding,
By experience made wary,
  Said, the plaintiff's claim deriding:
"That defendant here was careless
  There is not the least pretence,
If I sit here till I'm hairless,
  I must deem that a defense.
Is a woman selling candy,
  Nuts or apples at bridge-end, or
Italian, with his cart so handy,
  A street-corner pop-corn vendor,
Liable, if any buyer,
  Eating, feels within his stomach
A sensation as of fire,
  And a nauseating hummock?
The defendant's no insurer
  Of the quality of food.
Maggie therefore must endure her
  Pangs of indigestion rude."
Out of court she goes quite wilted,
  Countenance and spirits droop,
Her hat-feathers downward tilted,
  Practically "in the soup."
Mr. Abbott, her attorney,
  Growing pale and long of face,
Is advised to take a journey,
  Having first thrown up the case.
Maggie's stomach now is easy,
  But there's settling still to make
For the costs and counsel fees he
  Is awarded for her sake.

FUR ET LATRO. — In Austin Dobson's third series of his agreeable "Eighteenth Century Vignettes" is given the following, from "A Sermon [in Paules Church] of god's fearefull threatenings for Idolatrye . . . with a Treatise against Usurie," by Richarde Porder, 1570: "I remember a tale concerning a theefe that was indyted of felonie, for robbing by the highe wayes syde, and being indyted by the name of *Latro* was condemned by ye name of *Fur*, for which the theefe quarrelled, and sayde the Judge had done him wrong. And when he would not cease exclamation, Mayster Skelton, the Poet, being a maister of wordes, and cunning in Grammar, was called to declare the difference between *fur* and *latro*, whose answer was that he saw no great difference between *fur* and *latro*, saving this, that *fur* did sit on the bench, and *latro* stoode at the barre." Which goes to show that the clergy were just as credulous in those days as now. Imagine a lawyer calling in a poet to explain the difference between technical legal Latin words! But the pun was good.

MORE OF DICKENS' ANIMALS. — It seems that we overlooked a pair of Dickens' animals in our late remarks on that topic. Tim Linkinwater's blind blackbird, in "Nicholas Nickleby," is not an independent or influential character, but he serves to show the broad humanity of the great creative master, who "loved both man and bird and beast." But in the same novel we have a glimpse of a more interesting animal, the pony appertaining to Mr. Vincent Crummler, the theatrical manager, and "who," like a good many human beings, was more remarkable for his ancestry than on his own account. He drew a cart rather than "a house." He was, to summarize Dickens' description in his own language, a strange, four-legged

animal, which he called a pony, given to taking his time upon the road, and evincing, every now and then, a strong inclination to lie down, but kept up pretty well by jerking the reins and plying the whip, and kicks by the elder Master Crummler when he refused to go. A good pony at bottom, but certainly not at top, for his coat was of the roughest and ill-favored kind. "He is quite one of us," said Mr. C.; "his mother was on the stage. She ate apple pie at a circus for upwards of fourteen years, fired pistols, and went to bed in a night-cap, and in short, took the low comedy entirely. His father was a dancer, not very distinguished. He was rather a low sort of pony. The fact is, he had originally been jobbed out by the day, and he never quite got over his old habits. He was clever in melodrama, but too broad, too broad. When the mother died, he took the port-wine business — drinking port wine with the clown — but he was greedy, and one night bit off the bowl of the glass and choked himself, so his vulgarity was the death of him at last." The pony was a *dernier ressort* in the lack of all other novelties — "we never come to the pony till everything else has failed," — but Nicholas declined to sing a comic song on the pony's back, although it had been known to draw money.

CURIOSITIES OF THE REPORTS.—There is a good deal of the curious and the humorous to be found in the "City Hall Recorder," by Daniel Rogers. Some reference to these reports was made in the recent sketch of William Sampson in this magazine. Turning over the pages casually, we ran across "George Frederick Cooke's Case." This was rather startling, for it was the name of the great English tragic actor, who visited New York about that time. But very curiously it turns out to be the report of a trial for grand larceny in stealing a portrait of Thomas A. Cooper, a famous tragic actor, of New York, whom Halleck, in "The Croakers," refers to.

John A. Graham defended the prisoner, on the novel ground that he looked and acted like an idiot: "every glance of that vacant, staring eye," said he, "every movement of that head — nay, his whole exterior, indicates downright madness." He also argued madness from the fact that the prisoner had offered to sell, for two dollars, a superb, inimitable and valuable likeness, a "monument of genius" which "some hundred years hence might sell for several hundred dollars." But as the jury could not see how that would benefit the prisoner, they found him guilty, and he went to prison for three years and a day.

Christian Smith's Case is prefaced by the reporter with a quotation from Virgil's Georgics, in the original and translated, and a very flowery and hifalutin exordium, warning his countrymen against "the awful consequence of harbouring, for a long period, a settled malignity against a neighbor." The trial was for murder, and although the jury acquitted the prisoner, Judge Van Ness informed him that he considered him "a very guilty man," and to "beware — you have not escaped. Believe me, your most awful trial is yet to come," namely, at the bar of God, and predicted that unless he repented and atoned, his "condemnation there is certain — whatever may be considered the law of Staten Island, your conduct is unjustifiable in the sight of God and man." This seems pretty hard measure, and rather extra-judicial.

In Jemsen's Case, the reporter excuses himself for the use of "circumlocution and indirect demonstration" on account of the indecent character of the evidence, observing: "If not in the former, yet in the latter mode of reasoning, we are fully justified, even by the authority of Euclid. (Simp. Euclid, lib. 1, Prop. vii and xxvi.)" We must say that his painstaking rather enhances than hides the indecency in question. In John Balls' Case (arson), the reporter concludes the report with the remark that "the character and situation of the defendant, as disclosed on the trial," reminded him of Arbuthnot's epitaph on Colonel Charteris (which he quotes in full), to the effect that God shows his contempt of wealth "by bestowing it on the most unworthy of all the descendants of Adam." Some of the headnotes are very funny. For example: "Where either a married or a single man is robbed of his property at a house of ill-fame, the least he can say is the better." "Honest, prudent people need not fear highway robbery in the City of New York." "Vigilance in clerks is highly commendable." "The more respectable the friends of a thief may be, the more enormous his crime."

NOTES OF CASES.

BOARDING MOVING TRAIN. — A late decision in the New York Court of Appeals in Distler *v.* L. I. R. Co. on this point is important, and shows some contrariety of opinion. The decision here is that it is not negligence, as a matter of law, for a passenger to attempt to get on to a train, in pursuance of the direction of the conductor, while it is moving at the rate of two or three miles an hour, when there is nothing to indicate any unusual danger. Three judges dissent. The case is distinguished from Hunter *v.* C. & S. V. R. Co., 126 N. Y. 18, where, as the train approached a platform at the rate of one or two miles an hour, the conductor said to the plaintiff, "If you are going, jump on," and he was injured in trying to do so. This was held contributory negligence as

matter of law, three judges dissenting. The Hunter case had been up before in 112 N. Y. 371, and the same decision was then made, one judge dissenting (Andrews, J.), Peckham, J., giving the prevailing opinion. Andrews, C. J., and O'Brien, J., who dissented on the last appearance of the Hunter case, were dissenters in the present case. In Northern P. R. Co. *v.* Egeland, 163 U. S. 93, the plaintiff, a common laborer in defendant's employ, returning from work on a train, was ordered by the conductor to jump off at a station when it was moving about four miles an hour, and he was injured by doing so. The question of his negligence was held to have properly been left to the jury. Mr. Justice Peckham gave the opinion, and endeavored to distinguish the Hunter case in 112 N. Y., in which he had given the prevailing opinion, on the ground that in the Egeland case "there is an element of obedience to the command given by the person in charge of the train and of the crew and given to the common laborer, and upon a matter where the jury might find that the danger was not so great and so obvious as to render obedience to the order a risk to the person obeying." He speaks of the speed in the Hunter case as "quite rapid," but the testimony put it from four to eight miles an hour, while in the Egeland case it was put between four and five. Things seem a little mixed, but possibly the cases in the two courts are distinguishable. We are rather inclined to side with the dissenters in the New York cases, on the ground that an intending passenger might be deemed warranted in following the conductor's invitation on the spur of the moment.

DYING DECLARATIONS. — It is gratifying to us to observe that the views which were expressed in these columns some months ago in respect to the admissibility of previous or subsequent contradictory statements to impeach dying declarations, have received the approval of the United States Supreme Court. In the recent decision of Carver *v.* United States, that court have declared such statements admissible, and that no foundation need be laid, as in the case of living witnesses, by calling the witnesses' attention to such contradictory statements. The court say: "They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of rewards or punishments." Citing State *v.* Elliott, 45 Iowa, 486; Cone *v.* Cooper, 5 Allen, 495; Goodall *v.* State, 1 Oregon, 333; Tracy *v.* People, 97 Ill. 101; Hill *v.* State, 64 Miss. 431. This decision substantiates the opinion of the New York Law Journal and our own, opposed to that of the Harvard Law Review. See 8 GREEN BAG, 223.

GOATS ARE "CATTLE." — In State *v.* Groves (N. C.), 25 S. E. Rep. 819, under a statute making it a misdemeanor to wilfully and unlawfully kill or abuse any "horse, mule, sheep, or other cattle," the court was called upon to decide whether the word "cattle," as here used, included a goat. Clark, J., who delivered the opinion, said that while the word "cattle" was often used in a restrictive sense as applicable to the bovine species only, it had another and broader meaning, which took in all domestic animals; and the context made it evident that it was here used in the broader sense. "Indeed," said the court, "the broader sense is the more usual one. Worcester's definition, 'a collective name for domestic quadrupeds, including the bovine tribe, also horses, asses, mules, sheep, goats and swine,' was approved by this court in Randall *v.* Railroad Co., 104 N. C. 410, 413. To the same effect are the Standard, Webster and Century Dictionaries. In the Scriptures, the word 'cattle' ordinarily and usually embraces goats, notably in the contract between Laban and Jacob. Gen. xxx, 30, 32. In Decatur Bank *v.* St. Louis Bank, 21 Wall. 294, the word 'cattle' is held to be broad enough to include even swine. In England, the statute 9 Geo. I. ch. 22 (commonly called the 'Black Act') made it punishable with death, without benefit of clergy, to 'maliciously and unlawfully kill any cattle.' Under this it was held that the statute embraced domestic animals other than the bovine species, as a mare, in 2 East P. C. 1074; Rex *v.* Paty, 2 W. Bl. 721, and 'pigs' in Rex *v.* Chappe, 1 Russ. & R. 77."

In Chesapeake & Ohio R. Co. *v.* Bank, 92 Va. 495, 1 Va. L. R. 825, it was held that a statute forbidding transportation companies to keep "cattle, sheep, swine, or other animals," confined for a longer period than twenty-eight hours, without unloading and allowing them to rest, included horses. In State *v.* Dunnavant, 3 Brev. (S. C.) 9, 5 Am. Dec. 530, the term "horses," in a criminal statute, was held to apply to mares. "Cattle" usually includes horses and sheep (Louisville, etc., R. Co. *v.* Ballard, 2 Metc. [Ky.] 177); also pigs (Child *v.* Hearn, 9 Exch. 176); but not buffaloes, (State *v.* Crenshaw, 22 Mo. 457.) A domestic fowl is an animal (State *v.* Bruner, 111 Ind. 98); and "bird or animal" would include a gamecock (People *v.* Klock, 48 Hun. 275); and tame linnets are within the protection of a statute punishing cruelty to "domestic animals." Colam *v.* Pagett, 12 Q. B. Div. 66. — *Virginia Law Register.*

The Green Bag.

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THE GREEN BAG.

EDITOR OF THE GREEN BAG.

Sir: "Your Disgusted Layman" was always half sure he was right as to Portia's trick on Shylock, that it wasn't either law or sense. Now that the best and sweetest — as well as most mentally acute — girl in the world, the deaf and blind Helen Keller, agrees with "Your Disgusted Layman," he wouldn't give two cents to have the Supreme Court of the U. S. "affirm" him.

In a recent letter to Y. D. L. from Mr. Arthur Gilman of The Cambridge School, where Helen is studying, he writes: "She must know the meaning of 'chicane,' and the exact meaning. I showed her that Burke meant trickery, sharp practice, or a legal quibble, and referred to the means which the Americans had used to ensure to themselves the privilege of holding town-meetings after August 1, 1774, when they were forbidden. I showed her that they knew that by parliamentary usage an adjourned meeting was not a new one, but the same old one, and that by adjourning the last meeting previous to the time set as a limit, they would be able to meet and adjourn at liberty without asking permission of the royal governor. Helen saw the legal quibble at once, and exclaimed, as her mind ran back to 'The Merchant of Venice,' 'There is an instance in the trial scene where Portia successfully used a legal quibble that Bellario had taught her.'"

Now surely Mr. Westley will not defend Shakespeare as a lawyer after Helen Keller has "reversed" him?

YOUR DISGUSTED LAYMAN.

LEGAL ANTIQUITIES.

"LET this be the method of taking down judgments and committing them to writing," says Lord Bacon. "Record the cases precisely, the judgments themselves word for word; add the reasons which the judges allege for their judgments; do not mix up the authority of cases brought forward as examples with the principal case; and omit the perorations of counsel, *unless they contain something very remarkable.*"

FACETIÆ.

A PIOUS youth, when rather *balmy*,
Longed a saint in Heaven to dwell;
So 'listed in a fighting army
And found himself a sentinel.

"I CAN'T hear a suit that isn't pending," said a judge to a young lawyer who was seeking advice.

"I know it isn't pending," replied the young man, in some confusion, "but it is *about to pend.*"

IN Kentucky, as well as farther south, for some years after the late war, courage exhibited and scars received in the service of the lost cause were, as a rule, a sure passport to public office. The element of capacity being thus minimized, some brave but incompetent heroes reached positions unattainable in less troublesome times.

One of these was C. C. Having a smattering of law, stentorian lungs, and a fervid oratory, he sought and was chosen public prosecutor in the ——th district. On one occasion he was engaged in the trial of a murder case. The prisoner pleaded "not guilty," and relied on evidence showing an alibi. In closing the argument for the prosecution, C. was especially vehement. "Gentlemen of the jury," said he, "the prisoner is trying to escape the law by pleading an alibi. What is an alibi, gentlemen? If I had Bouvier's Law Dictionary I would read you the definition, but in its absence I can repeat to you the substance of it. An alibi, as I recollect it, is where a man charged with a crime proves that he was somewhere else at the very time he committed it."

TEACHER. — Johnny, why do you always begin the word murder with a large letter?

Johnny. — Because it's a capital offense.

IN the early '80's, "Jim" Schultz was justice of the peace in Twin Groves township, Nebraska. One day an attorney was exceedingly domineering in his words and actions. His honor finally gave vent to his feeling as follows: "The court will now take a recess. Mr. Attorney, you are a damned liar and a scoundrel. The court will now come to order. Mr. Attorney, if you open your head I'll fine you for contempt."

IN a slander case, two witnesses, having testified as to the plaintiff's reputation for chastity, were asked if they knew the meaning of the word chastity.

"Why, certainly," replied both witnesses, emphatically. "It means always fighting and quarreling with the neighbors."

Fact!

IN a trial in the Supreme Court before Chief-Justice Shaw, at Pittsfield, Mass., an eminent Berkshire cross-examiner asked a witness, "Where did you get the money with which you made the purchases spoken of?" The victim thundered, "None of your ——— business!" The lawyer appealed to the Judge: "Please, your Honor, are counsel to be insulted in this manner?" "Witness," said the Chief Justice, compassionately, "do you wish to change your last answer?" Witness: "No, sir, I don't!" Chief Justice: "Well, I wouldn't if I were in your place."

NOTES.

HORNBOOKS.— Hornbooks,—those leaflets containing the alphabet, the a–b, abs, a text for exorcism, the Lord's Prayer, and the Roman numerals, framed and covered with transparent horn as with glass, — with which the first lessons in reading were administered to our ancestors, have disappeared so entirely that they are hardly known except to antiquaries, yet they were common in England down to the time of George II, and were introduced into America in the seventeenth century. Mr. Andrew W. Tuer, who has written their history, says that the preservation of many of those which have come down to us is due to the tricks of little boys, who dropped the hateful things through cracks in the floor or wainscoting, to be brought to light again when the house was pulled down. The earliest hornbook known to be left, which is assigned to the middle of the sixteenth century, was found behind the paneling of a farmhouse. A hornbook called the Middleton was discovered in 1828 in the thatch of an old cottage. As spelling books came more and more into use, hornbooks became obsolete; and when they were no longer in demand it is said that a million and a half were destroyed in one warehouse. They could, however, be found in use in the country villages down into the present century; and there may be people still living who took their first lessons from them, and had scholastic chastisement administered with the backs of them. As they became scarce, specimens of them rose in value; and while the usual price of them had been a penny, three half-pence, or two-pence, a famous copy — the Bateman Hornbook — was sold at auction for three hundred and twenty-five dollars. This book was three inches and three-quarters high and two inches and seven-eighths wide, with a handle an inch long, and was covered, except the handle, with leather. The alphabet was preceded by the cross, and this was the case with most of the hornbooks. Hence the phrase, "criss-cross row." The back was stamped with a figure of Charles I, bareheaded and in armor, on horseback. At the top corner and facing the king was a large celestial crown, issuing from a cloud above his head, and in the other corner an angel's face and wings. The book bore other marks of less interest. Some of the hornbooks were costly. Queen Elizabeth gave one of silver filigree to Lord Chancellor Egerton, and others were made of ivory and bone. Finally, we come to the gingerbread hornbook, which seems once to have been a common baker's dainty. Of it Prior wrote: —

> "To Master John the English Maid
> A Hornbook gives of gingerbread;
> And that the Child may learn the better
> As he can name, he eats the Letter."

Hornbooks may be seen portrayed in pictures by the German and Dutch masters, as in Rembrandt's "Christ Blessing Little Children," and the works of Jan Steen and Van Ostade. —*Popular Science Monthly*, Jan., 1897.

THE sentence of Lady Scott for circulating libels concerning her son-in-law, Earl Russell, calls attention to the fact that there are at present in Europe quite a number of other people of title and rank undergoing more or less lengthy terms of imprisonment. Lady Gunning, widow of Sir Henry Gunning, and granddaughter of the second Lord Churchill, is serving a term of several years' penal servitude for having forged the name of her father to a number of notes. She might have escaped with a punishment less severe had the fact not been brought to light during the trial that her frauds had extended over a number of years, and that the financial necessities which had prompted her to resort to this means of obtaining money had been caused by her recklessness in betting on the races. Mrs. Osborne, wife of Captain Osborne, of the Scots Greys, who belonged by birth to the aristocratic Elliott family, was sentenced to hard labor for purloining a pearl necklace from her dearest friend. Equal severity was extended to Gwynneth Maude, granddaughter of the Earl of Montalt, for obtaining goods under false pretences. The Dowager Duchess of Sutherland, more fortunate, was exempted from hard labor and convict garb during the six months' imprisonment she recently underwent in Holloway Prison, where Lady Scott is now undergoing her punishment. The daughter of Lord Robert Montague was convicted a year or two ago of the most shocking cruelty to her children, one of whom succumbed thereto. The popular feeling was that she deserved hanging. But owing to the tremendous influence exercised in her behalf by all the relatives of the ducal house of Manchester, to which she belongs, she was let off with a term of two years' imprisonment without hard labor. In times gone by, an English duchess, namely Her Grace of Kingston, underwent imprisonment for bigamy and forgery. At the present moment there are actually relatives of the queen who are "doing time." They bear the name of Count and Countess Leiningen, and belong to the princely and sovereign house of that name. The first husband of Queen Victoria's mother was a Prince of Leiningen. While the count is wearing stripes in an English penitentiary, the countess is in jail at Vienna for a long series of crimes, including forgery, blackmail, and swindling. The Marchioness of Donegal, a peeress of Great Britain, has time and again been sent to jail, generally for brief periods, following her arrest in the streets of London for drunkenness and disorderly conduct. Baroness von Gleissenberg and her pretty daughter, the Countess Waldeck, the two Sicilian Dukes of Villarosa, and Prince Caracciolo have been imprisoned for larceny and fraud, perjury and forgery, assassination, and wife-murder.

CURRENT EVENTS.

A HORSE-CAR line to the Pyramids has been authorized at Cairo.

IN France the doctor's claim on the estate of a deceased patient has precedence.

THE muscles of a mocking bird's larynx are larger in proportion to the size of the bird than those of any other creature.

THE heroine of the time-honored children's favorite, "Mary had a little lamb," is said to have been Miss Mary Taylor, who died recently in Somerville, Mass.

QUITE lately a process has been invented by which a valuable fibre is obtained from pine needles. The needles are macerated in water to separate the fibre, which is utilized in the manufacture of cloth. It makes particularly fine underwear.

SOME doctors hold that there is more danger going from the cold outside into a hot room, than from the hot air into the cold. It is declared advisable to get heated before going out into the cold; and it is further declared that in most cases it would be more correct to speak of "catching heat" than of "catching cold."

SPURGEON said, "I never had any faith in luck at all, except that I believe good luck will carry a man over a ditch if he jumps well, and put a bit of bacon into his pot if he looks after his garden and keeps a pig. Luck generally comes to those who look after it; and my notion is it taps once in a lifetime at everybody's door, and if industry does not open it, away it goes."

THE obituary addresses delivered upon the occasion of the death of a member of Congress cost the government a good deal of money. Usually twelve thousand copies are printed, with a steel-plate por-

trait of the deceased, fifty of which, bound in full morocco with gilt edges, are for the family of the dead congressman. The cost of obituary volumes in the Fifty-First Congress was over fifty thousand dollars.

LITERARY NOTES.

AMONG the many attractive pictorial features of the Easter number of LIFE may be noted a full-page half-tone cartoon by C. D. Gibson, full pages by Hanna, Toaspern, Gilbert and Gibson, and a beautiful decorative border by Attwood, illustrating an Easter sermon by E. S. Martin. Among the literary features are a short story depicting a characteristic phase of college life, several short humorous sketches, and numerous poems by well-known writers, all in LIFE'S best vein.

THE April issues of LITTELL'S LIVING AGE contained among other papers of striking and timely interest, Mr. Gladstone's pamphlet on the Eastern question which has so aroused the attention of the English people; Max Muller's "Literary Recollections"; Francis de Pressense on the "Cretan Question"; Leslie Stephen on "Gibbon's Autobiography"; and a reply by Sir Frederick Pollock to the article on the "Hidden Dangers of Cycling," which appeared in a March number of the magazine. The publishers have purchased the serial rights to the publication of "In Kedar's Tents," by Henry Seton Merriman, author of "The Sowers." Mr. Merriman's style is direct and forcible, and his humor is delightful.

THE April number of SCRIBNER'S MAGAZINE appearing at Easter time is always particularly bright and attractive, both in contents and illustrations. Four of the cleverest draughtsmen in line work — Raven-Hill, Hatherell, Linson and McCarter — illustrate with breezy character sketches Lewis Morris Idding's unconventional article on "Ocean Crossings." Even veteran travelers will find here some things that it is good for them to know. The hints about steamship fees are eminently practical. A brief paper by W. E. D. Scott, called "Bird-Pictures," gives some of the latest advances in the art of stuffing birds in a lifelike manner. "In Mr. Howells's "Story of a Play" there is a great deal of amusing characterization. A new character is introduced as a woman "who seemed to turn the sunshine into lime-light as she passed."

"ARMENIA and its People," written by a refugee, and illustrated from photographs recently taken in the country, is the title of an unusually attractive and timely article which appears in the May number of the NATIONAL MAGAZINE.

SPECIAL features in CURRENT LITERATURE for May are illustrated articles in addition to the presence of pictures in some of the regular departments. In the "Editor's Symposium," Mr. Cable gives his readers more of patriotism than of mere literature, "Crete and Cuba," "The Patriotism of Ideas," and "Cosmopolitan Patriotism" being some of the subjects he discusses. The fiction is represented by extracts from the much-talked-of recent publications, Ibsen's play, "John Gabriel Borkman," and Olive Schreiner's "Trooper Peter Halket of Mashonaland."

THE May number of HARPER'S MAGAZINE consists of a variety of interesting contributions. There is an article on "Cross-Country Riding," by Caspar Whitney, with illustrations by C. D. Gibson. George W. Smalley, who for so many years acted as London correspondent for the "New York Tribune," contributes a paper on "English Country-House Life." Dr. Henry Smith Williams discusses the "Geological Progress of the Century"; and in "The Hundred Years' Campaign" Professor Francis N. Thorpe presents a study of American political history.

IN his article on the "Principles of Taxation," in APPLETON'S POPULAR SCIENCE MONTHLY for May, the Hon. David A. Wells traverses the right of Government to stimulate special industries by means of bounties, and discusses the limitation of the power of taxation to articles exclusively within the territorial jurisdiction of the taxing power. In this number, also, Prof. W. Z. Ripley discusses the stature of the populations of Europe as related to race and other factors, and the history of the "Bubonic Plague" is told by Prof. Victor C. Vaughan, who also considers the conditions that contribute to its spread, and presents the results of the latest studies of the bacillus by which it is supposed to be engendered.

MCCLURE'S MAGAZINE for May gives a version of the story of the pursuit, capture and death of J. Wilkes Booth, the assassin of Lincoln, which promises to be the first really full and accurate one. It is written by a relative of Colonel Baker and Lieutenant Baker, the detectives who organized and led the pursuit, effected the capture, and disposed of Booth's body after his death. General Carl Schurz reviews the second administration of Grover Cleveland. The article is embellished with a new portrait of Mr. Cleveland, taken for this special use. The story of General Grant's rebuffs and disappointments in his first efforts to get employment in the war is told by Hamlin Garland, from new documents and material. This number also contains a series of life portraits of Daniel Webster — the "godlike Daniel," one of the few great men who looked every inch of their greatness.

WHAT SHALL WE READ?

This column is devoted to brief notices of recent publications. We hope to make it a ready-reference column for those of our readers who desire to inform themselves as to the latest and best new books.

(Legal publications are noticed elsewhere.)

THE general impression concerning the Constitution of the United States is that it was the invention of the Convention which framed it, but Mr. Sydney George Fisher, in his very interesting work on the *Evolution of the Constitution*,[1] traces back through previous American documents in Colonial times every material clause of it. These documents consist of twenty-nine Colonial charters and Constitutions, seventeen Revolutionary Constitutions, and twenty-three plans of union, — in all sixty-nine different forms of government which were either in actual or attempted operation in America during a period of about two hundred years, from 1584 to 1787. The author traces back the several clauses of the Constitution through all the previous documents, with quotations from each document, showing the gradual development, the experience that was acquired, or the experiments that were made. The book is one of great interest.

Siam on the Meinam,[2] by Maxwell Sommerville, is the result of the author's trip to the jungle of Ayuthia, and was called forth by the fact that Mr. Sommerville found on asking for a book on Siam, when he arrived at Bangkok, that no such book existed. His account of the manners and customs of the Siamese is interestingly and succinctly given, and the romances also embody many strange ceremonials and laws. The book is beautifully and lavishly illustrated. The frontispiece is a map of Siam.

Mr. Dobson, in his *Eighteenth Century Vignettes*,[3] has given us a most delightful and entertaining book. One wonders as he reads how the author could possibly have become possessed of such a number of facts concerning the dead and gone of a hundred and more years ago. He brings back a host of most interesting individuals from the misty past and introduces them with a familiarity that makes one feel that they must have been his lifelong friends. Altogether, the book is one which cannot fail to charm and delight the reader.

There is so much destroying of the beliefs of our childhood in the heroes of the world by the light thrown on them in the present day, that it is a relief to find that *The True George Washington*,[4] in spite of the fact that he is presented to the reader as he really was, as is shown from his own letters and the opinions and letters of his friends and contemporaries, can still be thought of as a great man, a human one, to be sure, but still a man who conquered himself, who served his country for his country's good and not for his own, and who was upright and sincere. The book is pleasantly written, well put together, and makes an attractive and valuable addition to the vast amount of material concerning the Father of his country, with which we have been favored of late.

Among the forthcoming works to be published by Little, Brown & Co. is a new historical romance by George R. R. Rivers, author of "The Governor's Garden," entitled *Captain Shays, a Populist of* 1786. The scenes of the story are chiefly laid in Boston and Petersham, Massachusetts, and the motive is the discontent of the farmers, and the noted "Shays' Rebellion" which arose from it.

The first volume of the new illustrated edition of Francis Parkman's Histories will be published by Little, Brown & Co., in May. The edition is to be a limited one, and will be printed from entirely new type. It will be in twenty medium 8vo volumes, and will be superbly illustrated with one hundred and twenty photogravure plates, consisting chiefly of authentic portraits and contemporary prints.

A story which will attract much attention, from the fact that it is written quite out of the ordinary style of novelists, is *The Day of his Youth*,[5] by Alice Brown. A young boy, whose mother is dead, is taken by his father to the woods and there brought up in solitude. He develops into a noble manhood through the strong influence of love, the suffering produced by treachery in love, and by unselfish devotion to humanity. The story is told by the means of a series of letters, and the narration is wonderfully graphic. The book will surely become very popular.

[1] THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES, showing that it is a development of progressive history and not an isolated document, struck off at a given time, or an imitation of English or Dutch forms of government. By Sydney George Fisher. J. B. Lippincott Co., Philadelphia, 1897. Cloth, $1.50.

[2] SIAM ON THE MEINAM, from the gulf to Ayuthia, together with three romances, illustrative of Siamese life and customs. By Maxwell Sommerville. J. B. Lippincott Co., Philadelphia, 1897. Cloth. $3.00.

[3] EIGHTEENTH CENTURY VIGNETTES. By Austin Dobson. Dodd, Mead & Co., New York, 1897. Cloth.

[4] THE TRUE GEORGE WASHINGTON. By Paul Leicester Ford. J. B. Lippincott Co., Philadelphia. Cloth. $2.00.

[5] THE DAY OF HIS YOUTH. By Alice Brown. Houghton, Mifflin & Co., Boston and New York, 1897. Cloth. $1.25.

NEW LAW-BOOKS.

A TREATISE ON THE LAW OF DEEDS, their form, requisites, execution, acknowledgment, registration, construction and effect. Covering the alienation of title to real property by voluntary

transfer, together with chapters on tax deeds and sheriff's deeds. By ROBERT T. DEVLIN. SECOND EDITION, revised and enlarged. Bancroft-Whitney Co., San Francisco, 1897. Law sheep. Three vols., $16.50.

The first edition of this treatise, issued some ten years ago, received the well-deserved endorsement of the legal profession, and was at once recognized as a standard authority upon the law of deeds. This second edition has been carefully revised by the author, and many additions have been made to both text and notes. In fact, so many new cases are considered, as to necessitate the extension of the work to three volumes. As a practical and exhaustive exposition of the law relating to the transfer of title to land, we heartily commend this work to our readers.

THE LAW OF RECEIVERSHIP as established and applied in the United States, Great Britain and her colonies, with procedure and forms. By JOHN W. SMITH of the Chicago Bar. Lawyers' Co-operative Publishing Co., Chicago, 1897. Law sheep, $6.00.

Mr. Smith has given us a really admirable treatise in this work on receivership, one which will well stand the test of comparison with the several treatises upon the same subject which are already in the field. The arrangement is methodical, and the notes very full and exhaustive. Considerable space is given to a set of forms which are invaluable to young and inexperienced practitioners. The author states that he has personally examined every case cited, and every effort has been made to include all reported cases down to January 1, 1897.

THE YEARLY ABRIDGMENT OF REPORTS. Being a full analysis of all cases decided in the English Superior Courts during the legal year 1895–96, so far as reported to the end of December, 1896, in all the reports, together with a selection from the Scotch and Irish Reports. By ARTHUR TURNOUR MURRAY, B. A., of Lincoln's Inn. Butterworth & Co., London, Eng., 1897. Cloth, $4.50.

This book will be appreciated by American lawyers who desire to keep fully in touch with recent English decisions. Unlike an ordinary digest, this work of Mr. Murray's is not a mere compilation of existing head notes, but consists of an analysis, the result of careful perusal, by the editor himself, of every reported case. It also differs from other digests in that *all* cases cited, whether by judge or counsel, are included.

EXECUTIVE POWERS IN RELATION TO CRIME AND DISORDER, or The Powers of Police in England. A short treatise on the executive powers which may be exercised by private citizens and official persons for the pursuit of crime and maintenance of public order. By THOMAS W. HAYCROFT, B. A., of the Inner Temple. Butterworth & Co., London, Eng., 1897. Cloth, $1.80.

The object of this book is to present in a clear and concise manner the various executive powers, whether derived from the common law or from statute, which may be exercised for the pursuit of crime or for the maintenance of public order. The duties of justices, coroners, constables, etc., as well as private citizens, are clearly set forth. The book is one which may be read with profit by everyone.

DIGEST OF INSURANCE CASES, Vol. IX, for the year ending Oct. 31, 1896. By JOHN A. FINCH of the Indianapolis Bar. The Bowen-Merrill Co., Indianapolis and Kansas City, 1897.

This volume contains all the decisions of the United States Supreme, Appellate and Circuit Courts, and of the Appellate Courts of the various states and foreign countries, in any manner affecting insurance companies; also references to annotations and to leading articles on insurance in the law journals. 835 cases are reported. The original plan of giving the abstract of each case in full, under one title, has been continued in this volume.

COMMENTARIES ON THE LAWS OF ENGLAND. In four books. By SIR WILLIAM BLACKSTONE. With notes selected from the editions of Archbold, Christian, Coleridge, Chitty, Stewart, Kerr and others; and in addition, notes and references to all text-books and decisions wherein the Commentaries have been cited, and all statutes modifying the text. By WILLIAM DRAPER LEWIS, Ph.D. Rees Welsh & Co., Philadelphia, 1897.

No more fitting work could have been chosen by the publishers with which to commence their "Educational Law Series" than Blackstone's "Commentaries," and they have been fortunate to secure the services of Prof. Lewis, dean of the Faculty of the Law Department of the University of Pennsylvania, as editor. As a result, we have one of the most satisfactory editions of the great commentator's work which has yet been published. "The Educational Law Series" is published a volume each month, and the subscription price is ten dollars a year.

C Doe

The Green Bag.

VOL. IX. No. 6. BOSTON. JUNE, 1897.

CHIEF-JUSTICE CHARLES DOE.

BY SAMUEL C. EASTMAN.

CHARLES DOE was born April 11, 1830, and died suddenly, while on his way to attend a law term of the Supreme Court, on March 9, 1896. He was graduated at Dartmouth College in 1849. He studied law with Daniel M. Christie at Dover and at Harvard Law School, practiced law in Dover after his admission to the bar, was county solicitor for two or three years, was assistant clerk and clerk of the senate of New Hampshire, was appointed judge of the Supreme Judicial Court, September 23, 1859, was legislated out of office by a change of the court in 1874, and, after another legislative change of the court, was appointed chief justice of the Supreme Court, July 22, 1876, which latter office he held till his death. His first opinion appears in 39 N. H. 211, Robinson *v.* Aiken, and consists of twelve lines; his second opinion is the next case, Pittsfield Bank *v.* Clough, and is expressed in two lines. His last opinion is not yet published.

It will be seen that, for over thirty-four years, he was a member of the court of final jurisdiction of the State of New Hampshire. There were no inferior courts in New Hampshire during his term of service. The judges of the Supreme Judicial and of the Supreme Court held the trial terms in the different counties and sat together in the law terms for the corrections of errors. Prior to his appointment as chief justice, Judge Doe, in common with his associates, presided at the trial terms, which were allotted to him. Not long after his promotion, he was excused by his associates from holding trial terms, but he sometimes took the place of one of them who was ill and generally, perhaps always, was one of the two judges required by the State law to be present in trials of persons accused of murder.

He was a Democrat at his entrance on his career, but became a Republican not long before his appointment as judge. After that appointment, he ceased to intervene publicly in political affairs, but it was pretty well understood that he exerted a great influence, sometimes by editorial contributions to the press, the authorship of which was not made public, and more frequently by personal interviews with leading politicians and by liberal contributions to campaign funds. When any matter that concerned the court, either as to its personnel, when a vacancy was to be filled by the governor and council, or when some proposed change was before the legislature, his influence was always felt, though not always seen.

It is said that in college he was not a diligent student. If this is the fact, he certainly changed his habits when he applied himself to law. He was always indefatigable in his researches into the past history of any question, and was not always inclined to follow established precedents when he believed that they were not founded on sound and valid reasons. During his term of office, largely owing to his influence, many of the decisions in the earlier reports have been modified, limited and overruled. Some of his own dissenting opinions have been finally adopted as the law and have obtained general acceptance.

As suggested above, Judge Doe was not a slave to precedent, but, on the other hand, had a passion for reform, sometimes, as has been thought by others, carrying his ideas to such an extreme as to be almost a hobby. By far the larger part of what he accomplished in this direction is accepted as beneficial, and very little will be undone in all probability. He was not, however, without the defects of men of his temperament, and the pendulum sometimes swung in both directions. Thus he wrote some of the briefest opinions to be found in the New Hampshire Reports, some of which are remarkable for their terse and condensed expressions and others equally remarkable for what is omitted. He also wrote the longest opinions in the series, some of which lack clearness and pith from the evident too great care taken to eliminate all sources of error by approaching the subject from all possible directions.

Under the influence of one of these moods and by personal supervision of each case, one volume of the reports contains chiefly brief opinions. The two notable exceptions in the volume are his own opinions. The rule of extreme brevity did not prove to be acceptable to the bench or the bar, and in the succeeding volumes there is no indication of the extraordinary use of the "blue pencil."

He was always anxious to have his opinions exactly right. Some of them were rewritten many times before he was satisfied with the results. It was this trait which made him withhold many opinions from the press, thereby delaying the publication of the reports till they are now several years in arrears.

When Judge Doe came to the bench, the old common law pleading, modified only by the statute allowing a defendant to annex to a plea of the general issue a brief statement of his defense in lieu of a special plea, was the law of the State. Half the labor of the bar was bestowed upon questions of pleading, and the lawyer who mistook his form of action sometimes lost his case from that cause alone. The merits of the case were often wholly lost sight of and never brought to trial.

Under the leadership of Chief-Justice Bell, a few simple rules swept away the unnecessary verbiage of the equity pleading. Justice has hardly been done to the great improvement that was effected by the reform thus inaugurated. The rules are few and readily understood and the examples given of what bill, plea and answer should be are masterpieces of concise pleading, from which, however, nothing essential has been omitted.

It remained for his successors, influenced largely by Judge Doe, to perform a like service for the common law practice. He began by amplifying the power of the statute authorizing amendments. On a demurrer, because the wrong form of action had been selected, he inquired of the contestant what form he would suggest as correct. "Very well," he said, on receiving the answer, "Let an amendment be filed, making it as suggested, and we will go on with the case." The court suggested one thing after another: that a declaration at law could be amended into a bill in equity; that a bill in equity could be added to the counts at law by amendment, when necessary to prevent a failure of justice, or the two could be joined originally. Step by step, the change went on until by the combination of the reform in the equity practice and the decisions modifying the common law pleading, the New Hampshire practice now has all the flexibility of the code practice without the rigidity of the hampering statutes. It is all controlled by the court, and all debate as to the meaning of a statute is avoided. All that is needed is for the plaintiff to complain that the defendant has done him some wrong for which he is entitled to relief, and secure service of the writ, and the court will see that he does not fail for lack of a chance to make a legal statement of his claim.

Judge Doe liked to remind the bar that substantial justice in a speedy, inexpensive form was the chief duty of the court. The verdict of the bar, at the present time, is that this reform has been a successful one. Some of the same results have been reached in other States by legislative enactments, but in none by rules and decisions of the court, as in New Hampshire.

Before his day, the practice of oppressive, unreasonable and often insulting cross-examinations had been very common. Judge Doe resolved to break it up and to secure civil treatment for all who were called upon to aid in the administration of justice. Daniel M. Christie, with whom he studied law, and one of the strongest and best known lawyers of his generation in the State, was one of the greatest offenders in this direction. It fell to Judge Doe to preside at a trial term in Dover quite early in his career as a judge. When he saw that Mr. Christie was beginning to abuse a witness, he took advantage of the first flagrant breach of proper questions to say to the witness, "You need not answer that question." Mr. Christie quickly comprehended the criticism and desisted. Gen. Marston, in the case of a like rebuke, gathered up his papers, ejaculated "What a damned fool!" and left the room and the case. He returned after the adjournment and a truce was declared, which proved to be a permanent peace. The old license of abuse has largely disappeared, though not without obstinate resistance on the part of some of the older and more aggressive members of the bar, as already suggested.

Judge Doe did many things in his way of working out his rule of substantial justice that men of less vigorous intellect and less self-reliance would not have ventured upon.

Not many years after his appointment to the bench, Judge Doe held a trial term in Grafton County. At that time there was no other bar in the State where trials were conducted with greater vigor and tenacity. Both the Binghams, Judge Rand, Harry Hibbard, and the present Chief-Justice Carpenter were among the leaders engaged in almost every case. Harry Bingham and Judge Carpenter were both well grounded in the common law, and doubtful, to say the least, of the propriety of any encroachment upon its well-established rules. In one of the school districts there had been a very bitter fight as to whether a schoolhouse should be repaired or a new one built in another location. The views of the economical party prevailed, and the school meeting, after an angry debate, voted to repair the old house. The minority, who, strange to say, were the men of wealth and the heavy taxpayers, determined it should not be done, and assembled and demolished the old house in broad daylight, not, however, without resistance. A large number of the destroying party, prominent citizens among them, were indicted for riot. The county solicitor, the present Chief-Justice Carpenter, with whom was associated Harry Hibbard, moved for a trial. A verdict of guilty was almost sure to follow. Of course the sending to jail of so many persons out of one small school district would have created a feud which would have lasted for years. Judge Doe, who had informed himself of the facts, quietly, as if it were an ordinary occurrence, without waiting for the counsel for the respondents to say anything, said that he had considered the case and thought that substantial justice would best be done by sending it to a referee to assess the value of the property destroyed, directing the referee to hear only one witness on each side, whom he named in the order; to determine who had participated in the unlawful act and to apportion the cost between them; when the damages were paid to the school district, the cases were to be dismissed. He offered to allow the State and the defendants to agree on the referee, but, as the solicitor would not agree, the referee was appointed by the court. The order was in his own handwriting and placed on file.

Although the court would not hear the

solicitor nor his associate when they attempted to protest against this unheard-of disposition of a criminal case, the refusal did not prevent the usual debate at "the tavern," frequented alike by the judge and the bar. Harry Hibbard, who possessed an unusual power of invective, walked up and down his large room, sympathizing with the solicitor and denouncing the act. All at once he stopped and exclaimed, "After all, there is a moral sublimity about that fellow's utter disregard of law which I must say commands my admiration."

At the next term, when the report came in, Judge Nesmith held the term. The county solicitor moved to reject the report and to proceed to trial, urging the illegality of the reference. Harry Bingham, who appeared for the respondents, followed. He was evidently hampered by his convictions and views of the law, but he made the best defense of the order that he could: that, under ordinary circumstances, an indictment could not be referred, but that, in this case, it was the best thing that could be done for all concerned.

Judge Nesmith was plainly embarrassed also. He finally said that, while he should have hesitated about making such an order, still the order was in the handwriting of Judge Doe, and it was a delicate matter to interfere with the orders of one of his brethren; he would make no ruling at all, but leave the case as he found it. "In short," he added, "I wash my hands of the whole matter." The result was probably beneficial to the school district, and is an example of what may be done by a judge whose doctrine is "substantial justice," provided proper discretion is always used.

It should not be forgotten that, under the common law rule in New Hampshire, the State has no exception, and, as the result was satisfactory to the respondents, there was no way of correcting the error, if it be so considered, except by impeachment.

The case has a sequel, which may as well be told here. Judge Doe always strove to prevent a trial for murder, as will be suggested later. At the trial of Palmer for murder, in Portsmouth, at the conclusion of the opening by the State, Gen. Gilman Marston, the counsel for the respondent, whose peculiarities were no less marked than were those of the presiding justice, was called to the bench. Judge Doe said, "You have heard the statement of the solicitor."

"Yes," said General Marston.

"Can he prove what he says he can?"

"I suppose he can prove some of it."

"Well," added Judge Doe, "don't you think this is a case to settle?"

"Settle," came the answer quickly and no longer in an undertone, "we can't settle, but you might refer it."

In a divorce case, tried by the court in New Hampshire, a hearing was fixed before the Judge at his room in the hotel. Judge Doe, on coming out from dinner, saw some persons waiting whom he thought might be the petitioner and witnesses. Finding on inquiry that this was so, he invited them to his room, questioned them to his satisfaction, and then told them they would not be needed any more and could go home. Shortly after, the counsel came in and apologized for his delay because he could not find his witnesses. "Oh," said Judge Doe, "I have seen them and granted the divorce." It is needless to add, perhaps, that there was no appearance for the defendant.

At the close of a trial term in Merrimack County, when there had been one or two closely contested cases, in which the sympathies of the judge pretty plainly appeared, there was a general going over of the docket. The day was well advanced and the gas was lighted. Judge Doe had caused an entire change in the arrangement of the furniture, and the room had assumed a guise which it never had before, nor since, and this may have contributed to the general vague sense of uneasiness. The usual hour of adjournment had arrived, but Judge Doe gave no

sign of stopping the call of the docket. One member of the bar, in whose favor various orders were made, manifested his content by a smiling face. The others were irritated to a greater or less degree. At length one member rose, and with tears in his eyes protested against a ruling. Almost immediately there followed in another case an exception with a vehement speech of ten minutes in length, directed chiefly at the court. In the same case, Colonel Tappan, afterwards and for many years attorney general of the State, joined in the denunciation of the rulings and closed by saying with great emphasis, "I protest against the action of the court." Judge Doe listened to the whole, which lasted perhaps half an hour, apparently unruffled, and, at the close of Colonel Tappan's protest, said quietly: "Mr. Clerk, enter Colonel Tappan's protest and any other motion or protest he desires to make, and enter them all overruled."

An amusing instance of his indifference to what was said about him and an illustration of his readiness occurred when a member of the bar, beginning his argument to the jury, was stopped by Judge Doe, who said, "You cannot argue that; there is no evidence in the case to sustain it." Twice or three times, the counsel started off with new suggestions and was stopped by almost the same language. Apparently at a loss, the counsel turned to the jury and said in a slow, solemn manner, "I have argued cases in this court room before Judge Richardson and before Judge Parker, and,"—when Judge Doe interrupted him with, "Proceed, Brother A., you are in order now."

Judge Doe's opinions occupy many pages in our reports. His style cannot easily be mistaken, and anyone at all familiar with the New Hampshire Reports cannot fail to recognize that many of the opinions bearing the name of some other judge must have emanated in a large degree from the pen of the Chief Justice. A brilliant and striking instance is the case of State *v.* Sanders, attributed to Judge Allen. Were it not for the astounding fact recorded at the end of the opinion that "Doe, C. J., does not sit," no one would hesitate to say that every word emanated from the mind of that eminent jurist.

Judge Doe exerted a great and commanding influence upon his associates. A strong man, a quick reasoner, his mind grasping the salient points as if by intuition, he naturally led rather than followed. These intellectual qualities generally made others yield to his judgment, especially when joined to them was the capacity of expressing his views clearly. When he elaborated an opinion, the result was sometimes wanting in lucidity, but his oral utterances were clear and to the point.

He did not always try to accomplish his purpose in the same way. He understood men and had different ways of dealing with them. At one conference with his associates, a difference of opinion gave rise to a long and vigorous debate between one of the judges and his associates. Judge Doe sat quietly listening and said nothing. At length, he said, to the great amazement of the majority, who felt sure of their ground: "I agree with Brother X. Let the majority opinion decide the case, and Brother X., you write the dissenting opinion."

No more was said at the time. A day or two later, when there was a lull in the consultations, Judge Doe turned round to Judge X. and said, in his usual pleasant manner, "X., I got to thinking over the Smith *v.* Jones case last night, and this occurred to me and it rather troubled me; I could not quite see my way out. What do you say to it?" And then he made a suggestion that was vital, but which had not been alluded to in the previous debate. Judge X., taken unawares and without the excitement of an attack from hostile sources, floundered about and had no answer ready. "I am afraid, Brother X.," said Judge Doe, "we shall have to give up that case," and

no more was heard of the dissenting opinion.

Of Judge Doe's personal peculiarities much has been said. He was indifferent as to his dress, regarding such trifles as polished boots as matters of no consequence. He was apparently annoyed by forms, preferring to say at the close of a session, "We will take a recess till to-morrow morning," rather than have the sheriff adjourn the court.

As has been said, he often presided at trials for murder. He evidently disliked the morbid curiosity which crowded the court room on such occasions and always endeavored to secure such a disposal of the case as would render a trial unnecessary.

Just before the trial of Hodgman for killing his wife at Greenville, Judge Doe, who was to sit as one of the two judges, called on Hon. Charles H. Burns, who was for the defense, and told him that his client was in great danger of being convicted for murder in the first degree, and that he had investigated the case and thought this ought not to be, and urged a plea of guilty in the second degree. Mr. Burns replied that his client was an intelligent man, and that his father was present and he would consult them. The young man explained to them the circumstances and claimed that the gun which caused the death of the wife, went off by accident, and refused to admit that he shot her by design, even to save his life. Mr. Burns was convinced of the truth of his statement, which need not be further explained, and told Judge Doe that his client would not assent to the proposition.

In the meantime, Judge Doe had represented to Mr. Barnard, the attorney general, that he was in danger of a verdict of not guilty, and urged him to accept a plea of guilty in the second degree, which Mr. Barnard likewise refused to do.

Neither of the two counsel knew of the conference with his opponent.

The trial took nearly two weeks. The jury went out in the afternoon and had not agreed at bedtime. Mr. Burns got up about five o'clock and started for the court house to see if he could hear anything, when he met Judge Doe. Judge Doe said: "The jury have not agreed, and won't agree, and might as well be discharged. Your client ought to plead to something, and I will give him five years. I will discharge the jury and let him change his plea. He ought to be punished, but I don't think he intended to kill his wife, but he did kill her."

Mr. Burns remonstrated against discharging the jury, and said it would be unprecedented to call in a jury at five o'clock in the morning and discharge them; that, if they did not agree by nine o'clock, it would be time enough to discharge them and talk about a compromise.

"Have you heard from the jury?" said Judge Doe. "Not a word. I don't want to hear from the jury. I have seen you. I shall protest against bringing in the jury now."

At this point, the sheriff came in and told them that the jury had agreed, and from his manner it was apparent that the verdict was an acquittal.

A short time after, Judge Doe sent a letter for Hodgman to Mr. Burns, in which in a very kind manner he gave him advice as to his future life.

The trial of the Almy case attracted a great deal of attention. Almy was indicted for killing Miss Warden at Hanover. The act was committed with a revolver, under circumstances that excited the public to an unusual degree, and was followed by the remarkable hiding by Almy in the barn owned by Miss Warden's father. Under the New Hampshire law, if the accused pleads guilty to an indictment for murder, it is the duty of the court to try the question whether it is in the first or second degree, the punishment for the former being death by hanging and, of the latter, imprisonment only.

The trial was in November, and in very cold weather. There was a great deal of

interest occasioned by the peculiar circumstances of the case, and the court room was besieged. Judge Doe ordered the windows taken out of the court room, so that there was a free access for the outdoor air. He allowed all present, who chose, to wear their hats, and everybody present wore overcoats. He himself wrapped a coarse blanket about his legs.

When the trial was nearly through, Almy expressed some fear that, if the finding of the two judges was that he was only guilty of the second degree, he would be lynched. Judge Doe caused him to be asked if he would waive the right to be present when the sentence was announced. Almy gladly assented and, in consequence thereof, before anyone of the crowd had any knowledge of the intended departure, he was well on his way to Concord.

The court found Almy guilty of the first degree and handed the sentence of death to the clerk, directing that a certified copy be read to Almy in the State Prison at Concord, which was subsequently done.

Unquestionably, the idea of the chief justice was to effect another reform in the procedure of the State, and thereby avoid the sensational scene, so eagerly sought for by many persons of morbid appetite. That the Supreme Court of the State would have sustained this ruling, and held that the accused could waive the antiquated form of English law, which required that he should be asked what he had to say why sentence should not be pronounced, at a time when nothing that he could say would have any effect, as well as waive a jury trial by pleading guilty, there is no doubt. Indeed, there is no reason to suppose that Almy had any desire to raise that question. But the decision of the Supreme Court in Bell *v.* United States, 140 U. S. 118, had undoubtedly escaped Judge Doe's notice. When it was brought to his attention, after some effort to induce the counsel for Almy to move for a rehearing, the attorney general filed a motion to bring the prisoner into court again, the term not having been finally adjourned. This was done and, after a rehearing, which had been asked for by the defense after the order was made to bring him in, the prisoner was sentenced anew with the usual formalities and subsequently executed. A paper written by Judge Doe, in which he analyzed the evidence and showed how the result was reached by the court, was given to the counsel for the defense, and shows very clearly the working of his mind.

Although Judge Doe was a man of great quickness of perception, usually preceding, rather than following, the words of the person addressing the court, he listened with great patience and apparent close attention to the arguments on questions of law. He took copious notes during oral arguments, often to the great satisfaction of the counsel, who supposed that his points were appreciated. His notes, which he always preserved with the papers in the case, were not, however, simply a statement of the suggestions of counsel, but very frequently, when he did not assent to the propositions, there would follow his answer to the argument prefaced by, "Doe says." He did not, however, interrupt counsel in argument in a way calculated to confuse, though he would sometimes make a suggestion intended to direct the argument to what he regarded as a vital point.

He claimed to be indifferent to the opinion of others and was wont to declare that he never read the newspapers. Probably this was "a figure of speech," as it would not do to presume on his ignorance of the important events of the day. He was not a reader of current literature, but on any subject on which his duties as a judge required him to be informed he was sure to be master of all that was essential before he announced his result. It is said that he devoted six months to the study of theology before writing his opinion in Hale *v.* Everett.

As has been said already, when he desired,

he could be terse and pointed in his expressions. Perhaps this article could not be brought to a more appropriate close than by quoting his will in full. Not more than three or four words could be omitted, and yet it expresses plainly his intention. It should be added that the first clause is made necessary by a statute of New Hampshire.

"I, Charles Doe of Rollinsford, N. H., make this my last will and testament.

1. I give and bequeath to each of my children and grandchildren, living at the time of my decease, the sum of one dollar.

2. I give, bequeath and devise to my wife, Edith H. Doe, all the rest and residue of my estate, real and personal.

3. I appoint my said wife, Edith H. Doe, executrix of this will and direct that she shall be exempt from giving a bond as such executrix.

Witness my hand and seal this sixteenth day of February, 1892."

A MODERNIZED MYTH IN COURT.

By William Barber.

IN the year 1857 it became necessary to take my deposition *de bene esse* in the city of New York as a witness in the Parish will case. I knew nothing of the matter in issue, but my testimony was required for the purpose of impeaching, on a collateral point, one of the witnesses for the proponents of the disputed codicils. Mr. O'Conor, the leading counsel, on behalf of the contestants, desired to see me prior to my examination, and in order that our interview might be free from interruption, it was arranged that Mr. Robert J. Dillon, with whom I had been previously in communication respecting the case, should join me at Mr. O'Conor's house, and that we should dine there together. During dinner the conversation naturally turned on the subject matter of the litigation. It appeared from Mr. O'Conor's statement, that Mr. Parish, the testator, a wealthy retired merchant, was, in the year 1849, stricken with paralysis, which deranged his intellect and reduced him to a condition of utter dementia from which he never recovered, though he survived the attack for six years. That after this attack he never uttered a distinguishable word, never wrote a syllable, and, though a dictionary was placed at his service that he might, by referring to it, utilize it as a substitute for vocal language, he never used it. That alphabetical letter blocks provided for the same purpose, proved equally unavailing. That his only vocabulary, if such it could be called, consisted of two inarticulate sounds, accompanied at times by incomprehensible gestures, and that his whole demeanor indicated a total absence of intelligence, yet that while in this condition two codicils had been added to his will giving to his wife a much larger interest in his property than the very generous provision he had made for her in that instrument which was executed when he was unquestionably of sound and disposing mind. That she was the only authoritative interpreter of the sounds and signs which he was in the habit of making, and her interpretation of these supposed symbols of his thoughts and wishes was always such as to create a favorable impression of his intelligence on the minds of various highly respectable and influential visitors who were permitted to see Mr. Parish and to receive his alleged communications through the medium of her interpretation, and who subsequently appeared as witnesses for the proponent. Thus, if the president of the Bible Society, having been presented to Mr.

Parish, was informed by Mrs. Parish that what he had just heard and seen was an expression of Mr. Parish's desire to give fifty dollars to the society, and that when an announcement was made under like circumstances to the rector of Grace Church, that Mr. Parish had intimated a wish to contribute liberally to the "building fund," each of these gentlemen would naturally be inclined to take a favorable view of Mr. Parish's mental capacity. That in the preparation and execution of the two codicils this faculty of interpretation was very largely and liberally invoked — that Mrs. Parish would suggest to the testator any gift she desired, and if he nodded assent, very well, down it went into the codicil. If he shook his head, *dissentiente*, it was laid aside and brought up again, and so on, until he assented.

I remarked that Mr. O'Conor's narrative reminded me of the story of the "Professor of Signs." He inquired what the story was, and I then narrated the substance of the anecdote which will be found below. Mr. O'Conor said at its close, "That just fits our case. Where can I find it?" I told him that I had read it, when a boy, in "Chambers' Journal," and that it would be found in one of the volumes between 1836 and 1840.[1]

On the argument of the case before the surrogate (5 vol. Parish Will Case, p. 461), Mr. O'Conor, after commenting on the interpretative process above referred to, said, "My friend, Mr. Brady, will mention a good illustration of this language of signs"; whereupon James T. Brady read as follows: —

"TWO WAYS OF TELLING A STORY."

"King James VI, on removing to London, was waited on by the Spanish ambassador, a man of erudition, but who had a crotchet in his head that every country should have a professor of signs to teach him and the like of him to understand one another. The ambassador was lamenting one day, before the king, this great desideratum throughout all Europe, when the king, who was a queerish sort of man, says to him: 'Why, I have a professor of signs in the northernmost college in my dominions, namely at Aberdeen; but it is a great way off, perhaps six hundred miles.' 'Were it ten thousand leagues off, I shall see him,' says the ambassador, 'and am determined to set out in two or three days.' The king saw he had committed himself, and writes, or causes to be written, to the University of Aberdeen, stating the case and desiring the professors to put him off in some way, or make the best of him. The ambassador arrives, is received with great solemnity, but soon began to inquire which of them had the honor to be professor of signs; and being told that the professor was absent and would return nobody could say when, says the ambassador, 'I will await his return though it were twelve months.' Seeing that this would not do, and that they had to entertain him at great expense all the while, they contrived a stratagem. There was one Geordy, a butcher, blind of one eye, a droll fellow, with much wit and roguery about him. He is got, told the story, and instructed to be a professor of signs, but not to speak on pain of death. Geordy undertakes it. The ambassador is now told that the professor of signs would be at home next day, at which he rejoiced greatly. Geordy is gowned, wigged, and placed in a chair of state in a room of the college, all the professors and the ambassador being in the adjoining room. The ambassador is now shown into Geordy's room, and left to converse with him as well as he could, the whole professors waiting the issue with fear and trembling. The ambassador holds up one of his fingers to Geordy; Geordy holds up two of his. The ambassador holds up three; Geordy clenches his fist and looks stern. The ambassador then takes an orange from his pocket, and holds it up;

[1] Chambers' Edinburgh Journal for 1836, p. 88.

Geordy takes a piece of barley cake from his pocket and holds that up. After which the ambassador bows to him, and retires to the other professors, who anxiously inquire his opinion of their brother. 'He is a perfect miracle,' says the ambassador; 'I would not give him for the wealth of the Indies.' 'Well,' say the professors, 'to descend to particulars.' 'Why,' said the ambassador, 'I first held up one finger, denoting that there is but one God; he held up two, signifying that there are the Father and Son; I held up three, meaning the Holy Trinity; he clenched his fist, to say that these three are one. I then took out an orange, signifying the goodness of God, who gives his creatures not only the necessaries but the luxuries of life; upon which the wonderful man presented a piece of bread, showing that it was the staff of life and preferable to every luxury.' The professors were glad that matters had turned out so well; so having got quit of the ambassador, they next got Geordy, to hear his version of the signs. 'Well, Geordy, how have you come on, and what do you think of yon man?' 'The rascal,' said Geordy, 'what did he do first, think you? He held up one finger as much as to say, you have only one eye. Then I held up two, meaning that my one eye was perhaps as good as both his. Then the fellow held up three of his fingers, to say that there were but three eyes between us; and then I was so mad at the scoundrel that I *steeked my nieve*, and wanted to come a whack on the side of his head, and would ha' done it too but for your sakes. Then the rascal did not stop with his provocation there, but, forsooth, takes out an orange, as much as to say, your poor beggarly country cannot produce that. I showed him a whang of a bear bannock, meaning that I did na' care a farthing for him or his trash neither, as long as I hae this! But by a' that's guid,' concluded Geordy, 'I'm angry yet that I didna' thrash the hide of the scoundrel!'

"So much for signs, or two ways of telling a story."

"McDiarmid's Scrap Book" is given as the source from which the above is taken. I only recently discovered that this amusing story, as it appears in its comparatively modern garb, with various changes introduced into the original narrative, and various incidents added to it, was plagiarized in substance from the old civilian Accursius, one of the commentators of the *corpus juris civilis*, who lived in the twelfth century.

In treating of the origin of the Twelve Tables of the Roman Law, he tells us of the appointment of ten envoys (the decemvirs) by the Roman People, who were directed to proceed to Athens and there obtain a copy of the laws of Solon. On their arrival at Athens the Athenians were unwilling to permit them to do so until they had first ascertained if the Romans were sufficiently intelligent to be worthy of receiving this favor. In order to satisfy themselves on this point, they dispatched a certain learned Greek to Rome to make the necessary investigations. When this was known at Rome, it was decided that as soon as this learned Greek should arrive, they would make a laughing-stock of him and of those who had sent him. Accordingly, as soon as he made his appearance, they sent to meet him a certain Roman simpleton — but let Accursius tell his story in his own words: —

"Et sic objecerint illi quendam Stultum Romanum ad hoc, ut ille sapiens Græcus disputaret cum illo Stulto et derisus recederet. Qui sapiens Græcus credens illi sibi objectum esse sapientem, cœpit cum eo disputare nutu et signis; et elevavit unum digitum, significans in corde suo — quod unus esset Deus. At ille Stultus credebat, quòd volebat sibi eruere unum oculum cum illo digito, et ipse elevavit duos digitos et etiam pollicem (et sic tres,) dicens in corde suo, quòd si tu vis mihi eruere unum oculum, ego erueram tibi duos oculos. Sed ille Græcus credebat quòd Stultus ille intelligebat de Trinitate. Deinde sapiens Græcus ostendit illi Stulto manum oper-

tam, significans in corde suo quòd omnia sunt manifesta Deo. Stultus autem credebat quòd volebat dare alapam sibi, et incontinenti ostendit ei pugnum clausum, significans quòd si vis mihi dare alapam, ego repercutiam te pugno clauso. At Græcus sapiens intellexit quòd per pugnum clausum voluit Stultus significare quòd Deus omnia manu clauderet. Et sic putavit Romanos esse valdè sapientes et dignos legibus. Et reversus fuit Athenas, et retulit Romanos esse legibus dignos et sic fuerint concessæ leges illis decem viris."

As this event is supposed to have occurred more than four centuries before the Christian era, Accursius should have explained how the Grecian sage had at that time become familiar with the doctrine of the Trinity.

The contested codicils were declared invalid in the surrogate, by the Supreme Court, and finally by the Court of Appeals. See Delafield *v.* Parish, 25 N. Y. 9.

LAWYERS AND LAW PRACTICE IN ENGLAND AND THE UNITED STATES COMPARED.

By a Lawyer of Both.

II.

I HAVE said enough to show that to become a lawyer in England is not an easy thing, and there is no disposition to make it more so. And now we may compare or contrast this with the conditions of admission to the profession in the United States, where there exists no such division of higher and lower, counsel or attorney, but where a man, admitted *at* all, is admitted *to* all. The rights and privileges which in England are divided among queen's counsel, junior counsel, special pleaders, proctors, attorneys and solicitors; in Scotland, between advocates and writers to the signet; in France, between advocates and avoués; and in every country of Europe, between men of different degrees or branches of the profession, are here enjoyed by everyone who gets into the profession at all. In for one thing, he is in for all things. And in many of the States there is practically no test of qualification at all, or none worthy of the name, no evidence even of an elementary general education, no necessary preliminary service, no examination whatever. A young man of very limited education, serving behind a counter or working in a shop during the day, may join a law school or class meeting at nights, may attend a number of lectures (which he cannot understand for want of elementary legal knowledge), and without any further qualification or test than this may be "admitted and licensed as an attorney and counselor of law," and by means of such license may, if he choose, procure admission in most of the other States of the Union, and he is the equal, as to legal right and status, of the man of greatest culture, learning, and experience the profession has in it. It is not too much to say that a profession into which men can swarm in this way can scarcely be designated a "learned profession," or command the respect and confidence of the public on its own merits as a profession. And a very limited observation of the practice of our courts in most of the States is sufficient to show us the natural fruits of this state of things. It is seen in the lack of courteous deference from the bar to the bench, and of respect and confidence on the part of the bench to the bar; in the bawling and thumping which are often made to do duty for quiet

logical argument and persuasive reasoning; in the evident lack of real legal learning; in provincialisms and educational deficiencies, and even in the behavior and bearing of the men. There are at the bar of every State of the Union men of great learning and culture and power, the leaders and ornaments of the community, but they are such by force of their own inherent qualities, and in spite of, rather than because of, the profession to which they belong. I would not, if I could, introduce into this country the English system of a divided profession, though there is very much to be said in its favor. It secures a high standard of attainment and character, and an independence of spirit, as far removed from blustering on the one hand as from servility on the other. But its disadvantages also are great, — so great as, in the estimation of many men even in England, to outweigh the advantages. The attorney has usually been with the matter in dispute from its inception, known all its phases and complications as they have arisen, become familiar with all the facts and all the evidence, and (other things being equal) no one so well as he could present them from his client's point of view to the court and jury that is to judge of them. But his mouth is closed. He must transfer all he knows to paper, although to do so may require scores, sometimes hundreds, of sheets, and occupy many days or weeks of labor. Of this vast mass of writing, several copies must then be made. These copies being delivered to counsel, all the knowledge of the case they give must be transferred from the brief to the minds and memories of the counsel, and however elaborately or carefully the brief may have been prepared, this process of transference must be at the best a very imperfect one, omitting very many details well known to the attorney, which, though they seemed too small for lengthy mention in the brief, may, as the trial develops, become all important to the client's success. But the attorney is not permitted to offer a word of information or explanation save by whispering to his counsel, who, having his mind fully occupied, may be quite impatient of such interruption. No one who has not witnessed it can imagine how much of humiliating reproof and rejection an attorney may have to take from his own counsel, before the eyes and in the hearing of his client, during the course of an important and exciting trial. Some counsel, indeed, seem to delight in and give full rein to this faculty of reproof and snubbing. Then of course, each counsel briefed is also *fee-ed*, and these fees form the main items in the costs of a trial. As a general rule, more than half the costs of a protracted trial in which three counsel are briefed is for the briefs and fees of counsel. They often exceed the attorney's fees, the court and jury fees, and the allowances to witnesses all put together.

And this matter of the increased cost of litigation is not the only nor the greatest objection to the system. The attorney is by it belittled and degraded. In London, more than in the provinces (for in the latter counsel is not so readily accessible), the attorney is little more than a medium of communication between the client and counsel. He gives no opinion but "takes counsel's opinion," for which purpose he must prepare a "case for opinion," and make copies of all documents referred to (for counsel object to receive originals), and deliver his case for opinion duly "marked" to counsel's clerk. He draws no pleadings, but sends instructions to counsel to "settle" them, which means to draw them. He trusts not to his own judgment at any single stage of the case, but at *every* stage is advised by counsel, and when the case is, or seems to be, ripe for trial, the incipient brief is submitted to the junior counsel to "advise on evidence"; and the scale of costs to be allowed on taxation provides for all this. Indeed, the law as it exists to-day makes it absolutely necessary for an attorney thus to instruct counsel at every stage unless he is willing to deprive

himself of his own remuneration. Nothing is allowed to *him* for thought and care, and experience and professional learning, but he is allowed for "preparing instructions to counsel," "attending counsel with instructions," "attending conference with counsel," "copying documents for counsel," and even for "drawing" pleadings which he instructs counsel to "settle," although settling really means drawing. Thus at every step the attorney's own remuneration depends on his employing counsel. But a more important fact in this regard is this: that by taking counsel's opinion at every stage he is relieved from responsibility. In an action against an attorney for negligence or ignorance in the bringing or conduct of a cause (say for mistake as to the form of action, or of the pleadings, or the insufficiency of the documentary evidence), it is sufficient for him to show that he acted on the opinion of counsel. He may be a man of great experience and social consequence, but that will avail him nothing, whereas by acting on the opinion of some mere stripling "at the bar" he would have been relieved from responsibility. This principle applies also to conveyancing, and all other branches of legal business in England, making it in all things to the advantage of the attorney to think little of himself and much of counsel, to instruct himself *in* everything, and entrust counsel *with* everything.

But the most serious objection to the English system is the irresponsibility of counsel, for this evil is moral as well as financial. As a rule, English counsel are *gentlemen*, and men of the highest moral tone. And it is the system, rather than the men that is to blame for the present state of things. No amount of learning or integrity can enable a man to be in more than one place at once, but it happens every day in London, during the term or sittings, that the same counsel is engaged in three, or four, or even more cases, all of which are being tried at the same time in as many different courts. I have frequently known men like Mr. Charles Russell (now Lord Russell), or Sir Richard Webster, have as many as four causes on trial at the same time in as many different courts, giving perhaps some measure of attention to all, cross-examining an important witness in one, "opening" in a second, "replying" in a third, taking an important objection in a fourth; or confining himself all the time to one case, and leaving all the rest to the care of his juniors. I remember one case in which the late Mr. J. P. Benjamin, Q. C., was briefed as leading counsel for defendant with two juniors. The hearing lasted four or five days, but Mr. Benjamin never once came into court, for he had three or four other cases going on at the same time in other courts, and to one of them only (an appeal in the House of Lords), he devoted his personal attention, leaving the others to his juniors; yet in all these cases, as in every such case, the absent counsel received the same fees as if he had been present every moment, and as "further consultation" or "refresher" could be marked on the brief of any of the juniors without marking the absent leader's brief also, with still heavier fees. It would not be easy to obviate this difficulty without a thorough change of the system. Counsel do not know, when briefs are delivered, at what precise day or time the case may be reached, or what other cases may then be on trial in other courts. In the chancery courts the leading counsel attach themselves to a particular court, and never go out of it except on special retainer, or to follow their own cases into the court of appeal, and thus they avoid the danger of clashing; and though I think something like this might be done in the courts of law, nothing of the kind is done now, or has ever been done, for all actions are brought in one court (the high court of judicature), and the distribution of them for trial among the several sitting courts is the business of the "masters" who know only from day to day what judges are available

and what courts can sit, and who make out the cause lists from day to day without any knowledge of the arrangements of counsel, or the disposition of briefs. And in England, except in very rare cases, trials are never adjourned because of the prior engagements, or for the mere convenience of counsel, even though they are then actually engaged in the trial of cases in other courts.

But the questions are asked whether, in spite of all these disadvantages, the cost of litigation is really greater in England than it is here, and whether the moral tone of the profession as a whole is not higher. That the cost ought to be less here I am quite sure, but I am not sure that it is. Trials last much longer here (in spite of the English system of daily "refreshers") without anything more of care or thoroughness. To say nothing of the time occupied in selecting juries (for in the course of twenty years' practice in England I never knew the selection of a jury occupy more than ten minutes), far more time is spent here in "objecting" and "excepting," and there is here less of ready and courteous deference to the rulings and suggestions of the judge. There, too, the judge in most cases interposes in the early stages of a trial to narrow it to the real question to be tried, and opens a straight cut to the real kernel of the case, either of fact or law. If of fact, the narrowed issue is of course submitted to the jury. If of law, it is, if substantial, reserved for argument before the court in banc. Thus trials occupying several days are comparatively rare. And the proportion of appeals is much smaller there than here, due in part at least, to the fact that the rulings and opinions of the judges at nisi prius are more respected by the bar, and less readily overruled or dissented from by other judges on appeal. And in criminal cases there is no appeal, save on questions of law reserved. But that which more than all else secures respect for, and deference to, the English judges is the absolute confidence of the bar and the public in their learning, independence, and high character. Thank God we have there no popularly elected judiciary, and no one ever suggests or suspects an English judge of political party, or personal bias. He is appointed for life, is well paid (the salary even of the puisne judges being $25,000 a year), and his position is one of perfect independence. He cannot enter Parliament, or accept any other office, or take any part in politics during his judgeship, and can never return to the bar. After fifteen years of judicial service, he is entitled to retire on a liberal pension (£3500 a year for the puisne judges), but most of them remain on the bench very much longer, either from the love of the work, or the hope of further promotion.

I am not about to pronounce an opinion on the respective merits of the systems of the two nations. Each may be the better in its own place. They have borrowed largely from each other in the past, and knowledge of both enables me to see how they may do so with mutual advantage in the future.

H. D. J.

A LEGAL INCIDENT.

THE following incident is told of the early professional life of a distinguished lawyer of Charleston, South Carolina.

He had worked on in his profession for two years conscientiously and laboriously, but for the past few months almost without hope of success. The bar in that city was very conservative, a large portion of the practice being inherited, and this young man, coming as he did from the country, had found it impossible to get a foothold.

He lived in the most inexpensive way consistent with decency, but economized as much as possible, the few savings which he had hoped would support him for the first year or two of his professional life were gradually exhausted, until the date of our incident finds him absolutely without a penny.

The scene is his chamber at 1 A. M. — a room in the same building with his office but at the rear of the structure and extending back over a sort of paved court below. The building is in the business part of the city, which is generally unused for dwelling purposes; and the street and all the houses around are as quiet as the grave. There should be a moon on this night, but the sky is overcast. The weather is warm and the windows of the room open, and the light that penetrates through them is only such as would enable one to see objects very indistinctly.

The poor young man is tossing on his couch, cursing his misfortunes and bewailing the inexorable necessity that confronts him of closing his office and abandoning the profession of his choice.

Suddenly a slight sound arrests his attention and a moment later a dark form has appeared at the window, leapt the sill, and presented a pistol at the head of the restless occupant of the bed. "I am hard up," the voice of the unknown whispers hoarsely, "and I want some money from you, or you know what 'll come, and I ain't foolin' neither." The situation is perilous but it has its humorous side, which is quickly caught by the young lawyer. He laughs softly and says: "Help yourself, my friend, to whatever you find here. You are a vagabond, while I am a member of the dignified profession of the law, yet if you are poorer than I am, I shall be glad to know it. You 'll find some matches and a candle over there. Strike a light and take a look."

Somewhat amazed at the coolness of the reply, the robber lit a stump of a candle and began his search — no money in the lawyer's only and very rusty suit of clothes which were lying on an old chair by the bed — nothing in a rickety bureau except two old shirts and a few threadbare collars and handkerchiefs — and nothing else in all the room. He stopped in disgust, put the candle on the bureau, and turned to his host who had meanwhile been sitting up in bed watching him with cynical amusement.

"Are you hungry too as well as broke?" asked the intruder.

"I spent my last copper for a roll yesterday morning," was the reply.

"Well, pard," said the man, "before I came roun' to see you to-night, I jest stopped in to a baker shop, what didn't have wery good fastenin's on de winder. I didn't git no money but I tuk a loaf of bread and a pie. Wait a minnit."

The man disappeared over the window-sill, only to reappear in a few moments with the edibles he had mentioned. "Poverty makes strange bed-fellows," and these two men, both of whom had so far failed of their just dues at the hands of the law, sat down amicably together on the edge of the bed, and exchanged views on the existing social evils over a loaf of bread and a pie.

The story, although a veracious one, is not devoid of poetical justice, as the sequel will show. The robbery at the baker shop was discovered and its perpetrator traced. The lawyer's midnight visitor was caught and held for trial. The lawyer, of course, volunteered for his defense, and cleared him in a manner that unmistakably bore witness to his own skill and ability, thus laying, in so unexpected a manner, the foundation of his future eminence.

SOME KENTUCKY LAWYERS OF THE PAST AND PRESENT.[1]

I.

By Sallie E. Marshall Hardy.

"First in the race that led to Glory's goal."

WILLIAM WIRT said: "The public opinion of the merits of a lawyer is but the winnowed and sifted judgment which reaches the world through the bar, and is therefore made up after severe ordeal and upon standard proof." With these words of Mr. Wirt in mind I have felt safe in selecting the lawyers I mention in this article, from among the thousands who have practiced in Kentucky courts, because of the reputation each one has of being worthy to be placed above his fellows.

LOUISVILLE.

The Louisville bar has from the first been distinguished for its strength. Alexander Scott was the first lawyer admitted to practice. He prosecuted George Rogers Clark, the great Kentucky pioneer soldier, for a keg of whiskey that General Clark claimed he had impressed from Eli Cleveland for the army.

Judge John Rowan was one of the most profound lawyers Kentucky has ever had. He is described as "leonine in appearance." He was a man of great learning and said: "No man can become a good lawyer who is not a good scholar. Professional excellence cannot be attained by one not versed in general literature and the sciences." One of his best known speeches was for the defense in the celebrated Wilkinson trial, and, it is said, "On that occasion he exhausted the reasoning against the acceptance by counsel of retainers for the prosecution of capital cases." Someone told Ben Hardin that Judge Wilkinson said he would also engage him if Judge Rowan needed him. "It is not worth while to ask Judge Rowan that," said Hardin, "the old Monarch never needed my services or any other lawyer's." His grandsons, Rowan and Lytle Buchanan, are to-day popular members of the Louisville bar. Rowan Buchanan is remarkable for the accuracy of his knowledge on general subjects.

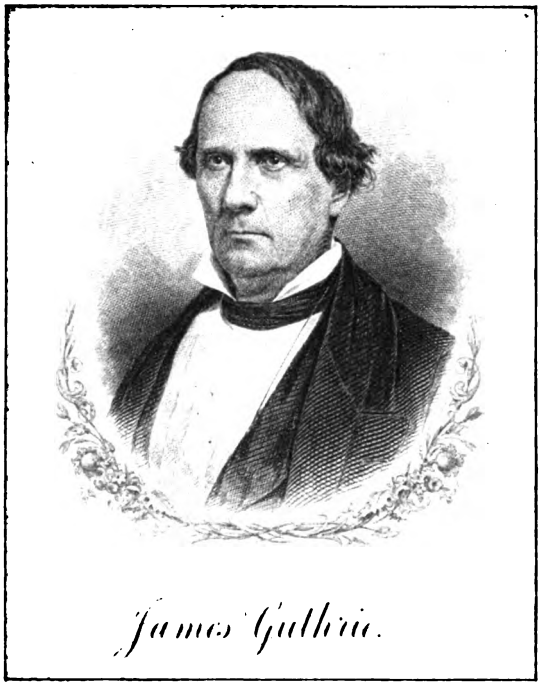
John Pope Oldham presided in the Jefferson circuit court from 1819 to 1821. He was a man of courtly manners. His son-in-law, Judge William F. Bullock, is said to have been "a noble specimen of culture, integrity, and talent." The land claims were the most difficult cases which engaged the early lawyers. "The claims to land," said Chancellor Bibb, in 1815, "are found in statutes which leave very much to be supplied by the discretion of the judges."

George M. Bibb was the first chancellor of the Louisville chancery court. He declined the office, saying the salary was too small, but the leading lawyers and merchants raised the money and doubled it. When he had a knotty question to unravel, with a line and bait he would go to Beargrass Creek and angle, not for fish but for ideas. It is said that he would throw his line in the water and sit for hours without looking to see if he had a bite.

In a celebrated case, the opposing counsel got an inkling of what his decision would be and sent him word, "There was no law authorizing such a decision." He replied, "Damn it, then he would make one." In 1809 he was appointed chief justice of Kentucky. In 1811 he was sent to the United States Senate. In 1827 he was

[1] I am much indebted for the material used in this article to Judge Little's "Ben Hardin and His Times," to several Histories of Kentucky, and to some members of the profession who have kindly aided me.

again appointed chief justice, but resigned to return to the senate. His great-granddaughter described to me his departures for Washington. He always started on the first of November. The whole family would assemble on the front porch to see him mount his horse, with a negro servant on another horse, leading a third in case of accident. They would all weep bitterly as he rode off, knowing it would be two months before there could be any tidings of him. Notwithstanding these difficulties, he was a bitter opponent of a bill in Congress to construct a national road through the country, and was burned in effigy at Zanesville, Ohio, during the rejoicings over the passage of the bill. He was appointed secretary of the treasury and went to Washington to live. It is a notable fact that four of the ablest secretaries of the treasury, since Alexander Hamilton, Bibb, Guthrie, Bristow and Carlisle, were Kentuckians. In the latter years of Judge Bibb's life, he was allowed to make his arguments before the Supreme Court seated, in deference to his age and distinction as a lawyer.



A legal Goliath was Nat Wolfe, the great criminal lawyer of Kentucky. When Mr. Wolfe went to Elizabethtown to engage in the Wickliffe murder trial, Ben Hardin, who was opposed to him, gave a very laughable account of the sensation he created. He said when he went to the barber shop to be shaved, the barber announced: "Mr. Wolfe has come to town." Hearing it on all sides, he went home, when his daughter called to him, before he was off his horse, "Pa, Mr. Wolfe has arrived in a barouche drawn by four horses and filled with law books." He hurried into the house and sat down to dinner, to his favorite dish of bacon and snap beans, when his wife began: "Mr. Hardin, Mr. Wolfe has come to town." He pushed his plate away, for his appetite was all gone, and exclaimed: "My God! Betsy, can't a man eat his dinner in peace even if Wolfe has come to town?"

James Guthrie was a great lawyer. He was a very firm man. The following story was told by General Cushing: A claim had been presented on the treasury, and Mr. Guthrie had rejected it. Some time after this, the president, having sent to the treasury for the papers, brought the subject up in a cabinet meeting. The different members of the cabinet expressed their views, but Mr. Guthrie remained silent. At length the president said: "Mr. Guthrie, this is a claim against your department, we should like to hear your opinion on it." Mr. Guthrie immediately rose and said: "Gentlemen, this case has been decided by the treasury. Good morning," and he walked out.

Judge S. S. Nicholas succeeded Judge Bibb as chancellor of the Louisville chancery court. James Speed said: "He was the most courteous, polite and patient judge

I ever appeared before." Judge Nicholas's plan for electing the president of the United States received the approval of the best intellects of the country.

General William Preston, on account of his handsome person and courtly manners, was called "the last of the Cavaliers." He achieved distinction as a lawyer, orator, diplomat and soldier.

Judge Logan was a man of deep learning. A gentleman once said: "Judge Logan is too profound to be agreeable." He had a habit of discussing the most complicated cases, that were submitted to him to decide as chancellor of the chancery court, with Washington Spradling, a popular negro barber, who shaved him. Some friend who heard him asked him why he wasted his time explaining the complicated chancery cases to Washington. He replied, trying to state them plainly enough for the negro to understand helped him to see them more clearly himself. His son-in-law, Thomas W. Bullitt, is one of the leading lawyers of Louisville. He has been engaged in many of the most important cases in the Kentucky courts since the war. He has associated with him, Charles H. Sheild, a clever Virginian, who has taken high rank at the Louisville bar.

BLAND BALLARD.

Henry Pirtle was a most distinguished lawyer. Col. Durrett says: "He read 'Coke on Littleton' and other heavy tomes as if they had been novels or poems. There was no judge in the State whose decisions were more just and learned." His son, Judge James Speed Pirtle, named for Attorney-General James Speed, is one of the most prominent lawyers now at the Louisville bar, and "has never suffered the lustre of his father's achievements to be dimmed in his hands."

Edward S. Worthington and R. T. Durrett composed a law firm in 1850. Col. Durrett is the founder of the Filson Club, and one of the best-loved men in Louisville.

Judge Thomas A. Marshall was an illustrious lawyer and judge. In private his life was as pure and lovely as his talents and acquirements were distinguished. He was a member of Congress and judge of the court of appeals, most of the time as its chief justice, for twenty-one years.

Judge Bland Ballard began to practice law in 1840. His vigorous mind and professional zeal soon gave him prominence.

Appointed by President Lincoln judge of the United States district court, he took his place on the bench in 1861, just as the flames of war were lighted. His position as judge of the Federal court in Kentucky made him many enemies. He was devoted to the preservation of the Union. Associate-Justice Field of the Supreme Court said: "As judge in Kentucky, Bland Ballard was worth twenty thousand men to the Union cause." Yet so absolutely just was his administration that, although he died only

fourteen years after the war, he numbered among his warmest friends some ex-Confederates.

Judge Ballard was pre-eminently the friend of young men. It was said that, however he might trip or entangle an old lawyer, he was ever ready to give a helping hand to the young. Several years before his death he formed, for his own pleasure, a class of young lawyers, chosen because he believed they were unusually bright. This was over twenty years ago, and to-day five of them occupy prominent and conspicuous places at the Louisville bar and the sixth died a few months ago, honored and mourned throughout the State. They were W. O. Harris, St. John Boyle, Alexander P. Humphrey, George M. Davie, A. E. Willson and Rozel Weissinger.

A. E. WILLSON.

It was Judge Ballard's opinion, I am told, that W. O. Harris had the finest mind of the six. Since then he has been judge of the law and equity court and is dean of the faculty of the Louisville Law School. A man of spotless integrity and great force of character, he is the professional peer of any lawyer at the Louisville bar.

Alexander P. Humphrey is the senior member of Louisville's leading law firm, Humphrey and Davie, and one of the best lawyers in the country. I am told he might hold high political office, but he is wedded to his profession.

It is said: "No man has ever been more popular in Louisville than George M. Davie." He has earned a well-merited reputation, not only in the Kentucky courts but in the Supreme Court of the United States. He led the Kentucky Democrats to victory for sound money in the late election.

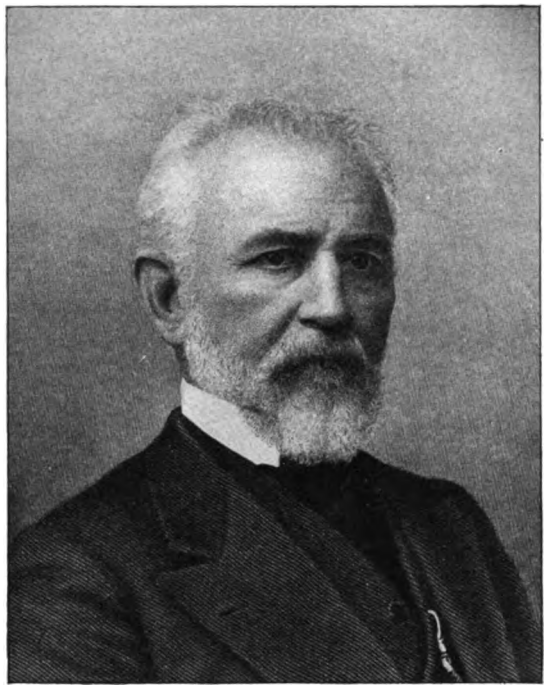
Augustus Everett Willson is a lawyer of high professional character. He graduated at Harvard in the class of '69. In 1874 he became the law partner of John M. Harlan, now an associate justice of the Supreme Court. No man in Kentucky has worked harder for the Republican party, and it was greatly due to his efforts that Kentucky became a debatable State. A Democratic paper lately said: "Mr. Willson is a man of high character and superb oratory. He is one of the few Kentucky Republicans now in politics who has been for years a recognized party-leader."

St. John Boyle is a grandson of Judge John Boyle, who was six years a member of Congress and sixteen years chief justice of Kentucky, and has inherited many of his ancestor's rare gifts. Col. Johnston says: "As a corporation lawyer, in the highest sense, Mr. Boyle stands in the very front rank."

Rozel Weissinger was a man of high ideas and great ability. He lost his life fighting the great fight of sound money in the Kentucky Senate last spring, staying on guard at the Capitol when he was very ill. It was truly said of him: "Kentucky owes no

greater debt to any of her sons." His name and talents will be associated with the history of the State in years to come.

George Alfred Caldwell was a very remarkable man. While in Congress he made a speech in favor of the annexation of Texas, that Frank Blair, editor of the Globe, pronounced, "the ablest speech made upon the question." His brother, Isaac Caldwell, was for years the head of the Louisville bar. It is said, "Few members of the bar have left a more enduring impression." He was appointed by Gov. Stevenson to appear for the State in the Blyen and Kinnaird cases, before the Supreme Court. The parties being charged in the State courts with the murder of negroes, the United States district court claimed jurisdiction, under the Civil Rights bill, of this and all similar cases. Mr. Caldwell won a splendid victory.



P. B. MUIR.

Judge Henry J. Stiles was a man greatly admired and respected. One nephew, Henry Barker, was for some time city attorney and is a clever lawyer. Another, John Stiles, also ranks high at the bar.

One of the finest lawyers in Kentucky is Judge P. B. Muir. He was judge of the Jefferson circuit court until it was divided, when he was elected judge of the common pleas division.

At seventy-four years of age he is in full practice with his talented son, Upton W. Muir.

Louisville had the honor of numbering among her lawyers, for some years, Benjamin Helm Bristow, who, as soldier, lawyer, solicitor general, and secretary of the treasury, commanded universal admiration and esteem. He was a man of massive build and a delightful conversationalist. The following characteristic story is told of him: A man noted for his meanness had written a letter to him disputing an account of one thousand dollars. One of the young men in the office insisted on bringing suit immediately, but Bristow said, with a smile, "Oh! no, John, it is worth the thousand to find out that the fellow is that particular species of a scrub."

That Associate-Justice John Marshall Harlan is a Kentuckian is a fact that should make all Kentuckians proud. He was named for the great Chief-Justice John Marshall. He is of magnificent and distinguished personal appearance, six feet, two inches in height, weighing about two hundred and forty pounds. "His character and mind fit well his splendid body," said a lawyer. He is uncompromising in his convictions of right: witness the mighty protest he raised against the law allowing merchant sailors to be imprisoned, in the recent case of Robertson and others against the marshal of California.

A man who was once his law partner says, "It was a matter of daily marvel to see this heavy man come up the steps to his office in the second story of the building, generally taking three steps at a time."

A writer says: "Judge Harlan is about the only man on the Supreme bench who strikes the beholder as being a jolly soul. He is a great story-teller, and when a tedious case comes up, he frequently leans over and whispers something to Justice Shiras that convulses Justice Brewer, who sits between them."

He lectures several times a week at the Columbian University upon public and international law.

Like the great judge for whom he was named, he is fond of walking, and twice a day takes the walk of three miles from his residence to the Capitol. It is said, "The big Kentuckian, as he swings along at his easy gait, looks as though he were at peace with all the world." He was appointed by Mr. Hayes in 1877. The opinions written by him since he has been upon the bench extend through more than sixty-six volumes of the Supreme Court Reports.

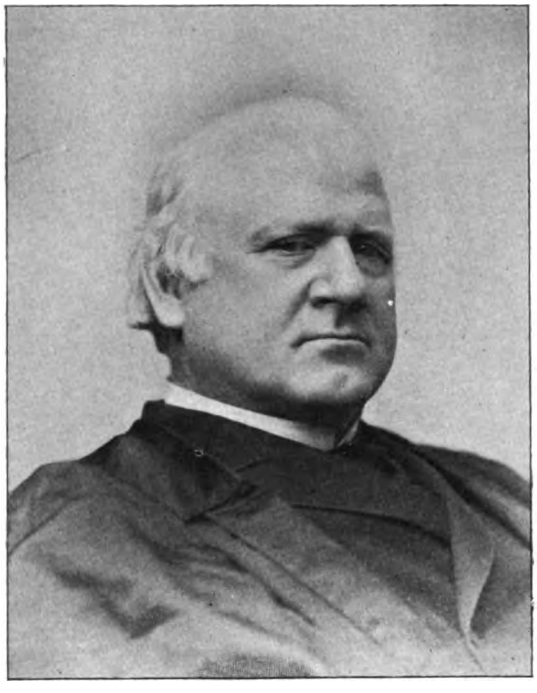
Former Solicitor-General Taft said: "His abundance of physical power and mental energy has led him to assume heavy labors on the circuit, composed of the States of Illinois, Indiana and Wisconsin. No year has gone by in which he has not decided a number of important cases as a circuit justice, the principal one being the 'Lake Front Case,' involving the title to the land under Lake Michigan, in the harbor of Chicago. As much as any of the justices who have come after those whose lives were contemporaneous with the making of the Constitution, he seems imbued with the spirit of the founders of the government. Like them, he is at the same time a jurist and a statesman, and it is not surprising, therefore, that we find so many cases involving constitutional questions assigned to him for opinion."

A Louisville lawyer told the following anecdote of him at a dinner given to the judges of the circuit court of appeals of the United States at Cincinnati, last year:—

The news that Judge Harlan had been confirmed as an associate justice of the Supreme Court came in the midst of an important jury trial in the circuit court, one of a series of cases brought by property holders along a street, in the middle of which a railroad was being operated, for damages to their property. Judge Harlan was engaged in the case, and the arguments were to be made the following day. Among the lawyers who gathered around to congratulate him was Judge Russell Houston, the Nestor of the Louisville bar, and a great counselor. Judge Houston had been president of the Louisville and Nashville Railroad, and was its chief counsel. Judge Harlan, who was always fond of a joke, with a serious air said to Judge Houston: "I am a little embarrassed as to what is the proper course for me to take in the argument of this case. It is probably the last jury case

I shall ever argue. I do not wish to fall short in my duty to my client, and at the same time I feel a certain constraint by reason of what my brothers of the bar might consider as due to the proprieties of the position I am about to occupy. There have been times when you railroad lawyers have been rather ready to intimate that, in my arguments, I occasionally lapsed into appeals which you were tempted to criticise. I have great confidence in you, and I should like to get your ideas as to the speech I should make under the circumstances." The old Judge took the matter seriously, and gave him his ideas of a conservative argument. The next morning Judge Harlan delivered the closing argument to the jury. It seemed as if he intended to put into that one speech all the appeals of an advocate to a jury and all the power he would have had left for his practice for the rest of his life if he had not gone upon the bench. He summed up the evidence in a terrible way. He stamped the floor, he pounded the table, he roared against corporations and their oppression of the poor. He gave vent to every agrarian and socialistic prejudice against railroads. After an effort of two hours of tremendous energy and scathing force, the case was submitted to the jury, which promptly returned a verdict of five thousand dollars, the full amount sued for, for damages to property worth seven or eight thousand. All through the speech, in spite of his getting red in the face and looking severe, there was a trace of laughter in his voice. He dared not look at Judge Houston when the jury came in; but the next morning, meeting him in the court room, with an affectation of serious interest he inquired, "Well, Judge, how did I do?"

The old Judge only said, "John, you be damned."



JOHN M. HARLAN.

A strong firm which practiced for years in Louisville was composed of John W. Barr and Kemp Goodloe. Judge Barr is now judge of the United States district court for Kentucky. The purity of his private and professional life has won him the esteem of all. He was the legal adviser of my family, and I was brought up to believe implicitly in his sense and goodness. Great was my horror, therefore, when I was told he was a Republican. In those days Republicans were scarce in Kentucky, and I had the same opinion of them as the little child who said: "What is a Republican? Why, a sinner mentioned in the Bible." Judge Goodloe was an able lawyer. He died some years ago, loved by all his associates.

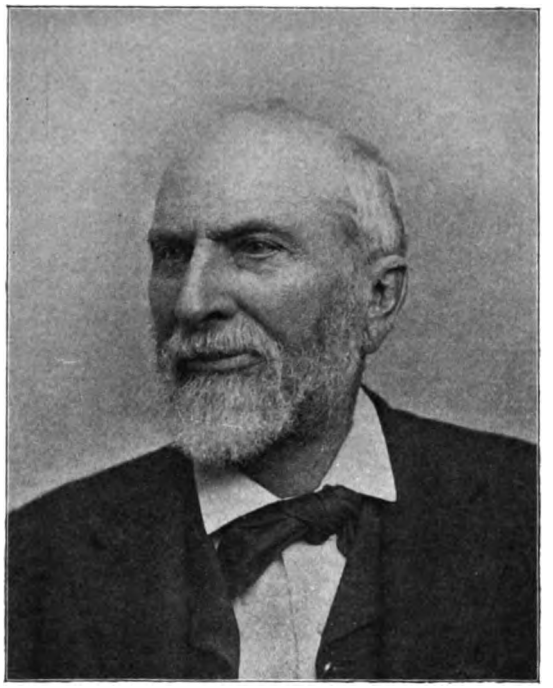
Thomas Gibson was a brilliant lawyer. He defended Gen. Jefferson Davis, of the Federal army, when he was tried for killing Gen. Nelson. Gen. Nelson, who was Gen. Davis' superior in command, was very dictatorial with his subordinates, and struck Gen. Davis in the Louisville Galt House, before Davis killed him. Mr. Gibson's son, Charles

Gibson, has all the characteristics of an able advocate.

James Speed was a leading lawyer of distinguished ability. He was attorney general in President Lincoln's Cabinet.

About a year before his death, when he was seventy-four, he made an argument which lasted four hours, in the Shirley will case, said to have been one of the best efforts of his life.

Addison M. Gazlay won high rank as a commercial lawyer. His contemporaries said, "When Gazlay finished with a subject there was nothing left to be said." His lineage goes back to the eleventh century, to Al Ghazzali, called "glory of the law."



JAMES SPEED.

John Mason Brown was a distinguished lawyer. In 1873 he became the partner of William F. Barret, a fine lawyer and a polished gentleman. One of Colonel Brown's first Louisville cases was the Newcomb case. His handling of it is said to have been so able as to win the admiration of the bar throughout the State. He was, as every lawyer should be, accustomed to seek exact truth. An instance of this is related by Colonel Durrett: "He was testing the probability of Europeans having visited America and formed settlements before the discovery of Columbus. He had found in Paraud's French translation of Filson's Kentucky a number of extracts from Greek and Latin authors, showing that Europeans had been in America long before the Christian era. Not satisfied, he searched Diodorus, Plato, Pausanias, Elien and Plutarch, in the original." To use the simile of the great Irish author, when speaking of a famous American, "like the chef-d'œuvre of the Grecian artist, he exhibited in one glow of associated beauty, the pride of every model and the perfection of every master." Colonel Brown's son and namesake is a bright young member of the Louisville bar and assistant city attorney.

Judge George B. Eastin possessed a rarely beautiful character, from the exceptionally well balanced proportions of its many fine qualities. He was a judge of the court of appeals and president of the Confederate Veteran Association of Louisville. Since his death it has been named in his honor.

Bennett H. Young has been prominent for years in Louisville. He is the youngest man ever elected an honorary member of the Louisville Board of Trade.

Judge Alfred T. Pone was judge of the law and equity court and the youngest chancellor who ever sat upon the bench in Kentucky. He was a man of noble character.

One of the legal giants of Louisville is Andrew Barnett. His partners are his son and Shackleford Miller, who is a fine lawyer.

Aaron Kohn is the finest criminal lawyer in Louisville. In the case of Kaelin, charged with wife-murder, he saved his client's life by establishing the principle that "the failure to

charge that the act was feloniously committed was fatal to the indictment." The rule has since been recognized in other States.

Judge Theodore L. Burnett was for eighteen years the city's attorney, having been elected, without opposition, six times. He was a member of the Confederate Congress and is a courteous, elegant gentleman. His son, John C. Burnett, is his law partner and they form a very strong firm. Another son, Gilbert, died in New York a few years ago. Although he had been a short time at the New York bar, he had established a fine reputation and seemed destined for honors.

GEN. BASIL W. DUKE.

Two of the greatest students and most learned members of the Louisville bar are C. B. Seymour and L. M. Dembitz.

Gen. Basil W. Duke is a man of unusual attainments and intellectual force. "His grandmother," says Colonel Johnston, "was a sister of Chief-Justice Marshall, and the family is perhaps as conspicuous for distinguished membership as any in the United States." He was a gallant soldier, and it was said, "He was the soul and brains of the Morgan brigade." He was for six years commonwealth's attorney. He is now connected with the law department of the Louisville and Nashville railroad.

Lyttleton Cooke has been the district attorney for Kentucky of the L. & N. R. R. for twenty-five years. He is a forcible and clear speaker. While in the Kentucky Senate, in 1872, he moved: "No one shall be incompetent as a witness because of his race or color." It was the first law which allowed negroes full rights to testify in Kentucky courts.

Judge H. W. Bruce, chief counsel at Louisville of the L. & N. R. R., has a record of which any man might be proud. He was a member of the Confederate Congress, judge of the ninth judicial district, chancellor of the Louisville chancery court, and professor of history and science of law in the University of Louisville.

Judge George Du Relle, of the court of appeals, comes of distinguished ancestors. He is a clever lawyer and a genial gentleman.

One of the ablest firms in the State is composed of James P. Helm and Helm Bruce. They are the son and grandson of Gov. John Helm and are also descended from Ben Hardin, a lawyer of renown, so it is natural they should be leaders at the bar.

Edward J. McDermott is a bright lawyer. He writes well and is a man of scholarly attainments.

Arthur M. Rutledge, who is a talented member of the Louisville bar, is the grandson of one of Kentucky's greatest lawyers, Joseph R. Underwood, and the descendant of a signer of the Declaration of Independence.

Judge A. E. Richards was for a number of years a judge of the court of appeals. He was one of "Mosby's men," but it is dif-

ficult to recognize in the sedate, busy lawyer of to-day "Dolly Richards," one of the bravest members of that Confederate band which made the country ring with stories of its daring. Judge Richards' partners are his clever young son-in-law, Albert G. Ronald, and John Baskin.

Zack Phelps was a member of the convention which formed the present Constitution of Kentucky. He is a fine speaker and is said to excel as an examiner of witnesses. His partner is W. W. Thum. Mr. Thum won the literary medal at the University of Virginia. One of his cases that was unique was Tierney *v.* the Standard Oil Company. At the first trial the jury gave the full amount sued for ($25,000). The court of appeals reversed on the ground of excessive damages. Upon the second trial in the lower court, twenty thousand was the verdict, and again the court of appeals reversed it, giving the same reason. Finally it was settled out of court.

OSCAR TURNER.

There is a laughable story told of a Louisville suit in which only one witness appeared. A wealthy groceryman employed a young dentist to make a set of false teeth for his wife, and advanced him twenty dollars to buy the gold to be used. When they were sent home they did not fit, so the old man returned them and refused to pay for them. The dentist immediately brought suit. There was an old dentist who stood high for ability and veracity, so each side, unknown to the other, summoned him as their only witness. The day of the trial came, and both lawyers, seeing him present, announced they were ready. The lawyer for the dentist called "Dr. W ——," and then asked: —

"Were the teeth well made?"

"Yes, sir."

"Did Dr. —— use twenty dollars' worth of gold on them?"

"Every bit of it."

After a few more questions which were all satisfactorily answered, the plaintiff's lawyer triumphantly announced he was through. To his amazement, the lawyer for the defense also called Dr. W——, and began to question him.

"You say the teeth were perfectly made?"

"Yes, sir."

"Did they fit Mrs. K ——?"

"No, sir."

"Who bought the gold used?"

"Mr. K ——." And the defendant's lawyer also announced he was through, amid the laughter of the spectators.

Judge John Roberts is a lawyer who is faithful to every trust. He was one of the lawyers in the Newcomb will case. The then chancellor said "the case was the most skillfully prepared and ably argued" that he had ever decided. His partner is his nephew, Mr. Quarles, a bright young Virginian.

Burwell Keith Marshall is a great-grandson of Chief-Justice John Marshall, also a descendant of William Moore, colonial gov-

ernor and president of the common pleas of Pennsylvania. It is not strange, therefore, that he is one of the best lawyers at the Louisville bar.

Edward F. Trabue is a fine pleader and a good lawyer.

Judge Charles S. Grubbs was a judge in Logan County before he removed to Louisville, where he has taken high rank at the bar.

Randolph H. Blain is lawyer for the school board and is a man of sound judgment.

Three Louisville lawyers, under President Cleveland's administrations, ably represented this country abroad. Boyd Winchester, a brilliant man, was minister to Switzerland. Charles W. Buck was one of the youngest men ever selected for a diplomatic office so important when he went as minister to Peru. He acquitted himself with great good sense and discretion, and it was said, "No United States minister, since the days of Randolph Clay, in the fifties, made such a favorable impression." Albert S. Willis went as minister to Hawaii at a time of great difficulty. How well he performed his task is fresh in the minds of all. He died at his post deeply mourned.

The judiciary of Louisville is equal to any in the country. Emmet Field, Reginald Thompson, L. M. Noble and I. W. Edwards are men who are highly respected and who fill their positions with credit to themselves and honor to the city.

Frank Parsons is the present able commonwealth's attorney. He is a brilliant member of a brilliant family. His brother, a very bright man, died while a member of Congress.

John Young Brown, former governor of Kentucky, is now numbered among the Louisville lawyers. He is one of the finest speakers in the State and made a very able governor. He was elected to Congress while under the constitutional age, and has always occupied a conspicuous and honorable place among the first men of Kentucky.

The list of Louisville's good lawyers would not be complete without the names of John and J. C. Dodd, John C. Russell, Frank Hagan, Edward Humphrey, Garvin Bell, and Frank Swope.

Among the younger members of the profession who give promise of worthily walking in the footsteps of those who have gone before are Oscar Turner, Arthur Peter, Swager Sherley, Ernest W. Sprague, George Burton and Theodore Snively.

President Buchanan came to Kentucky to practice law, but soon left. Years after, he said: "I went to Kentucky expecting to be a great man there, but every lawyer I met at the bar was my equal, and more than half of them my superiors, so I left."

SOUTHERN AND WESTERN KENTUCKY.

The list of lawyers of southern and western Kentucky includes the names of many men who have been and are eminent in the profession, and the equals of any lawyers in the country.

John Calhoon, for whom the town of Calhoon was named, was a brilliant man.

From Franklin came Beverly L. Clark, one of the finest lawyers in the State.

Oscar Turner was one of the best lawyers of his day.

His father was one of the most distinguished jurists of the South, and his mother, Caroline Sargent, was the daughter of Governor Winthrop Sargent of Louisiana. Coming to Ballard County, after his school days were over, Mr. Turner's fame as a lawyer soon spread. In 1851 he was the commonwealth's attorney, and it is said, "His vigorous prosecutions and undaunted courage and ardor soon brought law and order in many localities of his district, which had known little of either before." He was equally at home in criminal and civil cases, and successfully held his own against the best legal talent of the State.

In three congressional races he was victorious against odds such as would have

overwhelmed a less determined man. He made a national reputation in Congress, and in 1880 many of his speeches were circulated as campaign documents.

PADUCAH.

Judge Wiley P. Fowler was presiding judge of the circuit court for thirteen years, until the adoption of the Constitution which made the judiciary elective, when he refused the nomination, claiming that impartial justice could not be administered by judges dependent upon the favor of the people for their places; and besides, it was beneath the dignity of one fitted to hold such an office to condescend to the electioneering required. During the war, the judicial district in which he held court was occupied, in turn, by both the Confederate and Federal armies, and he was arrested by the military authorities of both for refusal to obey military orders in connection with his court.

HENRY BURNETT.

Henry C. Burnett was an able lawyer and one of the finest speakers of his day. It was a loss to the whole State when he died, in 1866, at the age of forty-one. His son, Henry Burnett, is a prominent member of the Paducah bar of to-day. He has the reputation of being a splendid man of business, and in every way worthy of the trust reposed in him.

Col. L. D. Husbands is one of the oldest members of the bar, and has long enjoyed a fine reputation.

Q. Q. Quigley and Q. M. Quigley form a law firm so strong that they can afford to defy superstition and have their offices at 113 Legal Row. One of their interesting cases, Robin *v.* Walker, hinged on the decision as to whether the act of Congress exempting pensions from the payment of debts follows the sum beyond the time it reaches the hands of the pensioner.

Thomas E. Moss is one of the finest criminal lawyers in Kentucky. It is said, "When speaking, he keeps his audience spellbound."

A leading Paducah firm is composed of W. D. Greer and W. M. Reed. They are the attorneys for the P. T: and A. Railroad and the City National Bank.

HARDINSBURG.

Hardinsburg, which is said to be "a little gem of a town," can claim Judge Alny McLean, who, as lawyer, judge, and member of Congress, was distinguished. He was called "a model gentleman."

Francis Peyton was one of the best criminal lawyers of his day. He was the first man, in the Kentucky legislature, to introduce a bill permitting a woman to control her own property.

Alfred Allen, a distinguished lawyer and wit, was for years a conspicuous man in the Green River portion of the State. He aided in the prosecution of Matthew Ward for the killing of Butler. Mr. Butler was a school teacher, and had whipped Ward's brother. The case attracted widespread attention,

and Col. Allen's speech is said to have been notably brilliant. He was once Consul to Foochow, China.

OWENSBORO.

Col. Joseph Hamilton Daviess, for whom the county, in which Owensboro is, was named, was a shining light at the early Kentucky bar. He was untiring in his efforts to convict Aaron Burr of treason at Frankfort, Kentucky, but the unprincipled Burr was then immensely popular, and, in spite of Col. Daviess' brilliant and persistent efforts, he failed. Henry Clay was Burr's counsel, having received from him "his word and honor" that he was innocent. It is said, "Never did two more illustrious orators encounter each other in debate." An enormous crowd heard them, feeling ran high, and, after the trial, two balls were given — one in honor of Burr, and the other by the friends of Col. Daviess. He was killed at the battle of Tippecanoe, while leading a charge against the Indians.

Judge Little was judge of the circuit court and is a man of great natural gifts. He is a charming writer, and his "Ben Hardin and His Times" is a valuable addition to the legal history of the country.

James Weir is a lawyer of great merit, especially in chancery matters, and is greatly respected and admired. His home, on the beautiful Ohio River, is very quaint and handsome.

HENDERSON.

Henderson, which is said to be the richest town of its size in Kentucky, has reason to be proud of its past and present bar.

Archibald Dixon was a successful lawyer and statesman. He succeeded Henry Clay in the United States Senate. The late Major Kinney of Louisville said: "When riding the circuit, as lawyers were wont to do in those days, Gov. Dixon would select some struggling young lawyer, take him along in his buggy, tutor him, encourage him, and, before their return, he would throw at least one good fee in his way. He was at once the bravest and the gentlest man I ever saw." His son, Henry Dixon, is a clever lawyer and writer.

Of the present bar, Richard H. Cunningham is a very bright man and capable lawyer. Henry F. Turner has long been regarded as one of the best lawyers, and Mr. Yeaman and J. F. Lockett are leading members.

BOWLING GREEN.

One of the most noted lawyers of the State was Joseph R. Underwood. He was distinguished as a lawyer, jurist and statesman. He was a judge of the court of appeals, repeatedly in Congress, and a United States senator. He was in the Kentucky legislature with Ben Hardin, and, Judge Little says, "He was in the habit, Mr. Hardin thought, of offering amendments too frequently to bills offered by other members. At last one day Mr. Hardin sprang to his feet and said, 'Mr. Speaker, I consider it one of God's mercies the gentleman from Warren was not upon the earth in the days of our Saviour. If he had been, he would infallibly have moved an amendment to the Lord's Prayer, which, if adopted, might have led to the damnation of a world.'"

At the present bar, J. M. Wooten and Congressman C. K. Wheeler form a strong firm, as also do Sims and Covington. Judge W. L. Dulaney, W. E. Settle, J. B. Grider, J. A. Mitchell, J. W. Wilkins, Nat Porter, H. F. Clark, Byron Renfro, and John Galloway are men of ability and fine lawyers.

GLASGOW.

Christopher Thompson was a member of Congress and a circuit judge. He was a man of high integrity and greatly respected.

Gov. Preston H. Leslie was a man of prominence and ability. His life affords a splendid example. "He was a cart-driver

at thirteen, a lawyer at twenty-two, a senator at thirty, and governor of Kentucky at fifty-one."

Of the present bar, Samuel Boles and W. L. Porter are leaders.

RUSSELLVILLE.

Dr. David Morton, a greatly beloved minister of the M. E. Church South, in a memorial of Logan County, said, "From 1792, for a period of seventy-three years, men named Ewing represented Logan County in the legislature, State and national, in the constitutional conventions, and were prominent on the bench and at the bar. Their arrival in Logan County was an era referred to as 'the year when the Ewings came and brought the law with them.'

"In 1801 Reuben Ewing was a judge of the first court of quarter sessions and in 1803 an associate justice of the first circuit court. Ephraim Ewing, one of the great men of southern Kentucky, was judge of the court of appeals in 1835 and chief justice in 1843. He was a man of commanding presence, massive intellect and sterling integrity. Presley Ewing was a brilliant lawyer and member of Congress, although he died at thirty-two. His eulogy of Henry Clay was printed in the school speakers and regarded as a classic. Robert C. Bowling, a lineal descendant of the Ewings, was a circuit judge for ten years." George Washington Ewing was a member of the Confederate Congress, and Judge Bowden says, "As a lawyer, singularly successful. In years he only lost one case. He was always a leader, his quaintness attracted, his candor disarmed, his kindness won and his convincing speech bore him onward to certain victory." Henry Quincy Ewing was a fine lawyer, and, Judge Bowden said, "in many respects the most remarkable man the country ever produced."

It has been said, "It seldom falls to the fortune of any man to be more deeply mourned than was Judge Elijah Hise, at his death." He was one of the ablest lawyers in the country. Says Mr. Marmaduke Morton: "He made a superb chief justice of the court of appeals of Kentucky, and some of his decisions are cited as legal classics." A curious habit of Judge Hise's was to pull hairs from his head and brows while reading and put them between the leaves of books, where they were found long years after. A friend said: "You can always tell what books Judge Hise liked best as they are always full of eyebrows."

Judge Edwards said of Henry P. Brodnax: "He was the best read lawyer of my acquaintance, and his honesty, integrity and uprightness were proverbial." He was twenty-six years a circuit judge. When the circuit courts were first established, the associate judges, usually non-professional men, were chosen from each county to sit with the presiding judge. For these men, it is said, Judge Brodnax had great contempt and plainly showed it. When deciding a question he would turn to each of them and say: "What do you guess?"

Ninian Edwards was a distinguished lawyer and chief justice of the court of appeals, and going to Illinois to live, he was twice governor of that State. A story is told of how he came to be governor. Gov. Scott had appointed him to the Kentucky appellate bench about the time President Madison made John Boyle governor of Illinois. Judge Edwards had purchased large tracts of land in Illinois and proposed to Judge Boyle that they should "swap" offices. So each resigned and was appointed to the other's place.

Of the present Russellville bar, George B. Edwards is a prominent member. James H. Bowden is engaged on one side or the other in every prominent Logan County case. He was presiding judge of the superior circuit.

Wilbur F. Browder is an able lawyer and ranks high. One of his interesting cases was Cardwell *v.* Perry, wherein an ante-

nuptial contract, for a woman's separate estate, played a prominent part. John S. Rhea is a fine lawyer and member of Congress.

IN AND AROUND THE SUPREME COURT.

WHEN you step from the corridor of the Capitol into the precincts controlled by the marshal of the Supreme Court, you feel at once that you have passed from an atmosphere in which everyone is trying to change something into one in which conservatism is the ruling motive.

And speaking of conservatism, let me tell at once a story which properly belongs further on: "In the vestibule to the conference room there has stood for many years a shabby old washstand, equipped with a plain china toilet service and a useful but not very sightly bucket for waste water. Last year a modern bath-room with every possible luxury of tiling and silver-plating and patent shower-baths was added to the suite of rooms in which the court holds its Saturday morning consultations. As this new toilet room is hardly a dozen steps away from the old washstand, the marshal's assistant naturally thought the latter could be dispensed with, but out of wisdom acquired through experience she prudently had it stored not far away. When court met, most of the justices sought out the new improvements and commended their beauty and convenience, but one of the elder ones walked directly to the site of the old washstand, and remarked sternly, 'I should like to know who has removed that washstand.'

"As the session was about to begin, his investigations were not pursued, and when the morning's work was over, he found the old stand, with its homely fittings and shabby bucket, in its accustomed place. Regularly every Saturday morning he washes his hands in cold water from the china pitcher, ignoring the luxurious silver-plated spigots in which his colleagues find comfort."

The Supreme Court is not only more conservative than any other institution of our government, it is also more ceremonious. In planning our legislative processes the builders of the Republic dared to be original, but fashioning the highest court of a nation destined to be great was another matter. Ceremony there must be; so, upon a modification of English judicial etiquette as a basis, there has been gradually reared a system formal enough to command respect, yet sufficiently simple to be in keeping with the other departments of the government.

Take, for instance, the opening of court in the morning. At twelve o'clock exactly a rope is stretched across the corridor which divides the robing room from the court room. Marshal Wright steps across the corridor, and opening the robing room door, shakes hands with the chief justice. The routine is never varied, though the two gentlemen may have ridden to the Capitol in the same horsecar, and parted only ten minutes before. The marshal leads the way across the corridor and through the hallway to the rear entrance to the court room, the associate justices following the chief justice in the order of their appointment. The decorous procession files through the door in the middle of the red plush drapery back of the bench, the marshal takes his seat at one end, the nine rustling black silk gowns settle into the nine big leather-covered chairs, and the crier announces that court is opened.

The court room, as nearly every one knows, is the one used as the Senate Chamber before the great wings were added to the Capitol. For every square foot of floor space there is at least one interesting historical association, and to see the place at its

best you want to catch the marshal at some leisure moment and go with him from spot to spot as he reviews the scenes which have happened there.

The room, in its present state, is very comfortable and interesting, with its well-preserved old furniture, and the warm tone of its judicial red carpets and hangings. The main entrance doors, directly opposite the bench, enclose small panes of glass, which the hurrying sight-seer used to utilize for his brief glimpse of the interior. As one can easily imagine, the constant succession of strange faces peering through these panes so disconcerted a former chief justice that he had a screen placed so that the openings were hidden from the judges, and whoever would see the court room now must take time to enter and be seated by the ushers, as no visitor is allowed to stand while the court is in session. Directly in front of this screen is the old-fashioned mahogany sofa upon which John Quincy Adams was laid to die — not a comfortable deathbed, as you instantly perceive, but very august and impressive as a relic.

The most interesting part of the room is screened off by the red drapery just behind the bench. At the ends are great fireplaces in which wood is burned. These are modern and mainly for the sake of ventilation. Between the large windows, however, are the beautiful old marble mantels, around which the early senators must have vainly tried to keep warm. Happily the conservatism of the place has spared these, though they are no longer necessary. The interesting carving on the old mantels illustrates the fable of the fagots, which, though easily broken when unbound, can successfully resist force when their strength is united. This space back of the screen is used by the judges as a breathing-place, or even as a buffet for a frugal luncheon, since a judge may retire to this convenient nook, and still be legally assisting in the constitution of a quorum.

A visit to the robing room across the hall is a very disquieting experience for the lover of furniture of the colonial period, for here Marshal Wright has collected a number of carefully restored treasures, which to see is to want forever afterward. Out of a set of fine old mahogany chairs, ruthlessly cast away in a lumber-room during that period of æsthetic darkness from which the country is just emerging, there were found enough perfect pieces to entirely rebuild two. A box-like tête-à-tête — torture to sit upon, but a rapture to behold — has also been restored, and occupies a conspicuous place at the fireside. The mantel here, too, is antique and of charming design, and there was still another of these downstairs in the conference room; but in the period of darkness before alluded to, it was voted to replace this old mantel with a modern one of Tennessee marble. The old one was offered for sale, and was promptly purchased for a song by Justice Gray — proving that that gentleman's astuteness is artistic as well as legal. If a justice is fastidious enough to want a last look at himself in his gown, before going into court, he takes it in a delightful old gilt-framed mirror, so excellent in design, and so admirable in its well-preserved age, that the least vain person in the world might covet it.

The furniture is not the only interesting feature of the robing room. Over the fireplace is a large portrait of Chief-Justice Jay — the first to hold his exalted office. He is dressed in a brilliant red gown trimmed with ermine, the earliest attempt at judicial costuming in this country. It was decided that the Supreme Court must have some sort of official robe, but as the cut and material were not yet chosen, the first Chief-Justice trimmed his Dublin University gown with ermine, to bridge over the emergency. This was probably thought too fine for a republic, so the material of the judicial robes was changed to heavy black silk. If you are fortunate enough to gain admission

to the robing room, Archie, the negro attendant, who has been there for many years, will proudly point out the beautiful workmanship on one of these gowns, and will possibly let you slip your arms through the wide sleeves and survey the effect in the glass. A woman's first thought is that she must at once have a lounging gown cut after the same graceful fashion, with the ample fullness shirred into a narrow yoke, and great sleeves that look, when the arm is dropped, like part of the voluminous folds of the main garment.

How many people know that the only person not a justice of the Supreme Court who ever sat on the bench during a session was Chief-Justice Coleridge? You cannot forget it after visiting the robing room, for here hangs the portrait of the famous Englishman, sent after he returned home, to the body which had honored him with so great a compliment. The letter which accompanied the portrait has also been framed and hung up, illustrating in the highest degree that grace in correspondence, whether stately or familiar, which passed away with the last generation.

In the basement of the Capitol is the large, bright conference room, where the judges meet on Saturday to discuss the cases argued before them during the week. The great table around which they gather has such a cheerful and hospitable look that I wonder it does not tempt them to forget the dry masses of evidence, and fall to telling good stories. But possibly it does. At one side is another large room used, with an adjoining corridor, as a library. The great question now with the court officers is where to find room for the books which are constantly accumulating. The models used as evidence in patent cases are not preserved except for a limited number of days, during which the owners can claim and remove them. At the end of that time they become the prey of the junkman, unless they happen to be of especial interest, when Marshal Wright transfers them to the little museum, which he has started in a lumber room belonging to his domain.

Besides the court room, the robing room and the conference room, all more or less separated from each other, the Supreme Court offices embrace sundry nooks and crannies, upstairs and down, and so erratically located, that you wonder how the marshal knows where his housekeeping begins or ends. One of the most interesting of these corners is the tiny office of the attorney general at the side of the main court room. A president who had seen its narrow doorway and limited dimensions would be impressed with the imperative necessity of appointing the smallest great lawyer of his acquaintance to be head of the judiciary; but, as presidents rarely explore the outlying portions of the Supreme Court, and as the attorney general sees this little office almost as rarely, the question of stature has not yet added a practical complication to cabinet-making. The corresponding office at the other side is used by the court reporter and is hung with oil portraits of former incumbents of the position.

The affairs of the court are administered by the marshal, Major J. M. Wright of Kentucky, and his assistant, Miss Tompkins, of the same State. Miss Tompkins is the first and only woman to hold an official position in the court, but she has so clearly demonstrated the practical superiority of having a woman perform the duties formerly allotted to a deputy marshal that the court would vigorously oppose any attempt to replace her by a man. The contrast between the way the rest of the Capitol is kept and the cheery comfort and radiant cleanliness of the Supreme Court's belongings is only one evidence of the success of the Marshal's experiment. Womanly thoughtfulness provides for the judges dozens of little comforts which they never knew before, and the only wonder is that members of Congress, seeing the pampered condition of the court, do not

insist upon having the rest of the Capitol housekeeping directed by a feminine brain. The taxpayer is interested, too, as Miss Tompkins keeps the court comfortable and happy on less money than any of her predecessors.

A few instances will serve to show the difference between a masculine and a feminine administration. Moths have no more respect for the draperies of the Supreme Court than for the overcoat of the ordinary citizen, so the hangings used to be annually devoured during the summer recess, or else stored at considerable expense at some upholsterer's in the city. Miss Tompkins had a great cedar closet built in an unused gallery for a very modest sum, and now the court draperies are as safe from moths as the parlor curtains of the most careful housekeeper. Another instance: several of the judges like to lunch in the court room instead of in the badly ventilated Senate restaurant. When Miss Tompkins came she was horrified to see the highest court of the land eating off of tables covered with greasy newspapers. She bought tablecloths and other necessaries, trained the messengers to act as waiters, and a hungry judge can now satisfy his appetite at as seemly looking a table as he would find in his own home.

A book could be written about the surroundings and traditions of the Supreme Court, and the sedate decorum of its daily routine, but it is to be hoped that no one will write it, since every lawyer in the country would be more than ever determined to gain a seat on the Supreme bench; and this excellent ambition is already too widely diffused among a profession in which this distinction means the highest possible achievement. — ALICE M. WHITLOCK in *Kate Field's Washington*.

LONDON LEGAL LETTER.

LONDON, May 1, 1897.

THE Society of Comparative Legislation has, in the second part of the first volume of its proceedings, which has just been issued, given to its members the result of the inquiries into the method of legal remuneration in contentious matters in various parts of the world. These inquiries have been prosecuted in twenty-five States and countries, and the result, which has been most carefully edited by Master Macdonel, of our High Court, is most entertaining. In the endeavor to obtain as wide information as possible, certain queries, translated when necessary into French, German and Spanish, were sent to lawyers of standing in Scotland, France, Belgium, Holland, Denmark, Italy, Germany, Austria, Hungary, Switzerland, Spain, Ontario, Quebec, New Brunswick, Nova Scotia, Cape Colony, Australia, Bombay, Bengal, Madras, Burma, and in the States of Massachusetts, New York, Illinois, Missouri and California.

Answers to the interrogatories were received from the United States from Mr. Moorfield Storey of Boston and Mr. Louis D. Brandeis of the Harvard Law School; Mr. Julien T. Davies and Mr. Osgood Smith of the New York Bar; Mr. Newton Fiero of the Albany Bar; Messrs. Dupee, Judah, Willard and Wolff of Chicago; Mr. Everett W. Pattison of St. Louis, and Messrs. Rothschild and Ach of San Francisco, while Mr. Newton Crane, who after having practiced for a number of years in the United States is now a member of the English bar, explained the differences which exist in the character of the work that is undertaken by an American and an English lawyer.

From the replies Master Macdonel draws the conclusion, as to the remuneration of lawyers by their clients in the countries from which reports have been received, that there are three systems: (*a*) those which recognize no scale of costs and which leave legal remuneration to be regulated by contracts, express or implied, as in the United States and Denmark; (*b*) those which fix a scale of charges for each service, leaving it to the court or its officers, in the event of a dispute, to determine the amount, such as prevails in England, her colonies, and Scotland, France, Holland and Italy; and (*c*) those which fix the remuneration according to the value of the subject matter in dispute, the stage at which the proceedings terminate, or according as the action is contested, as in Germany. As between the parties to the action the widest differences exist. Here in England, theoretically at least, the successful litigant gets his costs, including lawyers' fees, from his adversary, while in the United States he gets nothing beyond the small court costs. It appears, however, that in no country is the successful litigant completely indemnified for the expense he has been subjected to in the litigation.

The most interesting question as to how the costs compare is not satisfactorily answered as there is no statement of the costs in England, and in those countries where the functions of solicitor and barrister or attorney and advocate are not united in the same person there is no indication of the amount the layman is obliged to pay for preliminary expenses before the litigation begins. Some idea, however, of the comparative cost of litigation in the different countries may be gathered from the following table: —

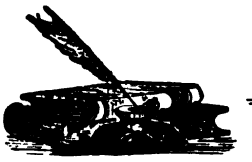
COUNTRY.	Action for Negligence.	Action for Libel.	Action for Breach of Promise.
Scotland	£150 to £160	£230 to £250	£40 to £50
Germany	50 to 60	About £6	
Holland	60	£60	35
Denmark	35	35	20
Spain	12 to 14	20 to 26	6 to 8
New York	50 to 100	100 to 150	30 to 100
Mass.	80 to 160	40 to 160	40 to 50
Illinois	60 to 100	20 to 100	10 to 50
Missouri	60 to 100		
California	50	100	
Ontario	50	70	30
Quebec	70	50	

From this it appears that the smallest charges are in Spain, and the highest in Scotland and the United States. Had an estimate been made for England it would have greatly exceeded the highest limit in the United States, as the fees mentioned for your country are about those which would be marked upon the briefs of the junior barrister and his leader, while at least as much more again would be charged up against the unfortunate litigant by his solicitors.

It is hardly possible to give in such brief limits even an idea of the excellent and most entertaining report Master Macdonel has made on this subject. Every practicing lawyer ought to read it, and as it is so easily obtainable (it is sent gratuitously to every member of the society) there is no reason why he should not do so. I regret to find, on looking through the lists, that there are only five members of the society in all the United States, and these are the Columbia University Library, the University of Michigan, the New York Public Library, the Law Association of Philadelphia and the Pratt Institute Free Library of Brooklyn!

STUFF GOWN.

The Lawyer's Easy Chair.



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

BY IRVING BROWNE.

CURRENT TOPICS.

PRESTON'S EPITAPH. — In one of his notes in 10 English Ruling Cases (p. 814), the learned editor, Mr. Robert Campbell, sets forth Sir George Rose's epitaph on Preston, the great conveyancer, which is new to us. It runs as follows: —

"Stern death hath cast into abeyance here
A most renowned conveyancer.
Then lightly on his head be laid
The sod, that he so oft conveyed.
In certain faith and hope he sure is,
His soul, like a *scintilla juris*,
In nubibus expectant lies,
To raise a freehold in the skies."

MICROBES. — The end of this century is an era of fads, and the most novel and persistent fad of science that has ever crept into the human brain is that of Microbes. Pretty much everything wrong, certainly almost everything in the nature of disease, nowadays is laid at the door of Microbes. People are growing so scary that they are almost afraid to shake hands, and it would not seem strange to see them doing it through the medium of a stick, as they are wont in plague time in some countries. The very latest discovery in this direction is that baldness, hitherto attributed to intense mental application or too persistent occupation of the front row at ballet performances, is the work of Microbes. Over-production is the bane of modern social conditions, and this seems to be the vice of the modern Microbe family. The scare has invaded the church, and the deadly worm lurks in the sacred cup at communion, so that modern science prescribes individual glasses, which being passed around on trays fearfully resemble the distribution of liquors at a restaurant. Even Cupid has had a scare, and is chary of allowing his devotees to kiss one another, thus depriving courtship of one of its chiefest attractions and casting a damp on the matrimonial market. But before the Microbe business was discovered there was one species of osculation which always seemed to the Chairman to be extremely loathesome, — so much so that he early contracted scruples of conscience against it, and, on the few occasions when he has been called as a witness, has insisted on being sworn with the uplifted hand, instead of kissing that greasy volume which a super-serviceable officer is always thrusting at the lips of the witness. The very smell of the book is frequently offensive. The constable's fingers are an offense, to say nothing of the countless forms of foulness which lurk upon the thousands of lips which press it. London "Truth" has precisely phrased the Chairman's sentiments on this subject, in recent verse, as follows: —

THE BOOK OF LIFE — AND DEATH.

"The book is an old one; its pages are stained;
Its covers with layers of grease are engrained;
Its edges, which once were by gilding made gay,
Have been dog-eared and damp for full many a day:
Its leather, which must have been new at some time,
Is now black with dirt and all sticky with grime;
In short — not to dwell on such features too much —
'Tis a bad book to smell and a worse one to touch.

The chemist, on subtle analysis bound,
Fine scope for research in this volume has found:
In its filth-crusted covers by him, as a fact,
Most inimical germs to their lairs have been track'd:
Of the microbes which rollick in dirt and in damp,
His lens has displayed quite a populous camp;
Nay, of noxious bacilli which act as a leaven
In sundry diseases, he's hap'd upon seven!

And what do you think is this badly used tome,
In which the pus cocci is too much at home:
This book, which neglect has contrived to convert
Into such an amalgam of mildew and dirt?
What, what is this volume which science affirms
Is the domicile now of a legion of germs?
In the very next line you an answer may slip on —
It's the testament used in the court house at Ripon!

. . . . . .

The hale and the wholesome, the sick and unclean,
The saint and the sinner, its kissers have been;
Till it now may be said it fairly belongs
To such things as should only be touched with the tongs."

ROMAN LAW LADIES. — In his agreeable "Causerie," in the December number of the Canada Law Journal, Mr. Charles Morse gives us to understand

that although women were prohibited from pleading causes for others in the court of imperial Rome, they might plead their own, and frequently received a legal education. He says: —

"Valerius Maximus tells us that there was a certain lady named Cafrania, wife of a Senator, who was addicted to verbal onslaughts of so violent a character upon a certain Prætor whenever she appeared before him, that in self-defense and in the interest of justice he made an edict forbidding all females from pleading for others in the courts of Rome. Valerius calls this disbarred lady the most shocking names, which we deem it prudent not to translate. This prætorial inhibition found its way into the Pandects, where the reason for its promulgation is also stated in language quite as denunciatory of the embargoed Cafrania as that above referred to. [See Dig. 3, 1, § 1, in Galisset's "Corpus Juris Civilis."] It would seem, however, that, notwithstanding this ban upon female pleaders, the study of the law was regarded as a becoming pursuit by educated women in the reign of Justinian. Testimony of this fact is to be had in the following epigram by Agathias upon the death of his sister Eugenia, translated by Lord Neaves in his notes to the fourth edition of Lord Mackenzie's 'Roman Law': —

'Blooming in beauty and in song before,
Skilled in the splendid truths of legal lore,
Here hid in earth Eugenie's seen no more.
Venus, the Muse, and Themis, at her tomb,
Cut their fair locks, in sorrow for her doom.'"

A PRIVILEGED CLERIC. — In our youth we disported ourselves in writing about the Ecclesiastical Courts and the Privileges of the Clergy in England. Just now there comes to us, in the "Law Times," the following account of a highly privileged ecclesiastical person: —

"There is a specially privileged clerk in Holy Orders of the Church of Scotland who is a member of the College of Vicars-Choral of Hereford Cathedral. He draws his salary with regularity, but declines to intone the prayers or to assist in chanting the Litany in the cathedral. The Dean and Chapter attempted to cite him before Lord Penzance in the Court of Arches, but in a considered judgment, delivered before hearing the parties, that learned and leisured and well-paid functionary held that the clerk of the Scottish Church was not subject to the Clergy Discipline Act of the Church of England, even though installed in an English benefice. And now the clerk is engaged in trying to prohibit the Dean and Chapter of Hereford from exercising a domestic discipline over him by citing him before their own body. This he objects to because (1) they already promoted the suit against him in the Arches Court, and (2) they cannot, he says, proceed against individual vicars-choral, but only against the body in its corporate capacity. A Divisional Court has granted a rule *nisi* to settle this nice question of ecclesiastical ethics."

As Ralph Waldo Emerson asked concerning pie, so we are led to ask, what is this person for? A man in a boat must row, fish, or cut bait, and we are curious to know what use can be extracted from this obstinate clerk. More especially do we desire to know why the kingdom should be taxed to support this luxurious official and to pay for his lawsuits.

ESCAPE. — An account in the English newspapers of a recent dash for liberty by a Dartmoor prisoner will remind readers of the opening scene in Dickens' "Great Expectations," and of that piteous episode in "The Silence of Dean Maitland." This prisoner panted for freedom, but he failed to achieve it because he could not steal any "pants" to take the place of his telltale striped nether garments. He tells the story in his artless way as follows: —

"I did take a swig or two out of some of the decanters of port wine and other Christmas drinks about, and I got two 'alves of plum pudden and a lot of breast of turkey stowed away in the pockets of that parson's overcoat which I stole in the first house I entered. But it must be a queer country as lies around that prison; why, there don't seem a single man to live there as 'as got more than one pair of pants to his legs, and it seems as 'ow they must all sleep with them under their pillows. Why, I was in one bloke's bedroom while he was in bed, and, s' help me, I think he must have been sleeping with his trousers on!"

This poor fellow should have reflected that perhaps the wives wore them, and have searched among the feminine apparel. It would certainly have been so in this favored country.

EARLY RISING. — The ancient sawyer said: —

"Early to bed and early to rise
Makes a man healthy and wealthy and wise."

But it doesn't do anything of the sort. Take for a test that class of men who follow this maxim most literally, the farmers, and it certainly is not true of them. They are not especially healthy — they are very apt to be insane, and no wonder. They are never wealthy. And when we say that we think they cannot claim any superiority in wisdom, we are putting it very mildly and respectfully. Of course the Chairman, whose favorite theory of passing vacation is to loaf and lie down, cannot be expected to advocate early rising, whatever he may think of early going to bed. He thinks it very disrespectful to get up before the sun. That is the most unhealthful time of day, when all Nature is reeking with night-damp, and, so to speak, has not brushed her teeth. A walk on an empty stomach and before the sun has done his beneficent office is a distressful and unwholesome exercise. But the Chairman is becoming an involuntary early riser, the victim of a species of insomnia. His trouble strongly resembles

that of a man who once called to consult a great authority on *massage*, residing in Carlsbad. He said he could not sleep. The doctor said: "You don't look like a man troubled with insomnia. How much do you contrive to sleep?" "Well, I generally sleep from about eleven till seven." "Eight hours! isn't that enough?" "Well, but Doctor, I can't sleep in the daytime!" That is just the difficulty with the Chairman — he can't sleep after six o'clock, A. M. The cause is the crowing of neighboring cocks. His neighbors in the rear keep roosters, some of which are expert in crowing and others are learning. The efforts of the latter remind him of the first attempts of a boy to whistle. It must be allowed, however, that these beginners are showing improvement, under assiduous practice, although they begin so early that their voices are hoarse with the dampness. One of these youngsters has a peculiar circumflex accent in his note that is extremely annoying. It is probably a birthmark. He is always the first on deck, and persists until he rouses his sleepy elders. He evidently regards that as smart, in this respect resembling a human baby. Then these birds hold dialogues with others near and far. Professor Garner, perhaps, could tell what they say, but we cannot, for their discourse is as unintelligible to us as one of those polyglot and penticostal operas in which the performers sing respectively in Italian, French and German. The whole performance is the more annoying to us because we never eat eggs, and we try hard never to eat a rooster. This untimely cock-crowing marks the foolishness of early rising, for the cock is notoriously a brainless fowl and the silliest animal in creation — just the creature to get up early and disturb his neighbors' sleep. We have had very serious thoughts about an endeavor to suppress this nuisance, and have wondered whether the courts would listen to an application for an injunction, or whether we have a right to take the law into our own hand, as in the case of a nocturnally howling dog, and suppress these feathered pests by some species of seductive poison. Have residents of a large city any right to keep roosters, or are we one of those abnormally nervous and sensitive persons for whom the law makes no allowance? We only wish we could shoot straight, or that the classic custom of sacrificing cocks to Esculapius might be restored, for there are many physicians living in our neigborhood.

NOTES OF CASES.

SELLING LAUDANUM TO ANOTHER'S WIFE. — An almost unprecedented case is Holleman *v.* Harvard, 119 N. C. 150; 34 L. R. A. 803, in which it was held that the sale of laudanum as a beverage to a married woman, knowing that it is destroying her mind and body and causing loss to her husband, when continued after his repeated warnings and protest, renders the seller liable to him for the damages which he sustains on account of the loss of her services. The Court said: —

"The action is a novel one. With the exception of the case of Hoard *v.* Peck, 56 Barb. 202, which, in its most important aspects, resembles the one before us, we have been able to find no precedent in the English common-law courts or in the courts of any of our States. It does not follow, however, that because the case is new the action cannot be maintained. If a principle upon which to base an action exists, it can be no good objection that the case is a new one. It is contended for the defendants, though, that there is no principle of the common law upon which this action can be sustained, and that our own statutory law gives no such remedy as the plaintiff seeks in this action for the wrong done to him by the defendants, and that the novelty of the action, together with the silence of the elementary books on the subject-matter of the complaint, while not conclusive, furnishes strong countenance to their contention. It is claimed for the defendants that while in the abstract such facts as are stated in the complaint would make the parties charged guilty of a great moral wrong, there would be no legal liability incurred therefor. It was argued for the defendants that there was no legal obligation resting upon themselves not to sell the drug, as is alleged, to the plaintiff's wife, or upon the wife not to use it; that many of the ancient restrictions upon the rights of married women had been repealed by recent legislation, or modified by a more liberal judicial construction; that a married woman was ordinarily free to go where she would, and that the husband could not arbitrarily deprive her of her liberty, nor use violence against her under any circumstances, except in self-defense, and that, if he could not restrain her locomotion and her will, he could not prevent her from buying the drug and using it; that the wife's duty to honor and obey her husband, to give to their children motherly care, to render all proper service in the household, and to give him her companionship and love, was a moral duty, but that they could not be enforced by any power of the law, if the wife refused to discharge them. But notwithstanding the claim of the defendants, we think this action rests upon a principle, — a principle not new, but one sound and consistent. The principle is this: 'Whoever does an injury to another is liable in damages to the extent of that injury. It matters not, whether the injury is to the property, or the person, or the rights, or the reputation, of another.' Story, J., in Dexter *v.* Spear, 4 Mason, 115. And also in the third book of Blackstone's Commentaries (chap. 8, p. 123) it is written: 'Wherever the common law gives a right, or prohibits an injury, it also gives a remedy, by action.' A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship, and of rendering all such services in his home as her relations of wife and mother require of her. The husband, as a matter of law, is entitled to her time, her wages, her earnings, and the product of her labor, skill and industry. He may contract to furnish her services to others, and may sue for them, as for their loss, in his own name. And it seems to be a most reasonable proposition of law that whoever

willfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. And the defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying her mind and body, and thereby causing loss to the husband. The defendants and the wife joined in doing acts injurious to the rights of the husband. From the facts stated in the complaint, the defendants were just as responsible as if they had forced her to take the drug, for they had their part in forming the habit in her, and continued the sale of it to her after she had no power to control herself and resist the thirst; and that, too, after the repeated warnings and protests of the husband. There is no difference between the principle involved in this action and the principle upon which a husband can recover from a third person damages for assault and battery upon his wife. That assaults and batteries are made criminal offenses makes no difference, the foundation of the husband's suit being, not for the public offense, but for damages, — compensation for the injury which he has sustained on account of the loss of his wife's services. The sale of the laudanum by the defendants to the plaintiff's wife, under the circumstances set out in the complaint, was willful and unlawful, and the husband's injury is just as great as if his wife had been disabled from a battery committed on her, although the unlawful act is not indictable.

"The defendant's counsel also insisted that the selling of laudanum is a lawful business, that it is on the same footing as the sale of spirituous liquors unrestrained by the statute. It is true that there is no statutory provision in North Carolina prohibiting the sale of laudanum as a beverage or as a medicine, but it does not therefore follow that a sale of it under all circumstances is lawful. As is well said in Hoard *v.* Peck, 56 Barb.; 'Its lawfulness or unlawfulness depends upon the circumstances of the sale, and the uses and purposes to which it is to be applied.' It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the dealer's complying with the license laws, except in the cases prohibited by statute. Certainly no fair inference can be drawn from this that damages may not be recovered from one who knowingly and willfully sells or gives laudanum or intoxicating liquors to a wife, in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action. But laudanum is well known to be a poisonous drug. As a beverage, it cannot be drunk without injury to the body, affecting the health of the physical and moral powers, and this is known to most persons of ordinary intelligence and to all druggists. The defendants knew, taking the complaint in this appeal to be true, that the plaintiff's wife did not buy the laudanum for medicine. They knew that she was buying it as a beverage; that she was violating her duty to her husband in destroying her health, and thereby rendering herself unfit as a companion for him, and to render proper service in the household. They assisted her and encouraged her, for gain, with the means of doing all this in face of his protests and warnings. The habit she had formed was the direct result of the use of the drug, which the defendants sold to her in such large quantities, and they knew it, and persisted in it, although repeatedly warned and entreated by the husband not to do so. His honor erred in sustaining the demurrer. It ought to have been overruled."

We think it is correctly remarked by the editor of the L. R. A. in connection with this decision: "To avoid the maxim *Volenti non fit injuria* the decision must rest upon the fact that she had become incapable of rational action in the matter, so that the injury to her is like an injury to property or to a person *non compos mentis*." But that leaves the question of injury to the husband unanswered. It may be plausibly argued that the principle involved is similar to that in cases of seduction or enticing away another's servant, in which the willingness of the seduced or of the servant is no defense. In the New York case one judge dissented, observing: "The plaintiff's wife was responsible to no human tribunal for her conduct." "The wrong in this case, if it could be regarded as a legal wrong, was committed by the wife of the plaintiff, and not by the defendant." We are by no means certain that the case is as clear against the plaintiff as we thought it, many years ago, when we wrote of it: —

"Next we shall come down on them for selling our wives patent medicines and female specifics. The corset-maker shall suffer, and the shoemaker who puts small heels on our wives' boots. In those States where lotteries are lawful, let the lottery dealers beware of selling too many tickets to married women. I am by no means certain that the doctrine may not be reasonably invoked against revival preachers, who drive weak women mad by powerful discourses, and against the advocates of woman's rights, who alienate our wives' affections from us by holding up the glittering prospect of the ballot."

DETENTION OF WITNESSES. — Solomon said: "There is nothing new under the sun"; and the old hymn says: "To Thee there's nothing old appears, Great God, there's nothing new." It is the same to a considerable extent in the law, so far as principles are concerned. Legal novelty chiefly consists in applying the old principles to new conditions. So doubtless the decision in Hull *v.* County Commissioners, 82 Md. 618; 51 Am. St. Ref. 484, that a witness confined in prison by the government, to secure his attendance, simply because of his inability to procure security for his attendance, may recover his *per diem* fee for attendance for every day of his confinement, will strike most practitioners as novel, although perfectly right. But it seems to be old law, for the Courts cite precise precedents from the Federal Circuit Court and those of Michigan, Missouri and Iowa. Of course this doctrine would not apply to those States which refuse witness fees in criminal cases.

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.

LEGAL ANTIQUITIES.

LORD BACON, in his advice to Mr. Justice Hutton, says: "You should be a light to jurors to open their eyes, but not a guide to lead them by their noses."

FACETIÆ.

ONE of the grand jury lately in session at Belleville got off rather a bright thing the other day, though it was some time before his colleagues in the study of crime tumbled to it. They were coming through the back yard of the Belleville House, and stopped to watch a butcher, who was at work on a hog. One of them made the remark, "We've just been investigating the case of a man charged with assault with intent to kill, and here is a man who kills with intent to salt."

"OH," said the lady lecturer, "I have had such a delightful conversation with the gentleman you saw bow to me as we left the train. He told me that the emancipation of woman had been his life work for ever so many years." "Yes," said the woman who had come to meet her, "that is so. He has been a divorce lawyer ever since I could remember."

A LAWYER brought a suit against a rich corporation for a man of good standing in the community, and of rather exceptional attainments. In the course of his argument, he declared in a loud voice, for the purpose of gaining the sympathy of the jury:—

"Gentlemen of the jury, who are the parties to this important litigation? Why, on the one side there is a powerful corporation, with an overflowing treasury, and on the other side" (pointing to his client, who was seated in the bar), "there is my poor, simple, uneducated client."

"Did you win your suit?" inquired a friend of the plaintiff a few days after.

"Yes," was the reply, "I won my suit; but I shall never employ that lawyer again. He called me a fool, and the jury believed it."

NOTES.

THE bill providing a limited indemnity for the loss of registered letters has become a law. The maximum of indemnity on any single registry is fixed at ten dollars. There is every reason for supposing that the registered mail business will increase, as a direct consequence of this new law.

FOUR Buffalo reporters attended a prize-fight in a professional capacity, and the "mill" being raided by the police, were promptly captured with the party. Judge King, of that city, before whom they were brought, released them, declaring that it was a principle of law, as well as of common sense, that three kinds of men were permitted to go anywhere without blame — doctors, clergymen and reporters.

THE English Criminal Statistics for the year 1895 fortify the view which we have consistently advocated, and in which the majority now concur, that excessive punishment defeats its own object. Crime actually declines in proportion as the sentences are merciful. These are the words of this interesting record: "This remarkable decrease in crime goes on *pari passu* with a still further reduction in the length of sentences. In 1895 the number of sentences of penal servitude has fallen from 956 to 803, and the sentences of imprisonment for one year and upwards from 765 to 762."

Some curious facts concerning crime and suicide disclosed by these statistics may be mentioned.

Heat aggravates crime; cold reduces it. Also, the decrease of crime goes on simultaneously with a period of special distress and poverty. Suicides decline in very cold weather. Drowning is the common method, which explains this. Drunkenness is highest in April and December — lowest in April. — *The Law Times.*

THE oldest will extant, unearthed by Professor Petrie at Kahum, Egypt, is at least four thousand years old. In its phraseology, the will is singularly modern in form, so much so that it might be admitted to probate to-day.

THE Oklahoma senate has agreed upon the absolute separate school measure as it passed the house, providing for separate school districts, separate school boards and separate funds for white and colored children.

THERE are 52 penitentiaries and over 17,000 jails in the United States. They cost $500,000,000 to build. Over 900,000 persons were incarcerated in the year 1892. The criminal expense to the country is not less than one hundred millions annually. — *Current Literature.*

PROF. CHRISTOPHER G. TIEDEMAN, LL. D., has resigned his chair in the University Law School, New York, the resignation having been tendered to the Council of the University in the early part of March, to take effect at the close of the current college year. Prof. Tiedeman was appointed in the fall of 1891, when the law school was reorganized under the leadership of the late Austin Abbott.

IN Kansas a law has been proposed which meets with favor and which promises to employ convicts without displeasing the representatives of organized labor. This law would divide the convicts into three classes, one of which would be employed in digging irrigating ditches, another in road-building, and another in raising farm products for the State institutions — the most vicious alone to be kept at the State Prison, where they would be engaged in breaking rock to be used in building State macadamized roads.

THERE is in the strong rooms of one of the oldest private banks in London a large quantity of jewels, plate, and other valuables which were deposited for safe custody by French refugees shortly before the outbreak of the Revolution. Several of the depositors claimed their belongings after the *coup d'état,* but the present deposits are still awaiting claimants.

THE law class of the Syracuse University has adopted the following college yell: —

Agency, contracts, bills and notes,
Equity, pleadings, sales and torts,
Domestic relations; Raw! Raw! Raw!
Syracuse 'Varsity,
College of Law!

MISS ELISE BROWN, a dressmaker, recently sued Rev. Frederick Hetling, Vicar of Christ Church, London, for the recovery of a sovereign which she had put into the collection-box while in a fit of temporary aberration. Occasionally such lapses came over her, she said. For two years she did not go to church, but at length she decided to attend Mr. Hetling's early communion service, and it was there that the aberration of judgment fell on her and led her to put into the plate a sovereign, which she now wished to recover, as she had changed her views on ecclesiastical polity. The lady told the judge that she did not believe she would have given the sovereign had she been in her right mind. The judge said that what was given for charity or for church purposes could not be recovered, and he accordingly gave judgment for the defendant.

A NEGRO had stolen a hog from Mr. Henderson of Tennessee, and as witness Mr. Henderson took the stand, and the justice of the peace began: "Is your name Tom Henderson?" "Of co'se," was the reply. "Didn't reckon I'd bin changin' names, did yo', Squar'?" "Live in this yere town?" "Sartin, I do. That's a powerfully foolish question to ask me." "Reside in this yere county and State, I take it?" continued the Squire. "Suck my hide, but of co'se I do!" exclaimed the plaintiff. "I was bo'n right yere and never wandered fifty miles away, and yo' know it and the laws knows it." "On the fifth day of this month were yo' in possession of a certain spotted

hog weighing about 120 pounds and hevin' a kink in his tail?" "Of co'se. I was in possession of six hogs, and he was one of 'em. What's all this beatin' around fur, Squar'? Why don't yo' go ahead and let me sw'ar to the k'llin' and findin'?" "Law is law, Tom, and we must go 'cordin' to law or we can't make a case. Was yo' out in the woods in the afternoon of the 5th?" "I was." "Gettin' chestnuts?" "Yes." "Find any?" "'Bout half a bushel, but what's the matter now? What has chestnuts got to do with that hog?" "Steady, Tom. Is yo'r eyesight good?" "Jess h'ar him. Squar' Taylor, that ain't no law. That's only foolin' around, jess like a man lookin' up a coon tree when the coon is somewhar' else." "How about yo'r hearin'?" continued his honor. "Say, Squar'," continued Tom, as he rose and pounded on the desk, "this hain't no case whar' somebody traded mewls, but it's a case whar' that pesky Abe Salter stole one of my hogs, and is yere to be tried fur it, now yo' quit fussin' and go 'cordin' to law, or I'll walk right off." "Wall, Tom, I reckon we've made a good 'nuff case," said his honor, as he closed the law book before him, "and Abe Salter is sentenced to three months in jail, and will be took thar' right off!"

CURRENT EVENTS.

A CURIOUS row over the divorce question has arisen in a village of Brittany, the most strongly Catholic part of France. The mayor, whose duty it is to perform the civil marriage ceremony, refused to marry a couple because the man had been divorced, and sent in his resignation. The assistant-mayor and four municipal councilors were asked in turn to perform the ceremony, and, rather than comply, resigned one after the other. The sub-prefect of the district refuses to accept the resignations, the disappointed bridegroom has sued the recalcitrant officials for ten thousand francs damages and six francs for every day he remains unmarried, and the district attorney threatens to prosecute them in behalf of the state.

JAPAN is a literary country, with a history of writing and literature since at least A.D. 712. Last year the number of books published was 26,965, of which 20,000 were translations or compilations. Law led with 4,830; religion followed with 1,183; painting and sculpture had 3,000; music, 1,022; Japanese poetry, 982; and works in belles-lettres, novels, stories, criticisms, etc., 1,112 titles. — *The Critic.*

AT Kew no watch has yet succeeded in getting the one hundred marks which signify perfection. The Kew test is no light one. The watch is tested in every position, and its rate registered, not only per day, but per hour; it is hung by its pendant, hung upside down, hung on each side, placed dial down and back down and at any number of angles, and to finish up with is baked in an oven and frozen in an ice-pail. A watch with a Kew certificate is a comfort to its owner. When it is considered that it makes eighteen thousand vibrations in an hour, and must not vary a second a week, while a quarter turn of its two time screws, meaning the millionth of an inch, will make a difference of twenty seconds a day, the delicacy of its adjustment will be appreciated.

ACCORDING to a decision just rendered by the supreme court of appeal at Paris, all companies incorporated for the purpose of carrying on business in France must be incorporated in France itself, according to the French company law. As there are a large number of American enterprises of one kind and another in France, this attitude on the part of the French authorities is worthy of serious consideration, all the more as it is a matter for discussion as to whether it does not constitute a violation of the stipulations of France's treaties of commerce with foreign countries.

THE taxable wealth of the negro population of the United States is over three hundred millions of dollars. There are twenty-three thousand four hundred and sixty-two negro church bodies, with church property valued at over twenty-six millions of dollars. There are over one thousand college-trained colored ministers.

SNAKES and wild animals claim an increasing number of victims in India. According to the last yearly returns, 3,014 persons died from snake bite, while 22,086 were killed by wild animals, tigers and wolves claiming the largest number of victims.

FOR a fee of from two to eight cents a message, one may talk from the smallest of Swiss towns over a long distance telephone system to any part of the country. The instrument is kept in perfect repair, and the service is excellent.

PROFESSOR LANG of Vienna declares that sponges, owing to the impossibility of killing germs in them, have long since been banished from the surgeon's table, and should also be excluded from the bathroom and washstand.

LITERARY NOTES.

A NOVEL by Frank R. Stockton, "The Great Stone of Sardis," begins in the June number of HARPER'S MAGAZINE. It is a humorous romance of the twentieth century, a salient feature of which is a submarine expedition to the North Pole. The opening article, "A New Switzerland," written and illustrated by Edwin Lord Weeks, is an account of travels and adventures in the Dauphiné, a part of Switzerland as yet uninvaded by the tourist. "An Elder Brother to the Cliff-dwellers," by T. Mitchell Prudden, is an account of the Indian's experiment in civilization which was thwarted by the advent of the white man. "Henry Gladwin and the Siege of Pontiac," by Charles Moore, is an historical account of a hitherto obscure episode in American history compiled from original sources. In "The Celebrities of the House of Commons," the first of two papers on the British Parliament, T. P. O'Connor, the brilliant Irish leader, sketches the life and character of his political contemporaries, and tells many anecdotes of parliamentary life. "Within the Eye of Honor," by George Hibbard, is a short story raising questions of social casuistry. It is illustrated by C. Dana Gibson. "Grandmother Stark" is one of the series of Lin McLean stories by Owen Wister.

KOREA, that bone of contention between China and Japan, is a land of strange customs, some of which Prof. Edward S. Morse describes in the May number of APPLETON'S POPULAR SCIENCE MONTHLY. "Highway Construction in Massachusetts," is described, with illustrations, by Charles L. Whittle — that is, the improved highway construction that has come in response to the modern demand for good roads. Prof. Frederick Starr begins a series of papers on scientific societies with a history of "The Davenport (Iowa) Academy of Natural Sciences," giving portraits of its leading spirits and other illustrations. "The Latent Vitality of Seeds," which enables them to germinate after long keeping or extreme refrigeration, is discussed by M. C. de Candolle.

A BEAUTIFUL cover in nine colors, from a design by Gorguet, the distinguished French artist, gives promise of the bright and spring-like contents of the May number of SCRIBNER'S MAGAZINE. It launches a new kind of college article — a reminiscent and discursive account of "Undergraduate Life," old and new, which is always The College in the minds of its graduates. Edward S. Martin, one of the founders of the "Lampoon," and a graduate of '77, opens the series with Harvard. His account of the career of a typical Boston boy on his way through the social mazes of Harvard is not only amusing, but of great value as a picture of real student life. Judge Robert Grant, who, as undergraduate, post-graduate and law student, spent a decade at Harvard, gives his reminiscences of "Harvard College in the Seventies." Princeton will be exploited in the June number by James W. Alexander, and Yale in the July by Judge Henry E. Howland. H. J. Whigham, the amateur champion in America, contributes an article on "Golf," which is almost free from technicalities and full of valuable points for the beginner or the expert. What he has to say about links will surprise most American golfers. May is the drawing-room month in London, and C. D. Gibson describes and pictures it in his fourth article. A presentation at Court is pictured for the first time from life by an American artist. Mr. Davis's "Soldiers of Fortune" has reached its dramatic climax in the description of the Revolution and flight of the President's wife. It is the strongest piece of writing Mr. Davis has ever done, and shows him a larger man in a literary way than even his admirers anticipated.

THE CENTURY for May contains a group of three papers dealing in an authoritative way with a fresh topic — the scientific uses of kites. Mr. J. B. Millet writes on "Scientific Kite-Flying," with special reference to the experiments at the Blue Hill Observatory, near Milton, Mass. Mr. William A. Eddy writes of "Photographing from Kites," giving an account also of his experiments in telephoning and telegraphing through lines suspended from kites — the first known experiments of the sort. Lieut.-Gen. Schofield contributes the first of his records of unwritten history, his article dealing this month with "The Withdrawal of the French from Mexico," and including an important letter from Gen. Grant to Gen. Sheridan showing the attitude of the United States government towards the French invasion. Affairs in the East are treated in an article on "Crete, the Island of Discord," by Demetrius Kalopothakes, a Greek writer educated in America, now resident in Athens, and in a paper on "The Royal Family of Greece," by Prof. Benjamin Ide Wheeler, late of the American School of Athens, who writes from personal acquaintance with King George and the Greek princes.

THE June number of the NATIONAL MAGAZINE contains an illustrated article of unique interest which gives an account of the well-known verses of "Mary Had a Little Lamb," together with a portrait and a life of the woman who was *the* Mary. The sketch is written by *a niece* of this lady. "Antitoxin; a Modern Triumph," by Dr. H. B. Boulden, an illustrated article on the new discovery, also appears in this number.

On the question of how to save the fur seals the Review of Reviews takes the ground that President Jordan's recommendations should be heeded at once, and that, without waiting for England's sanction, the United States should absolutely prohibit American citizens from engaging at any season of the year in the taking of seals in the open sea. All who remember Mr. Stephen Bonsal's brilliant services last winter as Cuban war correspondent to the New York "Herald" will be interested in his statement of "The Real Condition of Cuba To-day." The editor declares that the charter of the Greater New York, as passed by the legislature, is "a practical impossibility." The limitation of the mayor's power of removal to six months makes the charter, in Dr. Shaw's opinion, a huge piece of folly. "With that limitation removed, objectionable as the instrument would remain in many respects, it would not be — what it now is for practical purposes — a self-evident absurdity." There is also a brilliant character sketch of M. Hanotaux, the French Chancellor, written by the Baron Pierre de Coubertin.

The complete novel in the May issue of Lippincott's is "Jason Hildreth's Identity." "A Star Route Case," by Mary E. Stickney, is a tale of old days in the West, when mail coaches were "held up" by agents of their owners. Joseph A. Altsheler, in "My Pennsylvanian," deals humorously with a supposed incident of the Revolutionary War. Alva Fitzpatrick traces the fortunes of certain "French Pioneers in America," i. e. Napoleonic exiles who came to Alabama after the downfall of the empire. Mrs. Schuyler Van Rensselaer writes of the "Beginnings of Liberty in New York," questioning some assertions of S. G. Fisher.

WHAT SHALL WE READ?

This column is devoted to brief notices of recent publications. We hope to make it a ready-reference column for those of our readers who desire to inform themselves as to the latest and best new books.

(Legal publications are noticed elsewhere.)

In *Memories of Hawthorne*,[1] Mrs. Lathrop pays a sweet tribute to her father and lays the reader under a lasting obligation for an opportunity to join, as it were, the family circle and see what a lovable man the great writer was. We are not over fond of memoirs, but we could linger for hours over this simple story of Hawthorne's life, so delightfully is it told. A voluminous correspondence shows how the man endeared himself to all who knew him, and Mrs. Lathrop relates many interesting incidents never before published.

Messrs. DeWolfe, Fiske & Co. will publish shortly a book entitled *Samuel Sewall and the World He Lived In*, by N. H. Chamberlain, author of "Autobiography of a New England Farmhouse." The author has gathered his material from the old Boston and New England life of 1630–1730. A number of interesting Sewall portraits and other illustrations, for the most part published now for the first time, lend a picturesque value to the work.

A Transatlantic Chatelaine,[2] by Helen Choate Prince, is an interesting story of an American girl who marries a descendant of one of the oldest families in France and whose money is used to build up the family fortunes. One of the characters disapproves strongly of international marriages, asserting that an American cannot realize the strong hold that the traditions and rank of the old families have on the minds of their descendants. Love has no part or place in these marriages on the part of the husband, his only idea being to keep up the family name and state. The story is strongly and well written and demonstrates that the author is a worthy descendant of her illustrious grandfather, Rufus Choate.

The Wisdom of Fools[3] is a collection of stories by Margaret Deland, having a slight connecting thread. They deal with questions that trouble us all at times, questions which cannot be decided for the multitude, but which each one of us must decide according to his conscience. They are well and strongly written, and leave an impression on one's mind not easily to be effaced, — which is more than most of the prevalent short stories do.

NEW LAW-BOOKS.

American Negligence Reports. Vol. 1. Nos. 1 and 2. A Monthly Report of all Current Cases in Negligence. Edited by John M. Gardner of the New York Bar. Remick & Schilling, New York. Price per volume, $5.50.

The plan of these Reports is to furnish in a convenient form promptly each month all the current decisions upon the subject of negligence (commencing January, 1897), reporting the novel and more impor-

[1] Memories of Hawthorne. By Rose Hawthorne Lathrop. Houghton, Mifflin & Co., Boston and New York, 1897. Cloth. $2.00.

[2] A Transatlantic Chatelaine. By Helen Choate Prince. Houghton, Mifflin & Co., Boston and New York, 1897. Cloth. $1.25.

[3] The Wisdom of Fools, by Margaret Deland. Houghton, Mifflin & Co., Boston and New York, 1897. Price, $1.25.

tant cases in full, while those reported in abstract are to contain a clear, intelligent and concise statement of the facts. The plan of reporting cases in abstract was adopted some years since in a series of reports, titled "The Reporter," which enjoyed a large support from, and was approved and complimented by members of the bar throughout the United States. Upon the completion of a volume in monthly issues the permanent bound volume will follow, containing official citations. The monthly advance sheets (not to be returned for binding), permanent bound volume with official citations, and expressage, all for the moderate price, $5.50. The design of these reports is excellent, and judging from the initial numbers, Mr. Gardner will make them of great value to the profession.

THE TRUE DOCTRINE OF ULTRA VIRES IN THE LAW OF CORPORATIONS. Being a concise presentation of the doctrine in its application to the powers and liabilities of private and municipal corporations. By REUBEN A. REESE, of the Colorado Bar. T. H. Flood & Co., Chicago, 1897. Law sheep. $4.00 *net.*

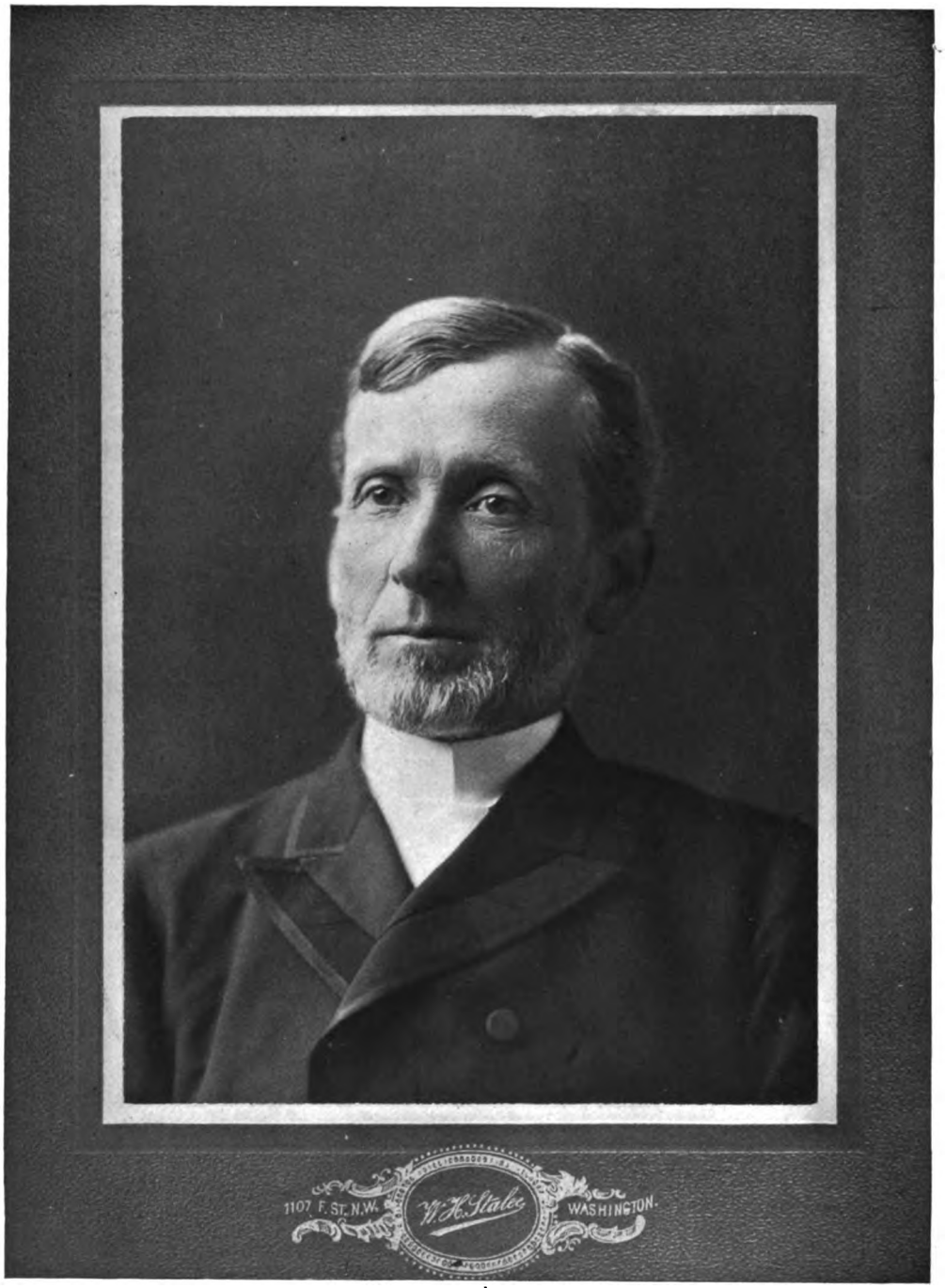
The purpose of this volume, as stated in the preface, is "to set forth in a concise and practical way the established principles of the Doctrine of Ultra Vires in its application to the acts and contracts of corporations both public and private." In the preparation of this work some 4,000 of the latest and most important decisions of the higher courts of America and England have been examined and are cited. The propositions laid down and the principles deduced from these adjudications are, in the main, stated in the exact language of the court; and where courts are in conflict respecting the proper application of the doctrine to the different phases of corporate acts or contracts, the author has not shirked what he deemed his duty to point out in vigorous and convincing language, the apparent inconsistencies and misconceptions which logically follow the loose construction which is sometimes put upon this doctrine. The work will prove to be of great practical value to corporation lawyers, and we heartily commend it to the profession at large.

A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP of Minors and Persons of Unsound Mind. By J. G. WOERNER. Little, Brown & Co., Boston, 1897. Law sheep. $6.50 *net.*

Judge Woerner, who is well known to the legal profession through his admirable treatise on "The American Law of Administration," further increases our obligation to him by the preparation of this exhaustive work upon the law of guardianship. The leading features which made "The Law of Administration" so practical and so popular are not lacking in this new work. The subject, after a general introduction, is divided into two parts — the guardianship of minors and of persons of unsound mind. It is then subdivided into the natural and logical titles, treating successively the instituting of guardianship over minors, the functions of guardians of minors, the conversion of real estate of minors, the guardians' accounting, the procedure to establish unsoundness of mind, the functions of guardians of persons of unsound mind, the close of the guardianship. Each statement of the law is supported by citations to the decisions of the courts of last resort, and where necessary or advisable, to the statutes, of all the States, and of the United States. The total number of cases cited, as in the work on Administration, is very large, while they are selected with all the discrimination shown by Judge Woerner in the earlier book. No recent publication deserves a heartier welcome, and we are sure its merits will be fully appreciated by all practicing lawyers.

THE ORDER OF THE COIF. By ALEXANDER PULLING, Serjeant-at-law. William Clowes & Son, London. The Boston Book Co., Boston, 1897. Cloth, $3.00.

The original edition of this exhaustive chronicle of the antiquity and dignity of the degree of Serjeant-at-Law, which was published at the price of two guineas, has been reissued by the present publishers at a price which brings it within the means of every lawyer. The Order of the Coif has been bestowed on many distinguished men, erudite lawyers, powerful advocates, great judges, and masterly writers, and its history must be a matter of great interest, not only to lawyers, but to the students of the Constitution and History of England. Serjeant Pulling treats his subject in a most interesting manner, and gives us the early history of the order, together with an account of the Aula Regis and the courts at Westminister Hall derived from it: the Justiciars, the Judges, and serjeants of the Coif, the Apprenticii ad Legem, the Inns of Court, the forms, solemnities, and usages kept up by the bench and the bar, records and memoirs of the old Order, and its many distinguished members, their legal and social position, and the gradual innovations on the old institution. The book is fully and finely illustrated, and deserves to find a place in every lawyer's library.



ATTORNEY-GENERAL McKENNA.

The Green Bag.

Vol. IX. No. 7. BOSTON. July, 1897.

ATTORNEY-GENERAL McKENNA.

CALIFORNIA, in its relation to the Union as a State, dominates the Federal department of justice in the administration of President McKinley; and for the second time the attorney-generalship locally leaves the section of the Union east of the Rocky Mountains. Hitherto several States have monopolized the office: Virginia, during four presidential terms, with Edmund Randolph, Charles Lee, William Wirt and John Y. Mason; Pennsylvania, seven times with William Bradford, Richard Rush, Henry D. Gilpin, Jeremiah T. Black, Titian J. Coffee, Wayne McVeagh and Benjamin H. Brewster; Massachusetts, six times with Theophilus Parsons, Levi Lincoln, Caleb Cushing, Ebenezer R. Hoar, Charles Devens and Richard Olney; Maryland, the same number with Robert Smith (who under Jefferson held the office only a few months and then joined the large army of totally forgotten Smiths), William Pinkney, Roger B. Taney and Reverdy Johnson, whose legal fame will ever remain green, and John Nelson, who made as inconsiderable a figure in office as did his President, John Tyler; Kentucky boasted possession of the office during four presidential terms: twice with John J. Crittenden, with John Breckenridge and James Speed; New York thrice with Benjamin F. Butler the great, William M. Evarts and Edwards Pierrepont; Ohio, also four times with Henry Stanbery, Edwin M. Stanton, Alphonso Taft and Judson Harmon; Georgia twice with John M. Berrient, Amos T. Ackerman; and, only once, Maine with Nathan Clifford; Delaware with Cæsar A. Rodney; Tennessee with Felix Grundy; South Carolina with Hugh S. Legaré; Connecticut with Isaac Toucey; Missouri with Edward Bates; Indiana with William H. Miller; Arkansas with Augustus H. Garland, and Oregon with George H. Williams. Rhode Island remains the only New England State never represented in any Federal Cabinet and in company with Florida and Texas among Southern States. The early and less known attorney generals were the hardest worked of all, because during the first quarter century of the Federal government all legal questions that concerned the government were embarrassing by reason of their novelty.

Attorney-General Joseph McKenna was born of parents of Irish descent, in Philadelphia, fifty-four years ago, and was brought by them to California when he was twelve years old and there educated. It was the initial wish of his parents that he should embrace the priesthood, as the family were of the church of Rome, but young McKenna carried his pious rectitude into the legal profession and with that quality of soul has thus far illustrated it. His home was in the interior County of Solona. He had only been at its bar five years when he was elected its district attorney, and for a second term — so popularly had he discharged his office with desirable tact and proof of high legal ability. "I tried to vindicate what learning I had," he once remarked to an intimate, "because my County of Solona bore the revered name of Solon, the lawgiver, who ameliorated the harsh statutes of Draco." With an intellectual cast of countenance of Hibernian type and eloquent eyes, Attorney-General McKenna at times shows as pretty bits of wit as belong to the land of Philpot Curran. "Joe McKenna," as his townsmen of Suisin — the county seat

— affectionately called him, was its leading lawyer. His office adjoined the Court House, and one of his functions was as agent for lawyers in San Francisco and other legal centers of the State, to keep for them watch and ward of their calendar cases and attend to any necessary interlocutory motions. Being an Irishman by descent and an earnest American patriot, it was natural that he took early interest in politics and that he was on the Republican side. In his thirty-second year his County sent him to the State legislature, where he so made his mark that his constituents named him for Congress, but he was twice unsuccessful. He was, however, a believer in the Robert Bruce apothegm which a poet has rendered for juveniles by a song, "If at first you don't succeed, try, try again." A third trial proved successful, as did a fourth and a fifth canvass. One term being under the administration of President Harrison, who, when a vacancy occurred in the ninth Federal judicial district (in California) by the death of that intrepid Circuit-Judge Lorenzo Sawyer, appointed him to that high office. His juridical opinions, pronounced as appeal judge during the five years of his non-interrupted term, are to be found in the "Federal Reporter," beginning at about volume forty-nine. When examined they will show succinctness of style, breadth of argument and precision of comment that will induce any layman even who reads them to exclaim, in the language of Ben Franklin's Quaker litigant, "Well, if this is not good common law it is good enough common sense."

Mr. McKenna's congressional career proved to be the stepping stone to his present office for, serving on the same committee with a congressman named McKinley, from Ohio, a strong friendship arose between them with mutual respect and esteem, especially as to McKenna's legal fence in committee room. So that when the whirligig of politics placed the Ohio comrade in the White House, being called upon by political exigencies to provide California with a Cabinet place, the President bethought him of his old associate, McKenna, who had won new legal laurels on the bench, and conferred upon him his present office; affording the Executive an opportunity to put another good Republican lawyer in the vacated judicial place and, in the event of Justice Field retiring on a pension, placing the attorney general on the Supreme bench, following the precedent set by President Jackson in taking ex-Attorney-General Roger B. Taney from a Cabinet post and placing him on the Federal bench. While legal abilities often lead their possessor into political office, it is not often that political office leads toward a juridical position.

While circuit judge at San Francisco, Judge McKenna displayed tact as well as skill in construing treaties and expounding international law, when many controversies arose respecting the treatment of Chinese *emigrés* and their status of residency, thereby demonstrating his eminent fitness for his present post, which will contemplate many treaty questions and international legal inquiries touching the neutrality laws, the bearing of the Greek blockade upon American commerce and construction of tariff complications or reciprocal treaties, or in transcontinental railway and corporate trust questions. Any lawyer, who shall even listlessly turn the leaves of the many volumes of opinions of attorney generals in the libraries of the Federal departments, can understand and appreciate how delicate and far-reaching are the questions which come before an attorney general. He is also senior adviser to a hundred Federal district attorneys. With previous legislative, executive and judicial experience preceding his assumption of his present office, Attorney-General McKenna's career, be it short or long, may be expected to add fresh luster to that already imparted to it by a Parsons, a Wirt, a Crittenden, a Johnson, a Cushing, a Black, and an Evarts.

THE OLD SUMPTUARY LAWS.

By George H. Westley.

AMONG those abuses of our day that make the judicious grieve, are some which might be mended by a renewal of the sumptuary laws of our ancestors. For example there is the too frequent case of the millionaire's son who races through his patrimony, duplicating the Rake's Progress *en route*, tainting whomsoever he touches, presently arriving, a moral, mental, and physical wreck, at some asylum for the insane. Under well ordered sumptuary laws, properly enforced, such a thing could not be.

Yet, while a legislative revival of this nature would improve some matters, it would bring with it a long train of clearly foreseen undesirabilities; and so we must needs be content with that remnant of the old system which yet remains, namely, the restrictions upon the sale of intoxicating liquors.

The sumptuary laws (Latin *sumptus*, expense) were designed to prevent personal extravagance. Legislation of this kind dates back to ancient Sparta, where that somewhat mythical character, Lycurgus, is said to have enacted laws tending to the suppression of every desire towards luxurious living. All citizens were compelled to take their meals at a public table, and from this not even the king was exempted. The fare was of the coarsest and plainest description. It was said of the famous "black broth" of Sparta that, if the Spartans had to live upon this, it is no wonder that they were so ready to die. The restrictions were not confined to indulgences of the palate: no foreign luxuries of any kind might be introduced, and all adornment of dwellings was prohibited by an inexorable law.

Six centuries later, that is, in the third century before Christ, we find sumptuary laws directed against extravagance in dress. No man should wear a garment of silk "fit only for women," and as for the latter they might not wear a dress of different colors, possess more than half an ounce of gold, nor ride in a carriage in the city or within a mile of it, except on public ceremonies.

There is more reason in this legislation concerning wearing apparel than at first appears. The ancients believed that clothes exercised a distinct influence over the mind of the wearer. Thus Aristotle tells us that when Cyrus had overcome the Lydians, which were a warlike people, and designed to bring them to a more peaceable life, he changed their apparel and music and, instead of their short warlike coat, clothed them in long garments like women, and in a short time their minds were so mollified and abated that they forgot their former fierceness and became tender and effeminate. "Whereby it appeareth that there is not a little in the garment to the fashioning of the mind and conditions."

But, to return to our second last paragraph, the man or body of men that undertakes to curtail the privileges of women in the matter of finery invites trouble. Such a clamor was made and maintained by the fair sex that in twenty years the obnoxious law was repealed, and probably it had become a dead letter long before. "One of the most difficult things with women," said Bossus, "is to root out their curiosity for clothes and ornaments of the body."

The Lex Fannia, 161 B. C., regulated the expense which might be incurred at entertainments. At certain festivals, one hundred *asses* might be spent. On ten other days of each month the sum was limited to fifty *asses*; while for all remaining days ten *asses* were deemed sufficient. When we learn that our

nominal equivalents for these sums are one dollar and a half, forty-five cents, and fifteen cents respectively, we can readily believe that the food at their tables was neither rich nor over-abundant; even if we agree with M. Say that gold at that period had three times the purchasing power that it has to-day. Subsequent laws, however, made a more liberal allowance, and under Augustus a citizen might expend for an entertainment as much as one hundred dollars.

Legislation concerning apparel was not unknown to Greece and Turkey; and in some of its forms it prevailed in the latter country down to a recent period. It is scarcely more than fifty years ago that a traveler saw a crier stand by the palace gate at Pera and make a long proclamation. He held in his hand a baton shod with iron, which he struck three times sonorously on the pavement, and when he had thus collected a crowd in the streets and windows, he announced in a loud voice that the Padisha, "taking into consideration the vain superfluities of female apparel, strictly enjoins every woman whose perigee touches the ground to cut it off as high as her ankles; and every woman whose headdress extends too far from her head is ordered to restrain it within due limits." It should be told that the women of this period were given to expanding their head-dress with gauze and tinsel to an enormous size. There is an account somewhere of the method by which "due limits" were determined, and their transgression punished. An officer approached the suspected woman, solemnly measured her headgear with a rule, and cut off whatever exceeded the proper length. What a pity we moderns have not a similar law limiting the size of the theater hat.

In the fourteenth century Philip the Fair of France made sumptuary laws regulating his subjects' expenses even to the minutest detail. In the matter of clothing, no duke, count, or baron was to have more than four robes a year, and their wives were limited to the same number. Prelates and knights could have no more than two, while every woman, whether single or married, whose annual income was less than two thousand livres, was allowed but one. Imagine the condition of affairs if the ladies of to-day were so restricted.

Under Charles VI an edict was issued: "Let no man presume to treat with more than a soup and two dishes!" According to Dr. Hammond, an old French law prohibited the use of any drink by women save water. An old Scotch law made it a crime for anyone under the rank of baron to use pies or baked meats.

The first sumptuary laws in England concerned indulgences of the palate. The Plantagenet who reigned in 1336 shut down upon "the excessive and over-many sorts of costly meats" which caused "many mischiefs" to happen to the people of the realm. No man, high or low, dining at home or dining out, should at any meal allow himself to be served with more than two courses, except only on the principal feasts of the year, when three courses were permitted.

Thirty years later the laws of that country took up the matter of wearing apparel. "For knights and squires cloth of silver with girdles. Persons of lower rank are not to wear any silk, nor embroider their cloth with any silver, nor wear any jewelry, and the cloth itself must not cost more than four marks the whole piece." Then follows the thoughtful enactment that "the clothiers shall make cloths sufficient of the aforesaid prices, so that this statute for default of such cloth, be in no wise infringed." This law did not last long, however, for a twelve-month later an act was passed repealing it and ordaining that "all people should be as free as they were before."

For a hundred years after this the people of England could dress as they pleased, when it appears that their costumes had reached such a pitch of extravagance and absurdity that sumptuary legislation was again deemed necessary. One thing that needed to be

checked was the ridiculous length of shoe points. Some of these were two feet long. A law was passed forbidding anyone under the rank of earl wearing shoe points longer than two inches. Then again short garments were held to be indecent when worn by commoners, so gowns and cloaks were ordered to be made of a certain length, under pain of forfeiture.

The last sumptuary law enrolled among the statutes of England was that made under the first Queen Mary. Persons with an income of less than twenty pounds a year might not wear any silk in their hats or bonnets, girdles, nightcaps, hose, shoes, scabbards, or spur-leathers. The penalty was three months' imprisonment and a fine of ten pounds for every day the interdicted material was worn. Moreover, anyone keeping a servant in his employ who had broken the law, should pay a fine of one hundred pounds.

While Queen Bess, who succeeded, did not enact any sumptuary laws of her own, she was very active in enforcing those already on the statute-book. She issued proclamations reminding her subjects of the existence of certain Acts of Apparel and, to enforce these acts, she appointed special officers in each city. In a proclamation dated 1575, she sets forth the evils caused by the daily increasing excess, "particularly the wasting and undoing of a great number of young gentlemen, otherwise serviceable."

Under James I the sumptuary laws were all repealed; although that monarch in the early part of his reign tilted by proclamation against costly hose, "Spanish shoes with polonied heels," the wearing of hair in tufts or locks, and "any body or sleeves of wire, whalebone, or other stiffening, saving canvas or buckram only." Concerning the last it was ordered that no lady or gentleman wearing "this impertinent garment" should be permitted to the festivities of the court.

Three articles which came under the ban of the early sumptuary legislators in Massachusetts appear to have been tobacco, dress, and intoxicating drinks. In the records, dated 1634, it is ordered "that victuallers or keepers of an ordinary shall not suffer any tobacco to be taken into their houses, under penalty of 5 shillings for every offence, to be paid by the victualler, and 12 pence by the party that takes it." Lest we should say that such a law only be enacted under a rampant puritanism, let us glance over a law made by one of the sultans of Turkey. The monarch in question ordained that anyone of his subjects detected in the act of smoking should for the first offense have his cheeks bored and transfixed by his pipe; for the second offense he was to have his nose cut off, and for the third he was to lose his head.

Another Massachusetts law of the same year read "that no person, either man or woman, shall hereafter make or buy any apparel either woollen, silk, or linen, with any lace on it, silver, gold, silk, or thread, under penalty of forfeiture of such clothes." Two years later it was ordered that no person should make, sell, or set on their garments any bone lace, or indeed any kind of lace except small edging. In 1639 it was found necessary to issue a new edict against this obnoxious lace which tended "to the nourishment of pride and the exhausting of men's estates, and was also of evil example to others."

Perhaps after all the most curious of the sumptuary laws of our Puritan ancestors was the following, and with this we conclude. "If any men shall judge the wearing of any the forenamed particulars, new fashions, or long hair, or anything of the like nature, to be uncomely or prejudicial to the common good, and the party offending reform not the same upon notice given him, that then the next Assistant, being informed thereof, shall have power to bind the party so offending to answer it at the next Court, if the case so requires; provided, and it is the meaning of the Court, that men and women shall have liberty to wear out such apparel as they are

now provided of (except the immoderate great sleeves, slashed apparel, immoderate great veils, long wings, etc.)."

Was there ever another law enacted in which liberty and tyranny so closely shook hands? Here was each citizen endowed with Comstockian powers ten times multiplied, and yet so much a serf that he could not appear on the streets in his own hair without danger of arrest.

RONDEAU FOR A LAWYER.

By Paul L. Dunbar.

I LOVE to lie the whole day thro'
Where skies outspread their tents of blue,
And canopy the waving trees
That whisper to the whisp'ring breeze
Tales centuries old but ever new.

Where plaintive doves begin to sue
For that warm love which is their due,
And drown with moans the mock-birds glees,
I love to lie.

In fact, while the aforesaid 's true,
To lie is what I always do,
Whenever and where'er I please;
Not only at such times as these,
But any time,—I own to you,
I love to lie.

BENCH WIT IN NEW YORK CITY.

NEW YORK'S new State Constitution made radical changes in the matter of consolidating many courts having special names but which possessed nearly equal powers with the Supreme Court. These, by that instrument, were all annexed to the latter. Consequently, in the city of New York, the courts of common pleas, dating from colonial times, and the superior court, sixty years old, disappeared, with the result that all their judges became Supreme Court judges, and two of the former lost the much coveted title of chief justice. Courts of Oyer and Terminer also became obsolete, and criminal law divisions took their place. The transferred judges, however, were confined to jury or equity trials and orders at chambers, while only the old-time Supreme judges could sit in the interlocutory appellate courts peculiar to each judicial district. To these appellate divisions were awarded the discretion of allowing or disallowing appeals to the highest State court of appeals, and therefore subject to growls from the lawyers who were forbidden a last appeal; growls to the effect that the interlocutory appellate judges, when nice points were made in a case, would, from motives of pride, decline to award the risk of having their decisions reversed. One journalist made a pretty clear case of such a declination, in an action of his own, wherein, after the decision was made against him, an unreported opinion of the highest court was discovered, which directly contravened the opinion from which he desired to appeal. The refusal to appeal on the new citation stated by him created much professional gossip not complimentary to the judges below. This power of refusal is regarded as a pretty despotic one; for not every judge is a Chief-Justice Mansfield or Chase, strong enough to either reverse himself, or give others a chance to reverse him. How many judges are as tenacious of their opinions as a contentious wife who has an obstinate husband?

The Supreme Court of Judicature in London possesses its twelve judges; but that of New York City its nineteen, with the Rory O'More luck of odd numbers in its favor as against the English bench.

New York City Supreme Court judges are always favorite and star guests at public banquets, and there is not one in whose favor could not be sung at those the convivial chorus of "For he's a jolly good fellow." There is not one of these nineteen but can be classed as either humorist or wit, and without any sacrifice of dignity. Perhaps in that respect Judge Roger A. Pryor might be dubbed *primus inter pares*. His repartees, always appropriate and in place, are heightened in effect by his almost preternatural countenance, in which the smiles seem fairly weirdlike. Judge Sedgwick is noted for dry wit, and therein Judge Smyth shares. Judge Van Brunt is master of sly but unwounding sarcasm. Judge Andrews is a quippist. Judge Joseph F. Daly shares with his brother — the famous theatrical manager — drollery of ideas. Judge Barrett is addicted to humorous paradox. Judge Patterson always wears a smile, and would keep it even if he were sentencing to the electric chair, and is given to irony. Judge O'Brien has doubtless inherited the wit of a long line of Irish witty ancestors. The wit of Judge Lawrence is caustic and apposite. Judge Beach delights in a humorous antithesis. Judge Bischoff seems to chaff one with the eyes behind his spectacles. Judge Ingraham is a jokist, and could edit a comic periodical if invited to. Judge Dugro is master of punning. Judge Gildersleeve is a humorous *raconteur;* while Judges Giegerich, Bookstaver and Beekman merely reserve the right

to laugh at the wit and humor of their associates, without themselves tickling the ribs of Momus. Judges Daly and Van Brunt are the champion postprandials of the New York Supreme Bench.

One of the best mots is recorded of Judge Van Brunt, who, being surprised by a brother justice, laughing heartily over a new calf-skin-bound book, and being asked, "Whence your mirth?" answered, "The laws of the last session, just issued and full of comic novelties."

A witness who was very prolix, and tested the patience of the bench, jury, and even the counsel who had called him, was suddenly asked by Judge Joseph F. Daly, "What is your business?" He answered, "I lead the orchestra at a Music Hall." "I thought," responded the Judge, with a weary look at the court-room clock, "that you must be an expert at beating time."

Judge McAdam, from his familiarity with divorce law, is usually assigned to hear marital quarrels. On one occasion, a prolix lawyer, seeking divorce for a wife, kept continually repeating, "And yet, your honor, God had joined them." Judge McAdam, interrupting him, asked, "Was this couple married in church?" The affirmative being given, the Judge said, "And yet you ask me to contradict the solemn words of the marriage service, and put them asunder."

On another occasion he interrupted a prolix lawyer with, "Time for luncheon, counselor," and, looking at the jury, added, "I am not the Adam of the Catechism, by whom all men die, but an Adam by whom some may dine."

Justice Barrett was often apportioned to try murder cases, and once, in closing court at dinner hour, said, "We will adjourn further testimony until morning, and respect the legal maxim in England established by a poet: "Rogues must hang that jurymen may dine."

Judge Pryor, being at chambers, overheard a disappointed lawyer, whose motion he had just rejected, say, in an intended *sotto voce*, "His honor's rulings are mere toss-up of a dollar," and retorted with his grim smile, "But heads (tapping his own) and Liberty win the toss-up."

Judge Gildersleeve, at the annual dinner of the sheriff's jury, being importuned too much by an officious fellow guest at his elbow to take more wine, retorted, in declining, "You are a judge of wine; but the law I am judge of is not, this evening, very dry."

Among Judge Dugro's puns, this is mentioned. He had ordered a non-suit, and a juror timidly asking what was meant by a non-suit, the Judge answered, "It means a ninny suit case — one without legal sense."

Upon another occasion, handing back an offered affidavit after he had read it, he said, "Imperfect and foolish, and appropriately written on foolscap paper." In dismissing a suit for assault and battery on shipboard just outside the county water boundary, for want of jurisdiction, he remarked to the lawyer bringing it, "You ought to have seen that this was malum in *sea*.

Judge Barrett is litterateur as well as jurist, and has composed romances and plays, and he often quotes poetry. On one occasion, in charging the jury in a telephone damage case, he revived a quartet very happily, thus: —

> That steed called Lightning — say the Fates,
> Is owned in the United States.
> 'Twas Franklin's hand that caught the horse,
> Whose harness came from Doctor Morse.

THE CRIMINAL CODE OF CHINA.

By Albert Swindlehurst.

IT has been well said that the criminal code of a nation forms the true index of its civilization, and the Ta-Tsing-Leu-Lee, or Chinese Code, is a notable illustration of this fact. Each one of its 2095 octavo pages bears impress of the peculiar character and genius of the people.

The Chinese always talk of their Code with pride, but most of its provisions, when viewed from a Western standpoint, appear cruel and barbarous in the extreme. Torture is freely made use of to obtain evidence, and we look in vain for those excellent principles of Anglo-Saxon justice by which every man is presumed innocent until he is proven guilty, and no man is required to incriminate himself.

The growth of a spirit of equality and freedom, upon which all true justice is based, is prevented by the division of the people into privileged and non-privileged classes, and the respect required to be shown towards government officials and persons of rank.

Amidst so much that is repugnant to our civilization, the enforcement of filial duty and respect, and the consideration and lenity shown to old age, are worthy the greatest admiration.

The first regular code of Chinese penal laws, Lee-Tuee-Fa-King, was put in force under the dynasty of Tsin, which succeeded to the throne of China, B. C. 249, and enlargements and alterations took place under the several dynasties of Han, Wee, Tsin, Tse, Swee, Tang, Sung, Yuen, and Ming, until, in 1647, Emperor Shun Chee, the first of the Tartar dynasty of Tsing, now reigning, conquered the Chinese Empire, and promulgated the Code which is at present observed.

Each emperor, on his accession, issues a prefatory edict, stating the amendments to the Code which will be acted upon during his reign; the custom bearing a striking similarity to that adopted by the Roman prætors with reference to the Jus Honorarium.

From the earliest of the edicts issued by the present dynasty we gather that the chief ends proposed to be gained by the adoption of a fixed code of penal laws were to "secure uniformity of punishment throughout the empire; to guard against violence and injury; to repress inordinate desires, and to preserve the peace and tranquillity of an honest and unoffending community."

To bring about these ends the Code contains articles and tables which, in their complexity, are like so many mathematical problems; it being necessary to take into consideration, not only the nature and degree of the crime and particular circumstances of the case, but also the social class, age, and physical condition of the offender.

The severity of the law is always relaxed in favor of the privileged classes, of which there are eight, viz.: The privilege of the Imperial blood and connections; of long service; of illustrious actions; of extraordinary wisdom; of great abilities; of zeal and assiduity; of nobility and of birth. The fathers, mothers, paternal grandfather or grandmother, wife, son or grandson of any person belonging to one of these eight classes are also privileged.

Almost all penalties may be commuted on payment of a money indemnity, and the law is further mitigated by the granting of indulgences to offenders disabled by the loss of an eye or limb, or who are the sole sup-

port of sick, infirm or aged persons, and to persons over seventy or not more than fifteen years of age.

Timely confession; the restoration of stolen goods, or assistance in bringing accomplices to justice, always secure to the offender a mitigation of punishment and, in many cases, a full pardon.

Children under seven years of age and accused persons over ninety are deemed incapable of committing any crimes but those of rebellion and high treason.

The crimes most severely punished are those known as the "Ten Abominations," viz.: rebellion, disloyalty, desertion, parricide, massacre, sacrilege, impiety, discord in families, insubordination, and incest. These crimes, when the offense is capital, are excepted from the benefit of privilege or any act of general pardon "in order that people may learn to dread and avoid the same."

High treason is defined by the Code as "an unspeakable outrage and attempt to violate the divine order of things on earth." It is committed by any attempt to subvert the established government; to destroy or injure the person of the sovereign, the palace in which he resides, the temple in which his family is worshipped, or the tombs in which the remains of his ancestors are deposited. The punishment inflicted on traitors is extremely barbarous. All persons convicted of having been principals or accessories to any act of treason suffer death by a slow and painful execution. Moreover, all male relations in the first degree at or above the age of sixteen, without any regard to place of residence, are indiscriminately beheaded. The remaining male children, if proved to be totally innocent of and unacquainted with the commission of the offense, are suffered to live, but rendered eunuchs that they may be employed for the public service in the exterior buildings of the palace. Female relations in the first degree are distributed as slaves to the great officers of the state, and the property of every description belonging to such treasonable offenders is confiscated for the use of the government.

Parricide is considered only one degree less culpable than treason, and is punished as a crime of the deepest dye; such a violation of the ties of nature being held to be evidence of the most unprincipled depravity. Any person convicted of a design to kill his or her parents or ancestors, whether a blow be struck or not, is liable to suffer death by being beheaded. If the murder is actually committed, all the parties concerned therein, whether principals or accessories, if related to the deceased as above mentioned, suffer death in a slow and painful manner, being cut into a thousand pieces. If the criminal dies in prison an execution similar in mode takes place on his body.

Murder, in all cases, is punished by decapitation. When committed with the design of afterwards mangling the body and distributing the limbs of the deceased for magical purposes, not only is the offender executed, but all the inmates of his house, although innocent of the crime, are perpetually banished. Persons giving information by which such offenders are brought to justice receive a reward of twenty ounces of silver from the government.

All persons rearing venomous animals, or preparing drugs of a poisonous nature, for the purpose of murder, are beheaded; their property confiscated, and family banished, even if no person is actually killed by such means.

The use of abusive language is very sternly repressed, especially if the offended person happens to be the husband or ancestor of the offender. The Code says: "Opprobrious and insulting language, having naturally a tendency to produce quarrels and affrays, this book of laws expressly provides for its prevention and punishment."

Robbery and theft are severely dealt with. If the individual plundered or stolen from

is likewise wounded, the principal offender is beheaded, and if any organized band of robbers, in an attempt to secure booty, burn a house or violate a female, the criminals are beheaded immediately after conviction, and their heads, as soon as struck off, are fixed on pikes and exhibited as a public spectacle.

If accessories to a robbery or theft, when it is their first offense, surrender themselves before information has been given to any magistrate, they are pardoned.

In passing sentence on persons guilty of theft the magistrate always takes into consideration the rank of the person stolen from and the amount taken. In ordinary cases the guilty persons are branded in the lower part of the left arm with the words "Tsie tao," signifying "thief," as a warning to others and a reproach to themselves, in addition to receiving corporal punishment, and in some cases they are exiled perpetually.

As to what constitutes a theft or robbery, and what an attempt only, the rule is that an open and violent taking constitutes robbery, and a private and concealed taking a theft. An attempt is to be distinguished from the accomplishment of the criminal purpose in the following manner: In cases of strings of copper money, utensils and other easily movable articles of that description, possession must not only be obtained, but they must have been moved out of the place or apartment in which they were found; otherwise a theft or robbery of such articles is only to be considered as having been attempted. In case of pearls or other precious stones, and other small and valuable articles, it is sufficient that they are found on the person of the offender. On the contrary, in the case of large, heavy articles of wood or stone which the unassisted strength of man is not adequate to remove to any distance, they must not only have been displaced, but actually lifted upon the cart, or upon the animal provided for their removal. In respect to horses, asses, mules and cows, they must have been taken out of the stable, and some evidence must be adduced of exertion on the part of the offender to make himself master of them. Thus, if one horse is stolen and the rest follow, the thief is not responsible for the theft of more than one horse; but if he steals a mare, and the foal follows, his offense is to be deemed a theft of both the mare and the foal. In general, when there are circumstances to trace, and witnesses to give evidence of the overt act, but not of any actual possession of the goods, the offense is punished as an attempt only. When actual possession is proved the theft or robbery is considered to have been completely carried into effect, and punished accordingly.

Great care is taken to ensure the health and comfort of the emperor, and if any physician inadvertently prepares and mixes the medicines destined for the use of His Imperial Majesty in any manner that is not sanctioned by established usage, or does not accompany them with a proper description and direction, he is liable to a penalty of one hundred blows.

The cook who prepares the imperial repast must also be exceedingly careful, for if he introduces any prohibited ingredients into the dishes by inadvertence; uses articles of food not clean and skillfully selected, or neglects to taste their quality when cooked, punishment is administered.

Some of the provisions of the Chinese Code are of great merit, particularly the one guarding against monopolies of all kinds, which provides that if artful speculators, using undue influence in the market, oblige others to allow them an exorbitant profit, and by unjust contrivances raise the price of their goods far beyond their real value, they shall be severely punished.

There is also a humane section with regard to the care of the aged, infirm or destitute. Every magistrate is bound to maintain and protect all such people in his

district, if they are without relatives, and should he fail to do this he renders himself liable to punishment.

The Code contains many other curious provisions, but sufficient has been quoted to show that while, for the most part, the criminal law of China favors the classes, and is barbarously severe where the common people are concerned, there are some sections not unworthy the attention and imitation of the enlightened and progressive nations of the West.

A LAWYER'S LULLABY.

By John Albert Macy.

SLEEP, my little baby, sleep!
From the court of heaven the day
Has retreated far away
In the caverns of the deep.
Lawyer Night has won his suit,
And has ceased to prosecute.

Lullaby, sweet baby mine,
Slumber's claim must granted be.
Now above thee watchfully,
Stars in twinkling myriads shine,
Sheriffs set by night to keep
Guard above thee in thy sleep.

Sleep, my baby; at Life's bar
Love, himself, shall always plead;
And the angels from afar
In thy cause shall intercede.
Kisses pay the lawyer's fee;
Sleep, my baby, peacefully.

THE STUDY OF LAW FROM THE STANDPOINTS OF MENTAL DISCIPLINE AND GOOD CITIZENSHIP.

By W. E. Glanville, Ph.D., LL.B.

ALL study worthy the name is advantageous and disciplinary in its character. Not less than the body, the mind requires cultivation and discipline. If it be conceded that the study of Latin and Greek is no longer advisable because of its lack of practical utility, still it cannot be denied that the mental exercise inseparable from the study of these languages is most salutary.

It is this mental exercise, this drilling of mental powers, that constitutes not the least important feature of rational education. The pernicious idea that education consists simply in cramming a stock of information into the mind, as you would provisions into a larder, cannot be too earnestly combated.

Human minds are not to be stuffed as turkeys are for Thanksgiving; nor packed as trunks are for a vacation.

To abuse the mind by subjecting it to abnormal strains produced by overloading it with undigested mental nutriment too frequently results in arresting its development and impairing its vigor and versatility for the remainder of life. Study is the process by which we incorporate into the mind the thought or mental production of another and make it part and parcel of our own mental being. It includes not simply a cursory acquaintance with books or objects. It embraces patient and thoughtful assimilation of the knowledge contained in those books or objects, and results in enlargement or enlightenment of mind. This is particularly true of the study of law, which is coextensive "with the boundless variety of human concerns." It reveals to the student the fundamental principles upon which civilized society is reared and regulated; it opens up for his investigation otherwise hidden springs of history; it narrates the origin and progress of civil and judicial institutions; it indicates the sound functions and boundaries of good government. It pertains to the most sacred and solemn transactions in which human beings can engage in this life, and affords opportunities for exploring the domains in which private, municipal, national and international rights severally move.

Affording a field of inquiry so vast and extending over a period of time which dates from the remotest antiquity, the study of law is calculated to furnish an expansive and profitable course of mental discipline.

The following are among the chief features of mental discipline such a course of study presents: —

1. Concentration of attention.

Legal study offers no inducement to the sleepy, slovenly, careless or frivolous student. A law text-book can have no attraction for the person who is not prepared for hard work. Charles Lamb, in his appreciative essay entitled, "The Old Benchers of the Inner Temple," informs his readers that one of the celebrities he describes, while enjoying a high reputation for legal acumen, actually possessed very little knowledge of law. The essayist adds: "When a case of difficult disposition of money, testamentary or otherwise, came before him, he ordinarily handed it over to his man Lovel, who was a quick-witted little fellow, and would dispatch it out of hand by the light of his natural understanding, of which he

had an uncommon share." Had that worthy lived to-day I doubt not he would have had little difficulty in figuring before the world as a "briefless barrister." The light of natural understanding is not the light of jurisprudence; and however sharp-witted and gifted a student of law may be, he quickly discovers that nothing else and nothing less than alert attention and painstaking diligence will satisfy the demands of the text-books and treatises he studies. This is an indispensable condition of legal study, and involves a course of mental discipline of the most thorough character. It trains the student not to jump to conclusions, frequently reminding him, when he attempts to do so, that such mental gymnastics are leaps in the dark. It trains him at concentrate his attention upon the work before him. His time is misspent and his labor is in vain if he withdraws his attention for a moment and thus breaks the continuity of thought contained in the section or chapter he is reading. He will sometimes find that even after he has read a section with moderate carefulness he has failed to convey to his mind the correct sense intended by the author; and hence a re-reading and a particularly strict study of the paragraph is required. Close and careful reading, the exclusion of all foreign matters of thought, the closing of the ears of the mind to all other voices, and undivided attention to the voice of the author as it speaks in the book, this is a feature of the mental discipline the study of law ensures.

2. A second feature of mental discipline the study of law emphasizes is a drilling in the habit of systematic thought.

It is a source of increasing gratification to the eager and interested student to note, as he proceeds from stage to stage in his legal studies, the perfectly reasonable and sensible relationship in principle which exists between different branches of the law; to trace the process of thinking exhibited in any distinct piece of legislation from its inception to its perfection or present appearance; to remark the evolution of distinct rights, remedies and titles from judicial dicta and decisions; to observe how former decisions have been followed in some cases in their spirit rather than in their letter; while in other cases they have been overruled, modified, or extended in their application, not by reason of any arbitrary caprice, much less partiality, on the part of the court, but by reason of an attempt to bring them into conformity with fundamental general principles of law and equity.

3. A third feature of mental discipline the study of law presents is the facility of generalization it fosters.

What are the sententious legal and equity maxims interspersed throughout law treatises but made pieces, crystals, of generalization, the essence of judicial administration for centuries past and the guide for judicial administration for centuries to come?

Similarly might we refer to the established definitions of legal terms; and legal literature generally is largely illustrative of the same fact. Text-books, especially on subjects not previously treated of, are of necessity based upon the decisions of the courts which furnish the material out of which generalization of statement and treatment is constructed.

4. Another advantage in the way of mental discipline arising from the study of law is that it trains the student to examine all sides of a question.

It is the misfortune of not a few thinkers that by a partial mental development they are too apt to suppose that there is only one side to a question, and *that* the side they happen to perceive. Thinkers of this description remind one of the blinkers that form a part of a horse's harness in some places. These blinkers are broad pieces of leather attached to a horse's headgear to prevent him from looking in any other direction than the way in which his head is turned. Even so there are many who by

force of habit manifest an incapacity to examine a question from different standpoints, or to recognize the possible soundness of their opponent's position.

The study of law, and especially of equity jurisprudence, will do much to obviate this misfortune, and to produce not simply in legal questions, but in the general affairs of life, domestic, commercial, political and religious, what may be best described as a "well-balanced mind"; a mind ready to receive truth from whatever direction it may flow.

5. A further advantage of the study of law is the practice of exactitude of expression it inculcates.

Exact expression is the correlative of exact thought, and is a gift more generally acquired than possessed by nature. The student of law quickly learns the force of words and the importance of weighing his words. Legal study introduces the student to a class of writers who are worthy of occupying a foremost rank as models of clear style. Who can read Blackstone's "Commentaries" without being fascinated by his beautiful and luminous style; or Cooley's "Constitutional Law" without being impressed with its massive compactness of diction; or Parsons on "Contracts" without admiring his straightforward, business-like method of expression; or Story's "Conflict of Laws," with its full and frequent citations from transatlantic authorities, without admitting that the writer was a master of language; or Bispham's "Equity Jurisprudence" without being animated by the easy rhythmic flow of his sentences? Many of the most distinguished orators of this and other countries, in ancient and modern times, have been learned in the law; and it may not be too much to suggest that, apart from natural qualifications, they have owed not a little of their oratorical eminence to their acquaintance with the law.

6. A final feature which the study of law presents from the standpoint of mental discipline is the removal of the deep-seated prejudice which exists in many minds against the integrity of the legal profession, and the alleged unjust rules and practices of law. Legal proceedings are regarded by many as an amalgamation of knavery, trickery and subtle dishonesty. That such, as a matter of fact, is not the case, and that such prejudices are not based on a rational foundation, a course of legal study will demonstrate. That the procedure of the courts is at times used for oppressive and dishonest purposes, is the lament of conscientious members of the bench and bar alike.

II. We now consider the study of law from the standpoint of good citizenship. It is a matter of history that the youth of Sparta by their attendance at the public tables were from their earliest childhood familiarly acquainted with all the important business of the commonwealth. They were trained in its constitution, in a knowledge of the powers of the several functionaries of the state, and the defined duties and rights which belonged to the magistrates and citizens respectively. From Roman history we learn that the youth of that nation were required to learn the Twelve Tables by heart as an indispensable part of their education.

It was held dishonorable, badge of disgrace, for any person of patrician rank not to have mastered the laws and constitution of his country. In some of the European universities to-day the study of law, to some extent, forms a compulsory branch of the general curriculum. In the nature of things it would appear quite right, and proper as a qualification for exercising the privileges and discharging the responsibilities of citizenship, that at least the elements of law should be included as a part of general education.

"*Ignorantia legis neminem excusat*"; and, that being so, it does not seem consistent that that ignorance should be tacitly encouraged by the absence of any form of legal training in the public schools of the land.

Is it not possible that the mischief of undesirable companionship, and the criminal danger of meretricious novels, might be checked, and a large amount of the rapidly increasing youthful crime be prevented if our youth were made acquainted with the outlines of criminal law and the nature of crimes thereunder? Reverence for law instilled into the minds of the youth, by appropriate instruction on the meaning, history and office of law as one of the strong bulwarks of the Republic and of any civilized community, would go far to diminish the ravages of lynch law, the widespread corruptions in politics and outbreaks of organized lawlessness. Nor need such instruction as is here suggested encroach upon the ground already occupied by the Law Colleges and Business Colleges of the States.

As a general proposition it may be affirmed that no citizen is qualified to wear the toga of citizenship, much less to measure the dignity of his citizenship, unless he is familiar with the constitution of his country and the functions of the different departments of government, federal, state and municipal. And especially does this apply to aliens who seek naturalization. Referring to this matter Walker writes: "Whatever may be said about subordinate branches, no American citizen can hesitate about this. He can but poorly appreciate the freedom he enjoys, who does not understand the great charter which secures it. Lawyers must study it as the foundation of other law: and shall not all citizens study it as a foundation of their liberty?"

To intelligently exercise the privilege of suffrage; to preserve fresh and pure the fountains of legislation; to uphold law and order against the agents of anarchy; to discriminate between liberty and licentiousness; to decide what is best for the commonweal even though personal predilections, for the time, have to be sacrificed; and if the call comes, to serve his fellow citizen in a municipal, state or federal office; and to acquit himself there honorably, with clean hands and good conscience; to fill this program an unswerving reverence for law and for the constitution of his country engendered by a study of the same is all-important for the citizen.

SOME KENTUCKY LAWYERS OF THE PAST AND PRESENT.

II.

By Sallie E. Marshall Hardy.

GEN. JAMES S. JACKSON of Hopkinsville was a brilliant lawyer and gallant soldier. He was killed at the battle of Perryville during the Civil War. He was a member of Congress. It is said: "This Hotspur of the Union Army, like Harry Percy, waved his sword in the face of death as gaily as though a desperate battle were a dress parade and the war bugles were sounding the strains of a ballroom."

Francis Marion Bristow, father of Gen. B. F. Bristow, was a very able lawyer and a man of high character. Dr. David Morton says: "Probably no lawyer in Southern Kentucky had more followers in his profession, and, especially, many of the present generation of lawyers in Todd County received their legal training in his office."

Judge H. G. Petrie is the leading lawyer of Elkton. He is a man of great probity. It is said of him, "He is everybody's friend and all men are his. He will leave a heated discussion in a court room to pray by a sick friend."

Mr. Goodnight, although still a young man, has served three terms in Congress, and is a fine lawyer.

CENTRAL KENTUCKY — BARDSTOWN.

In Bardstown, in early days, most of the great legal luminaries met. Ben Hardin, Judge Rowan, John Pope, Felix Grundy, John Hayes, Charles Wickliffe and all of the renowned lawyers took part in the lively court house scenes in this beautiful little Nelson County town.

Ben Hardin, the great lawyer whose achievements are fresh in the minds of all Kentuckians, although he has been dead nearly fifty years. S. S. Prentiss called him "the Achilles of the Kentucky Bar," and said, "He is one of the ablest lawyers of this or any country." Judge Rowan, who had measured strength with him in many a hard-fought trial, said: "When Ben Hardin is on the other side I tremble for my client, for he can lay a man's faults the barest, make them look the blackest and most odious, of any man living, and it does his heart the most good." Tom Marshall said, "Hardin is a good judge of bad men." He was the terror of the criminal class of his day, and John Randolph said, "Hardin is like a kitchen knife, whetted on a brick: he cuts roughly, but he cuts deep." In the Wilkinson trial, one of the most celebrated ever tried in Kentucky, Mr. Hardin was lawyer for the plaintiff. In his speech he said: "Call a man a knave and he may forget it, but call him a fool and he will never forgive you. Call a young lady a coquette and she may pardon you; tell her she is ugly and she will hate you." He once said: "There are three things in this world very uncertain: whom a woman will marry, which horse will win the race, and how a jury will decide a case." His son-in-law, John L. Helm, was a prominent lawyer, statesman, financier, and a gentleman of the old school of incorruptible integrity. He was governor of Kentucky and president of the Louisville and Nashville Railroad.

Thomas M. Green says of him: "In practical usefulness in the development of the natural resources of Kentucky, he was surpassed by no other man." In one noted Meade County case, Ben Hardin was for the defendant, and his son-in-law for the plaintiff.

Gov. Charles A. Wickliffe was considered by many Ben Hardin's most formidable rival. When eighty-one years old he made his last speech in the court of appeals; it

lasted two hours and was an able effort. He was the father-in-law of the late Senator Yulee of Florida. His son, J. Cripps Wickliffe, has been United States district attorney, and held other offices of honor.

Another leader at the early Bardstown bar was Ben Chapeze. He was a farmer, but, it is said, his wife, a very clever and ambitious woman, persuaded him to study law. He was known as "the honest lawyer." It is related of him that before he studied law he was sued by a neighbor. In the magistrate's court he argued his own case from a Bible which he held in his hand, and the facts in the case, and won the suit.

BEN HARDIN.

It is said Judge Samuel Carpenter "made the lawyers who appeared before him keep at a double quick, for he disposed of business so rapidly and held court early and late." The Baptist church building in his town was sold for debt, and he bought it and resold it to them for almost nothing, and it is said "This generous act went far towards making the Baptists forgive him for leaving them and joining the Campbellite or Christian Church."

Some of Kentucky's greatest lawyers lived and practiced law in Springfield. The brilliant Felix Grundy was chief justice of Kentucky before he was thirty. He had the circuit courts established. He is the man to whom the Federal writers referred when they said: "The most powerful triumvirate now influencing the destinies of this country are James Madison, Felix Grundy and the devil." He went to Tennessee to live, and ranked among the foremost men of the country.

John Pope was an eminent lawyer, a member of Congress, and territorial governor of Arkansas. He was one-armed, and when he ran against Henry Clay for Congress, an Irish voter said, "Faith, an' sure I mane to vote for the man who can't put more nor one hand into the treasury."

LEBANON.

Clement S. Hill had few superiors at the Kentucky bar. He was once opposed to Ben Hardin, and after he had made a very fine speech Mr. Hardin said: "Clem, I knew you could do it, but I did not think you had the audacity to treat me so." His son-in-law, H. W. Rives, is a prominent member of the Lebanon bar. Former Attorney-General Garland said: "Hill made, as prosecutor in a murder trial, one of the finest speeches to which I ever listened."

Ben Spalding, a member of the noted Spalding family which has given so many distinguished priests to the Roman Catholic Church, is commonwealth's attorney, and one of the finest lawyers in all central Kentucky.

FRANKFORT.

Frankfort being the capital, it is natural that a sketch of its bar should contain the names of some of Kentucky's greatest men.

The first chief justice of the court of appeals, Harry Innes, was commissioned June 28, 1792. He was the grandfather of the present mayor of Louisville, George D. Todd. He was a cultured, able lawyer, and remained on the bench until his death in 1816.

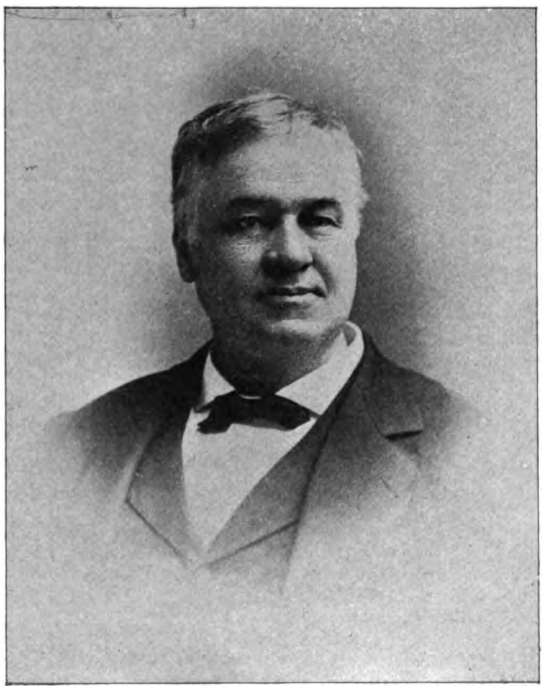
William Murray, it is said, "was probably the most accomplished scholar among all the eminent men of Kentucky of his day." In 1798 he was a leader in the opposition to the resolutions offered by John Breckinridge, and it is a curious fact, stated by Col. Durrett, that his argument against them was almost identically the same as the one used by Daniel Webster against Robert Hayne, in the United States Senate, in 1835. The speech of the brilliant speaker in the backwoods of Kentucky had never been printed, and yet, fifty years after, the great Webster repeated it almost verbatim.

JOHN L. HELM.

It has been said, "Next to Henry Clay, no man, living or dead, possessed a larger share of the affections of Kentucky than John J. Crittenden." He was governor of Kentucky, many times elected to the United States Senate, and attorney general of the United States under Harrison, and again under Fillmore. His daughter, Mrs. Chapman Coleman, a brilliant and charming woman, wrote a life of him. She says: "He was so popular in his home county, Woodford, that criminals from other counties were always trying, first to employ him to defend them, and then to have the trial transferred to Woodford, well knowing that a jury could scarcely be found in the county that could resist him. Indeed, there were many old men who declared they could not conscientiously serve on the jury with him as counsel for the prisoner, they were so completely fascinated by his eye and his voice that justice and the law were lost sight of." On one occasion he closed a powerful argument, defending a murderer, with these words: "When God in his eternal counsel conceived the idea of man's creation, he called to him the three ministers who wait constantly upon the throne — Justice, Truth and Mercy — and thus addressed them: 'Shall I create man?' 'O God, create him not,' said Justice, 'for he will trample upon Thy laws.' Truth said: 'Create him not, O Lord, for he will pollute Thy sanctuaries.' But Mercy, falling upon her knees and looking up through her tears, exclaimed, 'O God, create him; I will watch over him in the darkest paths which he may be forced to tread.' So God created man, and said to him, 'O Man, thou art the child of Mercy; go and deal mercifully with thy brother.'" As he finished, the jury were in tears, and the man was, of course, acquitted. Mr. Crittenden was wont to say in speaking of it: "Yes, I begged that man's life of the jury." The last words of Mr. Crittenden were: "May all the ends thou aimest at be thy God's, thy country's and truth's." They are engraved on

his tomb. Mr. Crittenden's great-grandson, Morton V. Joyes, is a bright young lawyer at the Louisville bar.

George Robertson was for fourteen years chief justice of the court of appeals, and it is said "his opinions speak for themselves" and have been held as precedents in all the courts of the country. He was a great lawyer and a profound jurist. Judge Pryor, who succeeded him, said: "He was the ablest judge and finest writer that ever occupied a bench in Kentucky."



WILLIAM LINDSAY.

Judge Milton Elliott was a brilliant speaker and close debater. He was killed on the steps of the Capitol Hotel by Tom Buford, who had taken offense at an adverse decision of the court of appeals and intended to kill several of the associate judges.

John Rodman, who died in 1886, was one of the most noted lawyers of his generation. Of a decided individuality and most distinguished appearance, he attracted attention in any crowd. He was twice attorney general of Kentucky, and after the expiration of his last term he was of the prosecution in the case of the commonwealth against Tom Buford, who killed Judge Elliott. He was also of the prosecution in the later case against Cornelison, who, for like reasons, assaulted Judge Reid of the Superior Court. The outcome of this assault was the suicide of Judge Reid, who was an able, upright man, but very sensitive. The circumstances surrounding each case were peculiar and tragic in the extreme, and excited great interest. In each of these cases General Rodman was brave and aggressive, and his vigorous speeches attracted wide attention. His son, Hugh Rodman, died a short time ago. He was a brilliant young lawyer. He was valedictorian of his class at the Louisville Law School. The following are the resolutions of the Frankfort bar on his death: —

"Resolved: That in the death of Hugh Rodman, the Frankfort bar has lost a brilliant and useful member. He was distinguished for his wit, his largeness of heart, and his generous impulses. He was ever loyal to his friends, and gratitude was one of his prominent traits. His word was his bond, his bravery was conspicuous, and he was a gentleman under all circumstances."

S. F. J. Trabue was prominent at the Frankfort bar for many years. When only twenty-five he came very near defeating Charles S. Morehead, one of the most popular men in Kentucky, for Congress.

Alvin Duvall was a Huguenot by descent. He first served as a circuit judge and then was on the appellate bench for eight years. He was a candidate for re-election in 1864, but General Burbridge, military governor of Kentucky, caused his name to be stricken from the poll books because he was in sympathy with the South. He was a hard student, had a large practice and justly earned the reputation of being one of the ablest lawyers

in the State. The following is told as an illustration of his ready wit: "On one occasion he was much interested in having a certain public measure adopted in Scott County, and to that end called a mass meeting at the court house in Georgetown. When the time came, he and a Mr. Johnson were the only ones present. After waiting some time Judge Duvall said, 'Well, Johnson, I'll take the chair, and you act as secretary.' This being agreed to, he produced a set of resolutions, with a caption: 'At a large and respectable meeting of citizens of Scott County, etc.' This he signed as president and handed it to Mr. Johnson to sign as secretary. Mr. Johnson hesitating, Judge Duvall asked, 'Are you not large, and am I not respectable?' 'That is so,' said Mr. Johnson, 'it is a meeting of large and respectable citizens,' and he also signed the paper."

W. S. PRYOR.

William Lindsay, present United States senator from Kentucky, has won a place among the greatest lawyers of the country. He was a gallant Confederate soldier, and judge of the court of appeals, part of the time chief justice, for eight years. Senator Lindsay is a Virginian by birth and a Scotchman by descent. It is said no senator, during the last administration, received a warmer welcome at the White House than Senator Lindsay. President Cleveland recognized the great ability of the big Kentuckian and never tired of hearing his comments upon men and things. He is a very large man and, as has been said of another great Kentuckian, "his mind fits well his splendid body."

Judge W. S. Pryor, who honored the court of appeals bench for a quarter of a century, and was four times chief justice, is beloved and respected from one end of the State to the other. It is said, "Judge Pryor's life has been as regular as the ticking of a clock."

The first court ever held in Henry County, Judge Daridge presiding, is said to have convened on Judge Pryor's home farm, that the bench was a stump of a tree and the jurors' seats an old log, still to be seen near a spring. He was a circuit judge in 1868. The first time he held court in Trimble County, an old fellow with whom he used to fish came into the court drunk. He called out to the Judge, "Well, Bill, how are they all at home?" "I ordered him to jail," said Judge Pryor, "but before the sheriff reached the door with him, he called back to me, 'Now, Bill, since you've been elected Judge, you think you've played well, and forget I've drank with you many a time when we've been fishing in the creek.'" This plea was too strong, so the Judge ordered him released.

SHELBYVILLE.

Col. John Allen, who had few superiors as a lawyer, fell at the battle of the River Raisin in 1813. He was associated with Henry Clay in the defense of Aaron Burr. His

wife never believed he was dead and patiently watched for his return until her own death.

Pryor J. Force is a very able lawyer. His home paper once said of him, "There is no question as to his ability. His record is a clear one and one that any man might well feel proud of. He is a good lawyer, an able debater, and a popular gentleman. He has made his own way and to-day stands the peer of any lawyer at the bar, the honored head of one fiduciary institution and the second in authority in another, with the full confidence of his fellow citizens." Mr. Foree took the second honor of his class, which was one of the brightest ever graduated from the Louisville Law School. He is a great-nephew of Chief-Justice Marshall, and, descended from an illustrious family, he is one of its cleverest members. He is president of a trust company, president of one bank and attorney for another, and the local attorney for two railroads.

PRYOR J. FOREE.

EASTERN KENTUCKY.

What Danville was to the Bluegrass region of Kentucky, Barboursville was to the wilderness hill-country north of the Cumberland Mountains. "It was the Athens of the Kentucky Highlands from the early days until the railroad penetrated that country," wrote a lawyer friend. The lawyers were few and made the circuit with the judge of the district. They were dignified and learned. Among the more noted were Judge Ballinger, who moved from Barboursville to Keokuk, Iowa; Judge W. P. Ballinger, who moved to Galveston, Texas; Hon. Green Adams, who moved to Philadelphia late in life and died there; R. P. Herndon; John G. Ell; Joseph Ell, ten years a member of Congress, a circuit judge and minister to the republic of Texas, where he died; William H. Randall of London, who was probably the first circuit judge in Kentucky to permit negroes to testify in court; he was a member of Congress; and Charles Kirtly of Mt. Vernon. John White moved from Goose Creek Salt Works, in Clay County, to Richmond. He was ten years a member of Congress and speaker of the Twenty-seventh Congress. He was judge of a circuit extending to the head of the Big Sandy. He was a very talented lawyer. President John Quincy Adams said of him, "White is a man of fine talents and an able debater." His son, John D. White, is a brilliant lawyer and a clever gentleman. He was the only Republican congressman from Kentucky for years.

A most eminent lawyer of eastern Kentucky was Samuel F. Miller, for years an associate justice of the Supreme Court of the United States. Judge Miller first studied medicine and located at Barboursville. Mr. John D. White told me he had made professional visits to patients at his grandfather's, driving twenty-one miles to do so. He began the study of law at Barboursville and

was there a candidate for county attorney. He subsequently removed to Iowa and was appointed to the Supreme bench by President Lincoln. Judge Burnam, who knew him well, says, "He was one of the first legal minds of the world, and his opinions will be handed down to posterity for ages to come."

LEXINGTON.

Lexington is in the famous Blue-grass country, "the garden spot of the world," as it is proudly called. It was there Henry Clay, Kentucky's greatest statesman and lawyer, lived. "The Old Prince," as he was called, was the idol and the pride of all Kentucky. I have written of him in another article for THE GREEN BAG. Judge Little calls him a political lawyer and tells as an evidence of his great tact that once, when called to the president's chair in the Senate, a debate was progressing, in which both senators from Arkansas were taking part. One pronounced it Arkansaw and the other as it is spelled. Mr. Clay varied the pronunciation in deference to each.

JAS. B. BECK.

John Breckinridge, the first of that illustrious family in Kentucky, died when only forty-five, yet no man of his day excelled him as a lawyer and statesman. He was a member of the Virginia House of Burgesses when only nineteen. His son, the gallant Confederate general, John C. Breckinridge, also achieved distinction at an early age. He was vice-president at thirty-two, and it is mentioned as a curious fact that if President Buchanan had died during the first three years of his term, the vice-president would have been ineligible as his successor, as the law requires the president of the United States to be thirty-five.

Robert Wickliffe was one of the pioneer lawyers of Fayette County. He bore an active and conspicuous part in all the leading questions which agitated the State for half a century. "When the state was rocked, as with an earthquake," by the discussions on the relief and new court question, he was among the most active and efficient champions of the constitutional judiciary. He was acknowledged to be one of the ablest land lawyers in the State.

Judge David R. Atchison, Judge A. C. Wooley, Judge Goodloe and General Roger Hanson were all wise and able men. Madison C. Johnson was a man of profound learning and an illustrious lawyer. He was such an authority in Fayette County that his opinion on any subject was rarely disputed. It was enough to close a discussion for one side or the other to say, "Mat Johnson says so." An illustration of this is the following, which was told by a well-known humorist: A man went to Lexington to live. The morning after his arrival he told the hotel clerk he had been almost de-

voured by mosquitoes the night before and wished a bar up in his room. The clerk was highly indignant, as mosquitoes have ever been considered as prejudicial to the prosperity of a place as malaria. He said if the places the stranger showed on his nose were mosquito bites he must have gotten them in Louisville. Seeing it was useless to argue further, Mr. U—— went to a dry goods store to buy a bar. The proprietor showed him several pieces of goods, and finally asked, "For what do you want it, sir?"

"To make a mosquito bar," was the answer." "Then, of course, I have nothing to suit you," said the shopkeeper, "for we have no call for it, as there are no mosquitoes in Lexington." The stranger became angry then, but after he had exhausted himself, the proprietor said, "Oh, well, sir, you are mistaken, that is all, and if you will just step around to Mat Johnson's office he will tell you there are no mosquitoes here."

It is said: "Mr. Johnson was one of the most notable instances of that character which is crude, raw, awkward in youth and only reaches perfection in mature age. For five years he sat in his law office without a single client, but all the time he worked hard, studied and polished himself until he became a grand man."

William T. Barry was an accomplished lawyer and chief justice of Kentucky. He was postmaster general under President Jackson. In 1835, he was appointed minister to Spain, but died while on the way to that country.

George B. Kinkead was a man of splendid attainments. He graduated second in his class at Transylvania University in 1833, and was a partner of Garrett Davis.

The present bar of Lexington has a number of able members. Among them are George B. Denny; Charles Bronston, a fine lawyer, who was commonwealth's attorney; John Shelby, a splendid man and an able lawyer; Judge Jere Morton, who was judge of the circuit court for years, and of the common pleas; Soule Smith, a fine writer and lawyer; George B. Kinkead, a brilliant man; Robert Thornton, who is a son-in-law of the late General Preston and a man of ability; and Judge H. M. Buford.

James B. Beck, former United States senator, was a man Kentucky delighted to honor. He was a man of powerful build, of great strength of mind and body, and a speaker of uncommon power.

He was one of the ablest lawyers of his day. He went to Congress, term after term, from the Ashland District (Henry Clay's), and then to the United States Senate. He was a Scotchman by birth, and his first case was given him by an Irishman who had crossed the ocean in the same ship with him. This Irishman made money rapidly, and watching Beck, as he worked on a farm by day, and studied by the light of a tallow dip at night, became interested in him and persuaded John C. Breckinridge to take him in his law office. One day, Mr. McGarvy, the Irishman, went to the office to have them bring suit against a corporation for which he had been building a road, but both General Breckinridge and his partner, Judge Bullock, told him it was impossible to recover. Mr. Beck was sitting in the office reading, so turning to him Mr. McGarvy said: "These old lawyers know too much, will you take the case?" He did so and won his first fee, which is said to have been a very liberal one.

William Rogers Clay was for three years private secretary to Senator Beck. He graduated from the law department of the University at Washington, carrying off the honors from a large class. Senator Beck prophesied "a brilliant future for young Clay." He is superintendent of the Lexington public schools, has a large law practice, and is attorney for the Bluegrass Building and Loan Association, one of the largest corporations in Lexington. He is a man of fine natural gifts and rare culture, possesses a pleasing and attractive person, and is an

eloquent speaker. A pamphlet on "Liabilities of railroads for injuries to employees," with which Mr. Clay won a prize at the Washington University, is now considered authority in railroad law.

The oldest practitioner at the Lexington bar is Major Otis Seth Tenney. He was a gallant Confederate soldier, and when he attempted to practice law, after the war, he was refused by the presiding judge, under the expatriation act of the legislature, but he appealed to the court of appeals, and the celebrated Chief-Justice Robertson rendered a decision by which he and all ex-Confederate soldiers were allowed to practice law in Kentucky.

A NOTABLE CRIMINAL TRIAL.

IT will scarcely be credited, at first hearing of the statement, that the writer has either drawn or, after inspection, approved, during the course of a professionally official career as prosecutor of criminal pleas, over fifteen thousand indictments in the course of a fifteen years' official experience, and has assisted in at least ten thousand trials; which experience will entitle him to credence when he pronounces the *cause célèbre* which is the topic of this article the most interesting one that came within the scope of his observation or participation. It was known to the newspapers all over the Union, and through them to a vast clientele of readers, as the Chemical Bank forgery case. This financial institution, situated in New York, in a modest little brown stone building on Broadway, opposite the city hall and court house — and since towered over by pretentious sky-scrapers — boasts the highest value to stock known to any corporation in the world. In this 1897, each of its original hundred dollar shares sells for over two thousand dollars. During the Civil War, and when gold was at an enormous premium, the Chemical Bank never refused to redeem in the precious metal, when offered, any outstanding of their bills, long since now ceased to be issued. Its officers, from highest to lowest, have always been of the shrewdest; and yet, in the summer of 1854, that bank was made the victim of the most ingenious criminal obtaining of money, even yet, nearly half a century later, known to New York's financial circles.

Not many months prior to that date newspaper readers had been made sensationally acquainted with the details of a trial before that great judge of the Federal Supreme Court, John McLean, sitting at *nisi prius*, in Ohio, wherein William Kissane and Lyman Cole were arraigned as conspirators, with three others for attempting to defraud certain fire insurance companies by incendiarily destroying an Ohio River steamboat falsely laden with a variety of alleged valuable but sham merchandise much over-insured. Apart from the boldness of the crime the trial became notable from the array of counsel engaged, among whom was one who afterwards became a candidate for vice-president and an ambassador; another who later ascended the bench of the Supreme Court at Washington, a third who was an ex-State governor, and others who were respectively a cabinet secretary or a Federal attorney-general, and a leading counsel for the defense of an impeached president of the United States. Throughout four weeks there was a daily contention of legal wits over novel and complicated legal questions, but all only to the simple ending of an acquittal. The Ohio case was popularly known as the Martha Washington case, because that revered name was on the paddle-wheels of the burned steamboat.

Freed from criminal danger in the matter, their jury to a moral certainty unduly influenced in their favor, Kissane and Cole — still cute as moths hovering around a candle-flame with previously singed wings — hastened to engage in a new criminal enterprise as daring and ingenious as had been the Martha Washington conspiracy. In this second criminal design they enlisted James Findlay, a broken-down commercial man of Cincinnati, who possessed a small cash capital of two thousand dollars, needful to initiate the contemplated fraud which was to involve complicated forgery and false personation. Westward their star of imperial criminality began its way under many con-

ferences, but New York City was selected as the locale of operations. And the *cause célèbre* involving such criminality, that began March 15, 1855, in the court of general sessions of that metropolis before Recorder Smith — whom as a great veteran jurist still living THE GREEN BAG recently commemorated — developed by evidence what in the sense of a narrative the following story shows.

In the summer of 1854, those three conspirators together visited New York. Findlay put up at a hotel then at the corner of Park Place and Broadway, and the other two took separate private lodgings. But, notwithstanding this separation of abode in order to avoid appearance of intimacy, Kissane and Cole used Findlay's hotel room as headquarters and thus exposed their identity and movements to the observation of one of those quick-witted Irish chambermaids whom travelers in this country often observe. There, according to her testimony, they would sit for hours conversing and engaged in much writing. From this hotel they removed to the large and fashionable New York Hotel farther up Broadway, to be under similar incidents of companionship, as testified to by another quick-witted chambermaid. Here were arranged details of the crime according to the story of Findlay, who ultimately "turned State's evidence" — thereby contradicting the very fallacious saying of "honor among thieves."

"I was to personate a Kentucky drover desirous of selling cattle to some provision dealer," said Findlay, when in the witness chair. "Cole was to put up his $2,000 as capital. Through the provision dealer — bringing to him a forged letter of introduction from one of his well-known Kentucky customers of whose handwriting the conspirators had procured specimens — I was, under the false name of Henry Bishop, mentioned in the letter of introduction (and being that of a Western operator favorably known to the provision trade), to negotiate with the selected merchant for a shipment and obtain from him an introduction to his bank for the purpose of opening an account."

Kissane, who had in past years dealt with provision brokers, selected a firm upon whom Findlay *alias* Bishop was to call — its name to be written as addressee in the forged letter of introduction. The firm in question received Findlay *alias* Bishop very cordially. Its banking institution happened to be the rich Chemical Bank, which by this accident became the victim. Such excellent customers as the provision partners had no difficulty in procuring permission from the false Bishop to open an account, and Findlay deposited the two thousand dollars cash which Cole provided and also two forged cheques whereof drawers and certifications were of excellently simulated handwriting.

Prior to the visit to firm and bank, Cole had gone to the Wall Street money brokerage firm of Very and Gwynne and sold them some slightly uncurrent Western banknotes at a discount, receiving their cheque on the Continental Bank for payment. The cheque bore on its face the imprint, as makers, of Nathan Lane & Co., well-known stationers. To them, before cashing the cheque, Kissane, who was a born confidence man of plausible bearing and business manners, repaired; and under pretense of desiring cheques printed for his firm — inventing a fictitious partnership name — was heedlessly allowed to examine sample specimens of cheques already printed for and used by other firms. Among these samples was a blank cheque on the Continental Bank of the very firm whose cheque he already held and which had induced his call on the printing establishment; and also a blank cheque, on the American Exchange Bank, of banker John Thompson, one of the best known of his business. These two blank cheques were adroitly pocketed. Thus the signature of Very and Gwynne was already in possession on the good cheque ready to be counterfeited into

the blank form: and the signature of John Thompson was in very common use because he was the largest buyer of uncurrent money in the Union and always gave cheques instead of cash for purchases however small in amount. Cole took the genuine cheque to the paying teller of the Continental Bank, and obtaining a certification, now also had possession of the teller's genuine signature for imitation. The blank cheques just referred to accordingly became the basis of the forgeries passed on the Chemical Bank by deposit. So ingenious had been the conspirators that before any steps toward the fraud were taken these had been rehearsed in detail. Cole, in the rehearsal, played, in fancy, the rôle of the provision merchant to be duped; and Kissane coached Findlay in the lingo of the Western provision trade for the interview. Kissane also personated cashier and teller and coached Findlay as to the "how" of circumventing these bank officers. The after performance did credit to the rehearsal, and to stage manager Kissane. For the provision merchant was delighted to receive the letter of introduction from such a notable Western factor and to make introduction at the bank in hopes of future profitable consignments. Kissane knew that within twenty-four hours the forged cheques must be returned crossed with the fatal letter F — for forgery, because the tellers would, by comparison with their certification books, have discovered the falsities; therefore, Findlay was instructed as Bishop to call at the bank, and under some pretext induce the Chemical cashier to fill out a cheque covering four-fifths of the deposit, sign it as Bishop and immediately call with it at the paying teller's window. That officer seeing the handwriting of the cashier to the body of the cheque was thrown off his guard, and unhesitatingly paid the large amount — some fifteen thousand dollars — in five-hundred-dollar bills, although Findlay had asked for smaller amounts, knowing that such could in the end not be so readily traceable. But not enough small currency happened to be at the teller's table. Next the conspirators met and equally divided the plunder, and at once "bolted" for the West.

Not one of their real names was known: Cole had punningly registered as Carbon, Findlay as Bishop, and Kissane as Thompson. The only clue to the identity of Cole or Findlay, who had been personally active, consisted when the forgeries were discovered in the printer's description of Kissane, in Very's description of Cole, and a rough pen and ink sketch of Findlay, made from memory of face and figure by the Chemical teller, who happened to be facile as an amateur draughtsman. Of course the forgeries became widely known through the newspapers, and the account invited the attention of a Cincinnatian, temporarily in the city, who had casually met Findlay, Cole and Kissane together in the street, and who knew of the great steamship fraud. This visitor at once jumped to the suspicion that those ex-worthies might have been the criminals, and he communicated these supicions to the Chemical Bank officers, who in turn communicated with Chief of Police Matsell and his right bower, the most accomplished thief capturer of the time, Robert Bowyer. Hotel registers were vainly searched, for the police were ignorant of the aliases, but they telegraphed to the West, where the conspirators were, of course, well known to police authorities, and this resulted in their being captured, and each was found in possession of Chemical Bank bills of five-hundred-dollar denomination. This was a first link in a chain of evidence. When the conspirators, Kissane, Cole and Findlay, were subsequently confronted with those with whom they had nefariously dealt and recognition came, the chain was complete. But there was little evidence against Kissane, who was believed from his past record to have been the mainstay of the plot; and therefore pressure was brought to bear upon Findlay

— the more actual operator — to turn State's evidence. Indictment was drawn for felonious conspiracy in forgery against the three, and to purge the record so he could be made a witness, Findlay pleaded guilty to misdemeanor with promise of immunity as witness.

Richard Busteed, an eminent criminal advocate of the period — who, during the reconstruction period after the Civil War closed, became a Federal district judge in Alabama — was employed to defend. The district attorney had only been in office three months, and readily assented to the Chemical Bank employing as senior counsel one of his own predecessors, James R. Whiting, who had served with eminent success years before. The press having widely exploited the police details, great difficulty was experienced in finding a jury of readers unbiased by the accounts. The preparation of the facts had been entrusted to Assistant District-Attorney John Sedgwick, an admirable systematizer and brief-maker, who is now a venerable and popular justice of the New York Supreme Court.

The testimony as to the meetings of the conspirators and their separate yet concerted actions, and the false personations and forgeries and possession of the feloniously obtained money was admirably marshaled, and when the prosecution closed its testimony and rested, curiosity was excited as to what possible defense could be offered.

But when Counselor Busteed, who was always fond of desperate cases, opened, it was seen that, inasmuch as many of the connecting links in the case for the people wholly depended upon Findlay's confessions, the defense, which had not called witnesses and had exhaustively cross-examined the confederate as to his moral antecedents, proving him to have been an undiscovered criminal, was bent upon asking the jurors to utterly reject the uncorroborated story of an informing confederate without which the reasonable doubt was engendered. Counselor Busteed was impolitic enough to inveigh against the employment of private counsel (referring to Whiting), and when he arose to make the closing speech, that gentleman, whose popular soubriquet was "little Bitters" (he was short in stature and a master of sarcasm and invective), began thus: "Gentlemen of the Jury, my adversary was baptized Busteed, but I call upon you by your verdict to alter his name into Busted." The latter's speech had been quite pathetic in its close when he had expatiated on the danger of allowing personal liberty to be sacrificed by the lies of an informer, purchasing immunity thereby; but the laugh on the advocate by the prosecutor's opening sentence, snuffed out the pathetic light that had so brilliantly burned.

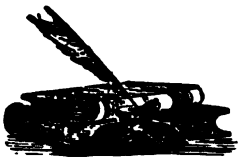
The judge charged mainly on the relations of testimony of the nature popularly described as "State's evidence," and said that the belief in such by a juror was only restrained by caution in weighing it. His charge, like all the Recorder's charges (and although frequent appeals were taken from his rulings, never during his judicial career were errors found by the appellate court), was thoroughly impartial, but logical and bold in tone, and it undoubtedly brought about the almost instantaneous verdict of guilty.

During the trial the entire doctrine of criminal conspiracy became discussed, and there certainly was a flaw as to evidence of its formation, which depended alone — uncorroborated therein — on the tainted testimony of the informer. The testimony of the chambermaids and of the innocent victims as certainly proved concert of action. While under custody eastward, Kissane had jumped from the moving train, and on objection to the fact becoming proof, the doctrine of flight as an element of guilty consciousness became also thoroughly discussed; also that regarding the silence by an accused of explanatory or denial testimony when pressed by incriminating facts — a

doctrine subject to many shades of irrelevancy or incompetency. The trial was remarkable for an utter avoidance of the slightest reference by the prosecution to the steamboat fraud of the accused, when there was much temptation toward prejudicing the jury against them by mentioning the connection.

Kissane, the only one on trial, was, after conviction, sentenced to the full term of imprisonment after he had made an ineffectual but pathetic appeal for mercy. After only a year of penal service he was pardoned by Governor Myron H. Clark, and the source of influence to that extent and the reasons for it became and remains a mystery. Kissane then took up a new career on the Pacific coast. He prefaced it by assisting in the notable Walker filibustering expedition to Central America and obtained some fortune by levying upon the valuables and fears of its inhabitants. When the marauding expedition failed, a rebellion broke out in China which attracted the bravado and ingenuity of Kissane, who journeyed thither to join the forces of the emperor and returned to California with the rank of general in the Celestial service. The devil seemed to befriend him, and his luck of acquittal in the Martha Washington case, of his pardon, of his money luck in Grenada, and good fortune in China, was added to by his luck of rapidly acquiring wealth in real estate and mining speculations. Having publicly died as Kissane by causing his death in Grenada to be announced with apparent authenticity, and changing his name and former personal appearance, it was a long time before the California millionaire was accidentally discovered to be Kissane. The Chemical Bank now commenced suit in San Francisco to recover from him the plunder, now amounting with interest to twenty thousand dollars, but here the luck again favored, for the California court upheld his plea in bar of the statute of limitations, refusing its operation to suspend during his foreign absences — a ruling that engendered disagreeable rumors regarding the integrity of the trial judge. Of course newspaper gossip again recited the two *causes célèbres* with which Kissane was connected, but his acquittal and pardon seemed to rehabilitate the millionaire, and his bold deeds as filibuster and Chinese warrior put a halo of notability around him, so he lived pleasantly and died as happily as may be. It is always a misfortune to the legal profession that *nisi prius* does not carry along a trained reporter; because much interesting legal discussion and valuable decisions on novel legal questions constantly transpire but are unfortunately lost and become mere newspaper traditions. But the now cited Chemical Bank forgery case with its incidents of a purely legal nature are at least preserved in the pages of the GREEN BAG.

The Lawyer's Easy Chair.



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

∴ ∴ ∴ ∴ ∴ BY IRVING BROWNE. ∴ ∴ ∴ ∴ ∴

CURRENT TOPICS.

ANGLING. — Vacation is upon us, and with it comes the constantly recurring question to every busy man, How shall I kill the time in which I ought to rest? This work-habit is a dreadful thing and it is hard to lay it aside even for a few days, and when one has to reassume it, it comes doubly hard. The Chairman has so long preached to a deaf people his favorite theory of recumbency in vacation that he does not need to dwell on it now. Perhaps he has said before — he finds that he has said almost all his good things before — that if one cannot or will not loaf lying down, the next best thing is to loaf sitting down, and a pleasing occupation for that time and attitude may be found in angling. None of your wading and walking for miles in wet clothes, but just a quiet, restful squatting on a log, or even a river wharf, with a few perch or bass for reward. In spite of Ben Franklin and Byron, many great men have been anglers. Daniel Webster rehearsed his second Bunker Hill oration while fishing near Marshfield, and it is said that he hauled up a fine fish while exclaiming: "Venerable men! you have come down to us from a former generation"; etc. The Chairman has recently bought the very latest edition of Walton's "Compleat Angler," at the end of which is to be found an "Angler's Calendar," with the entry opposite March 27th: "Grover Cleveland, President, U. S. A., *angler*, born 1837." Such is Fame! To go down to posterity as twice President and always an Angler! But the Chairman has ever been stronger in theory than in practice, and if there is a lazy and luxurious way of doing anything he has been pretty sure to find it out. So of Angling. Long since did he discover that there was a serious and unnecessary waste of nervous tissue in the usual mode of pursuit of this enticing pleasure, and substitute for it a comfortable and labor-saving method. Perhaps his readers will not object to learning

HOW I GO A-FISHING.

'Tis sweet to sit in shady nook,
Or wade in rapid crystal brook,
Impervious in rubber boots,
And wary of the slippery roots,
To snare the swift evasive trout
Or eke the sauntering horn-pout;
Or in the cold Canadian river
To see the glorious salmon quiver,
And them with tempting hook inveigle,
Fit viand for a table regal;
Or after an exciting bout
To snatch the pike with sharpened snout;
Or with some patient ass to row
To troll for bass with motion slow.
Oh! joy supreme when they appear
Splashing above the water clear,
And drawn reluctantly to land
Lie gasping on the yellow sand!
But sweeter far to read the books
That treat of flies and worms and hooks,
From Pickering's monumental page,
(Late rivaled by the rare Dean Sage),
And Major's elder issues neat,
To Burnand's funny "Incompleat."
I love their figures quaint and queer,
Which on the inviting page appear,
From those of good Dame Juliana,
Who lifts a fish and cries hosanna,
To those of Stothard, graceful Quaker,
Of fishy art supremest maker,
Whose fisherman, so dry and neat,
Would never soil a parlor seat.
I love them all, the books on angling,
And far from cares and business jangling,
Ensconced in cosy chimney corner,
Like the traditional Jack Horner,
I read from Walton down to Lang,
And hum that song the Milkmaid sang.
I get not tired nor wet nor cross,
Nor suffer monetary loss —
If fish are shy and will not bite,
And shun the snare laid in their sight —
In order home at night to bring
A fraudulent, deceitful string,
And thus escape the merry jeers
Of heartless piscatory peers;
Nor have to listen to the lying
Of fishermen while fish are frying,
Who boast of draughts miraculous
Which prove too large a draught on us.
I spare the rod, and rods don't break;
Nor fish in sight the hook forsake;
My lines ne'er snap like corset laces;
My lines are fallen in pleasant places.
And so in sage experience ripe,
My fishery is but a type.

FALSTAFF'S DEATH. — The most beautiful emendation ever made of Shakespeare's text was that of Theobald, in Dame Quickly's description of Falstaff's death, in Henry V, evolved from the senseless "table of Greenfields" the natural and exquisite, "'a babbled of green fields." The believers in a "table" have suggested "upon a table of green fells"; "on a table of green frieze" — an allusion to Jack's gambling propensity probably! — "as stubble on shorn fields"; "on a table of greasy fell"; "and the bill of a green finch." Pope "took the cake" when he suggested that the passage was a direction to a "supe," named Greenfields, to bring in a table! No commentator until White seems to have taken the inevitable sense of the context: "For after I saw him fumble with the sheets and *play with flowers*, I knew there was but one way; for his nose was as sharp as a pen, and 'a babbled o' green fields." What more natural than to talk of green fields after playing with flowers? Editing Shakespeare seems to have reduced most scholars to the most contemptible degree of asininity. We would not, however, speak disrespectfully of an additional conjecture of Mr. Locke Richardson, in a recent number of "The Critic." He infers that the mention of green fields was an attempt on Falstaff's part to repeat the 23d Psalm, which speaks of "green pastures." He infers that as Jack was a choir-boy in his state of innocency, he must have sung the Psalm; that he was always deadly afraid of death and judgment; and that his reiteration of "God," in his last moments, shows that he was remorseful and asking for mercy. One difficulty in this view is that his appeal to God came after the babbling of green fields, whereas the peace which he naturally would have felt in recalling the sweet assurance of the Psalmist that he would "fear no evil" in the valley of the shadow of death, would inevitably have come after the exclamation of remorse and appeal to his Maker. Another difficulty is that his words were "green fields" instead of "green pastures." From this Mr. Richardson educes an additional beauty of the dramatist, "in thus making Mistress Quickly misunderstand and misquote Falstaff's words. Even at the last moment there is an intimation of the social difference in rank and intelligence between Sir John and the low-born hostess of a tavern." But a third and insuperable difficulty is that it leaves out of the account the dying man's playing with flowers, which would be much more apt to suggest the green fields in which he wandered and picked flowers in his boyhood than to remind him of the 23d Psalm. The reading of Mr. Richardson is novel and ingenious, but, we apprehend, too fine and recondite. We share Mr. Rolfe's doubt about it rather than Mr. Furness's acceptance of it. "It was admirable," as Mr. Furness says, but it is too admirable. It is asking too much to found an argument on words which Falstaff, as reported, did not use, by assuming that he used different words and was misreported. A lady, writing in the Shakespearean department of "The Critic," suggests that Falstaff was reciting the whole Psalm, and that Dame Quickly's ear being caught by the words "table" and "green pastures," she rendered them "table of green fields." "Table" might have appealed to her as an innkeeper, but the rest would seem irrelevant. On the other hand "babbled" seems a rather fine expression for a dame of her quality. On the whole, the passage will probably continue to furnish food for commentators to the bewilderment of the author's ghost.

A QUESTION OF IDENTITY. — A very curious question of identity, in one respect exceeding in interest the Tichborne case, is found in Bryant's Estate, 176 Pa. St. 309. Charles Bryant died in 1893, at the age of seventy, at a hotel in Philadelphia, in which city he had lived for forty-seven years. He was married there in 1853. He had followed the sea from an early age, and had become captain and owner of a brig. In 1870 he abandoned the sea and opened a grocery store. He left about forty-five thousand dollars. He never alluded to his family or his personal history. He had no correspondence nor any communication with anyone claiming to be of his blood. He left no writing which could furnish any clue to his origin, except a government certificate as sailing-master, dated in 1856, in which his birthplace was given as North Bridgewater, Mass. Among his personal effects were a daguerreotype and a photograph, evidently taken at about the age of thirty. On his death, the State claimed his property by escheat, and five different sets of claimants appeared, from Maine, Massachusetts, New York and Illinois, and one from Nova Scotia and England. It was almost like the contest for the honor of Homer's birthplace. Each afflicted family had lost a beloved Charles Bryant, who disappeared more than a generation previously, and they had never heard of him since. In every case his disappearance was without any assignable cause. The trial court said: "If the narratives told by the witnesses are reliable, and in the main they may be true, the decedent must be regarded as the type of quite a number of Charles Bryants, each of whom is possibly living a dual life, and without having developed any preparatory wickedness, has cast off the ties which are generally held to be sacred." Each family recognized the pictures, "in the most positive terms," as the "undoubted likeness of their individual decedent." So the trial court naturally did not attach much importance to their testimony as to the resemblance in the pictures.

On this point the court said: "Admitting, what it requires a large gift of credulity to admit, that five persons of the same age and name, but wholly unrelated to each other, disappeared at the same time from five different places, and were thereafter lost to all former acquaintances, and that these five persons so closely resembled each other that a single portrait would serve for the entire group, the difficulty would still remain of assigning, out of so many originals, his own proper personality to this decedent of adaptable likeness, who is proved to have been an exact copy of them all." To add to the absurdity, the Massachusetts claimants produced a photograph of their man, which they contended precisely resembled the pictures found in the decedent's possession, but in which the other claimants could not detect the smallest likeness to them! The trial court awarded the estate to the English claimants. This was reversed on appeal of the Massachusetts claimants, who lived at North Bridgewater, chiefly on the resemblance of their picture and the strength of the description of the decedent's person in the government certificate, and the property was awarded to the appellants. The court regarded the English claim as bearing "strong marks of having been manufactured after Captain Bryant's death, when the buzzards began to gather over an estate which seemed about to pass to the Commonwealth for want of real heirs." Of the resemblance between the pictures they say: "Such comparison leaves no doubt, in the minds of any of this court, of the strong resemblance . . . that such resemblance should exist between portraits of two different men, of the same name, of the same age, born in the same place, and following the same occupation, passes the bounds of credible accident." Of the different claimants' description of their relative they said: "The idea of succession to the fortune of a hitherto unknown relative exercises over even honest minds a fascination only to be compared to the gambler's desire to throw dice to get something for nothing." The case is rendered all the more romantic by the fact that the Massachusetts family had accepted news of the death of their kinsman, in New Orleans, about the time of the decedent's settlement in Philadelphia, and had actually received his chest sent to Bridgewater from New Orleans. The court seem inclined to believe that the decedent allowed himself to be supposed dead as reported. But how did that chest come to be sent to them from New Orleans? Of this they say no word, but we "rather guess" that the decedent falsely reported himself dead and himself sent home his chest. The case lacked only one element of consolation, which was derived by a Yankee, condoling with the widow of a sailor lost at sea. "Was he a pious man, ma'am?" "Yes." "And did they save his chist?" "Yes." "Well, ma'am, you've great reason to be thankful — he was a pious man, and you've got his chist." The Illinois claimants deduced title from their brother and uncle, Charles Bryant, born at North Bridgewater, in 1831, and who mysteriously disappeared during the emigration of the family to the west in wagons when he was two or three years old. He was manifestly too young. The claim from Maine was on behalf of Susan J. Calamer, who was married to a seafaring man of the name of Dean, in 1852, who came from Isleboro, Maine, and who disappeared in 1861; and it was based on the assumption that he took and lived under the name of Charles Bryant. The weakness of this claim was in the fact that the witnesses to the identity had concealed their discovery for twenty or thirty years, and one of them, Dean's cousin, had suffered the wife to contract a second marriage in 1873. This witness explained his reticence by the statement that Dean, who was a brother Mason, had pledged him to secrecy, and also that Dean had been in prison and adopted this *alias*. Curiously, however, a stepson of the decedent testified that the latter had once told him that he came from Isleboro, Me. But the decedent had told others that he came from other parts of New England, and another stepson always believed him to be English or Irish. On the whole it was "a pretty kettle of fish," and confirms our belief that there is nothing on earth so queer in domestic propensities as a sailor, except a cat.

NOTES OF CASES.

ACCORD AND SATISFACTION. — The Mississippi Supreme Court has been irreverent enough recently to deny the authority and scout the doctrine of *Pinnel's Case*, 5 Co. Rep. 117 *a*; 1 Eng. Rul. Cas. 368, in which it was laid down that an unsealed agreement to accept, in discharge of a liquidated debt, a smaller sum in satisfaction, and the payment of such smaller sum, does not constitute a satisfaction of the whole. Until now, all courts, both English and American, have followed that case and assented to that doctrine. The Mississippi court now assert, and quite correctly, that this doctrine was not involved in the *Pinnel* case, but was a mere *dictum*, the decision having really gone on a ground of pleading, namely, that the defendant did not plead that he had *paid* the smaller sum *in satisfaction*, but only generally that he had paid that sum and that the plaintiff had *accepted* it in satisfaction. The Mississippi court observe: "He lost, unhappy wretch that he was, born two or three centuries too soon, and not knowing the difference between legal tweedledum and legal tweedle-dee." The court point out that in Foakes *v.* Beer, H. L. 1884; 1 Eng. Rul.

Cas. 372, Lord Blackburn said that Coke's utterance in the *Pinnel* case was but a *dictum*, and that he knew "of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand," from that case "down to Cumber *v.* Wane, 1 Str. 476, a period of 115 years." But the Lords, in Foakes *v.* Beer, stuck to Coke's *dictum*, and Lord Blackburn, although he thought "that there was no such long-continued action on this *dictum* as render it improper in this House to reconsider the question," did not persist in his opinion and assented to the judgment. (One naturally asks himself, how long does it require to establish the working of "*stare decisis*"?) Lord Fitzgerald said: —

"I have listened with much interest, and I may add, with no small instruction, to the judgment of my learned friend, Lord Blackburn. He has as usual gone to the very foundation, and I regret that I have been unable to assist him in overturning the resolution of the Court of Common Pleas as reported by Lord Coke in *Pinnel's Case*, or in expunging from the books the infinitesimal remains of Cumber *v.* Wane. . . . My noble and learned friend, Lord Blackburn, has shown us very clearly that the resolution in *Pinnel's Case* was not necessary for the decision of that case, and that the principle on which it seems to rest does not appear to have been made the foundation of any subsequent decision of the Exchequer Chamber or of this House, and further, that some of the distinctions which have been engrafted on it make the rule itself absurd. But it seems to me that it is not the rule which is absurd, but some of those distinctions emanating from the anxiety of judges to limit the operation of a rule which they considered often worked injustice. That resolution in *Pinnel's Case* has never been overruled. For 282 years it seems to have been adopted by our judges. During that whole period it seems to have been understood and taken to be part of our law that the payment of a part of a debt then due and payable cannot alone be the foundation of a parol satisfaction and discharge of the residue, as it brings no advantage to the creditor, and there is no consideration moving from the debtor, who has done no more than partially to perform his obligation. Though it may not have been made the subject of actual decision, yet we find that every judge in this country who has had occasion to deal with the proposition states the law to be so. . . . I should hesitate before coming to a decision which might be a serious inroad on that rule, but I concur with my noble and learned friend that it would have been wiser and better if the resolution in *Pinnel's* case had never been come to," etc.

Such is the slavery of courts to precedent, even when founded on mere *dicta*, in spite of the boasted "elasticity and adaptability" of the common law. We admire the independence and good sense of the Mississippi court in refusing to be bound by that foolish old *dictum*, the silliness of which is demonstrated by Coke's own admission that the acceptance of a horse, hawk or robe would work a satisfaction "because it might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction." Just so, as the Mississippi court point out, the certainty of the smaller sum may be deemed by the creditors more beneficial than the chance of getting the whole amount, with its attendant delay, expense, and risk of eventual payment. The court very forcibly ask why the acceptance of a horse worth $100 in payment of a note for $1000 should be binding, and yet the acceptance of $999 would not be? Coke himself with great simplicity unintentionally showed that the smaller should be deemed a satisfaction for the greater, "otherwise the plaintiff would not have accepted it in satisfaction." The Mississippi court cited Harper *v.* Graham, 20 Ohio, 105, in which the Ohio court said: "The rule and the reason were purely technical and often fostered bad faith. The history of judicial decisions upon the subject has shown a constant effort to escape from its absurdity and injustice." In Kellogg *v.* Richards, 14 Wendell, 116, the court said: "The rule is technical and not very well supported by reason"; and in Brooks *v.* White, 2 Metcalf, 285, the court said: "A moment's attention to the cases taken out of the rule will show that there is nothing of principle left in the rule itself." The *Pinnel* case is another exemplification of the theory of the elder courts, expressed in the famous case of Bloss *v.* Tobey, 2 Pick. 320: "In a matter of technical law, the rule is of more importance than the reason of it."

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.

LEGAL ANTIQUITIES.

CARDINAL WOLSEY is, perhaps, the most notable person ever placed in the stocks. It is recorded that, at the time he was incumbent at Lymington, near Yeovil, during the village feast he had made too free with the glass, and the condition of the minister coming under the notice of Sir Amias Poulett, a strict moralist, he ordered him to be put in the stocks, which was accordingly done.

FACETIÆ.

THE law cannot be easily overthrown, and yet the general run of judges find little difficulty in laying it down.

JUDGE (to witness): It seems as if you were not telling the whole truth.

WITNESS: Excuse me, judge, I am telling much more than the truth.

JUDGE RAY BEAN of Langtry, Texas, was once trying a Mexican for stealing a horse, and his charge to the jury was one of the shortest on record: "Gentlemen of the jury, thar's a greaser in the box, and a hoss missing; you know your duty!" And they did.

"YOU wish to be relieved from jury duty, but you haven't given a good reason," said the judge.

"It's public spirit," said the unwilling talesman, "on the score of economy. I have dyspepsia, judge, and I never agree with anybody. If I go on this jury there'll be a disagreement, and the county will have to go to the expense of a new trial."

"Excused," said the judge.

SHE: "They talk about the vanity of women, but men are just as vain!"

HE: "What makes you think so?"

SHE: "Why, right in the account of this trial it says that the entire jury was padded. Just so they could appear fine in court! Humph!"

SENATOR VOORHEES was an eloquent lawyer, and was justly noted for his influence over a jury. Sometimes, however, he met his match among the hard-headed, back-country lawyers with whom now and then he contested a case.

A few years ago he was engaged in a suit before a justice of the peace, to defend a young lady in an action against a bank. The case was a weak one, but Mr. Voorhees endeavored to work on the feelings of the court. He depicted the sufferings of his client until the sympathy of the "Squire" was so aroused that tears trickled down the old gentleman's cheeks. But the decision was a disappointment.

"The plaintiff," said the Squire, "is a woman, and her counsel has for the last hour touched the sympathy of the court in her behalf. I am glad of it; but I think, under the law, that justice is on the side of the bank. I therefore will find in favor of the bank, and let the record show that Mrs. —— has the full sympathy of the court."

NOTES.

THE wife of Captain Dreyfus, the French officer sentenced to banishment on a barren island for betraying secrets of the French army to a foreign power, has never ceased in her efforts to prove the innocence of her husband. An exhaustive examination carried on with the assistance of all European military departments gives color to the suspicion that Captain Dreyfus's sentence was the result of a fearful judicial error. A movement for the reopening of the case is going on, and there is some talk of sending the captain to Algiers, to await the results of a new trial.

THERE are no lawyers in Korea but there are judges appointed by the king.

LORD BROUGHAM defined a lawyer as "a legal gentleman who rescues your estate from your enemies and keeps it himself."

AT Louisville a man was held for perjury for swearing in a bail case that he owned a four-hundred-dollar lot, when it was found that the lot was in a cemetery.

A PERSONAL friend of forty years' standing vouches for the fact that, as a young man, Matthew S. Quay was so bashful he broke down in his first speech to a jury, and could not be persuaded to try again, preferring to quit the law.

SIR WILLIAM GEORGE VENABLES VERNON HARCOURT, M. P., Liberal leader in the House of Commons, has been fined ten shillings and costs for allowing his chimney to catch fire through not having been cleaned.

THE report of the case of Swift *v.* Stevens (8 Conn. 439) concludes as follows: "Peters, J., having received, during the argument of the case, intelligence of the death of his son, Hugh Peters, Esq., of Cincinnati, left the court house —*multa gemens, casuque animum concurrus*— and gave no opinion."

ONCE, while Mr. Webster was addressing the Senate, the Senate clock commenced striking, but instead of striking twice at two P. M., continued to strike without cessation more than forty times. All eyes were turned to the clock, and Mr. Webster remained silent until the clock had struck about twenty times, when he thus appealed to the chair: "Mr. President, the clock is out of order! I have the floor!"

THE unspeakable Turk has a curious method of dealing with drunkards. The punishment for the first, second and third offenses is the bastinado in varying doses. After that stage is reached, however, the offender becomes a privileged character, as it were, and is entitled to be tenderly helped home by a policeman when he is found in an over-stimulated condition. The rush through the preparatory schools to the honor grade can be imagined.

A NUMBER of men were recently discussing present conditions at their club. One of them advanced the proposition that the McKinley administration had not as yet brought about any marked advanced in the country's prosperity.

"Oh, I don't know about that," quickly observed another. "We are already sending *hay* to England and *porter* to France."

"Nothing was said," adds the occasional benefactor, "of the beneficent influence of our sending an *angel* to Turkey."

OF Bismarck's capacity with the bottle in his student days many tall stories are told, but he was, in fact, a mighty drinker all his life until Dr. Schweninger forbade further indulgence because of increasing stoutness. He never had any fear of professors, and on several occasions he showed this clearly in the class-room and elsewhere. On one occasion, says a German paper, he was brought before a university judge to be questioned because he had the night before thrown a bottle into the street through the window of a beer hall. He entered the presence of the judge clad not in the conventional dress-suit obligatory on such occasions, but wearing his long smoking coat, a big pair of riding boots and white leather pantaloons. He was vigorously smoking a long pipe, and his ferocious-looking English bull dog accompanied him, to the great terror of the judge, who, retreating behind a chair, mildly asked Bismarck what he wanted. "Nothing at all," was the cool reply, "but you seem to want me," and he showed the summons. The dog was sent away, and the judge began to ask how the bottle got into the street. Bismarck said it must have flown there. "But what power caused this bottle's flight?" persisted the judge. "It partly consisted, sir," said Bismarck, "in the contraction of the muscles, partly in the impelling forward of the arms. To illustrate"—and the student picked up a heavy inkwell and aimed it at the judge, who saw the point and dismissed the case.

On a railroad in Pennsylvania stand thirty-two Pullman palace-cars, closely guarded day and night by watchmen, whose only duty it is to see that no one interferes with the process of decay and despoliation which the elements have inaugurated. The cars are the property of the Pennsylvania Railroad Company, and represent an outlay of about four hundred thousand dollars. These handsome coaches have been dragged through the slow and tortuous processes of litigation for over five years. Both the Railroad and the Pullman Company have claims on the cars, and until a final decision is rendered in the courts these magnificent vehicles of travel by rail are left to rot and crumble in the open air. They will soon be unfit for any use except kindling-wood and old scrap-iron.—*The Argonaut.*

At a recent term of the Knox County (Indiana) circuit court the jury commissioners, in drawing a jury, selected one David L. Buck, of Bicknell; but when the sheriff went to notify him of his selection, he discovered that Mr. Buck had been dead for several years. Not to be outdone, and having a little fun in view, the sheriff placed the papers in the hands of a country constable for service. The constable, somewhat verdant, hastened to the home of the late David L. Buck and, finding that he was dead, telegraphed to the sheriff for instructions, and Sheriff Orndorff wired back: "Do your duty." The constable then repaired to the cemetery where the body of David L. Buck was moldering in his tomb and, going to his grave, uncovered himself, and in the most solemn manner possible read aloud the subpœna summoning him as a juror. The affair was witnessed by a small crowd of people who had been given an inkling, and they report that it was a novel, grewsome sight. The constable chose the early hours of evening for his task, and this made the spectacle more weird and uncanny.

Since 1881 the number of criminal cases in France has increased by 30,000, although practically the population has not increased at all. Especially has the number of murders and homicides increased. Up to recent times Italy reported the largest percentage of criminals of this kind, namely, from 250 to 300 each year. France has now the sad distinction of being in the lead, the average in late years being about 700. While Italy reported annually about 80 child murderers, France now averages 180. Taking all the data together, the criminality of France has just about doubled in the last fifty years. The saddest feature about this increase is the fact that it is proportionally greatest among the youth of the country. The actual fact is that the number of criminals who are yet children or youths is twice as large as the number of adult criminals, although France has only about seven million children and youths and twenty million adults. In Paris more than one-half of the criminals arrested are less than twenty-one years of age. Prostitution among children is alarmingly on the increase. During the last ten years an average of 4,000 of such cases were brought to the attention of the authorities every year. In 1830 there were but five suicides to every 100,000 inhabitants; in 1892 there were 24, and the rate is increasing. Suicides of children under sixteen were formerly unknown in France; now there are on an average 55 each year. And in 1875 there were 375 suicides between sixteen and twenty-one."—*Revue des Deux Mondes.*

Toronto, in Canada, has long been a rival of Scotch Edinburgh as a paradise of Sabbatarians. No Sunday newspapers are published there, and no street cars run on Sunday. The lack of local Sunday papers seems to be endured with proper stoicism, but there is a strong sentiment in favor of Sunday transportation, and a fight is going on now about it. If a majority of the voters demand Sunday street cars they may have them, but it is understood to be rather unlikely that a majority favorable to them can be found. Advocates of a change say that without cars people find it hard even to get to church, while poor people who cannot afford carriage hire are unable to get to the cemeteries or into the suburbs for fresh air. Of course the prohibition of Sunday cars bears hardest on the poor, but it also causes an increased use of other vehicles so great as to involve about as much Sunday labor as if the cars were run. Among the opponents of Sunday street cars are people who see no objection to using their own private carriages on Sunday; but that is one of the customary inconsistencies of extreme Sabbatarian convictions.

In the June "Century" Florence Hayward describes the official record, that is preserved on a parchment roll, of Queen Victoria's coronation. Miss Hayward says: The "Coronation Roll" is wonderfully and curiously complete. It sets down every detail with minuteness and elaboration. The "Coronation Roll" of Queen Victoria is like the rolls of all her predecessors since the time of Richard II — a huge, bulky roll of parchment. It is what the lawyers would call a deed poll as distinguished from an indenture. It has its preambles and recitals and its obligation, all of which are quaintly set out in stilted phrases on a series of pieces of sheepskin, each fifteen inches wide, fastened together by loose stitches, until the whole attain the length of nearly one hundred lineal feet. It can be perused only by unrolling from one end to the other, and is so unwieldy that the seeker for any information of which the precise location is unknown must invoke the aid of no end of manual assistance to attain it. The script is in the highest style of the scrivener's art, and is an excellent example of the engrossment that is still considered necessary in England for wills and deeds, which, as there is no general system of publicly recording such instruments, are kept in "strong boxes" under lock and key. Speaking generally, the result, as a whole, is over a hundred square feet of solid reading in one breath, and in a language that is a mixture of legal, medieval, and court phrases, but each line gives one a glimpse not to be had otherwise of the intricacy, dignity, and significance of the coronation ceremony.

CURRENT EVENTS.

Kansas City has an ordinance imposing a fine of two dollars and a half on every elector who fails to vote at a general election. But the supreme court of Missouri has just declared the ordinance invalid, on the ground, so it is stated, that it is degrading to associate the franchise with a money value. It really ought to be made necessary for every man to vote who has the right of suffrage and who can get to the polls. If a fine is not proper, some other plan may be found. It might be well to experiment with a suggestion made some time ago, that a capitation tax of, say five dollars per annum, be laid upon every voter, to be remitted if he casts his ballot on election day, and rigorously collected if he does not. Put in this form, the proposition might pass the ordeal of the courts.

The Germans are by no means behind the Americans in developing the wheel so as to make it useful in every possible way. A unique tricycle cab has made its appearance on the streets of Berlin, and for the first few days attracted considerable attention. The people, however, soon noted its usefulness, and took kindly to the new vehicle. As a result, a tricycle cab company has been organized, and it will not be long before the streets of Berlin will swarm with them. The construction of this tricycle cab is very simple. The two hind wheels support a carriage-frame containing a cushioned seat and a support or platform for resting the feet. A folding hood is secured to the carriage-frame in order to protect the rider in wet or inclement weather. The driver of the tricycle sits in front and propels the vehicle in the same manner as an ordinary bicycle. Herr Hoffman, the inventor, believes his tricycle cab will supersede the cabs now in use, as it is capable of high speed, absolutely noiseless when in motion, and can be cheaply constructed. In addition, the low charge for fare will soon make it popular with the masses.

In Philadelphia there is located the most remarkable institution of its kind in existence, a museum which will contain specimens of the natural and manufactured products of all the countries of the world. Its object is to stimulate commerce and boom American trade, particularly with South America and Africa. All parts of the United States are interested in the enterprise, to which contributions have been made in one shape or another by cities North, South, East and West. The idea is that anybody who has anything to sell shall be able to find out just where and how it is wanted and the best way to seek purchasers anywhere on the globe. Merchants and manufacturers in every section of the country may obtain from the trade museum the most complete and comprehensive information respecting markets and all commercial data up to date. There are a great many points that the American manufacturer will have to learn before he can dispose of his goods in South America. At the museum he will not only find out what is wanted in those markets, but also how the goods ought to be packed, what the freight charges are, the latest price quoted, and the names of firms which are guaranteed as reliable consignees. All the valuable woods of the world are assembled in one great room. If a manufacturer wants material for tool handles or piano covers, he can find there in a short time the best woods furnished by forty countries. The museum occupies the whole of the large building on Fourth Street near Walnut, which until recently was used for office purposes by the Pennsylvania railroad, with the addition of four adjoining houses.

The arrangements have already been practically completed, the exhibits being for the most part assembled geographically, each country by itself. In going from room to room the curious minded find many queer things. For instance, there are a number of huge lumps of whitish stuff which defy identification, until one is told that they are chewing gum. All the chewing gum used in this country comes from Mexico in this shape. It is obtained from a tree the thick juice of which is boiled down like maple sap. One can also see strange kinds of bread never heard of before. Specimens of butter from the "cow tree" of Venezuela. The sap of this tree tastes something like milk, and the butter made from it is used on bread. Then there is a queer substitute for tea which is produced largely in southern South America, and it is believed that before long considerable quantities of it will be used in the United States.

IT is reported that the Czar of Russia is going to reform the present judicial system of Siberia. The reform may roughly be described as the transference of the judicial system from the ministry of the interior to the ministry of justice. The superior courts are now held in the capital of each province. Under the new arrangement Siberia will be divided into eight sections, and in each section a permanent assize court will sit, the judges and officials of which will be appointed directly by the minister of justice, and be responsible to him alone. To those who have studied the bureaucratic system now in use in Siberia, the importance of these beneficent changes will be evident.

THE Irish agitation for the general revision and readjustment of taxes has surged up with such vehemence that it has become the topic of the hour in Great Britain's political circles. The report of the Royal Commission appointed by Mr. Gladstone's government to investigate the question has given rise in the chief centers of Irish life to series of public meetings, which have been distinguished by a good deal of high-sounding rhetoric, and by the remarkable unanimity of Unionist and Nationalist, of extreme divergence in all other matters. There is room, no doubt, for some measures of readjustment in the distribution of the tax burden, as the problem is one which is constantly affected by the law of change, which is at work in any community; but whether a readjustment could be made to lighten the Irishman's burden without injustice to the Englishman or Scotsman is the great question to be answered. Much has been said about the treatment of Ireland as a separate fiscal entity as a condition of the act of union, but out of the very granting of this condition arises an answer to the assertion that the exchequer owes Ireland repayment for taxes paid in excess of her due share. The full observance of the act of union would entail an increase of the Irish contribution to the imperial expenses to more than thrice its present amount. The question is a wide one, and will occupy public attention for some time to come. Meantime, demonstrations can do no great good until the matter has been discussed in parliament and the government has declared its course of action.

UNDER a recent act of enfranchisement, the women of the Isle of Man voted in the parliamentary elections. The main question at issue was one of licensing, and a majority of the women voted for beer.

LITERARY NOTES.

APPLETONS' POPULAR SCIENCE MONTHLY for June contains an important contribution to modern economics by the Hon. David A. Wells on "The Nomenclature and Forms of Taxation"; Dr. C. E. Pellen gives some interesting facts about the early use of alcoholic beverages, and Prof. W. Le Conte Stevens describes "The Evolution of the Modern Heavy Gun."

"THE ingredients of that composite but intangible thing that Princeton men worship under the endearing name of Old Nassau" is the theme celebrated in James W. Alexander's article on "Undergraduate Life at Princeton," which leads the June issue of SCRIBNER'S MAGAZINE.

According to some authorities Stephen Crane depicted the feelings of a soldier in battle better from his imagination alone than others had done it from actual experience. Those who read "The Open Boat," in this number, will agree that he has pictured the sensations of the shipwrecked better from his own experience of it than others have achieved it by force of imagination.

Richard Harding Davis concludes his first long novel, "Soldiers of Fortune," with a bit of hand-to-hand fighting that ends the Revolution and makes the hero Dictator of Olancho for an hour.

Montgomery Schuyler, a leading authority, describes the architecture of "The New Library of Congress."

C. D. Gibson's glimpses of "London Salons" give an idea of what London is at the height of the season. One of the pictures shows a number of distinguished people; Du Maurier and Anthony Hope will be readily recognized.

A SERIES of satirical articles on the "Popular Summer Resorts of America," by Joseph Smith, will make our pictorial contemporary LIFE unusually interesting during the coming summer months. The articles will be illustrated in a unique manner, and the peculiar characteristics of each watering-place will be brought out in bold relief.

A TIMELY verse compilation in the June CURRENT LITERATURE is the two pages devoted to "War Songs of the Greeks." A notable series of articles, entitled "Great Magazine Editors," is begun in this number. Henry M. Alden of "Harper's" is the first editor to be considered. Two very diversely entertaining readings are selections from Henry James's latest novel, "The Spoils of Poynton," and from the much-talked-of "Quo Vadis" of the Polish writer, Henryk Sienkiewicz.

OF the more notable articles which have appeared in recent issues of the LIVING AGE, may be mentioned "The Mission of Tennyson," by W. S. Lilly; "Henry Drummond," by W. Robertson Nicoll; "Fathers of Literary Impressionists," "Gibbon's Autobiography," by Leslie Stephen; "France and Russia in China," by Holt S. Hallett; "Herbert Spencer and Lord Salisbury on Evolution," by the Duke of Argyle; "A Day of Celebration," by Walter Besant.

THE complete novel in the June issue of LIPPINCOTT'S, "As Any Gentleman Might," is a tale of adventure by William T. Nichols. The hero is an American, but the action is mainly in England, and the time is the early part of the present century. The other stories, "To Him that Hath," by Annie Nathan Meyer, and "From the Grand Stand," by Jean Wright, are very brief. "A Feathery Début," by Lalage D. Morgan, is a charming account of a family of thrushes, whose domicile was in the writer's garden. "College Athletics" are vindicated by Albert Tyler, one of the American victors in the Olympian games at Athens in 1896, and Edward S. Van Zile resurrects "New York's First Poet," namely, Jacob Steindam, whose works appeared in 1659 and 1661.

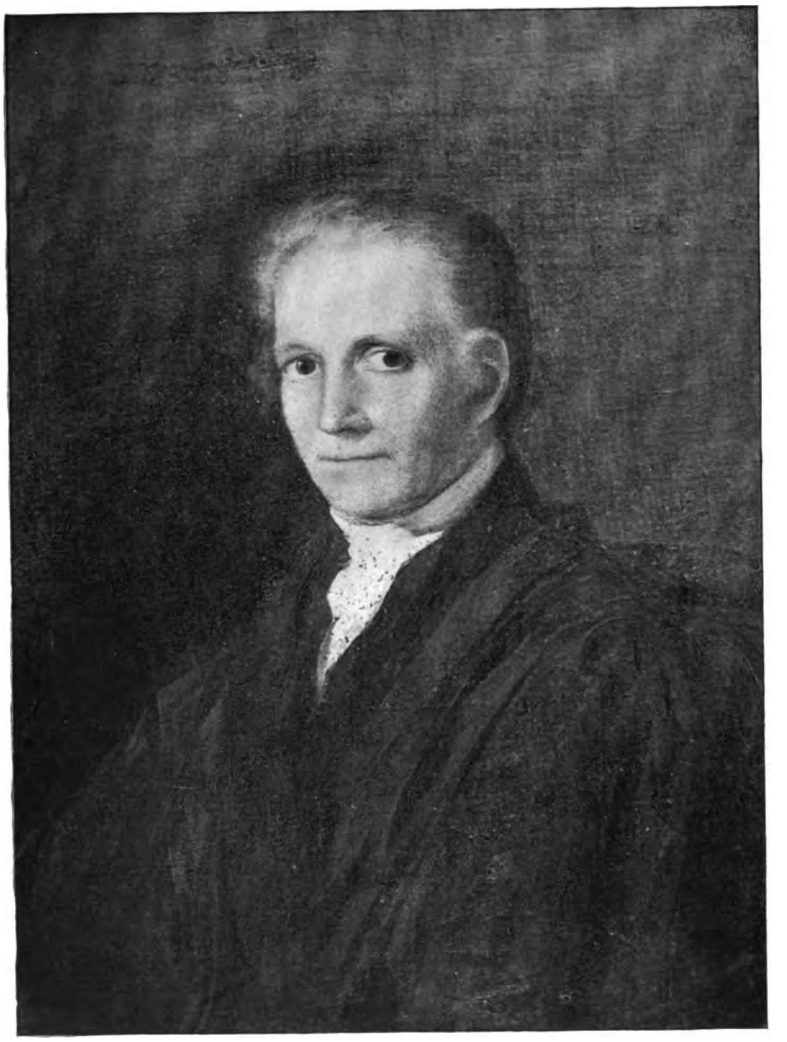
THE ATLANTIC MONTHLY for June contains, among other features, three articles of peculiar timeliness and interest. Professor B. I. Wheeler, recently resident in Athens, writes an article upon Greece and Turkey, the old struggle between the East and the West. Albert Shaw, author of "Municipal Government in the United States," contributes "The Municipal Problem and Greater New York." The "Lock-Step in the Public Schools," by William J. Shearer, Superintendent of Schools at Elizabeth, N. J., gives the author's experience in attempting to grade classes so as to permit of continuous promotion. Irving Babbitt of Harvard University writes of Brunetière and his work as a critic. He explains the methods of this celebrated French critic and shows his influence upon the literature of his time. Bradford Torrey, who can always be relied upon to write charmingly of nature, contributes an unusual paper entitled "In Quest of Ravens." Mrs. Catherwood contributes a delightful travel-sketch in Jeanne d'Arc's country, entitled "Around Domremy." H. C. Merwin contributes an essay with the suggestive title "On Being Civilized Too Much."

MCCLURE'S MAGAZINE for June opens with an article by Prof. S. P. Langley, secretary of the Smithsonian Institution, describing the "flying-machine" that he himself has lately completed, after ten years of laborious experiment, and which is the first "flying-machine" ever made by man that has actually flown. Apropos of the sixtieth anniversary of the reign of Queen Victoria, this number contains a series of life portraits of the Queen, the earliest showing her a child on her mother's lap, at the age of two years; the next at four, the next at five, and so on, almost year by year, down to the present day. It also contains a new short story of Kansas life — a Decoration Day story, by William Allen White, the young Kansas editor, orator, and story-writer. There is also an article on the "Revue des Deux Mondes," written by "Th. Bentzen" (Madame Blanc), who has long been a member of the staff of the "Revue" and has known intimately most of the famous contributors and the several editors, from Buloz, the founder, down to the present editor, M. Brunetière, who has just concluded very successfully a course of lectures on French literature before several American colleges.

NEW LAW-BOOKS.

THE AMERICAN STATE REPORTS, Vol. 53. 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. Bancroft-Whitney Co., San Francisco, 1897. Law sheep. $4.00.

The reader of THE GREEN BAG knows by this time the high estimation with which we regard this series ot reports. Each volume is kept fully up to the high standard of its predecessors, and Mr. Freeman furnishes a vast amount of valuable information in his annotations.



Bushrod Washington

The Green Bag.

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THE LATE MR. JUSTICE BUSHROD WASHINGTON.

BY BUSHROD C. WASHINGTON.

THE closing years of the nineteenth century are marked by a very significant tendency to retrospection in the mind of Americans, and the tendency appears both individual and national in its manifestations. As to the individual, it takes a genealogical turn, an inquiry into his ancestry. The searching of attics for old letters, documents and family bibles, the overhauling of court records, parish registers and other like sources of private history, is without precedent. The silent cities of the dead are invaded, and long-neglected tombstones and exhumed coffin-plates are put in evidence to prove that this or that citizen of today is descended from this or that soldier, statesman or other patriot of times colonial. The national, or public tendency, takes on the form of historical revision, a glancing backward into the processes by which this democratic, constitutional republic, came to live, move and have its being; a turning of search-lights back upon the path by which it has climbed into its exalted station in the family of nations. This tendency, though in a degree phenomenal, is not, as some aver, an epidemic craze possessing the public mind. Cause and effect are clearly discerned in it, and its manifestation at this time is both natural and according to the eternal fitness of things. It is an intuition born of the hour, and for which the times are ripe. American citizens realize that their country has passed from its experimental into its realistic era. It has survived the greatest of internecine wars and has bound itself together in an inseverable union.

The commonwealths and states composing it, reserving unto themselves a reasonable autonomy, moving each in its orbit of local self-government, which is indeed the Palladium of civil liberty, are yet held together by the attractive power of their central sun, which is the American Union — a union of states as from within, but as to the world, a nation. A nation of self-governing people, many minded, and agreeing to disagree as to matters of internal polity, but of one mind and one heart as to the welfare of their country. The average American has come to appreciate the greatness of his country, and realizing also that the greatness of a country is the sum of the greatness of its people, he naturally researches his ancestral record with the laudable ambition to establish for himself and family honorable place in his country's annals. The public mind, moved by the same spirit of retrospection, is demanding a rewriting of the constitutional history, and a revising of the biographies of the great men called the fathers and founders of the American Union. It is demanding also, that those master-builders succeeding them shall have due recognition and honor; who upon the foundation of national liberty already laid have well and wisely builded the superstructure of our great Republic. Responding to this spirit of retrospection, and recognizing in it the element of patriotic and robust Americanism, the writer presents to the

readers of THE GREEN BAG a brief outline of the life and character of Mr. Justice Bushrod Washington, a patriot who, his services having been rendered in the quiet, but laborious field of jurisprudence, is comparatively little known to his countrymen of this generation, outside of the bench and bar.

Bushrod Washington was born in Westmoreland County, Va., on the 5th day of June, 1762. He was the son of John Augustine, brother of General George Washington, and Hannah (Washington), daughter of John Bushrod, Esq., of Bluefield, Westmoreland County. The Bushrods were among the first people of the Colony of Virginia, of fair estate, educated after the manner of the times, loyal to the American cause, and zealous churchmen. The early education of Bushrod Washington, as far as known, was through private tutors and neighboring schools. He entered William and Mary College in 1775 and graduated A. B. in 1778. After the surrender of the British at Yorktown, where he was present, he rendered service as a private, in Colonel Mercer's troop of horse; a command spoken of as a "gallant band of Virginia Youths." He commenced the study of law in the office of Honorable James Wilson, a distinguished member of the Philadelphia bar, afterwards an associate justice of the United States Supreme Court, and, by strange coincidence, the one whom Bushrod Washington later succeeded in that exalted office. After admission to the bar he commenced the practice of law in his native State. He was married in 1785 to Julia Ann Blackburn, a daughter of Colonel Thomas Blackburn of Rippon Lodge, Virginia, who, as a volunteer aid-de-camp of General Washington, rendered distinguished service, was wounded at Germantown, and was referred to by General Washington, in an official report, as belonging to good old Federal fighting stock.

Mrs. Washington was of delicate mold, of highly nervous temperament, and of most affectionate and dependent disposition. She could not endure separation from her husband, and hence attended him almost constantly in the rounds of his practice; and he, in return, allowed few engagements, except those of a business or official nature, to separate him from her society. Having no children, they were all in all to each other. In 1787 he was elected a member of the Virginia Legislature, and in 1789 was elected a member of the Virginia State Convention which ratified the Constitution of the United States.

In the practice of his profession, which now became extensive and laborious, he continued a deep student of law, so absorbing and assimilating it into his nature that it became his possession. Sacrificing general literature, belles-lettres, and all that pertained chiefly to adornment, for the weightier matters of the law, he became distinguished as a counselor at law rather than an advocate. About 1790 he settled in Richmond, Virginia, and there received many law students into his office, among whom was Henry Clay, and others who attained distinction.

In 1798 he was appointed by President Adams an associate justice of the Supreme Court of the United States.

Of his character, qualifications and services in his judicial career we will let his contemporaries speak. Mr. Justice Story, his long-time friend, and associate upon the Supreme Bench, in a eulogy pronounced after his death, said, "Bushrod Washington was bred to law in his native State and rose to such early eminence that in 1798 he was selected by President Adams a justice of the Supreme Court of the United States, upon the decease of the late Judge Wilson of Pennsylvania Thirty-one years he held that important station with increasing reputation and usefulness. Few men have left deeper traces in their judicial career of everything which a conscientious judge ought to propose, for his ambition, his virtue, or his

glory. Few men, indeed, have possessed higher qualifications for the office, either natural or acquired. His mind was solid rather than brilliant; sagacious and searching rather than quick and eager; slow, but not torpid; steady, but not unyielding; conscientious, and at the same time cautious; patient in inquiry; forcible in conception; clear in reasoning. He was by natural temperament mild, conciliatory, and cordial; and yet he was remarkable for uncompromising firmness. Of him it may be truly said that the fear of man never fell upon him; it never entered into his thought, much less was it seen in his actions. In him the love of justice was the ruling passion; it was the master-spring of all his conduct. There was about him a tenderness of giving offense, and yet a fearlessness of consequences, in his official character, which I scarce know how to portray. It was a combination which added much to the dignity of the bench, and made justice itself, even when most severe, soften into the moderation of mercy."

David Paul Brown in his "Philadelphia Bench and Bar" mentions some incidents witnessed by himself which will give a more exact view of the personality of our judge. "Perhaps," says Mr. Brown, "the greatest *nisi prius* judge that the world has ever known, not excepting Chief-Justice Holt or Lord Mansfield, was the late Justice Washington. It is impossible to conceive of a better judicial manner, and, when to that is added great legal acquirement, great perspicuity and great-mindedness, exemplary self-possession and inflexible courage, all crowned by an honesty of purpose that was never questioned, he may be said, in the estimate of the bar and the entire country, to have stood among the judiciary, as *par excellence*." — "The Judge."

And yet we have heard it remarked by a most eminent scholar that Judge Washington's literary reading was so limited that it is questionable whether he ever knew who was the author of Macbeth. Lord Tenterden, we are told, did not know the author of Hamlet; Lord Holt and Lord Kenyon were certainly not remarkable for classical attainments, and there is no evidence on record of any distinguished judicial functionary who was conspicuous for his knowledge of general literature. The law is a jealous mistress . . . Judge Washington concentrated all his mind and learning upon one great object, the faithful discharge of his official duties, and thereby avoided the distraction of diversified learning. He never held conversations upon the bench or in the court room. The moment he entered the temple of justice, he was every inch a judge.

During a trial he took but few notes but kept his eyes fixed upon the witness or counsel. He never addressed the audience nor seemed to know they were present. We never knew him to speak even to the crier but once, and that was upon an occasion when the court room being crowded and the proceedings frequently interrupted, the crier bellowed "Silence," over and over again, when the Judge, turning towards him, in the most composed and quiet way said, "Mr. —, it seems to me, that you make much more noise than you suppress, and if I should have occasion to speak again upon this subject it will be to your *successor*."

Before Judge Washington no just cause could fail, no artifice succeed, whatever might be the talent of its advocate. The Judge had no partialities, no prejudices, no sectional or party bias. The proudest man was awed and the humblest man was sustained before him. He encouraged the weak and repressed the powerful. To the young and inexperienced members of the bar he was always attentive and indulgent.

There was one occurrence, and only one, that is known, indicating undue excitement on the part of the Judge. The Hon. Richard Peters was the district judge of the United States for Pennsylvania. He was a man of great honesty of purpose and infinite wit,

but certainly not a profound lawyer, and had rather loose notions of equity, looking upon it as a matter of abstract justice. With these opinions, he not frequently somewhat crossed Judge Washington in his views, and no doubt this course, long continued, rendered the Circuit Judge unusually severe.

Upon one occasion, when a case was presented to the court, in which the construction of the law bore with some hardship upon the defendant, and Judge Washington decided accordingly, Judge Peters was overheard to say, "That may be law, but I am sure it is not equity." "Equity!" exclaimed his learned brother, "What's equity! *Damn* equity!"

In laying down the law or in the explanation of its technical terms he was unequaled. I give but one instance, among many, of the latter. In the case of Murry *v.* Dupont, an action of malicious prosecution (See 3. Washington's C. Court Reports, page 37), much hung upon the term "probable cause." "Probable cause," says the Judge, "is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he stands charged."

"There is one case — a perilous case," says Brown, "in which the mental and moral qualities of the Judge were conspicuously displayed." It was the case of the United States *v.* Michael Bright. During the war of our Revolution, Gideon Olmstead and others, having fallen into the hands of the enemy, were put on board a British sloop as prisoners of war. The prisoners rose on the British crew, took the vessel and were steering for a United States port, when within five miles of the port, a brig belonging to the State of Pennsylvania came upon them and captured the sloop as a prize. The vessel was brought to Philadelphia, and there libelled in the court of admiralty of the State. Olmstead and his associates filed their claim, and a judgment was rendered, giving one-fifth of the prize to them and the remainder to the brig, that is, to the State of Pennsylvania, her owner. Olmstead appealed to the court of appeals, established by Congress, where the sentence of the court of admiralty was reversed and the prize decreed to Olmstead and his associates, and process issued directing the marshal to sell the vessel and cargo, and pay the proceeds accordingly. The judge of the court of admiralty delivered to David Rittenhouse, the treasurer of the State, the sum to which the State was entitled by the judgment of that court, but which by the decree of reversal belonged to Olmstead. The money was in possession of Mr. Rittenhouse at the time of his death, and then came into the hands of his daughters, as his representatives. The property was in this situation when Olmstead filed his libel in the district court of the United States, then established under the new Constitution, praying for the execution of the decree of the court of appeals. A decree was given by the district court according to the prayer of the libel. This was in January, 1803. Thus far the State of Pennsylvania had made no movement to assert her claims, but it was necessary for her either to surrender her pretensions to this money or to come forward and defend her citizens who were holding it only for her, and in doing so were exposed to the whole power of the Federal judiciary. Accordingly, on the second of April, 1803, an act was passed by the legislature of Pennsylvania requiring the representatives of Rittenhouse to pay the money into the State treasury and directed a suit against them should they refuse. The governor of the State was also required to protect the rights of the State, by any further means he might deem necessary, and also protect the persons and property of the ladies from any process which might issue out of the Federal court in consequence of their obedience to this requisition. The act of assembly declared the exercise of jurisdiction by the court of appeals illegally usurped in

contravention of the just rights of Pennsylvania, and the decree of reversal was null and void; so of the decree of the United States district court.

Pause for a moment to behold the awful position in which the two sovereignties, that of the United States, and that of Pennsylvania, are now placed. We tremble now, to look back at the precipice on which we stood. Nothing but the most calm and consummate prudence, and the most disinterested patriotism could have brought us safely through this mortal crisis. The district court of the United States hesitated to precede, the anticipated conflict being terrible in the extreme. The process was suspended that the case might be submitted to the Supreme Court, which, after a hearing, stood firmly to the Constitution and the law, and commanded the district judge to issue the process required. The process *was issued*, and the officer of the court had no choice but to execute it, and compel obedience. Gen. Michael Bright, commanding a brigade of Pennsylvania militia, was ordered by the governor immediately to have in readiness a sufficient force under his command to execute the orders of the State court, and employ them to protect and defend the person and property of the representatives of Rittenhouse, from and against any decree of the district court of the United States. A guard accordingly was placed by General Bright at the house of the ladies, and he with the other defendants in the indictment opposed with force the efforts of the United States marshal to serve the writ issued to him. The process, however, was served, and the State yielded, paying the money according to the decree of the district court. It was for this resistance of the process of a court of the United States that General Bright and others of his party were indicted and brought to trial before Judges Washington and Peters, holding a circuit court of the United States.

"In the course of this trial," says Mr. Brown, "and in deciding the various questions of law which arose under it, the extraordinary judicial qualifications of Judge Washington were shown in full relief. The case lasted several weeks, during which time there was the greatest popular agitation. Rumors and threats of every kind were put in circulation. The States-rights men affected to hold the power of the general government in contempt, and the authority of the court in derision. It was publicly declared that Judge Washington would never dare to charge against the defendants, or to pronounce sentence against them if they were convicted. But the people did not know him, or were incapable of appreciating his rare mental and judicial qualities.

"He did charge against the defendants, they were convicted and he sentenced them."

Judge Hopkinson, referring to the same case, narrates the following: "Upon the conclusion of the speeches of the counsel, the court sitting in the upstairs room of the United States circuit court, Philadelphia, the room being too small for the vast concourse of anxious auditors, many of whom came to witness, as they expected, Judge Washington's discomfiture, the Judge, turning to the crier, said to him in the mildest and most composed way, "Adjourn the court, to meet to-morrow in the room on the ground floor of this building. This is an important case, the citizens manifest great interest in the result, and it is right that they should be allowed, without too much inconvenience, to witness the administration of the justice of the country, to which all men, great and small, are alike bound to submit."

Some one has said that even in a republic one monarch reigns, that monarch being Law. If, in yielding allegiance to this stern monarch, he seemed at times austere, it was in the private life of Bushrod Washington that the humanities prevailed, and the official became merged in the man. In

his family and social life he was beloved. Plain-folk and children found in him an accessible and sympathizing friend. There is one still living whose memories run back to girlhood days, made happy by "Uncle Washington."

Being the favorite nephew of General Washington, the active executor of his will, inheriting Mount Vernon, and coming into possession of the General's public and private papers, it was with his assistance that Judge Marshall prepared his "Life of Washington," and later, under his direction, Mr. Jared Sparks published the "Life and Writings of Washington."

Although the owner of considerable property in slaves, Judge Washington was in favor of the abolition of slavery, and of the emancipation of the slaves upon any gradual and practicable plan consistent with justice to the owners, and humanity to the liberated slaves. He viewed the subject from a practical, rather than sentimental standpoint. In 1816 he was made first president of the American Colonization Society, whose object was the colonizing of liberated negroes upon the coast of Africa.

He was a vice-president and charter member of the American Bible Society, attended its meetings, and took interest in its work.

The honorary degree of LL.D. was conferred upon him by Princeton College, also by the Pennsylvania and Harvard Universities. He was the author of "Reports of Virginia Court of Appeals," also of "Reports of 3d Circuit, United States Court."

Perhaps the best evidence of the painstaking, methodical habits of his life was the system he observed in the preservation and filing of his letters and papers and keeping of his books and accounts. The letters of each month, through a series of thirty-five years, were filed in packages according to date and in alphabetical order. It would appear that he filed all letters, many of them being such as most men would have destroyed. Every letter was endorsed with the name of the writer.

He had no children by marriage, and although his moral character was unimpeachable he was not without blackmailers and enemies. Among his letters was one from a man calling himself Samuel Washington, addressing him as "father," claiming to be his son, and asking for money. This letter was filed in due order among letters from Judges Marshall, Story and others, his simple endorsement on it — "From some fool or knave claiming to be my son." Another vulgar and abusive letter written in mongrel French and English and signed, "Votre implacable Enemy," was duly filed with the endorsement, "Anonymous and sufficiently impudent." The preservation of these letters is indicative of his conscious innocence of wrongdoing, at least along the lines indicated in them.

Inheriting a name already super-illustrious in Washington, the father of his country, it made him at times somewhat conspicuous; but his modest nature caused him to shrink from every occasion that would cause him to appear the object of reflected greatness.

While the domestic tastes of both the Judge and Mrs. Washington were simple, and their usual manner of living not different from that of other hospitable well-to-do people of Virginia, yet Mt. Vernon, as the home and tomb of Washington, was the Mecca of America, visited often by persons of distinction from home and abroad, some bearing letters or otherwise entitled to unusual attention. In entertaining such, the state and formality were observed in keeping with the occasion.

His death occurred in Philadelphia, after a short illness, on the 26th of November, 1829. His remains were sent to Mt. Vernon by boat. Mrs. Washington, who was with him at the time of his death, was prostrated with grief. Having a peculiar aversion to traveling by public conveyances, she started for Mt. Vernon in their private carriage, in

company with their nephew and niece. When about six miles out from Philadelphia she suddenly fell forward and expired before she could be removed from the carriage, dying, as was said, of a broken heart.

Resolutions in memoriam of Judge Washington were passed and entered upon the minutes of the United States Supreme Court, January 25, 1830, Mr. Wirt presiding, Daniel Webster being the mover.

The members of the Philadelphia bar also, in commemoration of his worth, placed over the judgment seat where he had so long presided, a tablet recording their "affection for him as a man and their respect for the learning, labor and wisdom of his long judicial life."

In presenting this sketch of Judge Washington we have singled out one of a type, — a fair specimen of a body of public servants, whose services were rendered without observation and whose high office, in the very nature of it, required them to remain deaf to the appeals of faction and of friendship and unmoved by popular demonstration. It was theirs to apply the old, unchangeable principles of law to the new and ever-changing conditions of our advancing civilization and to methods peculiar to an undeveloped country. In doing this they were contented to take for their reward the satisfaction of an approving conscience, and to look for the vindication of their judgments in the unprejudiced mind of posterity.

Were the past history of the American judiciary more deeply explored, and the learning, patience, integrity and courage of those upholders of the law and expounders of the Constitution more generally known, it would tend to develop in the present and succeeding generations a deep and lasting gratitude, a more exalted patriotism and a truer veneration of those underlying principles for which they stood, and upon which rests the fabric which contains our social destiny.

ROMANTIC CUBAN JUSTICE.

BY GEORGE H. WESTLEY.

NO governor general of Cuba stands out so prominently in the history of the island as Don Miguel Tacon, who held the reins of Spanish government there from 1834 to 1838. The old Cubans who remember Tacon say that he was *un hombre muy grande;* but it cannot be said that they regard his memory with affection, for his policy was one of violence and he ruled with a hand of iron. There was this much to his credit, however, that he had but one interpretation of the law for the rich and the poor, for the humblest peasant and the wealthiest grandee.

While acting in his judicial capacity Tacon rarely tempered justice with mercy, but it is said that he took a keen pleasure in coloring it, whenever possible, with romance. And that brings me to the story.

In Havana, in Tacon's time, there was a beautiful young Creole girl, named Miralda Estalez, who kept a little cigar shop, frequented by young men of the town who loved a choicely made and superior cigar. Miralda was an orphan, having lost her father and mother before she was sixteen. In manner the girl was delicate and refined, yet cheerful, and though she was paid constant attention by her rich and gay young patrons, she never for a moment allowed her head to be turned by their flatteries, or was unfaithful to Pedro Mantanez, the young boatman who was her accepted lover.

One of Miralda's customers was Count Almonte, the gayest cavalier in Havana. He had conceived a violent passion for his fair attendant, and one day finding her alone, he took the opportunity to declare it, beseeching her to go with him to his magnificent mansion at Cerito in the suburbs, where he would surround her with every luxury she could possibly desire, except of course the luxury of being a countess. Miralda, true to her womanhood and her lover, scorned his appeal, and bade him never again insult her by entering her shop. Almonte went away confounded, but nevertheless determined that by fair means or foul the girl should be his.

On the following afternoon a file of soldiers halted at the door of the little cigar shop, and the lieutenant, entering, ordered the frightened girl to follow him immediately.

"What for?" she asked, "By whose orders?"

"The governor general's."

Not daring to oppose such high authority, Miralda closed her shop, and went with the lieutenant. She was not taken to prison, however, but, what was to her far worse, was conveyed to Almonte's castle at Cerito. The Count was there to receive her, and, smiling triumphantly, he assured her that she would be kept a prisoner until she acceded to his desires.

What was the surprise of the lover Pedro, that evening, to find the little cigar shop closed, and Miralda nowhere to be found. He instantly sought for some clue, and obtaining one, he traced it up until he discovered where the girl was confined. Then, to make sure that she was not there of her own free will, he disguised himself as a friar of the order of San Felipe and, applying at a favorable moment, he succeeded in getting in and securing an interview with his inamorata, who received him with open arms.

The next thing was to get Miralda out of the Count's clutches, and this was not easy. Almonte was rich and powerful, and Pedro was only a poor boatman. Nevertheless the young lover was not discouraged; he had

heard that Tacon loved justice, and he determined to go to him at once. After some delay he obtained an audience and presented his case.

"Is Miralda your sister?" asked the governor, as Pedro finished his story.

"She is my betrothed," replied Pedro.

Tacon then bade him come nearer, and holding up a crucifix, commanded him with a look that penetrated to his very soul, to swear to the truth of what he had said. Pedro knelt, kissed the cross, and swore. Tacon then told him to wait in the adjoining room, with the assurance that the matter would soon be attended to. Two hours later Tacon had the Count and Miralda before him.

"Count Almonte," said the governor, "you adopted the uniform of the guards for your own private purposes upon this young girl, did you not?"

"Excelencia, I cannot deny it."

"Declare, upon your honor, Count Almonte, whether she is unharmed whom you have thus kept prisoner."

"Excelencia, she is as pure as when she entered beneath my roof," was the reply.

Tacon turned to an attendant and sent him to the church near by for a priest, who in a few moments entered.

"Holy father," said Tacon, "you will bind the hands of this Count Almonte and Miralda Estalez together in the bonds of wedlock."

"Excelencia!" exclaimed the Count in amazement; while the girl and her lover exchanged glances of consternation.

"Not a word, Señor; it is your part to obey!"

"My nobility, Excelencia!"

"Is forfeited!" said Tacon.

Count Almonte knew the governor too well to offer further protest, and he doggedly yielded in silence. Poor Pedro, not daring to speak, was half-crazed to see the prize he had so long coveted thus about to be torn from him. Miralda stood as if bereft of her senses, and before she had fully realized what was taking place, the ceremony was over.

Tacon's next move was to summon the captain of the guard, to whom he gave a hastily written order. Miralda and Pedro were directed to remain, and Almonte was commanded to return to his castle.

For half an hour the parted lovers sat there mystified, while Tacon went on quietly with other business, as if he had forgotten their existence. Presently the officer of the guard returned.

"Is my order executed?" said Tacon.

"Yes, Excelencia! Nine bullets passed through the Count's body as he rode round the corner of the street you mentioned."

Tacon then turned to the priest and said, "You will see that the legal announcement is made of the marriage just performed here, as well as the legal announcement of the death of Count Almonte, with the addition that his widow becomes sole heiress to his property and his name."

Miralda and Pedro, greatly relieved, were then dismissed with the benevolent injunction to attend to the further prosecution of the case for themselves.

RHYMES ON REAL PROPERTY.[1]

By Richard Webb.

O Muse, whose aid has always been
Invoked by poets of every time,
Whene'er they sing their songs of war,
Or sing, perchance, of love and wine,
On my poor verse bestow thy grace,
Thy favor on my sentiments.
I sing a song of chattels real,
Of lands and hereditaments.

I do not sing such milder themes
As chattels usufructuary,
Or bills and notes and special pleas,
I sing of things hereditary;
The things that pass from man to man,
According to propinquity,
The tenements that men obtain
By right of consanguinity.

The deeds of heroes and of saints
Recorded are in song and story,
And are, for each succeeding age,
The monuments of former glory;
But deeds with witnesses and seals,
Recorded in a legal manner,
Have carried fields of greater worth
Than those won under waving banner.

A deed which, for consideration,
Recites the *dedo et concessi*,
And names the parties to the grant,
With good description of the *loci*,
A muniment of title is,
The very highest to be found.
Grantee may hold against the world,
He actually owns the ground.

[1] Read at the annual dinner of the Cumberland County (Me.) Bar Association, 1897.

The house in which a man may live,
And seem to take his ease in,
May prove a troubled home for him
Unless he hath the seizin.
Of course ejectment may be brought
Against him as a trespasser,
And damages be proved because
Injuria non praesumitur.

But every one who claims a fee,
And would be in possession,
Before he wins must pay a fee
To men of the profession.
And such a one should always be
In any course that he elects,
Most generous to his counselor,
De minimis non curat lex.

In building on his own demesne
One has to take the best of care
Lest his new building should obstruct
His neighbor's ancient lights and air.
Times now are different from the times
In which that doctrine had its source.
Cessante ratione legis,
Cessat ipsa lex, of course.

If in Black Acre A's estate
Is only one *per auter vie*,
Remainder, say, to B for life,
And over then to heirs of C,
And if, while leased by A for years,
It's taken for a railroad track,
And damages are paid to C,
Who then has rights in Acre Black?

Supposing that the hired man
Has carelessly left down the bars,
And lessee's cows upon the track
Are slaughtered by the railroad cars,
Would such an action by the Road
Be action called *quare obstruxit*,
And would an action also lie
In trespass *quare clausum fregit?*

The maidens of our favored land
  Who seek in Europe for a mate,
Would therein hardly be compared
  To conveyancers, at any rate.
The likeness is, however, marked,
  And evidenced by brief recitals,
Since both with eagerness intent
  Are occupied in searching titles.

The weather clerk, in modern times,
  Has power that is known to all,
Some people foolishly suppose
  That sun or rain is at his call.
But that the judges of our courts
  Can beat him it must be allowed,
Since they, when properly invoked,
  Have power to remove a cloud.

Then here's a toast to property,
  And here's to litigation;
And here's to those authorities
  That never need citation.
Here's one to learned counselors,
  And one to legal fiction,
And here's to our own Court Supreme
  Within its jurisdiction.

SOME KENTUCKY LAWYERS OF THE PAST AND PRESENT.

III.

By Sallie E. Marshall Hardy.

DANVILLE.

JUDGE SAMUEL McDOWELL was a judge of the district court which was opened at Harrodsburg in 1783, but removed to Danville the same year. Judge McDowell was an eminent Virginian, who, coming to Kentucky, became a leader of acknowledged ability. He was six feet, four inches tall, and very powerful. When his sons had grown to manhood, he would frequently challenge them in athletics. He could kneel on one knee and throw a heavy sledge hammer to a greater distance than any of them. He was a devoted Presbyterian, and when eighty years old rode on his favorite horse "Fox," from Danville to Nashville, Tennessee, to attend a meeting of Synod, and back again. Judge McDowell was an ardent Federalist, and his son-in-law, General Andrew Reid, was a devoted follower of Jefferson. In the possession of a member of the family is a letter from the old Judge to General Reid, expressing his political opinions in strong terms. On the back of it General Reid has endorsed: "Vicious, ought to be burned." Judge McDowell was a man of noble character, and it is not strange his descendants are proud of him. The Chapter of the Daughters of the American Revolution at Cynthiana, Kentucky, was named in his honor by the Regent, his great-granddaughter, Mrs. Mollie Casey Reynolds, and Mrs. Hervey McDowell and others, his descendants, are among the prominent members. It has been said: "He was an ideal man for the times, and Kentucky owes much to his courage, his conscience and his common sense."

Thomas Todd, chief justice of the court of appeals in 1806, and an associate justice of the Supreme Court of the United States, until his death in 1826. He was an able lawyer and judge. Many of his descendants are among the most influential and prominent citizens of Kentucky to-day. At the meeting of the bar of the Supreme Court to express regret at his death, William Wirt, the then attorney general of the United States, presided, and Daniel Webster presented the resolutions.

Judge William McClung was a very able man. He was appointed, by President Adams, one of the sixteen circuit judges he made at the close of his administration. It was the commissions of these judges that tradition says Chief-Justice Marshall was hurriedly signing, as secretary of state, when he was informed it was twelve o'clock and Thomas Jefferson was president of the United States. Congress repealed the act which allowed these judges, but Governor Greenup of Kentucky made Judge McClung a judge. His son, John McClung, was a brilliant lawyer, but studied for the ministry and became one of the most eloquent preachers in Kentucky.

James and John Overton were distinguished lawyers. John went to Tennessee where he was eminent as a lawyer and judge. He was a devoted friend of President Jackson, and his last words were: "Write to the General and tell him I died as a hero should die."

Judge John Green studied law with Henry Clay and became distinguished in his profession.

Aaron Harding was a prominent lawyer and man of fine character. The following is told of him: "When he was eighteen he had an attack of white swelling and not thinking the treatment of his physician,

which consisted of local applications and internal medicines, sufficient, with a keen knife he cut his leg to the bone and opened a long wound. The treatment proved effective and he recovered." His son, Robert Harding, is a leading member of the present Danville bar, and was county attorney for Boyle County.

Judge Fountaine T. Fox was for twelve years circuit judge, and it is said: "No one wearing the ermine ever enjoyed a more enviable reputation for uprightness and impartiality." His legal attainments were of the highest order.

CURTIS F. BURNAM.

Danville is the home of former Congressman Proctor Knott, one of the most distinguished lawyers in Kentucky. The late Hon. S. S. Cox, in speaking of legislative humorists said: "Who can fill the place of Ben Hardin or Tom Corwin? No one has approached either, unless it be another Kentuckian, J. Proctor Knott. In him Kentucky gives to us a second edition of Hardin." While in Congress, Governor Knott was chairman of the judiciary committee.

HARRODSBURG.

Harrodsburg is the oldest town in the State, and has been the home of some of the most learned and prominent men.

One of the intellectual giants of early days was George Nicholas. He lived in Kentucky only eleven years, but he won a place among the greatest men of his day. He was distinguished as a scholar, writer, orator and lawyer. He advocated that provision in the first constitution which gave to the court of appeals original jurisdiction in all suits in which the title to lands in the State was involved. He was strongly opposed, but, Col. Durrett says, "Such was his power in argument and such his force of character and earnestness that he over-rode all opposition.

James Harlan, the father of Associate-Justice Harlan of the Supreme Court, was the prosecuting attorney of Mercer County, a member of Congress and a most distinguished man.

Governor Beriah McGoffin was one of the ablest men in Kentucky. He was a man of strong character, and "had the courage of his opinions." He sent a message to the legislature recommending the most stringent laws against the marriage of first cousins, and he issued a proclamation, at the beginning of the war, of armed neutrality for Kentucky.

Garrett Davis was United States senator and a fine lawyer. He opposed the clause for an elective judiciary, when he was a member of the constitution of 1849, voted against it, and after it was adopted refused to sign it.

W. W. Stephenson is one of the most prominent members of the present Harrodsburg bar. He is a fine lawyer and a man of undoubted courage and ability. There are six members of the Hardin family who practice law in Harrodsburg.

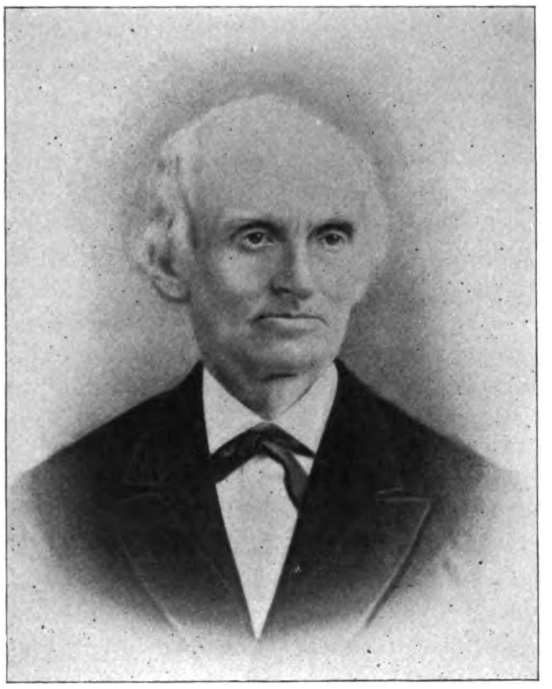
The office of circuit and county clerk has been held by members of the Allin family, from the beginning of the commonwealth until the present time, and Mr. W. B. Allin is now a popular member of the bar.

RICHMOND.

This town has numbered many brilliant men among the members of its bar. Judge Little says: "Madison County has ever stood for the best type of all that has given fame to Kentucky."

Martin D. Hardin early became prominent in the profession and was a scholarly lawyer. He was a senator, and attorney-general of Kentucky.

Judge Daniel Breck was born in Massachusetts, but came to Kentucky in 1814, and rapidly rose to distinction. While in the legislature he originated a number of important measures, notably the system of internal improvement and the Northern Bank of Kentucky. He was for six years a judge of the court of appeals and a member of Congress.



W. B. WINSLOW.

Col. John Speed Smith was a prominent lawyer and statesman. He was a leading member of the Richmond bar at the time of its greatest glory. He was United States district attorney for Kentucky and a member of Congress.

Judge Curtis F. Burnam graduated from Yale in the class of 1840 as valedictorian, and was a member of the famous "skull and bones club."

Now at the age of seventy-six he is in fine practice and has the vigor of young manhood. He has every requisite that goes to make up the highest type of Christian manhood. His is a notable legal family. Rollins, his eldest son, was his father's partner for twenty years until his election to the appellate bench. The son is a brilliant criminal lawyer, while the father has devoted himself more to equity and jurisprudence. Another son, James, is likewise on the bench, being the county judge, and distinguished for entire impartiality and great quickness of perception. When Judge A. Rollins Burnam was elected to the appellate bench, after practicing over a quarter of a century at the Richmond bar, his brother lawyers gave him an elegant banquet as "A testimonial of his eminent capacities as a judge, an upright citizen and an eloquent and honorable member of the Richmond bar."

James B. McCreary graduated with high honors from Georgetown College, and as lawyer and statesman has won distinction. When he was elected governor, he received the largest vote ever cast for any candidate for any office in the State. He was repeatedly elected to Congress by large majorities and is a clever, genial gentleman, who well deserves his popularity.

John Bennett is a capable lawyer, has been State senator several times, and is a leading member of the Republican party.

PARIS.

Bourbon County is one of the oldest and wealthiest in the State, and has been as rich in great men as in everything else. One of its citizens, the late Gov. James Garrard, enjoyed the distinction of being the only man ever elected twice in succession, and serving two terms as governor of Kentucky.

Judge Robert Trimble was an able lawyer, and an associate justice of the Supreme Court of the United States.

Benjamin Mills was a judge of the court of appeals. Judge Little says, "His success rested on his profound knowledge of the law."

Jesse Bledsoe, one of the leaders of the early bar, was a fine scholar. He received only twenty-five dollars for teaching six months in the Transylvania University. "Money was valuable in those days," and even the greatest lawyers received small fees. Chancellor Bibb sarcastically wrote: "Kentucky lawyers receive large fees only in promises." He was a circuit judge, and went to Texas in 1836, where he died. He was one of the most popular lawyers of his day.

William E. Sims, a distinguished lawyer, was a member of the Confederate senate, and a woman who was in Richmond, Virginia, during the war, says: "Judge Sims was one of the most popular bachelor beaux of the Confederate congress."

VERSAILLES.

Woodford County was named by Col. Thomas Marshall, father of the chief justice, for Gen. Willard Woodford, his commander in the Revolutionary War. They were captured together at Charleston, South Carolina, and General Woodford died while a prisoner. Colonel Marshall's son, Alexander, was a very talented man, and his grandsons, Edward C. and Thomas F. Marshall, were brilliant men. Thomas F. Marshall was one of the greatest orators this country has ever had. A writer says: "Marshall was a marvelous genius. He was, among the lawyers and orators of his day, what Byron was among men of letters, what the Earl of Peterborough, the hero of Barcelona, was among warriors, what Junius Brutus Booth was among actors. He was the nephew of John Marshall, the great chief-justice, and he had been admirably educated by his father, Dr. Lewis Marshall, the most accomplished man of his day. But Tom Marshall was more than an orator, he was a profound lawyer, an accomplished scholar and a brilliant statesman.

Tradition has it that he was unhorsed in Congress by the veteran John Quincy Adams; but get the remarks of both and read them, and you will find that "The old man eloquent," himself, was also on the ground and rolling about in the dust.

Edward C. Marshall was a famous wit and speaker and wherever he spoke the halls were crowded. He went to California, was a member of Congress from there, and defeated for the United States Senate by only one vote. Once when he was a candidate a man said to him: "Mr. Marshall, were you not the gentleman who all through this campaign has said, 'the man should not seek the office, but the office the man?'"

"Yes, sir," was his reply, "but when the office comes seeking the man, I think it is very discourteous for him not to be where it can find him."

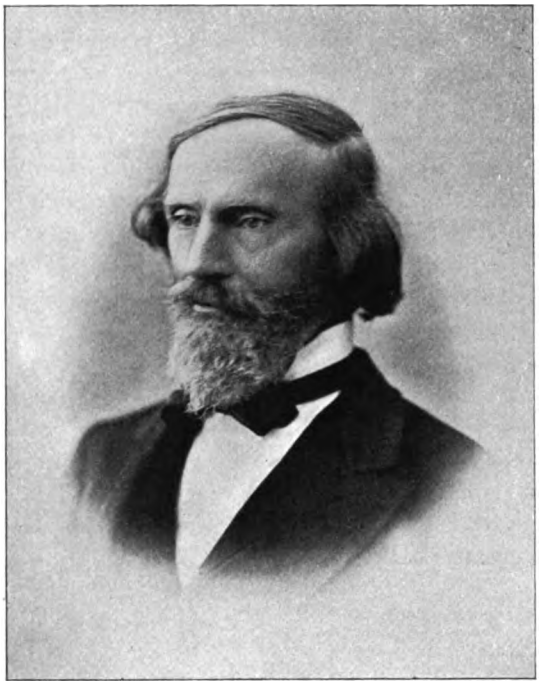
He was attorney general of California, and died in 1893. During his time as attorney general the Southern Pacific Railroad was forced to pay the State $1,280,000. There was much litigation over it, and it was carried to the Supreme Court. It is said, "For nearly two years this vast sum remained in the exclusive possession of General Marshall, and at any time, if he had been dishonest, he could have appropriated the money for his own use, without fear of legal penalty." A friend wrote of him: "As Saul was, from his shoulders and upward, higher than any of his people, so Ned Marshall strode among men, taller than

his fellows, and bearing a sovereign air. He never had his superior for satire and invective."

Judge James Paxton Harbeson and W. G. Deering are among the leaders of the Flemingsburg bar. Judge Harbeson was a brave soldier in the Federal army. He was elected county judge without opposition, in 1890, and is a brilliant man and a courteous gentleman.

Judge Peters of Mt. Sterling was a judge of the court of appeals for sixteen years, and Judge Richard Apperson was one of the leading members of the bar in central Kentucky, and a man widely beloved.

The present governor of Kentucky, William A. Bradley, has long been regarded as one of the ablest members of the central Kentucky bar, and his father, Robert M. Bradley, was a fine lawyer.



GEN. W. H. WADSWORTH.

J. N. Cardwell of Winchester is the brother-in-law of the present mayor of Louisville, George D. Todd. At seventeen he was a soldier in the Mexican War, and served with distinction on the Union side in the Civil War. His professional rank is indicated by the magnitude of the cases in which he is employed. He is skillful and successful in argument, and at the same time courteous, good-natured and self-possessed.

William Beverly Winslow of Carrollton was the most prominent lawyer in his section of the State.

His father was a lawyer and clerk of the Carroll (then Gallatin) County circuit court for thirty-three years. Mr. Winslow was a thorough business man. He was president of the Carrollton branch of the Southern Bank of Kentucky and trustee of the Carroll County Academy. His ability and the well-known integrity of his character won him not only his high position at the bar but the respect and admiration of all. He was a devoted member of the Southern Methodist Church. It is said "he had four 'hobbies,' his church, his home, his profession and his garden, or 'truck patch,' as he called it, and he never neglected any one of the four." His thoroughness and attention to details in his professional life is said to have been marvelous. A brother lawyer, Judge Nuttall, was in the habit of jokingly telling, at his expense, that so great was his thoroughness, that on one occasion in a case he proved a man dead and not satisfied with that, went on to prove he was still dead. He was very fond of gardening, delighted in seeing things grow, and prided himself on having the earliest vegetables in the county. In the gardening season he was in the habit of rising at daylight and working two or three hours before breakfast. He was a schoolmate of the late Norvin Green, President of the Western Union Telegraph Company. In writing to a son of Mr. Winslow's, Dr. Green said, "I cannot close this long and strictly business letter in justice to my feelings without some expression of the high es-

teem and warm regard in which, during an acquaintance of nearly forty years, I have always held your father, my high esteem of his clear head and professional ability, and my great admiration of his personal character."

Four out of Mr. Winslow's five sons are lawyers. Three of them at Carrollton, the eldest, Henry M. Winslow, is the leading lawyer of the present Carroll County bar. The fourth son, his namesake, William Beverly Winslow, is a talented lawyer and a member of a prominent New York legal firm, Russell, Robinson and Winslow. A recent able brief prepared by him and used in a case tried in the United States circuit court of eastern Tennessee, to prove the solvency of the Knoxville Building and Loan Association and prevent the appointment of a receiver, was widely commented upon and resulted in the property being turned back to the management selected by the majority of the stockholders. It is a notable fact that Mr. William Beverly Winslow, Sr., was buried in a cemetery which joined the lot on which he was born, though in a different town and county, the name of the town having been changed and the county created in the meantime.

MAYSVILLE.

Many are the lawyers' names that are inscribed upon the roll of Mason County's greatness, and those of Judge Adam Beatty, Judge Walker Reid, Judge Lorin Andrews, William Henry Wadsworth, Judge John Coburn, Martin P. Marshall, Harrison Taylor, Richard H. Stanton, Judge E. C. Phister and John D. Taylor are among the most noted.

Harrison Taylor was an indefatigable and untiring worker. "He was a big-hearted man," said one who knew him well, "too generous to be rich, and died universally regreted and respected."

Martin P. Marshall was one of the brainiest men Kentucky has ever known. He was distinguished as one of the best read, ablest and most conscientious lawyers of his day. He was a pupil of his uncle's, Chief-Justice Marshall, and for some time lived with him in Virginia. His grandson, Anson Maltby, is a prominent member of the New York bar and is a son-in-law of that splendid Kentucky lawyer, statesman and soldier, General John C. Breckinridge.

William Henry Wadsworth was one of the greatest lawyers in Kentucky. He was a second cousin of Henry Wadsworth Longfellow, and had much of his romantic, poetical nature. His beautiful home, above Maysville, on the river, was called "Buffalo Trace." General Wadsworth was a courtly, elegant gentleman, a great student and a charming conversationalist. He was four times a member of Congress, and General Grant offered to appoint him minister to Mexico, but he declined. He had a beautiful garden and was devoted to flowers. His charming home dispensed a wide hospitality, and especially on Sunday afternoon were all the prominent men in the neighborhood to be found there.

Richard H. Stanton was an able lawyer and writer. He was the father of Henry M. Stanton, the poet, and author of "The Moneyless Man."

CYNTHIANA.

Cynthiana was named for two women, Cynthia and Anna Harrison, daughters of Robert Harrison, who laid out the town. It is in Harrison County, a very beautiful and fertile part of the State, and a number of its bar have been prominent men.

Andrew Harrison Ward, the Nestor of the Cynthiana bar, is eighty-two years old and has been an active practitioner at the bar for fifty-two years. He never had a client hung, and the longest term in the penitentiary ever given one of them was ten years.

He deprecated the Civil War, was opposed to secession. He said, "This country is the grandest on earth and none too large

for me; I am unwilling to part with an acre of its land or a leaf of its history." It is to his lasting honor, however, that, although an intense Union man during the War, when it was over and he was in Congress, he fought bitterly the reconstruction measures. He was for years one of the most popular speakers and ablest lawyers of northern Kentucky. In 1863, when the powers at Washington ordered the bayonets to take charge of the ballot box in Kentucky, Judge Ward denounced it as an unpardonable outrage upon popular liberty, announced himself as a candidate for the legislature, in opposition to the military rule, just eight days before the election, and defeated his opponent. In 1865 he was nominated for the Thirty-ninth Congress in a Democratic convention on the first ballot over such distinguished competitors as John G. Carlisle, Col. Thomas L. Jones, Judge William E. Arthur, Dr. Chambers of Gallatin County and Judge Hogan of Grant County. At the end of his term in Congress he retired from political life and has since devoted himself to his profession. One of his most noted cases was T. J. Megibbon *v.* Edwin Bedford. The suit was about some fine cattle, and was popularly styled, "The case of Megibbon, Bedford and the Bull." During the trial many witty and humorous things were said by Judge Ward and John B. Houston, the opposing lawyer, which kept the court and audience convulsed with laughter and are still quoted and enjoyed.

ANDREW H. WARD.

In 1884, Judge Ward had a very interesting case in North Dakota to defend — twenty-four indictments for murder. Two men had been killed in a controversy between pre-emptioners and claim jumpers, and there were two indictments each against twelve men for the killing. Only one of the cases was tried, which resulted in an acquittal, and the others were dismissed. Judge Ward's associates in these cases were the most distinguished lawyers of the Northwest; notably Governor Davis of St. Paul (now United States senator); Messrs. Barrett and Irving of St. Paul (Judge Ward, who was a friend and admirer of the great Kentucky orator, Thos. F. Marshall, called Mr. Irving, "the Tom Marshall of the West"); Mr. Wellington of Iowa, and Noyes and Hamilton of Grand Forks. When starting for Dakota, Judge Ward, with the idea that he was going to the border of civilization, bought fifty dollars' worth of law books and took the heavy load with him, only to find on his arrival the most magnificent law library he had ever seen, and delightful people, among whom were many ex-Kentuckians.

A case which gave Judge Ward great pleasure to win was the prosecution of a suit against three prominent citizens for tearing down a house which had been abandoned as a schoolhouse, and in which a poor family had taken refuge. The children were numerous and worse than fatherless, for the father was a drunkard. The eldest

daughter was very handsome, and there were many evil reports about her, so three good citizens considered it was necessary to purify the neighborhood by driving the family out of it. They pulled down the house, and the half-clad children were driven out in the bleak winds of November and took refuge under some boards fastened against a fence. Judge Ward made a powerful argument, and the jury gave a verdict for heavy damages, and it is to the credit of one of the defendants that, after mature deliberation, he approved it and declared it was just.

Once, during the Civil War, Judge Ward engaged in a heated discussion with Thomas F. Marshall, in the latter's law office in Versailles, as to "whether a State had a constitutional right to secede from the Union." After various arguments pro and con, Judge Ward quoted from a pamphlet which Mr. Marshall had written himself some years before, against the doctrine of secession, saying: "This was from the pen of a man who has one of the brightest and grandest intellects Kentucky has ever produced." With a burst of laughter, Mr. Marshall, recognizing his own words, said: "I must surrender, for it is impossible for me to maintain my position against Tom Marshall and Harry Ward combined."

Judge Ward's son-in-law, Judge William Thornton Lafferty, is beloved by all and a splendid Christian gentleman. It is said his mother never uttered an unkind word in her life, and from her he inherited the beautiful disposition which has made him so beloved and respected, and gained for him the name of "Lafferty, the Peacemaker." As a judge, he is kind, firm, considerate, but unprejudiced, and he is a leader in his profession.

One of the most noted cases ever tried in Cynthiana was the trial of Issa B. Desha for the murder of Francis Baker. Desha was the son of the then governor of Kentucky, Joseph Desha. The trial was long and sensational, and some brilliant forensic efforts were made, but the jury found Desha guilty and condemned him to death. He was unable to procure a new trial, and appealed to his father, the governor, for pardon. The old man, who had been a gallant soldier in the War of 1812, and was one of the ablest and most energetic of the chief executives of Kentucky, for a long time remained firm and refused his son's appeals, but, after a pathetic struggle between his parental love and his sense of duty, he pardoned his son, who left the country a free man. He disappeared, and nothing was heard of him for many years. Recently there has come a story, that he went to Hawaii, married a Kanaka woman, and that the most eloquent and popular native preacher now in Honolulu is his son. The murder was committed in 1824. At the trial a noted jurist of Harrison County, George Shannon, presided. For the defense were the renowned John Rowan, William T. Barry, William Brown and James Crawford, who also stood high as lawyers. For the prosecution were Martin P. Marshall, one of the ablest men in Kentucky, William P. Ware, a splendid lawyer, and John Chambers, who was brainy and eloquent; so the array of legal talent was notable.

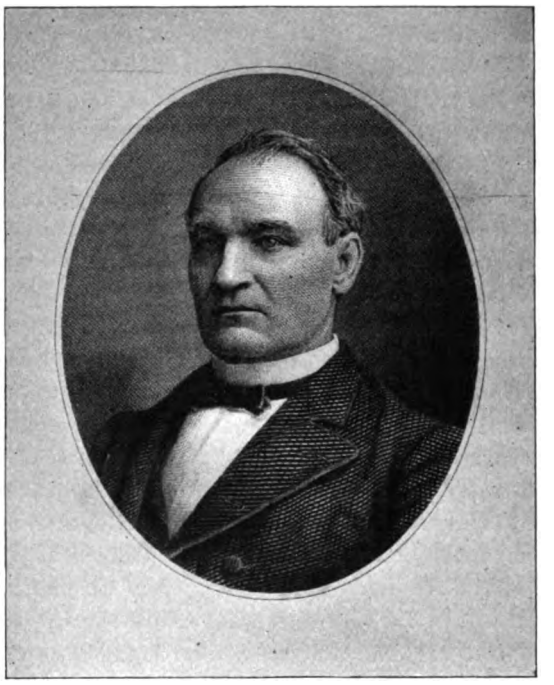
NEWPORT.

Campbell is a long, narrow county which formerly comprised all the northern part of Kentucky, and numbered then, as now, distinguished men among the members of its bar. It is said the county has furnished many novel points of law for decision by the court of appeals, and since the formation of the present boundary, the county has had as many causes, that are now known as leading cases, as any county of its size in the State. James Morehead, a governor of Kentucky, was one of the ablest lawyers in the State, and a scholarly gentleman.

Henry Stanberry was a lawyer of great ability. Although a native of New York he

was for some time a member of the Newport bar. He was attorney general of the United States under Andrew Johnson, and aided in the defense of President Johnson, before the United States Senate, for impeachment, in 1868.

Edwin Waller Hawkins, the Nestor of the present Campbell County bar, came to the bar more than half a century ago, and has been in active practice ever since. He is now eighty-two years old, and a member of his bar says: "Long may he be spared; honest has been his practice, pure his life." He was mayor of Newport before the war, and has always been considered the best authority on land law in his section of the State.



JOHN G. CARLISLE.

Thomas P. Carothers is a fine lawyer and genial gentleman. He was city solicitor for two terms. He has been engaged in some of the most important cases in the county, and is formidable before a jury. He is a leading Democrat, and has held responsible positions on the executive committees of his party.

COVINGTON.

Kenton County is one of the smallest in the State, but has had many prominent and talented lawyers.

Judge James Pryor was a splendid lawyer, a learned judge, and a gentleman of the old school. He was a circuit judge for some years, and a professor in the Louisville Law School. His grandson, James Pryor Tarvin, is a leading lawyer at the present Covington bar. He was his grandfather's partner during the last years of his life. He is a lawyer of unexceptional ability, and is frequently chosen as special judge. He is a close reasoner and a fine speaker, considered "a power on the stump, and a dangerous opponent in debate." He is a leader among the Democrats of his district, was chairman of the Democratic Executive Committee of Kenton County for several years, and president of the Jefferson Club, the largest Democratic club in the State.

It is the proud boast of Covington that she has given to the nation one of its foremost men, John G. Carlisle, late secretary of the treasury. Mr. Carlisle's style as a lawyer is simple, plain, direct, distinct, and his arguments are clear, forcible, logical and convincing. He possesses great power in explaining general principles of law and is one of the ablest lawyers in the United States. He is said to have been one of the finest speakers Congress has ever had, and, although a devoted Democrat, he was so just that at the close of the Forty-ninth Congress, the Republican members presented him with a splendid silver service, as a token of their respect for him.

John William Menzies began the practice of law in Covington in 1841. It is mentioned as a curious fact that every member of the Kenton County bar of 1841 was at some time a member of the General As-

sembly of Kentucky. Judge Menzies, while a member of the legislature, secured an amendment to the charter of the Lexington and Covington Railroad, necessary to its successful operation. He opposed the Constitution of 1850, on the ground of "the multiplicity of popular elections provided for by it, as likely to increase the number and power of corrupt voters." He was an able and successful lawyer, and an upright, honorable judge. For twenty years he was chancellor of his district. He is to-day the Nestor of the Kenton bar, and the sole survivor of the lawyers he found there in 1841, and is respected by all for his legal learning, judicial integrity, and the purity of his private life.

There have been few important cases in northern Kentucky in the past twenty years in which William H. Mackoy has not been engaged, and it has been the exception when he was not successful. He is a splendid lawyer, and it is not strange that he is one of the leaders of the bar in Kentucky. I am told that, with all the honors which have been bestowed upon Mr. Mackoy, he is, perhaps, prouder of the fact that he is an A. M. of the University of Virginia than of anything else. There are many old students of this grand old institution among the prominent Kentucky lawyers, and they are all very loyal to their alma mater and fond of speaking of her glories and the clever men she has sent forth. One of the most popular professors who was ever connected with the University was the late John B. Minor (old John B., as he was affectionately called by his students) who was professor of law many years. Professor Minor was in the habit each year, with a twinkle in his eye, of calling his students' attention to the old English law, which allowed "a man to chastise his wife with a stick no larger than his thumb," but he would add, "Young gentlemen, it is a law that it would be very unwise to try to follow, especially where the wives are Virginia or Kentucky women." Mr. Mackoy is of fine Scotch ancestry. In 1890 he was a member of the Constitutional Convention, serving on the Committees of Corporations and Municipalities, and he drafted the parts relating to trade subjects. He was made a member of the Committee on Revision, and rendered most important and valuable services. He was a delegate to the Sound Money Convention, and to the Monetary Convention. He has associated with him his clever son, Harry Brent Mackay. Some of his most important cases have been the extensive litigation in connection with the affairs of the Swift Iron and Steel Works of Newport, the celebrated case of Beal and Wickliffe, the City of Covington *v.* Casparis and Company, and the Fidelity National Bank *v.* Armstrong, Receiver.

William Goebel is one of the brainiest men in Kentucky. He is possessed of great talent, and is one of the leading lawyers of the State.

LAW LIBRARIES IN COLONIAL VIRGINIA.

By Bernard C. Steiner.

NEARLY every Virginia gentleman was a lawyer and a justice of the peace. He was the leader of his neighborhood in the militia, and the dispenser of the law of the land. When the emergencies of the Revolution came, his mind was found ready to grapple successfully with the most important questions of government. His knowledge of English precedent was exhaustive, his skill in expounding constitutional law was remarkable. These facts are inexplicable, unless he had access to legal text-books and reports and unless he used this access to good purpose in making himself master of the legal lore of the day. He was not a mere easy-going, pleasure-loving man, but, in his leisure moments from the care of a great plantation, he employed his time in the study of political and legal questions. Instances may be brought forward of men whose lives did not correspond to this description. These were exceptions; we are describing the typical Virginia gentleman of the last century.

From the faithful work of President L. G. Tyler in the "William and Mary College Quarterly," we are enabled to ascertain what were the resources of the Virginians in the way of law books. There were no public libraries in the colony save that of the college at Williamsburg. The purchase of books for oneself and borrowing of books from a neighbor were the only means whereby a man could obtain knowledge of what had been published. So, in the detailed inventories of colonial estates, we are able to discover what were the literary resources of the planters. In his reprints of these inventories, President Tyler has enabled us to open the book closets of the colonial gentry and discover what they had to read. We penetrate even into "Madam Wormeley's closet" and find law books there, which had overflowed, doubtless, from the well-filled shelves of her liege lord. Oftentimes we learn at how many pounds of tobacco or at how many shillings those who made the inventory valued the books. Often, on the other hand, the skill of the local gentry was not equal to such appraisement, and the entry is merely "inventoried, not valued."

Let us take these library catalogues as we find them in the inventories. In Lower Norfolk County, in 1648, John Kemp possessed Rastall's "Abridgment of the Statutes," and a part of the "Court Baron and Leet." Though the latter was imperfect, the value of the two was put at two hundred pounds of tobacco. Kemp was of a period which had but few books; a half century later, when wealth had increased and a generation of men had sprung up who had no longer to act as pioneers in the wilderness, we find several notes of law books in inventories. In 1697, Capt. Thomas Cocke of Princess Anne County owned "The Jure Maritimo," in quarto, "The Office of a Complete Attorney," in octavo, and "The Young Clerk's Guide," "The Compleat Justice," and "A Collection of the Laws of Virginia," in "twelves." These books were the indispensable ones and are found in several catalogues. Capt. Christopher Cocke, in 1716, seems to have had some of these very books, but he had added to them others, such as Lord "Cook's" "Institutes," Swinburn on "Last Wills and Testaments," Shepherd's "Abridgement of the Common Law," the "Scrivener's Guide," the "Compleat Solicitor," the "Judge's Resolutions upon the Several Statutes of Bankrupts," and a "Catalogue of Law Books."

These were small collections. The first large one was contained in the library of

Capt. Arthur Spicer of Richmond County, who died in 1699, leaving a considerable number of legal works. He was well supplied with form books, and owned Herne's "Conveyances," West's "Precedents," Herne's "Precedents," West's "Symbolographia," "A Book of Entries, by J. H.," the "Attorney's Academy," Browton's "Collections of Orders in Chancery," Horne's "Mirrors, Declarations and Pleadings," "The Mysteries of Clerkship," "The Clerk's Tutor," "The Conveyancer's Light," and "The Practical Register." Among his other text-books were Dalton's "Justice," "Terms of the Law," Kitchin's "Jurisdictions of Courts," "The Office of Executor," "The Layman Lawyer," Finch's "Law," "The Law concerning Justices," William Noys' "Compleat Lawyer," Judge Jinkin's Works, "The Office of a Justice," by William Lambert, "A Preparative to Pleading," "Fines and Recoveries," Perkins's "Treatise," Fleetwood's "Office of a Justice," Keble's "Justices." How they are all forgotten! Who knows or cares what was the subject of Perkins's learned treatise, or what was discussed by Judge Jinkins in his judicious works!

It is noticeable how the Virginians fortified themselves in justice's practice, by having at their elbow Fleetwood, Keble and others whose very names are gone. Captain Spicer was wide in his legal tastes, owning Bacon's "Elements," Wingate's "Body of the Common Law," "A Dispute between a Civilian and a Common Lawyer," "Index of Sentences," "Life of Sir Matthew Hale," "Practical Part of the Law," Noys's "Maxims," "Magna Charta," Wingate's "Abridgements," "Directions for the Study of the Law," "The Office of Executor." In statutes, he possessed Rastall's "Collection," "Pulton's" "Statutes," and the Statutes at Large from 1640 to 1675. Tottle's "Reports," Croke's "Reports," and a "Table to Cook's Reports," were also to be found on his shelves, and are the earliest reports we have noted in Virginia.

Captain Spicer had evidently used his books thoroughly and not always with the greatest care, while he had not kept up with the newer works, so that his whole law library was only valued at £5. The appraisers note that most of the books were "old, broken and damnified."

Col. Ralph Wormeley of Rosegill, in Middlesex County, died two years later, in 1701. He was one of the chief of the colonial gentry, a member of the Council, and secretary of Virginia. From the prominence of his family, he had received the best education England could give and had studied at Oriel College, Oxford. His library was a marvelous collection for that day and generation and was rich in all sorts of works. In legal works, however, we do not find the variety we noticed in Captain Spicer's library, and the carelessness of the appraisers in referring to "an old Law Book," without mentioning its title, and in giving us such enigmatical titles as "The rule for granting passès," or the "Jurisdiction of Lawful Authority," makes it difficult for us to ascertain exactly what books he owned. Of course he owned the inevitable books on the office of justice of the peace, and the form books, such as the "Clerk's Guide," and the "English Secretary." It was natural, too, to expect Coke's "Institutes," Shepherd's "Abridgement," "Lex Murkatoria" (*sic*), "Jure Mauritamo" (*sic*), the Virginia "Law Books," and the English "Statutes at Large." His official position and wide experience in public life make it not surprising to find in his inventory "The Office and Authority of Sheriffs," two "Treaties (*sic*) of Government," "The Foundations of Monarchy," and the "Laws of New England," as well as "Privileges of the Baronage of England." He was clearly somewhat of a jurist and, as church and State were nearly allied in Virginia, he had occasion to refer to "An Abridgment of the Ecclesiastical Laws," and "The History of Tithes." Among more miscellaneous works

we note "The Earle of Stafford's Tryal," and the "Mirror of Justices." We can see that the Virginia gentlemen could refer to works in the long winter evenings which would enable them to resist, with stubbornness and with reliance on English precedents, the demands of their governors sent out from the mother country.

Col. Richard Lee of Westmoreland County, who died in 1715, at the age of 67, had doubtless found his law books of value to him in the sessions of the Provincial Council, of which he was a member. Like the rest, his reports were limited to Croke and Coke, but his works on constitutional law and government were such as we have not hitherto seen. We find him owning "Governments and Obedience as they are directed by Scripture and Reason," Thomas Smith's "De Republica Anglorum," and "Titles of Honor." He also owned several works on mercantile law, such as a "Treatise of Maritime Affairs," and "A Compleat Book of Sea Laws," while of more miscellaneous character are "Practicle Part of the Law," "Trials per Pais," "Court Keeper's Guide," "Institutio Legalis," "Les Termes de Loy," "Law Dictionary," "Laws of Ecclesiastical Polity," Fitzherbert's "Natura Brevium," and a "Collection of Penal Laws."

Another member of the Council, who died in 1718, leaving a small law library, was Edmund Berkeley. His library contained, of course, "The Country Justice," "A Brief Treatise of Testaments," "The Young Clerk's Guide," "A Compleat Collection of all the Laws of Virginia," and "An Abridgement of All the Statutes in Force." He also owned "A Guide to Constables," and "A Perfect Guide for a Studious Young Lawyer." The library is a typical one and shows us the gentleman engaged in acting as justice of the peace, consulting the statutes of England and the colony, settling estates, and drawing up legal documents of all sorts.

A similar library was among the effects of Capt. Charles Colston of Richmond County, who died in 1724. The "Jurisdiction of Court Leet," and Beverly's "Abridgement of Virginia Laws," are the only books he owned which we have not found in most of the other libraries.

Such cannot be said of the large collection of law books left by Richard Hickman, resident of the city of Williamsburg, and clerk of the Council, who died in 1732. He owned somewhat over a hundred law books, and in his ample collection were to be found textbooks, reports, form books and statutes in considerable number. Our old friends are here and with them many more, for example, in reports, Mr. Hickman possessed Hubbard, Modern, Saunders, "Levizes," Coke, Latch, Winch, Vaughan, Keylin, Brownloe and Muldsborough, Ventris, "The Second Year Book of Henry VI," etc. In textbooks his inventory mentions "Coke upon Littleton," Plowden's "Commentaris," Powell's "Interpretation," Puffendorf's "Law of Nature and Nations," Wingate's "Maxims," "The Orphan's Legacy," "The Law of Trespass," Wellwood's "Sea Laws," "Instructor Clericalis," in seven volumes, Hawkin's "Pleas of the Crown," "The Law of Obligations," Hale's "Pleas of the Crown," and others. His form books were numerous, among them being Cleft's "Entry," "Modern Conveyancer," Lilly's "Conveyancer," and Lilly's "Entrys." The statutes of England, Maryland and Virginia, law dictionaries, etc., complete this noteworthy collection of books. As clerk of the Council, Hickman needed to be a practiced lawyer, and, in his well-stored shelves, he had every opportunity for complete knowledge of his profession.

As the years passed by, other books came into the inventories. Capt. Samuel Peachy of Richmond County died in 1750 and left a number of law books. Fitzherbert's "Natura Brevium," and Croke's "Reports," were among them, but we also find the unfamiliar names of Webb's "Virginia Justices," "London Cases Abridged," Boyer's "Doc-

trine of Impeachment," Jacob's "Modern Justice," Kirkwood's "Grand Treatise of the Sea Law," Wingate's "Sermon Law," "Actions for Slander," Godolphin's "Lex Testamentaria," and Sheppard's "Marrow of the Law."

As wealth increased, so did Virginian libraries. Mr. George Davenport left a "large collection of law books," in 1766, and when the magnificent library of Col. William Byrd of Westover was sold in April, 1777, three hundred and fifty law books were found amongst its 4,000 volumes. So we see, from the records left in the county court houses, that the Virginians not only prized the traditions and principles of English jurisprudence, but also owned the best legal works of their day, and from these so fitted themselves for legal and governmental positions that it is little wonder that, during the early years of the United States, their hold upon high Federal positions was of such long duration as to make other sections of the country grumble at the continuance of the "Virginia dynasty." The Virginia gentry had been preparing themselves, during more than a century, for rule in a constitutional State and, when this was founded, they were the men best fitted for the public service.

IRVING BROWNE AS A POET.

WHEN Thomas Noon Talfourd — then only barrister, and unaware that he would soon become Q.C., then sergeant, wearing the consecrated coif, and finally judge, to expire on the bench suddenly while pronouncing to a grand jury majestic words of warning towards duty — wrote his dramatic poem of "Ion," which Macready placed upon the stage of Drury Lane, the benchers of his Inn shook their wigs reproachfully, and mourned that such a promising junior should imperil his chances at the bar by mixing his briefs with poetry, so fixed in their minds was the old notion that law was too jealous a mistress to put a side-saddle on Pegasus. Not even the illustrious precedent of Sir William Jones placing his treatise on bailments and his poetic translations from the Persians side by side in the library of the Middle Temple could break down the prejudices of benchers against having their disciples flirt with Erato or Calliope.

American lawyers have never entertained similar prejudices, so that their annals all over the Union have interwoven the laurels of the bar with the flowers of the poet when crowning the same individual. As witness the published poems of Joseph Story; the dramatic epic of his son who prepared also a treatise on the law of sales; or Recorder Vaux of Philadelphia; or Albert Pike with his classic odes; or Richard Henry Wilde, a great Southern jurist, with his tender lyric beginning "My life is like a summer rose"; or Attorney-General Benjamin F. Butler, who on one day would pen an opinion for a department, and on the next a poem for the "Democratic Review"; or his son, William Allen Butler. And now recently comes the monthly sitter in THE GREEN BAG'S Easy Chair, Irving Browne, with a daintily printed and daintily bound volume of poems well entitled "The House of the Heart," which his brother lawyers may place on their bookshelves beside the many bound volumes of that poet's "Albany Law Journal."

Seldom have flowed better "rivulets of pearl type through wide meadows of margin," than this poetical house exhibits. The title is most apt, for the lyrics group themselves under subdivisions fantastically poetic in their very names, such as: "The Library," "The Bedroom," "The Nursery" and "Tower" and "Garret," or "Windows that look upon street, or woods, or on churchyard."

A ramble through these pages exhibits poesy attached to ideas and ideals, as well as to harmonious thoughts and musical lines; also versatility of grave, gay, witty and tender topics. Many are Horatian in mold, and some hint of the style of Juvenal or Pindar, yet modern in tone and treatment. The author shows high imaginative power, even in mere choice of topics and appellations. In fact, he

"Finds tongues in trees, books in the running brooks,
Sermons in stones, and good in everything."

At the window of the "Home of the Heart," overlooking the sea, on the first page of his volume, the poet hears "The voice of the shell," with a refrain from its depths, first at morning of love, then at noontide of fame, and next at night of rest, closing thus: —

"Oh, Love of the morning so dim;
Oh, elusive Fame of the noon;
Oh, prophecy of the evening hymn,
Will my love come back to me soon?
But the shell says only rest!
Its single whisper is rest."

How Berangeric it all is!

And the closing strain of the volume, as the moon is beheld from the tower of the Home of the heart, reads: —

"And still Luna moves on in God's highway,
Heedless alike of fond Endymion's sighs,
Of querulous man's lament, of watchdog's bay,
And shows nor scorn, nor pity, nor surprise, —
So shall she move 'til this trivial world
In hopeless ruin and confusion hurled
Shattered lies at the awful judgment day."

These few extracts will serve to show the extent of Irving Browne's poetic grasp from the first to the last of his 155 pages.

Once, one X-ray turns upon the poet and develops the lawyer in these verses entitled "Two faces seen at the window of a jail."

Upon page 101 is a "Christening Hymn" that should at once find place in a church hymnal, and could be sung to the good old Puritan tune of "Dundee."

The poems collected in the lyric entitled "How a bibliomaniac could bind his books" challenge even the ingenuity in that direction of Tom Hood, and the lyrics sung in "The Nursery" to the little ones, equally challenge the tenderness, in a similar behalf, of the late Eugene Field. Few can read the lyric entitled "Man's Pillow,"— first, on a mother's breast, and lastly in old age when death hovers, — without feeling the perusing eyes to moisten.

Upon the whole, the volume is precisely one for the lawyer on his summer vacation to take to the hammock on the seaside piazza, or under the trees, or by the brookside, reading from it at any of these retreats, upon an August or September afternoon, the poem entitled "A Vision of Ships," or "Bob White" and his treetop song, or "The Water Nymph"; and no tourist to the White Mountains or the Catskills could fail of delight at perusing the playful lyric entitled "A Bed in a Country Inn," which smacks of the memories of a lawyer upon circuit.

CONVICTED BY A DREAM.

By George H. Westley.

WHILE glancing through one of the earlier volumes of The Green Bag —I frequently do so to entertain an odd moment—I came across an article entitled "Dreams Before the Law Courts"; and as I read the interesting cases therein described, my mind reverted to a remarkable criminal trial which I had once heard of as having taken place in Franklin County, Vermont. On looking the matter up I find it to have been substantially as follows[1]:—

About the year 1840, Eugene Clifford deserted from the British army in Canada, and, escaping his pursuers, made his way into the little town of Fairfield, Vermont. Here he took up his abode and secured work upon a farm. Being a man in the prime of life, of stalwart form and good bearing, Clifford soon won the affections of a buxom widow who lived in the neighborhood with her two children, and in due time they were married. The widow brought him property to the value of about two thousand dollars.

One Sunday in October, only a few months after the wedding, Clifford and his wife and step-children started to cross the lake in Fairfield, with a view to visiting some acquaintances on the opposite side. The day was cloudy and cold, and a strong wind was blowing from the west. The boat which Clifford had borrowed was by no means a safe one; it was roughly built and altogether unfit to be out in stormy weather. Nevertheless the venturesome pair started off, Mrs. Clifford and the little ones seated in the stern, and the husband rowing. It is important to say that the woman and children were wrapped up in two shawls, one a silk and the other a Highland plaid.

[1] Thanks are due to Mr. J. J. Beardsley for assistance in the presentation of these facts.

The lake was about three miles long and three-fourths of a mile wide. As before stated the weather was boisterous and cloudy, and so it does not appear that the boat was observed by anyone after it had got fairly away from the shore. Therefore there was none to witness the drowning of the wife and children, and none to tell the story of the sad affair save the surviving husband. His report was this: That as they approached the side of the lake to which they were voyaging, the boat gave a sudden lurch and the three unfortunates were thrown into the water; that he sprang to the stern of the boat to save them, when his sudden movement capsized the boat; that being himself pitched out he immediately sank, and after struggling and strangling, he rose to the surface and grasped an oar; that on looking around for his wife and children, he could see no sign of them; that with great difficulty he managed to keep himself afloat, until at length, his feet touching the bottom, he waded to shore.

While this story was generally believed, there were certain circumstances connected with the case which in some minds aroused suspicion. In the first place, it appeared that Clifford gave the earliest information of the accident at the boathouse, where he arrived late that same afternoon. Now to reach this house he must have traveled at least two miles, passing by or near several inhabited dwellings. When he arrived at the boatman's, his clothes and hair were dripping with water, so much so that at his trial it was insisted that he must have renewed his bath on the way, to corroborate and give force to his story. Under Clifford's guidance, search was made for the bodies, and they were found a few yards from the land at a place ten or twelve feet deep.

The boat, partly filled with water, was discovered further along the shore, whither it was supposed to have drifted. It was remarked, in connection with the finding of the bodies, that neither of the shawls was upon them, nor could the most careful search discover the whereabouts of these highly colored articles of dress.

It is not stated that there was any inquest held over the bodies; but we learn that Clifford was put under arrest, and a court of inquiry held by two magistrates of the town. All the facts attainable, which were practically no more than I have related, were considered, and the prisoner was discharged, the court deciding that there was not sufficient evidence to hold him for further trial.

Thus far the case is of no greater interest than the ordinary. But now comes the strange part. Ten days later, Clifford was again arrested, this time on the evidence of a woman who had a dream. The new witness was a Mrs. Marvin, who lived nearly a mile and a half from the lake, and fully two miles from the scene of the drowning. She dreamed that she saw Clifford, after he had drowned his wife and children, come out of the water bearing the two shawls in his arms and, proceeding to a point some fifteen or twenty rods from the shore, through timber and undergrowth, deposit them in a clump of alder-bushes, twisting them together and matting and tangling the grass over them. The spot was fixed in the dreamer's memory by a fallen tree beside the hiding place.

Thus far the dream related to the past, but before it ended she also saw what was to be Clifford's punishment. She dreamed that he would be tried, and upon her testimony convicted of the crime of murder; that he would not be hanged, but would remain in prison until, by slow decay, mind and body should perish.

This dream was continued for three nights in succession, and on each morning Mrs. Marvin repeated it to her husband and family. So convinced was she that she had received a message to be obeyed, that she begged her husband to accompany her to the spot, in order that the shawls might be found, and the guilty man brought to justice. But he remained incredulous, and for a day or two the matter was postponed. At length she persuaded a couple of her neighbors to go with her, and they started out on their strange quest.

They went first to the spot on the shore which was now well known as the scene of the tragedy. Mrs. Marvin herself had never been to this place before. The trio then walked inland through timber and underbrush for a dozen rods or so, when Mrs. Marvin suddenly exclaimed: "Look, there it is; that is the clump of alders I saw in my dream!" and coming a little nearer she added, "and there is the fallen tree." Excitedly they approached the clump and dug into the tangled grass at its root, when presently, behold the shawls! wadded up and twisted together, still moist, and slightly flecked with sand.

The authorities being notified of this discovery, the machinery of justice was set in motion, and, as before stated, Clifford was again arrested. A second court of inquiry was held, witnesses were summoned and sworn, and among them, of course, Mrs. Marvin, who, under oath, related her dream and the steps she had afterwards taken to discover the shawls, which were now produced in court. She was known to be a woman of irreproachable character and sound sense, and her testimony passed unchallenged. "A full and perhaps fair investigation was had," says Mr. Beardsley, "with little regard to legal formalities, but with honest intent by the magistrates to do justice. In spite of themselves, they, in common with others, interpreted the dream to mean, 'Thus saith the Lord.'" Clifford was bound over and committed to prison without bail.

At the next April term of the Franklin

County Court, the prisoner was indicted for the murder of his wife. At the trial Judge Redfield, one of the judges of the Supreme Court of Vermont, presided; Orlando Stevens appeared in behalf of the State, and H. R. Beardsley and Stephen S. Brown represented the defense. All four of these names will be remembered by old Vermonters as belonging to men of high standing in the legal profession. The evidence elicited from the various witnesses was presented. The dream was not related in full, that portion of it which seemed to forecast the future punishment and treatment of the prisoner being for obvious reasons excluded, but it was found impracticable to separate it from the discovery of the shawls, and so much of it as was necessary for this was told, in spite of objection and protest, to the jury.

When the witnesses had all been examined, the case was fully argued on both sides, the evidence commented upon, and the law concerning the case explained to the jury. Judge Redfield then delivered his charge. In speaking of Mrs. Marvin's dream, he told the jury that they should wholly disregard it; however truthful it might be, it was not evidence; and though it might have led to the discovery of the shawls worn by the deceased at the time of her death, as from the evidence it doubtless did, still it should have no more effect upon their minds in regard to the defendant's guilt than if they had been found by accident or ordinary search.

The jury retired; and, after a long consultation, returned into court. The foreman and the prisoner were made to face each other, and the vital question was put: "What say you, Mr. Foreman, is the prisoner at the bar guilty or not guilty?" There was a moment's silence, and then came the reply, "Guilty." Clifford turned as pale as a ghost and would have dropped to the floor had he not been upheld by the sheriff and his assistants. In this insensible condition he was carried back to jail.

A day or two later he was brought into court to receive sentence. Being asked if he had anything to say why judgment of the law should not be pronounced upon him, he arose and tried to speak, but his tongue seemed paralyzed of utterance. After a few appropriate words to the prisoner, the judge pronounced sentence in accordance with the law then in force: "That you, Eugene Clifford, be taken from here to the jail from whence you came; that from thence you be taken to Windsor, in the County of Windsor, and there be committed to the State's prison, and there kept and held in solitary confinement for the term of one year; and that you thus be held and kept within the said prison, until the Governor of the State issue a warrant under his hand and official seal for your execution; and that at the time and place mentioned therein you be hanged by the neck until you are dead."

While legal interest in the case may close at this point, it is worth while to give the sequel. It will be remembered that Mrs. Marvin's dream followed Clifford to his end. Let us see how the facts accorded with the forecast. Shortly after Clifford was put in solitary confinement, his mind began to weaken, and each succeeding month found him less and less himself and less and less a man. He became possessed with the idea that the jury who tried him, instead of finding him guilty, had declared him not guilty. So persistently did he harp upon this, that the warden of the jail was induced to write his lawyers to ascertain if there were or possibly could be any mistake about the verdict. The reply he received assured him that there was not. Clifford's mental and physical decay went rapidly on. Before a year had expired he had become a hopeless wreck in body and mind. He was transferred from prison to the insane asylum at Brattleboro, Vermont, and there he soon afterwards died, his career closing exactly as had been foretold in Mrs. Marvin's dream.

JAPANESE CAUSES CÉLÈBRES.

II.

SOKICHI: OR THE MAN WHO WOULD NOT BETRAY HIS BENEFACTOR.

By John H. Wigmore.

AMONG the chief qualities which rendered Oka, Lord of Echizen, at once feared, admired and trusted by the townspeople of Yedo, was his marvelous capacity for discerning character in a moment's observation of those who came before him. The case of Sokichi illustrates (at least in local tradition) not only these profound powers of penetration attributed to Oka, but also the force of the sentiment of gratitude as evinced in the steadfast self-sacrifice of a humble Yedo citizen.

It happened, one morning (the 5th of April, to be particular), about the middle of the last century, that, as Oka was proceeding through the streets to the court, the sound of the fire-bells near by led him to change his course, but as he passed in his chair through a narrow side-street, his attention was attracted by the noise of an altercation proceeding from a pawn-shop. A *samurai* (to whose face Oka instinctively took a distrust) was administering a beating to a respectable, but needy-looking tradesman; and at the moment Oka passed, he heard the *samurai* exclaim, "You rascal! you swindler! I was the one that did the work for this!" His constables soon had the people out before him and heard their stories. A woman, Osugi, whose face bore traces of grief and distress, was the principal personage, and with her was her nephew Kohachi, the one who had been using the stick. The woman was the wife of Sato Jubei, the retainer of a knight whose family had fallen into pecuniary distress. Jubei had two nights before drawn a part of his master's stipend from the treasury, and on his way home had been foully murdered in a dark street by an unknown man. The nephew, Kohachi, had called at his house in the afternoon to borrow money of him, and having learned his whereabouts, started to meet him. But he never saw Jubei alive again. The next morning the uncle's body was found by the roadside, with a long sword-wound on the neck, and by its side the corpse of his faithful attendant. The fifty *ryo* in gold, which he was to have drawn for his master, was not to be found, but an inquiry at the treasury showed that he had certainly received the money. There was no clue of any kind to the murderer. If the grief of Jubei's family was great, their pecuniary condition was now equally distressing, for their share of this stipend had thus been lost to them, and nothing now remained but the usual resort of the poor, the pawn-shop. Here they were, Osugi and her nephew Kohachi, on the succeeding morning, just before Oka saw them, when there entered a poorly dressed merchant bent on settling a long-standing debt. To their astonishment and horror he drew out of his pocket, as he proceeded to make the payment, the crêpe purse which had belonged to the murdered man. They knew it by the yellow color and by the spray of wisteria-blossom embroidered on it. The woman shrieked, and the nephew with a cry sprang upon the man, and was endeavoring to overpower him, when the constables came up. When the man Sokichi's turn came to speak, he had only protestations of innocence to make; and Oka finally ordered all the parties to appear in court next morning, sending Sokichi along meanwhile with two constables.

In the interval Sokichi had time to reflect

what course to pursue. He was in fact utterly innocent of the charge now to be made against him. But he had nevertheless obtained the purse and its contents under circumstances so peculiar that every sentiment of honor and gratitude forbade him to reveal the facts at the present time. Sokichi had been, like his fathers before him, a dealer in second-hand clothes. The family had never been anything but poor, and as Sokichi's parents had died when he was quite a child, he and his sister had been brought up by the grandparents, who in their turn were now utterly dependent on him. The day came at last when Sokichi was compelled to raise money by disposing of the one remaining treasure of the house, till now left religiously untouched. On the second night before his arrest he had been returning home with the money (fifty *ryo* gold) in his pocket, when he was set upon by two men, and robbed of it all. The greater part of the money had been intended for a miserly blind money-lender, who had of late been threatening in his demands, and Sokichi now saw before him the disgrace of the family name and the life of a ruined bankrupt. He speedily unwound his sash, climbed a wayside tree, and fastening one end to his neck and the other to a branch, precipitated himself into mid-air. But the branch was rotten, and the sudden shock broke it short off and let Sokichi to the ground, stunned and half-choked. As he lay there in a stupor, footsteps approached, a pair of hands lifted him to his feet and began to adjust his dress, inquiring the cause for a resolution so plainly indicated by his appearance. Sokichi told him the story of his misfortunes. The man heard it with expressions of sympathy, and at its close took out a purse, embroidered with wisteria, and, pressing it quickly into his hand, went off into the darkness. Sokichi called and ran after him to learn the name and abode of his benefactor, but he had disappeared. It was when Sokichi, rejoicing in his replenished resources, had gone to the pawn-shop to settle a long-standing account, that he had been pounced upon by Kohachi; and the result found him a prisoner of the law on a charge of which he was entirely innocent.

But the true explanation seemed clear enough to Sokichi, and to his mind there was but one course open to him. To betray his benefactor, to throw the crime on the true offender, would be the act of one dead to all sense of honor and gratitude; for Sokichi never doubted that the man who had given him the purse was the real robber and murderer, and his suspicious haste in avoiding identification served to remove all doubt. Sokichi, then, if necessary, would confess to crime and let Oka do with him what he pleased, but he would in no way do anything to reveal the guilt of his generous benefactor. Such was Sokichi's philosophy, and when he came up for examination he loyally stood by it.

Oka had made inquiries as to his history and reputation, and what he heard had confirmed the good impression he had received of Sokichi's honest face. He had made up his mind that the man was not the real offender; and it was an entire surprise to him when Sokichi, at the first question, confessed his guilt, begging only that the news might in some way be kept from his grandparents, who would be heart-broken to know of his great disgrace. "How did you kill these men?" said Oka. "With a carving-knife," said Sokichi, for he knew Oka would not believe that he, a tradesman, had killed two *samurai* with a sword, the professional weapon of the *samurai*. "But the wounds," said Oka, "are over a foot long; you could not have made them with a knife. Where was it you attacked them?" "Inside the Gate of the New Bridge," said Sokichi, for he had heard the rumor of the murder. "That is curious," responded Oka, "for the bodies were found without the Gate." At length, Sokichi kept silence, for he only entangled

himself in contradictions. The confession was a consideration which Oka could not disregard, and so in spite of his conviction of Sokichi's innocence, he remanded the latter to jail until further developments. Meanwhile he had his own hypothesis as to the guilty one.

Then a strange thing happened. As Sokichi left the court house, in the rude litter used for criminals, a man passed into the court, apparently bent on legal business, whose face seemed somewhat familiar. A glance of half-recognition passed between them. It was the man who had given him the purse. For an instant it seemed to Sokichi as though the opportunity for saving himself ought not to be rejected. Then his better feelings conquered, and he put away his base impulse, and thanked fortune that he was not such a man as to gain a little longer life by bringing evil upon the man who had once saved that life. But the passer-by, too, had recognized Sokichi, and the thought instantly came over him that it must be the purse or something connected with it that had brought Sokichi into this plight. So, without taking the time to inquire, he returned to his house, got pen and paper, and wrote out an affidavit to the following effect: —

"On the 3d of April, in the evening, I took a sedan chair from Bancho ward to Horsedealers' ward. The cushion was still warm from the previous occupant when I entered, and a purse was lying upon it, embroidered with wisteria, and containing some forty or fifty *ryo*. I put it in my pocket, intending to report its discovery next day, but after I had left the chair, and was passing along the street, I saw on the ground, insensible, a young man who had been trying to commit suicide. I restored him to consciousness, and when he told me that he had just been robbed of the last *ryo* he had in the world, I took out the purse, on the impulse of the moment, and forced it upon him. I then left him, but, as it seems that he has been accused of stealing the purse, I hasten to inform you that he is entirely innocent."

Oka, when he read the affidavit, proceeded to summon both Yagobei (for that was the man's name) and Sokichi, and began by questioning the latter. "I learn," he said, "that you have been trying to deceive me, and that you really received the purse from this man here, and did not steal it at all." But Sokichi, now convinced utterly that his benefactor was the real thief and had confessed to save Sokichi, was determined not to be outdone in generosity, and made one last effort to complete his sacrifice. "This man is a liar," he protested, "I am the one who killed the men and stole the money, and whoever denies it speaks falsely." When Oka perceived this noble attempt of Sokichi to defend his benefactor, he was filled with admiration, and said to himself that he had seldom seen such noble self-sacrifice in one so young. But he saw that as far as Sokichi went there was nothing more to be learned, so he turned to Yagobei and asked him about the chair-bearers, the appearance of the chair and a few other details. On the next day he had all the chair-bearers from Asakusa district to Ushigome district, a distance of several miles, summoned to court. They came in obedience to the summons, a motley throng, and ill at ease, for a summons from Oka never failed to send a thrill of apprehension to every Yedo townsman, whose conscience could not show the very whitest record.

The examination proceeded, and after several clues had been followed up, the matter was narrowed down to this: That two sedan-bearers were found who had carried Yagobei that evening; that the passenger just before him had got into the chair in a drunken condition, and had gone off in an unknown direction; that the only thing noticeable about him was that he carried a lantern marked "Yorozu Mago," and that there was a tea-house near the New Bridge kept by a man named Magohachi, of the

Yorozu House. So this man was summoned. Now it happened that the Kohachi already mentioned, the nephew of the murdered man, had recently spent much money at this tea-house, and was, in fact, the man to whom Magohachi had lent a lantern on the night in question. All of this Magohachi readily confessed in great trepidation, for he had been surprised at the amount of money the man was spending, and was anxious to clear himself of all suspicion in connection with the man's conduct.

So Kohachi was summoned, and Oka charged him directly with the murder of his uncle, and the robbery of the fifty *ryo*. But Kohachi stoutly protested his innocence, and laid the charge to the malice of his enemies. Then Oka said to the sedan-bearers, who had been brought in while Kohachi spoke: "Do you know this man?" And they answered, "He is the same drunken *samurai* whom we carried on the night of the 3d of April." Then Oka asked Magohachi, the tea-house keeper: "Do you know this man?" And he answered: "This is the man who has caused all the trouble. I lent you a lantern that night, and you never returned it. Sorry I am for the day I first knew you, for this disgraceful affair has brought me and my family into great trouble, and is ruining our business." But Kohachi vehemently protested that they were all liars, and that secret malice was the motive of their declarations.

Then Oka commanded silence and said: "Kohachi, you have forgotten the meaning of the phrase, 'the eyes of God,' which is, that though darkness is about you, Heaven does not permit your evil deeds to pass unseen. Do not hope to escape the results of your wickedness, for justice never fails to bring the evil man to his just deserts. *I know you to be the guilty man, and by a confession out of your own mouth.* On that day when this innocent man was arrested, I was passing, and I heard your words when you said, 'I was the one that did the work for this.' Know, then, that when I heard these words, and saw your hypocritical face, I divined the true robber and murderer. Witnesses have been brought who have convicted you before all men, but from the beginning I knew where the guilt lay."

Then Kohachi broke down and confessed the story of the crime from beginning to end. The people were loud in their praises of Oka, and none more than the relatives of the deceased, to whom had been revealed with the plainness of day the unwelcome truth that the murderer was the unfilial beneficiary of the faithful old retainer.

The Lawyer's Easy Chair.

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

BY IRVING BROWNE.

CURRENT TOPICS.

A MARGINAL TRESPASS.

(Cole *v.* Drew, 44 Vt. 49; 8 Am. Rep. 362.)

The highway sides on plaintiff's land
  Were overgrown with weeds and grass,
Which high as children's waists didst stand,
  And when they sought to school to pass,
Wet through their pants and petticoats,
And raised up white spots in their throats.

So Mrs. Drew, defendant's wife,
  Directed by the road-surveyor,
Cut down the grass to save their life,
  And, like a careful house-purveyor,
Bestowed it on her husband's horse,
Without an atom of remorse.

The harvest weighed but twenty pounds,
  But plaintiff, bent to have his own,
For trespass on his lawful bounds,
  Sued for a crop he had not sown,
And, as the circumstances showed,
One which he never would have mowed.

Now when this sharp penurious Yankee
  Was told the verdict of the jury,
He did not stop to give them thank-ye,
  But rushed from court in sudden fury,
For they a wholesome lesson meant,
And gave him damages — one cent!

But like the average of folk,
  Not letting well enough alone,
Forgetful of the case in Coke —
  By name "Six Carpenters" 'tis known —
Defendant angry "'pealed it up,"
And thus he filled with wrath his cup.

"A trespass *ab initio*,
The taking and the feeding show;
'*De minimis non curat lex*'
We'll not apply, our brains to vex;"
So said the court, upon appeal,
And dampened down defendant's zeal.

So plaintiff got his costly cent,
  Defendant paid a bill of costs;
Both parties gave their passions vent,
  And left the weeds to heat and frosts;
But little recked each wise attorney,
He did not have to tramp that journey.

This is the smallest case of any
  That lawyers con by midnight lamp;
It beats that of the English penny,[1]
  And that of the deficient stamp,[2]
And shows how great a fool he is
Who litigates *de minimis*.

CONNIVANCE. — A very interesting point is decided in Dennis *v.* Dennis, 68 Conn. 186; 34 L. R. A. 449: "A woman who authorizes her attorney to employ detectives to watch her husband, whom she suspects of infidelity, for the purpose of obtaining evidence which will entitle her to a divorce, and who goes with them at a time appointed to surprise him in a compromising position with a lewd woman employed by them for that purpose, may be found to have known that the woman's movements were governed by them, so as to show connivance on her part which will bar her right to divorce." The Court said:

"Connivance is the corrupt consenting of a married party to that conduct of the other of which afterwards complaint is made. It bars the right of divorce because no injury is received: for what a person has consented to, he cannot set up as an injury. Connivance is a thing of the intent resting in the mind. It is the consenting. But the connivance may be the passive permitting of the adultery or other misconduct, as well as the active procuring of its commission. If the mind consents, that is connivance. Ross *v.* Ross, L. R. 1 Prob. & Div. 734; Pierce *v.* Pierce, 3 Pick. 299; 15 Am. Dec. 210. The connivance of the plaintiff is established as a fact upon evidence to the admission of which no objection was made, and we suppose this to be a conclusion which this court cannot revise."

Then follows a statement of the facts, and the court continue: —

"Her conduct then and ever since might well be deemed to cast a reflex light on her knowledge of the purposes for which the detectives were employed, and her consent to the artifices which they practiced. These are the facts and circumstances from which the trial court held that the plaintiff was barred of all right to have a divorce for the acts of adultery she had proved. In the light of the authorities we have cited, we think the decision of the court on this part of the case should not be disturbed. Morrison *v.* Morrison, 136 Mass. 310; Myers *v.* Myers, 41 Barb.

[1] Teall *v.* Felton, 1 N.Y., 137; 12 Howard (U. S.), 284.

[2] London & B. Ry. Co. *v.*, Watson 3 C. P. Div. 429; 4 *ibid*, 118.

114; Hedden *v.* Hedden, 21 N. J. Eq. 61; Austin *v.* Austin, 10 Conn. 221; Cairns *v.* Cairns, 109 Mass. 408; Masten *v.* Masten, 15 N. H. 159; Gower *v.* Gower, L. R. 2 Prob. & Div. 428. In this last case it was held, that 'if a person employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery brings about an act of adultery, the husband cannot obtain a decree of dissolution [of the marriage] on the ground of such adultery, although he may not have directed or authorized his agent to bring it about.'"

Other cases cited as supporting the same doctrine are Williamson *v.* Williamson, L. R. 7 Prob. Div. 76; Hawkins *v.* Hawkins, L. R. 10 Prob. Div. 177; Heyes *v.* Heyes, L. R. 13 Prob. Div. 11. The court conclude: —

"The State makes itself a party to all marriages, in that it requires the marriage contract to be entered into before officers designated by itself, and with certain formalities which it has prescribed. This State does this, not alone that children may be born and properly reared, but that the parties to the marriage may themselves be the better citizens; it being in accordance with the experience of all mankind that human beings are happier, and are better citizens and better disposed towards the State, when married and surrounded by the ties of a family and with children, than when they remain unmarried. The State desires good citizens. It regulates divorce procedure in its own interest. A divorce cannot be had except in that court which the State authorizes, and for those causes only, and with those formalities, which it has by statute prescribed. As the State favors marriages for the reasons stated, so the State does not favor divorces, and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the married parties, which seem to the legislature to make it probable that the interests of society will be better served, and that parties will be happier, and so the better citizens, separate, than if compelled to remain together. The State allows divorces, not as a punishment to the offending party, nor as a favor to the innocent party, but because the State believes its own prosperity will thereby be promoted. 'Seeley's Appeal,' 56 Conn. 202, 206. The forms of the law of divorce should never be allowed to minister to the caprices of fickle-minded persons, or to the revenges of the disappointed or vindictive, and least of all to the passions of the incontinent. Nor under any circumstances should they be used in fraud of the statute allowing divorces, nor of the court. To the end that any and all attempts to use the forms of the law of divorce for any of the purposes indicated, shall be discovered and defeated, all courts possessing divorce jurisdiction are vested with a discretion. A wise discretion should always be exercised in administering the law of divorce, lest its spirit be disobeyed by a too narrow adherence to its letter."

In Morrison *v.* Morrison, *supra*, the trial judge found that the plaintiff was willing that his wife should commit adultery, provided he could obtain a divorce, founding his decision on the facts that after his suspicions of her fidelity were aroused, he frequently retired, leaving her alone with the suspected paramour, having previously arranged to have them watched by a detective; allowed her to go alone with the suspected paramour in the streets of the city where they lived, and also on pleasure excursions, and permitted him to use undue familiarity with her in his presence, without disapproval. This evidence and that finding were held to support a finding of connivance. It will be observed that the plaintiff's willingness was inferred from his conduct alone.

In Hedden *v.* Hedden, *supra*, it was held that "If a husband sees what a reasonable man could not see without alarm . . . he is called upon to exercise a peculiar vigilance and care over her, and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the result."

The case in Barbour showed an evident procurement of the offense by the plaintiff, — as the court said, "a most bungling and wicked conspiracy and connivance." The activity of the plaintiff was much clearer than in the foregoing cases. Such, but still more strongly, was the New Hampshire case. In the Hawkins case, the English court went so far as to hold that where a man had seduced his wife before marriage, and left her for sixteen years, allowing her but a small sum for her support, his "conduct in leaving his wife without a husband's protection . . . conduced to her adultery," and he was not entitled to a divorce.

Opposed to this array of authority is Robbins *v.* Robbins, 140 Mass. 528; 54 Am. Rep. 488. There a husband, suspecting his wife of adultery with a lodger in his house, informed his wife that he was going out of town, and should not return that night or till late that night. He did not go out of town, but watched the house in the evening until he saw the lights in his wife's and the lodger's rooms extinguished, and then secretly entered and surprised them in bed together. It was found by the trial court that this particular opportunity for adultery would not have existed except for this scheme, but that "there was no corrupt intent that adultery should be committed." The appellate court held that the plaintiff's conduct did not constitute connivance in law; that a husband has a right "to have a wife who will remain chaste when exposed to temptations," and has a right to lay a scheme to detect her if she is guilty. It is difficult to distinguish this case from the case in 136 Massachusetts, or that in Connecticut, unless it is to be held that connivance is purely a question of fact. If a husband's willingness is inferable from his conduct, it was inferable in the Robbins case as well as in the others. We prefer the doctrine of Mr. Bishop: "A husband who suspects his wife of adultery may take means to procure proof. But he must not lead her into a fresh wrong because

he fears she has been guilty of an old one. He may watch her; even leave open the opportunities which he finds; but he must not make new ones or lay temptations in her way." "Connive" means literally to wink at. The Century Dictionary gives as a definition: "To wink; to refrain from looking, in a figurative sense, as at a culpable person or act; give aid or encouragement by silence or forbearance; conceal knowledge of a fault or wrong." "To shut one's eyes to; wink at; tacitly permit." The Bible says that "Their wickedness God hath hitherto winked at." Will it be argued that God was *willing* that men should commit sin?

Since the foregoing was written, a report comes to us, in the "Albany Law Journal," 265, of a case at special term of the Supreme Court, in the city of New York (Karger *v.* Karger), decided by Pryor, J., which agrees with the Dennis and Morrison cases in its conclusions. The facts are stated as follows: —

"Suspecting a criminal connection between his wife and one Stein, the plaintiff concerted with the witness Wolf a scheme for detecting the defendant in the act. She was in the habit of visiting Stein at his room in Wolf's house, and the arrangement was that the plaintiff should go to the house, and Wolf 'would show it to him.' He went to the house, and was so situated that, though himself concealed, he could observe the approach of his wife. She entered the house and met Stein. Meanwhile, Wolf, with plaintiff's privity, had so disposed the company and fastened the doors as apparently to assure the defendant of security in the illicit intercourse. From the ambush in which they lay, Wolf, in company with the plaintiff, heard Stein invite the woman to his embraces, and saw them go to bed together. Then, after waiting 'two or three minutes,' the husband and witness rushed into the room and surprised the parties in the act."

The Judge observed: —

"Not only did he permit it to be done, when a look or a word from him would have prevented it; not only did he suffer it to proceed in his presence, and delay interruption until he supposed it consummated, but through the agency of Wolf he promoted and facilitated the adultery. The inference is irresistible that the plaintiff was willing that the defendant should commit the act in order that he might obtain a divorce (Morrison *v.* Morrison, 136 Mass. 310)." . . . "It would be a dangerous principle to establish, that a husband who has suspicions of the infidelity of his wife shall be allowed to lay a train which may lead her to the commission of adultery, in order that he may take advantage of it to obtain a divorce (Pierce *v.* Pierce, 15 Am. Dec. 210; 3 Pick. 299). I am aware of the decision in Robbins *v.* Robbins (140 Mass. 528), but cannot recognize it as an authority (33 'Alb. Law Journal,' 401)."

OATHS. — Mr. Rogers tells us, in his agreeable paper on this topic, that the Bedouins swear by their tent-poles. We should call that swearing by the Styx.

NOTES OF CASES.

BICYCLING ON SUNDAY. — In Eaton *v.* Atlas Ins. Co., 89 Me. 570, it appeared that the plaintiff rode on Sunday on a bicycle to attend the funeral of a friend, returning by a longer route for recreation, and was injured on his return. The court held that his going was not a violation of the law against traveling on Sunday, and therefore his accident insurance policy was not avoided "while or in consequence of violating any law," but his returning in the longer way brought the accident within a clause of the policy limiting recovery to a certain amount in case of injury, "while engaged for pleasure or recreation in amateur bicycling," etc. The court intimated that the result would have been otherwise if the rider had been injured while on his direct route to or from the funeral.

EXHUMATION. — An interesting and almost novel point was decided by the New York Court of Appeals in Weble *v.* U. S. M. Acc. Association, an action on an accident policy. The insured had met his death by drowning. The policy 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 so often as he requires," and to attend any *post mortem* examination held on the part of his representatives or beneficiaries. Also that a strict compliance was a condition precedent to the enforcement of the contract. The deceased was drowned, September 4, 1893, and immediate notice thereof was given to the company. The body was buried, after a coroner's investigation, September 9th. On September 19th, written demand was made by the company's medical adviser for permission to examine the body to ascertain the cause of death, and was refused on account of the necessity of disinterment. The court held that the refusal was warranted. They observed: —

"The effect of the giving of immediate notice was to impose upon the defendant the obligation immediately to make such investigation of that occurrence, as to enable it to decide whether to insist upon its right of an examination of the body in order to satisfy itself as to the cause of the death. It was not at liberty to wait indefinitely, or for any unreasonable length of time. The provision, though not, as before observed, of an unreasonable nature, nevertheless was one which, in the nature of things, called for prompt action on the part of the insurer. Although no time is specified within which the permission to examine may be availed of, still, a due regard for the sentiments of the family and friends of the deceased, if not public policy, required as immediate an exercise of the option to examine as was possible. Conditions in insurance policies, as in all other contracts, should be construed strictly against those for whose benefit they were reserved (Paul *v.* Insurance Co., 112 N. Y., 472). It was an unreasonable delay on the

part of the insurer to wait until after the body of the deceased had been interred, and nothing appears in the evidence to show any excuse for it, if it was deemed that an examination of the body was necessary. From September 4th until September 9th an opportunity was afforded for an examination of the body, and, in the absence of evidence to the contrary, we must assume that the immediate notice conceded to have been given of the death left an ample margin of time for such an examination."

The court cite no cases in point, but the precise question was decided in the same way in Grangers' Life Ins. Co. *v.* Brown, 57 Miss. 308; 34 Am. Rep. 446, which was relied on by the court below. See Browne's Short Studies in Evidence, pp. 34, 35.

DOG LAWS. — Shakespeare said: "The dog will have his day." (Some commentators have conjectured that "day" is a misprint for "bay," the latter word being more consonant with the first part of the line, "The cat will mew"; but there was certainly a common proverb that "every dog will have his day.") The United States Supreme Court recently flew in the face of this proverb, in their decision in Sentell *v.* New Orleans, etc. R. Co. The plaintiff was the owner of a valuable registered Newfoundland bitch, which he kept for breeding purposes. While following him on the streets of the city, she stopped on the track of the Railroad Company, and not observing the approach of an electric car, and moreover "being in a delicate state of health and not possessed of her usual agility, she was caught by the car and instantly killed." Sentell sued the railroad company in a District Court and recovered $250 damages. On appeal the Court of Appeals reversed the judgment, holding that Sentell should have shown a compliance with the State laws and city ordinance regarding dogs. A Louisiana statute provides that dogs are only to be regarded as personal property when duly recorded upon the assessment-rolls. Mr. Sentell's dog was not so recorded, and the principal question was of the constitutionality of that statute. In affirming the judgment of the Court of Appeals, the Supreme Court, through Mr. Justice Brown, who wrote the opinion, declared property in dogs at common law to be of an imperfect or qualified nature. They are not to be considered as being on the same plane with horses, cattle and sheep, in which the right of property is perfect and complete, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals, kept for pleasure, curiosity or caprice. In other words, they have no intrinsic value, common to all dogs and independent of the particular breed or individual. But the court considers it practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, and therefore all legislation on the subject, though nominally including the whole canine race, is really directed against the latter class, and based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. The court observed: —

"Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy, and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the liability on the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from annoyance and destruction. Such legislation is clearly within the police power of the State. While these regulations (in Louisiana) are more than ordinarily stringent, and might be declared to be unconstitutional if applied to domestic animals generally, there is nothing in them of which the owner of a dog has any legal right to complain. The statute really puts a premium upon valuable dogs by giving them a recognized position, and by permitting the owner to put his own estimate upon them. The judgment of the Court of Appeals is affirmed."

This decision may give some shock to sentimental ideas concerning the standing of Lo's "faithful dog," but this mundane sphere is not an "equal sky" for dog and man. The Chairman rejoices over it when he recalls how his neighbor's worthless little pug rushes out in the street and snaps at his helpless calves as he is mounted on his bicycle, and cannot kick with safety. Certainly, if society has the lawful power to require human beings to take out a license to get married, or to keep a dog, or to make registration of conditional sales of personal property, it has the right to enact the statute in question.

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.

LEGAL ANTIQUITIES.

IN a case in the time of Elizabeth, the plaintiff, for putting in a long replication, was fined ten pounds and imprisoned, and a hole to be made through the replication, and to go from bar to bar with it hung round his neck. Milward *v.* Welden, Tothill, 101.

FACETIÆ.

JUDGE: "Don't you think that this is a matter which could be settled out of court?"

PLAINTIFF: "Can't be done, your honor, I thought of that, but the cowardly defendant will not fight."

A FRENCHMAN was convicted of killing his mother-in-law. When asked if he had anything to say for himself before taking sentence, he said, "Nothing, excepting I lived with her twenty-one years and never did it before."

HE had just been sentenced to thirty days for stealing and eating two apples. "Fifteen days," said one of the bystanders in the court room, "for stealing an apple? That's a high price."

"That's nothing," said another, "Adam took only one and was condemned to hard labor for life."

"I HAVEN'T any case," said the client, "but I have money."

"How much?" asked the lawyer.

"Fifty thousand dollars," was the reply.

"Phew! you have the best case I ever heard of. I'll see that you never go to prison with that sum," said the lawyer, cheerfully. And he didn't — he went without a dollar.

A GEORGIA lawyer, who had a case in which conviction for his client seemed certain, closed his argument with a scriptural quotation. To the amazement of all, the jury returned a verdict of "Not guilty," without leaving their seats. After court had adjourned, the lawyer approached the foreman.

"I am curious to know," he said, "just on what point of law you based your verdict?"

"It warn't no law point, Colonel," replied the foreman, "but we couldn't jest git over the Scripture."

HERE is a New York yarn about ex-Judge Curtis. Men who have worn the judicial ermine generally have certain privileges in court that the struggling young lawyer would make any sacrifice to obtain. A newly admitted member of the bar made a suggestive remark to Mr. Curtis about this and the old gentleman became very angry. When he gets mad, he lets himself loose. He did so on this occasion, but finally wound up with, "I am a fool! I am the biggest fool on earth!" The wise youngster attempted to soothe him with the remark: "Judge, all men are fools at times. I have been a fool myself." The enraged old lawyer glared at him. "You a fool?" he sneered. "Yes, and a bigger fool than you, Judge." This caused the Judge to tear the little hair left upon his venerable head. "I deny it, sir!" he shouted. "It is a lie! You could never be a bigger fool than I. You have not the capacity, sir; not the capacity!" — *Ex.*

NOTES.

IN Michigan, some years ago, a bill was before the legislature to restore the death penalty for the crime of murder. Three of the ablest members of the House made long speeches in favor of the bill — so long as to be found wearisome, especially by those who disagreed with the opinions expressed. When the third man had finished, a young member on the other side of the chamber

rose and said, very sarcastically: "Mr. Speaker, I rise to a question of privilege." "The gentleman will state his question of privilege," said the Speaker. "Mr. Speaker, I wish to inquire of our friends of the other side of the House which they think is preferable — to be hanged or talked to death?" The question was greeted by applause. Then suddenly some one with a very loud voice said: "Oh, well, if *you're* going to talk, we prefer to be hanged."

With a piece of string and a little sand and grease some Hindu convicts recently sawed through an iron bar two inches in diameter in five hours and escaped from jail, according to the "Pioneer Mail."

The sturdy incorruptibility of the Japanese policeman is said to work wonders among the Formosans. A Hongkong contemporary quotes a dispatch which states that "the Japanese gendarmerie and police have obtained a very great influence over the natives, who 'adore them like God.' A single word from a policeman will make a native debtor pay his bills." Our contemporary thinks that a few such policemen might improve the moral status of backward subscribers. — *Literary Digest.*

Some years ago an Eastern farmer, in trying to repeat Webster's dying words, "I still live," gave an amusing rendering of the spirit, if not the exact letter of the phrase. A gentleman had remarked to him, "Life is very uncertain." "Ah, yes," replied the farmer, "that's true, every word of it; and, by the way, Captain, that makes me think of what one of your big Massachusetts men said when he died a spell ago." "Who was it?" inquired the Captain. "Well, I don't jist call his name now, but at any rate, he was a big politicianer, and lived near Boston somewhere. My newspaper said that when he died the Boston folks put his image in their windows and had a funeral for a whole day." "Perhaps it was Webster," suggested the Captain. "Yes, that's his name! Webster. General Webster. Strange I could not think on it afore. But he got off a good thing just before he died. He riz up in bed and says he, 'I ain't dead yet!'"

Carlyle met our Webster at some breakfast, and has left this record of his impression: —

"This American Webster I take to be one of the stiffest logic buffers and parliamentary athletes anywhere to be met with in our world at present — a grim, tall, broad-bottomed, yellow-skinned man, with brows like precipitous cliffs, and huge, black, dull, wearied yet unwearable-looking eyes under them; amorphous projecting nose, and the angriest shut mouth I have anywhere seen. A droop on the sides of the upper lip is quite mastiff-like — magnificent to look upon; it is so quiet withal. I guess I should like ill to be that man's nigger. However, he is a right clever man in his way, and has a husky sort of fun in him too; drawls in a handfast, didactic manner about 'our republican institutions,' etc., and so plays his part."

CURRENT EVENTS.

It is not as well known to Americans as it might be that, when their Constitution was still forming, Jefferson happened, as he was pouring out a cup of hot tea into his saucer, to ask Washington abruptly "Of what use is the Senate?" "You have answered it, yourself," replied Washington, "the Senate is the saucer into which we pour our legislation to cool it."

The sanitary congress held in Venice not only created a great deal of attention in Europe but also accomplished part of the work it set itself to do. The Sultan, replying to the representatives of the Foreign ministers, has consented to give orders to the governors to dissuade his subjects from proceeding on the pilgrimage to Mecca. If these pilgrimages can be stopped or limited, there will be little or no danger of the spread of the plague.

Ought domestic servants to be entitled by law to receive written characters? This is a question which has been raised in parliament. It appears to be the habit of some mistresses and masters to refuse any character to servants seeking "another place." This is evidently prejudicial to the servant's interests, but would they be better off if the written character were not of a laudatory kind? A written character unfriendly to the owner might be a dangerous document for the writer. Many a master, to escape a possible action for slander, would be only too willing to make the character favorable if forced to write it in compliance with the law.

BUSINESS before pleasure is evidently not the motto of Judge Curran of the English county court. Among the grand jurors who failed to attend at the quarter sessions in King's County were an auctioneer and a master of foxhounds. The former got a solicitor to explain that he had fixed an important auction for that day; the latter sent word that he was away at a meet of the hounds. His honor fined the auctioneer. The sportsman's excuse was accepted as satisfactory.

RECENT experiments have disclosed the fact that olive green is the best color for war vessels. White is the most easily distinguished by search light at night. In the daytime a drab-colored ship is with difficulty seen on the horizon. Olive-green harmonizes with the water, is as difficult as drab to see in the daytime, and much more invisible at night with the search light. This color was first used by the Brazilian navy in 1891, and would be used by the English navy in time of war.

THE most expensive book ever published in the world is the official history of the War of the Rebellion which is now being issued by the United States Government at a cost up to date of $2,300,000. Of this amount nearly one-half has been paid for printing and binding, the remainder to be accounted for in salaries, rent, stationery and miscellaneous expenses, including the purchase of records from private individuals. In all probability it will take three years to complete the work and an appropriation of $500,000 more has been asked, making a total cost of nearly three million dollars. The work will consist of a hundred and twelve volumes.

A SHIPBUILDING firm of Copenhagen has recently completed for the Russian government the largest and most powerful ice-breaking steamer yet built, the Nadeshuy, which means "one to be depended upon." The engine was contracted to develop 3,000 horse power, but at the trial indicated 3,600 horse power, giving a speed of 14¼ knots. The Nadeshuy is built of ¾ in., ⅞ in. and 1 inch steel plates; the ribs are numerous and strong. Both sides and ends are much concaved. The rudder and propeller are placed so far under the vessel as to be fully protected. The engine occupies some ⅔ of the steamer. She has, in Copenhagen, with a speed of 3 knots, cut through firm 26-inch ice, and with stern foremost she went still faster through 27-inch ice. Nadeshuy successfully broke ice of 16-feet thickness consisting of accumulated flakes of over 2 feet thickness. Finally with several repeated runs she cut through an accumulation of ice extending over a mile and measuring 22 feet in thickness. The Nadeshuy is to be stationed at Vladivostok, to keep that harbor free from ice; previously it has always been icebound for part of the year.

ALTHOUGH the French and German governments may have each other chiefly in view in their naval augmentations, England is bound to take note of these menacing preparations. Happily the rivals seem to be toning down their maritime enthusiasm, and their program of construction has shrunk to quite modest proportions. Still there is a certain amount of increase in both cases. The German Kaiser will not easily give up his plan of making Germany as powerful on sea as she is already on land. France also is much stronger on the sea than she used to be, nor does Russia lag behind in this department of warlike preparation.

A GRACEFUL act of international courtesy on the part of the consistory court of London has drawn attention to the remarkable history of a manuscript volume which is essentially one of the most valuable heirlooms of the American nation. The Pilgrim Fathers who left their native land on board the Mayflower bequeathed to their children a detailed chronicle of all their doings, in the form of a manuscript book, entitled "The Log of the Mayflower." It did not end with the voyage but was continued as a history of the first settlement of New Plymouth and of the general colonization work of the next twenty-eight years. At the application of the American ambassador, the consistory court of London gave this book to the President of the United States.

IT may be said without disrespect to M. Hanotaux, who has recently been elected to membership of the French Academy of Letters, that his services to literature are not to be mentioned in the same breath with those of M. Zola, whom the Academicians reject in his favor. Yet M. Zola's defeat was a foregone conclusion, and many of his admirers wonder why he continues so persistently to seek admission to a society which has so often rejected his name. This reason has been given by the novelist. He knocks at the Academy doors not only in his private capacity but as the representative of a school. The important movement begun by Balzac and carried on by Flaubert, de Goncourt and Emile Zola has ever been overlooked by the Academy; none of the great names which illuminate its history have been officially

proclaimed immortal. It is as the champion of a cause and not as a free lance that M. Zola courts the ridicule which attaches itself to the name of "Perpetual Candidate."

In the Argentine Republic the service of trains is appallingly irregular, chiefly owing to the bad state of the permanent way, which, when once laid, is left to take care of itself. The permanent way in some parts of the line is in such a dilapidated condition that almost every train is thrown off the rails. This astounding fact is contained in a recent report of the railway company concerned. The rate of traveling, too, is astonishing. At one spot, on a go-as-you-please local line, no train ever travels faster than two and a half miles per hour. One may vary the monotony of the journey by getting out and taking a quiet stroll along the line, or stopping to pick up pretty flowers; there is no fear that the train will catch you up.

LITERARY NOTES.

Prof. Woodrow Wilson of Princeton University contributes an article, upon "The Making of the Nation," to the July Atlantic. Another political paper of importance is by E. L. Godkin, editor of the "Nation," on "The Decline of Legislatures." A distinctly literary flavor is added to the issue by the printing of hitherto unpublished letters of John Sterling and Emerson. Edward Waldo Emerson edits them, and adds an interesting sketch of the cheerful and heroic Sterling. Three short stories of unusual merit are: "One Fair Daughter," by Ellen Olney Kirk; "A Life Tenant," by Ellen Mackubin, a story of army life in Texas; and "Nég Créol," by Kate Chopin, a delightful short story of low life in New Orleans.

The beginning of a new volume of the Review of Reviews is signalized by an expansion of the name of that very successful and widely read periodical. It has now become the American Monthly Review of Reviews. The July number contains a variety of important contributed articles. Among these we note Edward Cary's able and interesting character sketch of President Seth Low, Dr. Gould's exposition of the plans of the City and Suburban Homes Company of New York City for a model suburban settlement, Baron de Coubertin's vivacious account of "The Revival of the French Universities," General Greely's survey of "Higher Deaf-mute Education in America," and Sylvester Baxter's sympathetic review of Edward Bellamy's new book.

The complete novel in the July issue of Lippincott's is "A Mountain Moloch," by Duffield Osborne. The hero is an American naval officer who leaves his ship for love of a native princess and the adventures and bloodshed are worthy of Mr. Rider Haggard in his palmiest days. Dr. Francis E. Clark, founder of the Christian Endeavor Societies, who is now visiting the trees of his planting in remote parts of the earth, furnishes a vivid sketch of "A Plague-Stricken City," written during a recent sojourn at Bombay when the bubonic plague was at its height; and Lawrence Irwell tells of the theory and practice of "Suicide among the Ancients," *i. e.*, the Greeks and Romans.

McClure's Magazine for July opens with an interesting account of the actual daily life in a little "Republic" where the citizens and governors are young boys and girls from the poorest and most crowded districts of the city of New York. Other features of this number are a humorous story by Robert Barr, describing the subjugation of the "bully of the school" by an ingenious Western schoolmaster; an adventurous tale by Conan Doyle, dealing with those picturesque kings of the high seas who lived, like several distinguished playwrights, by taking their own where they found it; and the account of the voyage of the "Mayflower" from Governor Bradford's quaint and naïve "History of Plymouth Plantation," lately presented by the authorities of the Bishop of London's Library at Fulham, England, to the State of Massachusetts.

The very successful group of college articles in Scribner's Magazine is concluded with Judge Henry E. Howland's account of "Undergraduate Life at Yale" in the July issue. Judge Howland has kept in close touch with Yale life from 1850 to the present day, and his article is the very cream of nearly half a century of reminiscences and anecdotes. As a member of the University crew of 1854 his remarks on rowing are unusually pertinent. A picture of the '54 crew, from an old daguerreotype, is one of the most interesting pictures. Exactly four hundred years ago (June 24, 1497), John Cabot discovered the main land of the American continent and started the tide of Anglo-Saxon immigration which was to dominate North America. Lord Dufferin, who is the chairman of the committee which has in charge the Bristol, England, celebration, has written for this number an article expounding the significance of Cabot's discoveries, and their relation to the development of free institutions in Canada and the United States. Walter Crane has given a charming quality to his article on "William Morris," because of a fine artistic sympa-

thy with Morris's aims, and through personal friendship, which began in 1870. "Cavendish," the great authority on whist, writes about contemporary "Whist Fads," telling what is good in them and what bad. The Whist Congress, to meet in July, will find much in this article to discuss. C. D. Gibson concludes his papers on "London" with "London People." It includes striking full-length portraits from the life of Phil May and Du Maurier — the latter sketched in June, 1896.

THE LIVING AGE, for all its fifty-three years of life, was never fresher, more vigorous or more valuable than now. Timely and able articles on the leading questions of the day, papers of interest and value, biographical, historical and scientific, are always to be found within its pages. The following partial contents of recent issues will give a slight idea of its world-wide scope and variety.

AMONG the noted writers who either by original or selected matter are brought together in the July number of CURRENT LITERATURE are Hamilton Wright Mabie, Richard Burton, Moses Coit Tyler, John Hay, Henry Van Dyke, M. W. Hazeltine, W. Robertson Nicoll, Lilian and Arthur T. Quiller-Couch, D. T. MacDougal, Ernest Ingersoll, Baron Pierre de Coubertin, William Winter, Mrs. Humphrey Ward, Norman Gale, Albert Bigelow Paine, John B. Tabb, Clinton Scollard, Gilbert Parker and George W. Cable, editor of the magazine.

MCCLURE'S MAGAZINE for July contains an article on the late Professor Drummond, written by his intimate friend the Rev. D. M. Ross. The source of Drummond's rarely equaled influence over men — assemblages as well as individuals — was his own charm of character; and Mr. Ross's paper deals especially with his personal traits. The actual daily life of the citizens of William R. George's "Boys' Republic" — one of the most interesting philanthropic enterprises yet undertaken — is depicted in an article by Mary Gay Humphreys. The short stories in this number are by Conan Doyle, Anthony Hope, and Robert Barr.

THE July number of APPLETON'S POPULAR SCIENCE MONTHLY contains a thoughtful article on "The Principle of Economy in Evolution," by Edmund Noble. The author shows that the whole of evolution, viewed apart from its secondary processes, may be summed up in the simple formulæ — movement in the direction of least resistance. The curious psychological conditions dominating the mob are discussed by Prof. E. A. Ross. He shows that a crowd, even an excited crowd, is not a mob. Saturn, so much feared by the ancient astrologers because of its supposed malign influence on the world, is the subject of an instructive paper by Clifton A. Howes.

THE opening article for the midsummer HARPER'S is a story, by Frederic Remington, of Indian fighting in winter, entitled "A Sergeant of the Orphan Troop." The illustrations are by the author, and include the frontispiece of the number, in color. In addition to this there are seven complete stories: "Sharon's Choice," by Owen Wister; "The Cobbler in the Devil's Kitchen," by Mary Hartwell Catherwood; "In the Rip," by Bliss Perry; "The Marrying of Esther," by Mary M. Mears; "A Fashionable Hero," by Mary Berri Chapman; and "A Fable for Maidens," by Alice Duer. In "The Inauguration," a companion article to "The Coronation," Richard Harding Davis contrasts our political and social life, as manifested in our greatest national ceremony with that of the Old World. In "The Hungarian Millennium," F. Hopkinson Smith writes of the distinctions and humors of the recent exposition at Buda-Pesth. "A State in Arms against a Caterpillar," by Fletcher Osgood, is an illustrated account of the ravages of the offspring of the gypsy-moth, which, having devastated large tracts in the suburbs of Boston, is being prevented from spreading throughout the country only by organized effort on the part of Massachusetts.

WHAT SHALL WE READ?

This column is devoted to brief notices of recent publications. We hope to make it a ready-reference column for those of our readers who desire to inform themselves as to the latest and best new books.

(Legal publications are noticed elsewhere.)

MR. WARD has written a very bright and interesting continuation of his wife's (Elizabeth Stuart Phelps) two stories, "An Old Maid's Paradise," and "A Burglar in Paradise." He calls his story *The Burglar who moved Paradise*,[1] and the account of the burglarious moving of Paradise on two scows is infinitely amusing. The book is just what one needs to while away an hour during the summer vacation.

[1] THE BURGLAR WHO MOVED PARADISE. By Herbert D. Ward. Houghton, Mifflin & Co, Boston and New York, 1897. Cloth, $1.25.

THE agrarian and financial agitation through which the country has been passing for the past few years has been but a repetition of the troubles which confronted our government at the close of the Revolution. The same spirit of discontent witnessed today prevailed in 1786, among the farmers of New England, and gave rise to what is known as Shays' Rebellion. The events of those stirring times have been embodied in an interesting and dramatic story entitled *Captain Shays, a Populist of* 1786.[1] The author gives an historically accurate account of the rebellion, and at the same time offers the reader one of the most delightful stories of old New England which it has been our good fortune to read.

ALL those who are interested in our early colonial history will find Mr. Hilton's new book, entitled *In Buff and Blue*[2], well worth the reading, and those who care less for history and more for romance, will much enjoy the pretty little love story which is interwoven with the sterner realities of war and its drilling and fighting. It is a curious confirmation of the saying that men's minds "run in the same channel," that the hero of "*In Buff and Blue*" goes to the Meschianza, the large ball given in honor of Gen. Howe on the eighteenth of May, in disguise, and in the June installment of "Hugh Wynne, Free Quaker," the serial by S. Weir Mitchell, running in the "Century," his hero also goes to this ball in disguise. These two accounts must have been published almost simultaneously in Boston and New York.

[1] CAPTAIN SHAYS, a Populist of 1786. By George R. R. Rivers. Little, Brown & Co., Boston, 1897. Cloth.

[2] IN BUFF AND BLUE, Being Certain Portions from the Diary of Richard Hilton, Gentleman of Haslet's Regiment of Delaware Foot in our ever glorious War of Independence. By George Brydges Rodney. Little, Brown & Co., Boston, 1897. Price, $1.25.

NEW LAW-BOOKS.

THE GENERAL DIGEST. American and English. Vol. II, new series. The Lawyer's Co-Operative Publishing Co., Rochester, N.Y.

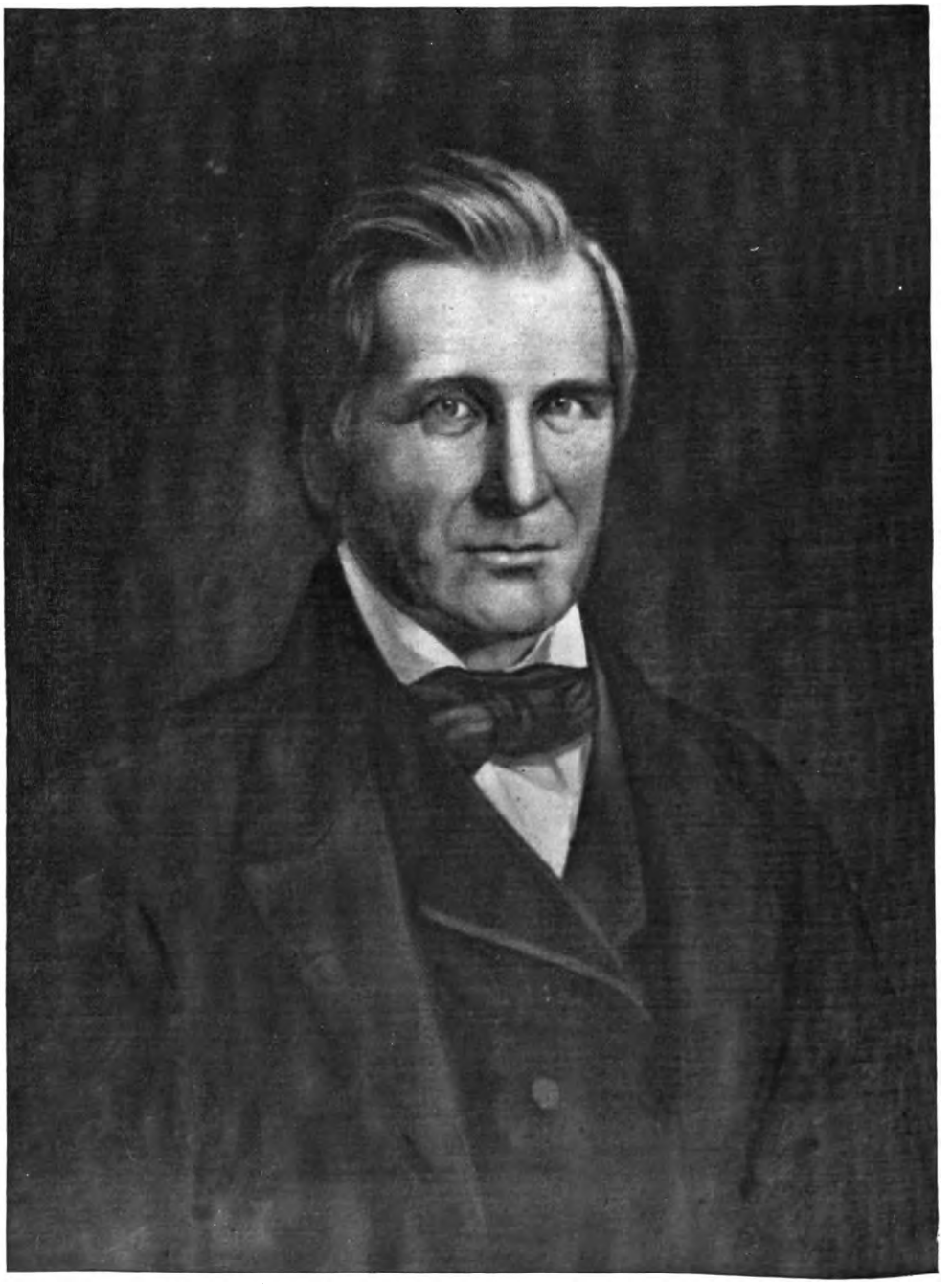
The publishers have met with the general approbation of the legal profession in the new departure which they have taken in this Digest. The change made may be summed up as follows: —

The semi-monthly becomes quarterly; the annual becomes semi-annual; and the bound book is limited to (1) officially reported cases and (2) cases not to be officially reported. These reasons, as given by the publishers are: (1) twenty-four small pamphlets a year are inconvenient; (2) the book has become too large, and must become still larger unless divided; and (3) the quarterly parts being convenient and prompt, the permanent book may defer not officially reported cases until the official reports can be cited, except those not to be officially reported at all. The quarterly parts contain all American and English reported cases cited where first published; the permanent semi-annual books contain officially reported cases, cited wherever published officially and unofficially.

In its new form the "General Digest" seems to leave nothing to be desired.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Vol. IV, 1895. Edited by Tilghman E. Ballard and Emerson E. Ballard. The Ballard Pub. Co., Crawfordsville, Ind., 1897.

This series of Annuals is a complete compendium of Real Estate Law, and is a valuable aid to all lawyers whose practice embraces litigation involving questions regarding Realty. The cases are selected with evident care and discrimination and cover almost every point likely to arise.



JOHN TAYLOR LOMAX.

The Green Bag.

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JOHN TAYLOE LOMAX.

BY ELIZABETH W. P. LOMAX.

BEFORE touching upon the subject of this sketch it may be as well to state that a handsome notice of this eminent Virginia jurist was prepared by his grandson, the Hon. Lunsford Lomax Lewis, ex-judge of the court of appeals, Richmond, Va., at the request of the editor of the Virginia "Law Register" in May, 1896. This brief biographical sketch was no doubt widely read, yet leaves something to be said by the present chronicler.

John Tayloe Lomax came of a line of ancestry notable if not illustrious. He was the second son of Thomas Lomax and Anne Corbin Tayloe, his wife, and was born at the family seat, Port Tobago, in the county of Caroline, State of Virginia, the nineteenth of January, 1781.

John Lomax, the progenitor of the family in this country, emigrated to the colony of Virginia, from the county of Northumberland, England, about 1700. He was the son of John Lomax, a clergyman of considerable distinction in the Established Church and a Master of Arts of Emmanuel College, Cambridge. His living was that of Wooler, in the county above mentioned, from which he was ejected after the restoration of Charles II, for declining to conform to the Act of Uniformity, passed in 1662.

In Calamy's "History of the Ejected and Silenced Ministers," a high tribute is paid to his piety and learning and to his patience under persecution.

In 1703, shortly after his arrival in this country, John Lomax sought the star of his fate in one of the daughters of the colony. He married Elizabeth Wormley, a daughter of the Hon. Ralph Wormley and Catherine his wife, who was the only daughter of Sir Thomas Lunsford. Sir Thomas had been a zealous partisan of King Charles I in the Civil War, which made him so obnoxious to Parliament that he was forced to leave England. He came to Virginia. Here, on the twenty-fourth of October, 1650, he obtained a grant for land extending for five or six miles, encircling Port Tobago Bay on the Rappahannock River. Through this marriage of John Lomax with the granddaughter of Sir Thomas Lunsford a valuable domain was acquired, which descended for generations to the Lomax family.

John Tayloe Lomax, the subject of this sketch, on his mother's side of the house, was connected with most of the prominent families of the State. His mother as Anne Corbin Tayloe had married Thomas Lomax of Port Tobago, while her seven sisters stepped each across the threshold of Mount Airy (Richmond County, Virginia), as a Lloyd of Maryland, as the wife of Francis Lightfoot Lee, or as the bride of her cousin, the Hon. Ralph Wormley, as the case might be, while another sister became the wife of Mann Page of Rosewell, who erected the magnificent mansion, Rosewell, early in the eighteenth century. Another married Landon Carter of Sabine Hall. Another, William Augustine Washington, nephew of George Washington, and the youngest sister became the wife of Robert Beverly of Blandfield.

The estate of Port Tobago then, as well as Mount Airy and the old Octagon House,

Washington, D. C., are historical landmarks in the life of John Tayloe Lomax. Not to dwell too long upon these things, perhaps the two last — which have been recently described — may be touched upon in passing. Mount Airy, the ancient home of the Tayloe's, is three miles from Sabine Hall, on an eminence overlooking the Rappahannock River, and is one of the few colonial homes that bore the brunt of the Revolution, the stress and strain of the Civil War, and managed to retain its distinction,— the state of preservation, never lacked by its broad acres, when dusky plowboys sent the music of the old plantation song far over the meadows, uphill and down-dale. Near the mansion house the highlands fall gently into a wide, low plain, which affords from the bowling green at the back of the house a lovely landscape scene, the silvery line of the Rappahannock and the pine-robed hills of Essex. In this view to the south the meadow lands, plain, and belts of forest include the area which has for centuries formed part of the Mount Airy estate. It looks to-day much as it did in 1827, when it was described by a French diplomat as an imposing edifice of granite on a fine elevation; connected by covered wings. Its interior consists of a broad stairway and long center hall, numerous high-pitched rooms and a gallery of family portraits of the Corbins, Taskers, Platers, Ogles and Tayloes, beside a conservatory filled with plants, and tall trees of lemon and orange. The garden is at the foot of the bowling green and has terraces and squares of old-fashioned flowers — the lawn in front is terraced and shaded by royal trees of yew. The weather-stained, sentinel sundial bespeaks the present and past, the rise and set of the sun upon the happy occupants of Mount Airy.

The Octagon, Washington, D. C., was erected about 1779 or 1800 by John Tayloe of Mount Airy, father of the uncle who superintended the education of John Tayloe Lomax. It stands at the intersection of New York Avenue and Eighteenth Street, where it is regularly sought out by visitors to the capital. It is a fine old monument of departed splendor. Mr. Tayloe permitted it to be occupied by President Madison after the White House was burned by the British in 1814. The octagon room over the front hallway is the room in which the treaty of peace was drawn. It was here that Dolly Madison held the drawing-rooms which made her famous.

The church of St. John at Washington, D. C., was the first building erected on Lafayette Square after the War of 1812, to which John Tayloe was by far the largest contributor and to which he presented the massive service of silver, at one time in use at the old church of Lunenburg, Richmond County, Virginia.

John Tayloe Lomax was named for the uncle, with whom he always maintained the closest and tenderest relation. His uncle had an almost parental regard for him, advancing his education and aiding him materially after he came to man's estate. He had the best advantages Virginia at that day afforded in academical instruction, and after due preparation entered St. John's College, Maryland, where he graduated. During this collegiate course and sojourn at Annapolis, he had social advantages, which that city notably possessed, in its society of distinguished men and women. In the sister of his mother, the widow of Governor Lloyd, he found a kinswoman deeply interested in his welfare and progress. He was often at the fireside of the Lloyd mansion, celebrated for elegant hospitality, and formed friendship with men who later on were conspicuous for talent. Among these were Philip Barton Key, Francis Scott Key, Roger B. Taney and his cousin, the second Governor Lloyd and many others.

After completing this course of study, he entered upon that of law at Annapolis, and when qualified for the profession, he returned

to Virginia, was admitted to the bar and commenced the practice of law in Fredericksburg and the adjacent counties. From the start he displayed sterling qualities of mind, habits of industry and the most thorough preparation of all cases intrusted to him, which at once gave him standing in the courts, and introduced him to the favorable notice of the judges before whom he practiced. His love for and knowledge of the classics, of English literature and a critical study of the speeches of such men as Fox, Chatham and Burke had inclined him to cultivation of the graces of the English language, to rhetorical oratory, but he was diverted at an early day from this path of distinction in his profession by cases of a civil nature, involving intricate questions of the law of realty, in the settlement of large estates, and the administration of trusts, which threw his practice into the courts of chancery, which sat in the cities of Richmond and historic Williamsburg. Here he was brought into contact with the ablest members of the bar of his day, and here a friendship with the distinguished William Wirt of Virginia was cemented. Based upon mutual respect and admiration of one another's talents, this friendship lasted throughout life and embraced a correspondence which contributed many delightful letters from Mr. Wirt.

JOHN TAYLOE OF MOUNT AIRY.

In July, 1804, John Tayloe Lomax married Charlotte Thornton, granddaughter of the Hon. Presley Thornton of Northumberland House, in the county of that name, who was a member of the King's Council at his death in 1769. The father of Mrs. Lomax was Capt. Presley Thornton, who had a military education and served as captain in what was known as the army of John Adams in 1798, organized to repel the apprehended French invasion. Of this army, George Washington was Commander-in-Chief.

About the year 1810 Mr. Lomax removed from Fredericksburg to Richmond County, in order to facilitate his practice in the courts of chancery. Here, in the War of 1812, he was commissioned an officer in a regiment raised in the lower counties of the Northern Neck, for the purpose of guarding that territory, exposed as it was to attack by the enemy, from the two great rivers by which, with the Chesapeake Bay, it is bounded. About the year 1817 he returned to Fredericksburg and resumed the practice of law, and was engaged in the active duties of his profession until 1826. In April of that year William Wirt, having been notified of his own appointment as professor of the School of Law at the University of Virginia, declined it, owing to his duties as attorney general of the United States, but recommended his friend John Tayloe Lomax to Thomas Jefferson and the Board of Visitors. This led to the visit of Mr. Lomax to Monticello shortly before the death of the great statesman, and to the

appointment of Mr. Lomax to the chair of law at the university.

From the beginning of his career as a lawyer, Mr. Lomax had been a close and ardent student of its principles. He went to the bottom of its foundation, searching among the hard, clean gray stone, or the dust and debris, for the reason of things and was never satisfied until he found them. The common law of England, its history and growth, the statutes ameliorating, enlarging and defining its principles, the rise and progress and controlling power, the remedial action of the courts of chancery, had all been subjects of research and critical examination. He lived to see these unfold, apply themselves to the vast change and development brought about by science and mechanical invention in the first six decades of the eighteenth century.

It was his proficiency of learning that enabled him to throw a search light upon recondite doctrine and as a lecturer to give a rational cast to "the most subtle dogmas of the common law," and amid dry details to illustrate by some graphic picture of mediæval times, in whose rigid customs the law took its rise, to be broadened under the influence of a later and higher civilization.

In 1830, Mr. Lomax resigned the chair of law in the University to accept the position of judge of the circuit superior court of law and chancery, and was assigned to the third district and fifth circuit, composed of the counties of Spottsylvania, Caroline, Richmond, King George, Westmoreland, Lancaster and Northumberland. This constituted him a judge of the general court, with appellate jurisdiction in certain cases. This judicial appointment compelled his return to Fredericksburg, which continued to be his home for the rest of his life. His circuit was the territory familiar to him from boyhood. Every county contributed some relative or friend at whose fireside he was a guest of welcome, and whose hospitality he enjoyed.

In 1848 a special court of appeals was formed, composed of five judges of the general court, the oldest of whom was Judge Lomax, to relieve the Supreme Court of the appellate business, which had accumulated on its docket, and to try and determine such cases as might be assigned.

In addition to his judicial labor, Judge Lomax taught, during the winter months for many years, a law school at Fredericksburg to which many young men resorted for instruction. Among these were the Hon. Wm. S. Barton, Henry A. Washington, Professor of Law in the College of William and Mary, Howard Shackelford and Robert Montague. If he had been deservedly popular as a lecturer during his professorship at the University of Virginia, he in the same kindly intercourse and fatherly interest in the students of his classes never failed to attach them to him personally. It may be said in this connection that to Judge Lomax and the second Judge Tucker, more than to any other two men, may be ascribed the credit of molding and educating the young men of their day for the Virginia bar — many of whom later on attained the highest rank in the legal profession.

Although interested in the political movement of the time he did not aspire to or seek to gain office. He was eminently the scholar. The honors reaped by him were confined to his profession. In 1844 the degree of LL.D. had been conferred upon him by his Alma Mater. His "Digest of the Laws of Real Property," published in three volumes in 1839, brought him to the attention of Professor Greenleaf of the Law School of Harvard. These men became friends, and no doubt Professor Greenleaf instigated another honor, for in 1847 the degree of LL.D. was conferred upon Judge Lomax by the University of Harvard.

The convention which framed and amended the constitution for Virginia in 1851, on application of the members of the bar practicing in his circuit, struck out the pro-

posed limitation of age in the tenure of judicial office by which Judge Lomax would have been excluded, and when by that constitution the office was made elective he was without opposition chosen by the people to continue in discharge of his judicial functions.

To Judge Lomax as a judge the highest praise has always been accorded. He applied the law with careful, even painstaking exactness. His analytical power of mind resolved at once the most complex case into simple, essential fact, with an almost intuitive sense of justice. His calm and equable nature stood by him and enabled him to poise steadily the scales of justice. If they inclined to one side or the other, it was toward mercy. During his judicial career, withdrawn from the pandemonium of the world, living above the hurly-burly of politics, he sought rest and refreshment in the love and peace of home, and the intercourse of social life, and came forth from this environment unbiased by interest, prejudice or passion to deal righteously, judge justly between his fellow men. Beside his work on real property, he was the author of quite an exhaustive volume on the law of executors and administrators, new editions of which were published as late as 1857. These, unfortunately, did not escape the fate of relentless war. During the evacuation of Richmond by the Confederates in 1865 and the conflagration which followed, the house of his publisher was consumed. Even the title to his work deposited in the clerk's office of the Court Federal was destroyed, with the court records, and the publisher having failed to deposit copies in the Congressional Library at Washington, the loss became irreparable.

He continued to exercise the discharge of his judicial functions until his resignation in 1857, when the continued illness of his wife appealed to him strongly for his ministrations and companionship. It may be of interest to know something of the manner of his reply, when requested earnestly by the members of the bar to reconsider and withdraw his resignation. "With whatever complacency," he wrote, "my own consciousness, or the opinion of others, which you mention, may contemplate a capacity for the service of the bench, as yet being unimpaired by the hand of time, there are, I regret to say, weighty considerations that impel me and make it necessary that I should now retire from the duties I have been employed in discharging for more than a quarter of a century. During this entire period, with the exception of one court last month, I have never lost a single day or a term of any court, which was by law appointed for me to attend in the circuits.

"Now, however, there are anxieties of a domestic nature, engendered by a union of more than half a century, that plead with resistless importunity and designate home, its peace, comforts and consolations as the fit resting place at the last advanced period of life. This devotion of the brief remnant of declining age claims a sacred preference above the employment in public service during the few years that now remain of the official period for which I was elected."

However, the peace and consolation so much desired in the retirement of his own health were fated to be of brief duration. The peaceful prospect was all too soon overclouded by the sounds of political strife which absorbed his attention, and pained and thrilled him with apprehension for his home and to an even greater extent for the future of the old commonwealth so dear to him. Throughout the winter of 1860–61 he looked eagerly to Washington, watching with intense interest the efforts of Mr. Crittenden and his coadjutors to adjust a compromise between the jarring factions and thus secure peace and preserve the Union. It was at this time that he sent a letter to a friend saying: "My feelings all gravitate to the 'irrepressible conflict' which is beginning and is likely soon to rage and with disaster that none

can adequately foresee or estimate. Whether we contemplate the miseries which are arising within the union of these States or out of the union of these States, they are appalling to the mind of an octogenarian whose days began before the glorious achievement of Yorktown, the signing of the treaty of peace which established one independence, and which have since been passed in the brightness of unparalleled prosperity. Deep is the distress of soul which weighs down one in his old age, at the approaching prospect of destruction which may entomb his country before he sinks into the grave. That a single lifetime should survive the duration of the liberty, peace and prosperity of such a country as ours is a heart-rending bitterness of sorrow." In the lapse of a few months these forebodings were realized.

In character Judge Lomax was preëminently and typically what he is at the present day often spoken of by his grandson (a distinguished Virginia lawyer) as, the "dear old gentleman." In appearance he was a man of fine presence and imposing stature, his bearing was one of the simplest dignity, radiated by a manner as cordial as kind. His face expressed the pure goodness of heart which attracted to him a legion of friends and followers throughout his own State and far beyond her borders. At times he was full of pleasant humor, at others grave without the affectation of gravity. He was eminently just to the character of every man, and where he could not commend he was silent. His was a soul and personality of intellectual strength, a life of honors fairly won. He chose that these gifts should adorn social life, sweeten the joys of domestic bliss, rather than seek display upon the stage of public life. He held a high and conscientious sense of duty, and the memory of it and of John Tayloe Lomax is cherished by many who survive, especially his descendants, — east, west, north and south, on the shores of the Gulf, along the Atlantic coast, and on the Pacific.

He died on the first day of October, 1862, in his eighty-first year. His eyes were closed to all things earthly before the full horrors of the Civil War between the States could reach him. He had entered his eternal home before the streets of his town, and the surrounding heights of Fredericksburg were the scene of wretched strife, or the repulse of the army of General Burnside, when the storm of shot and shell destroyed the roof that had sheltered him so many years.

A long, quiet life was ended peacefully within the radius of a hundred miles from the spot where he was born. He was laid to rest where many of his Virginia ancestors repose, — modest, restful, unostentatious in his last sleep.

SOME HINTS ON PUBLIC SPEAKING.

WHEN old George Stephenson, the engineer, was on one of his visits at Drayton, Sir Robert Peel's place, says a writer in the "Law Journal," an animated discussion took place between the old engineer and Dr. Buckland, on one of his favorite theories as to the formation of coal. But the result was that Dr. Buckland, a much greater master of tongue fence than Mr. Stephenson, completely silenced him. Next morning, before breakfast, when he was walking in the grounds, Sir William Follett, the eminent lawyer, came up and asked him what he was thinking about. "Why, Sir William, I am thinking over that argument I had with Buckland last night. I know I am right, and that if I had only the command of words which he has, I'd have beaten him." "Let me know all about it," said Sir William, "and I'll see what I can do for you." The two sat down in an arbor, and the astute lawyer made himself thoroughly acquainted with the points of the case, entering into it with all the zeal of an advocate about to plead the dearest interests of his client. After he had mastered the subject, Sir William rose up, rubbing his hands with glee, and said: "Now I am ready for him." Sir Robert Peel was made acquainted with the plan, and adroitly introduced the subject of the controversy after dinner. The result was that in the argument which followed, the man of science was overcome by the man of law, and Sir William Follett had at all points the mastery over Dr. Buckland. "What do you say, Mr. Stephenson?" asked Sir Robert, laughing. "Why," said he, "I will only say this, that of all the powers above and under the earth, there seems to me to be no power so great as the gift of gab."

The "gift of gab," or the art of speaking, must always have an interest for lawyers as professional advocates. It is not merely for a knowledge of law that a client pays his lawyer. He pays him for his power of putting his case persuasively, for his courage, his address, his conduct of the case, — in a word, for his advocacy. When Stephenson called it the "gift of gab," he was using a popular phrase, but one which has an element of truth. It is a gift. The orator — the supreme orator — is born, not made. So John Bright thought, so many others have thought; but those who have read the life of Demosthenes, or Cicero, or Curran, or Lord Brougham, and noted the infinite pains which they bestowed on the cultivation of their natural gifts and the curing of their natural defects, will see that there is as much, if not more, in art than in nature. We all know the stories of Demosthenes haranguing the wild sea waves, to familiarize himself with the stormy Ecclesia, of his putting pebbles in his mouth to cure his stammering; but it is not so well known that his first attempt to speak was a complete failure, that he shut himself up for two or three months together in a subterranean chamber in order to practice declamation, that he wrote out Thucydides eight times to form his style, that he studied all the best rhetorical treatises, that he recited, under the direction of an actor, long passages from Sophocles and Euripides, that he ran uphill daily to strengthen his lungs and his voice. "*Sic itur ad astra.*" Unquestionably, all these things, the whole art of rhetoric, is far too much neglected by modern speakers; indeed, it is not too much to say that neither in England nor America are there any orators extant as the ancients understood an orator, or even as Pitt or Canning, or Brougham understood the word. The Americans,

however, without being orators, are good speakers, better, at least, in many points than Englishmen; less clumsy, less confused. They may not be superior in invention or in diction, but they possess, as their critic, Mr. James Bryce, admits, more fluency, more readiness, more self-possession. Any American can reel off a creditable, often an eloquent speech at a minute's notice, to the astonishment and envy of an Englishman. They have more quickness, too, in catching the temper and tendencies of an audience, more weight, animation and grace in delivery, and, crowning all this, more humor. Any rules for speaking, the result of American experience, are therefore well worthy of consideration. Here are some: —

1. *The speaker must be in earnest.* — He must have something to say, of course; but that is not all. He must have, in Carlyle's phrase, a "message to deliver," — must believe, or seem to believe, every word he utters. This is what Aristotle calls ἠθικὴ πίστις, the power of convincing, and it is as true of the lawyer advocate as of the preacher, the statesman, or the prophet. The lawyer must believe in his own case, however bad it may be. This is where sometimes a good lawyer, because he is a good lawyer, fails as an advocate: he cannot argue against his convictions.

Rule 2 is this: *Never carry a scrap of paper before an audience.* Nothing destroys so much the "magnetic contact" which ought to subsist between a speaker and his audience, as reading or reference to papers. Spontaneity is the essence of successful speaking. The late Bishop of Lichfield's advice to his curates on preaching was: "Write your sermon, read it over three times, throw it into the fire, and preach what you remember of it," — a very good recipe for a speech as well as a sermon. Scarlett, the greatest of verdict winners, never prepared his speeches. He thought out his ideas, and trusted to the inspiration of the moment for the language. Had he merely fired off speeches at the jury, he would never have got on those good terms with them which led to his being called a "thirteenth juryman." An eminent judge told a friend that he once lost a case on which he felt very sure, though his successful antagonist was a man not to be compared with him as a lawyer. When asked the reason, he said: "It was very curious; I had all the law and all the evidence, but that fellow Hale got so intimate with the jury that he won the case."

It is all very well to say this, "I never carry a scrap of paper before an audience"; but what is a speaker who has not got a good memory to do — a speaker who has not the copiousness and ordered intellect of a Pitt or a Gladstone? A preacher who had relied on his own resources in this way, once got into the pulpit, but when he found himself face to face with his congregation, his ideas vanished, his mind was a blank. He tapped his forehead, but in vain; his ideas would not come. "My friends," he said, "I pity you; you have lost a fine sermon," and he descended the pulpit steps. But all have not this equanimity. A speech, on the other hand, learnt by heart may be a splendid *tour de force*, but as a speech it must be defective. It dazzles, but does not persuade. Macaulay's brilliant and highly finished orations are an instance. They fell flat in the House of Commons, as Greville tells, when a light, dashing, vivacious, impromptu speech was applauded to the echo. If, then, you must have, as most must, some mechanical aids, *plan out* — this is the third rule — *a series of a few points as simple and orderly as possible*, using catchwords which will suggest the leading thought. This method prompts the memory without overburthening it. It was Mr. Bright's method. The fourth rule is, *Plan beforehand for one good fact, and one good illustration or anecdote for each point.* This brightens a speech, and gives body to it. But the best-laid plans are liable to be disconcerted, and we

can sympathize with the dismay of the guest of the evening at an American banquet as he heard his chosen anecdotes retailed, one after another, by preceding speakers.

Rule 5 is, *Speak in a natural voice, in a conversational way.* This may be good advice for an after-dinner speech, or the discussion of a bill in committee of the House, — rhetorical rhapsodies are then out of place, — but it cannot be accepted as a general rule for speaking. It will never do for the highest efforts. The voice is everything in the orator, and to attain elevation in oratory, to touch the deeper strings of feeling, the voice must be nicely modulated; it must vary, as Aristotle points out, with the theme of the speaker; it must rise and fall, sink or swell, vibrating in unison with the orator's moods. Garrick said he would give £100 to say "Oh!" as Whitfield did, and one who heard Newman preach at Oxford could never forget the tone in which he uttered the word "irreparable." The voice is the soul of oratory. But for the genteel comedy of life a natural voice, an easy, conversational tone, is no doubt the best.

These rules are good, but they omit one rule which Aristotle places in the forefront in speaking. It is to have the goodwill of your audience. We know how the *nisi prius* advocate is accustomed to get this by administering judicious flattery to the jury, but this has to be done adroitly now, not in the Buzfuz vein, or it only disgusts. A jest is, perhaps, the best thing for putting a speaker on good terms with his audience. This was Sheridan's way. He was once asked how it was he got on so well in the House. "I soon found out," he replied, "that nine out of the ten were fools, but all loved a joke, and I determined to give them what they liked." The consequence was a glow of pleasurable anticipation, seldom disappointed, whenever Sheridan rose to speak.

"A good speech," said O'Connell, "is a good thing, but the verdict is *the* thing." It is well for the forensic orator to remember this. Scarlett, perhaps, knew better than anyone how verdicts are won, and Scarlett said, as a result of his experience, that the most useful duty of an advocate was the examination of witnesses.

THE LITERARY ASSOCIATIONS OF THE TEMPLE.

FEW things can lend a charm like that of association with great men and great events; and no associations appeal more strongly than those with the great names in our literature — the names of those who have charmed us in our hours of ease, or cast a cloak of comfort round us in our troublous times of unrest. They surround us with a fascination that cannot be analyzed, and with simple reverence we stand uncovered in the presence of aught that suggests the great man's name.

Though Hampstead Heath is, and always has been, the abode of many distinguished literary men, "The Temple," lying between Fleet Street and the Embankment, is almost as closely associated with literature, teeming as it does with the memories of many great names. Brilliantly they cluster round it, the memory of one coming so fast on the association with another that at length they seem like stars lost in each other's brightness. It has little magnificence of architecture, and though most noted for its connection with the English law, much of its interest and fame is entwined with that of English literature. The buildings, dismal and murky-looking with London fog and smoke, the worn flagstones, the rickety staircases, the sundials, the fountain, and the old-fashioned pumps, have all a share in the glory of our literature.

It was about 1327 or 1328 that the Temple buildings came into the hands of a body of lawyers from Thavies' Inn, Holborn. They took it on a lease from the Knights Hospitallers of St. John at a rent of £10 a year. That century gave two great names to our literature, Gower and Chaucer, and both of these the Temple claims as members. Had one no other information, one would have concluded from the reading of Chaucer's description of the "serjeant of law ware and wise," and of the "gentil manciple of the Temple" in the prologue to the "Canterbury Tales," as well as from the knowledge of law displayed throughout his writings, that he must have been intimately connected with the legal profession. Chaucer, it is inferred (though Chaucer's biographers, alas, do not accept the inference), was a member of the Inner Temple, for Buckley, a writer of the reign of Elizabeth, mentions a record of that society in which "Geffrey Chaucer was fined 2s. for beating a Franciscan frier in Fleet Street." Gower, too, was a student of law, and in one place refers to having met Chaucer in the Temple. Thus early commences the connection of the two societies of the Temple with literature.

From the time of Chaucer till the reign of Elizabeth, English literature can present us with few great names, and the records of the Temple are equally barren. Thomas Sackville, Earl of Dorset, the lofty, melancholy, and moral author of the "Mirrour of Magistrates," became a member about the beginning of Elizabeth's reign. He was the founder of the Dorset family, and as Walpole called him, "the patriarch of a race of genius and wit." He was an intimate friend of Spenser, who has dedicated a sonnet to him, and he is further connected with literature by the fact that the "Scholemaster" of Roger Ascham was written for his children.

The Temple, too, has its share in the Elizabethan dramatists, as it can number among its members Massinger, Ford, and Beaumont. Of the personal life of Massinger we know very little; but from old editions of his works we learn that some of his plays were composed for the society of the Inner Temple, of which he was a member,

and that they were performed in the hall of that Inn. His tragi-comedy, "The Picture," was dedicated "To my honoured and select friends of the Honourable Society of the Inner Temple." His contemporary, Ford, the great painter of unhappy love, was also a member of the Inner Temple. He does not appear to have depended on his literary work for his livelihood, but rather to have followed diligently the employment of the law. Beaumont, who collaborated with Fletcher in those works which vie with Shakespeare's in tragic and romantic eloquence, belonged to the Middle Temple. Both were of high social status, Beaumont being the son of a famous judge and Fletcher the son of a bishop. These three are the contributions of the Temple to an age of great dramatists.

Though Evelyn the diarist was a member of the Middle Temple, and lived at 5 Essex Court, the other great diarist of those days, Samuel Pepys, cannot be claimed. Both, however, mention the Temple in their writings. In 1642, Evelyn tells us, he was chosen comptroller of the Christmas revels at the Middle. He was then twenty-two years of age. Many years later he writes: "bent to see the revels at the Middle Temple, an old but riotous custom, which hath relation neither to virtue nor to policy." Pepys tells us of an amusing incident which happened in 1669. "My lord mayor being invited this day to dinner at the Reader's Feast at the Temple, and endeavoring to carry his sword up, the students did pull it down, and force him to go and stay all day in a private councillor's chambers, until the reader himself could get the young gentlemen to dinner. And then my lord mayor did retreat out of the Temple with his sword up. This did make great heat among the students, and my lord mayor did send to the king, and also I hear that the drums did beat for the train bands; but all is over, only I hear the students have resolved to try the charter of the city."

"Honest Tom Southerne," the first to hold up to execration the slave trade, and the author of "The Fatal Marriage," was entered as a student of the Middle Temple in 1678. He soon deserted the law for the profession of arms, and is said to have been present at the battle of Sedgemoor. Congreve, the comrade of Swift at Kilkenny school, became a member of the Middle Temple when he came to London, but, like Southerne and Rowe, soon forsook law for literature, and became the darling of society. Rowe, the author of "Jane Shore" and "The Fair Penitent," entered the Temple in 1691. The study of law, however, had little attraction for one of such good presence and lively manners; and on his father's death in 1692 he betook himself to society and literature, and enriched our vocabulary with his "gallant, gay Lothario." Fielding, the novelist, had some experience of the world before he joined the Middle Temple in 1737, aged thirty at a time when he seemed to have to choose between being a hackney coachman and the career of a hackney writer. The record of his entry is as follows: "1 Nov^ris. 1737. Henricus Fielding de East Stout in Com. Dorset, Ar., filius et hæres apparens Brig. Gen^lis: Edmundi Fielding admissus est in Societatem Medii Templi Lond. specialiter et obligatur cum," etc. He is said to have studied vigorously, and often to have left a tavern late at night to abstract the abstruse works of authors in civil law. While a student he gave his aid in editing a periodical called "The Champion" and it is probably of this that Thackeray was thinking when he writes of Fielding, "with inked ruffles and a wet towel round his head, dashing off articles at midnight, while the printer's boy is asleep in the passage." After his call he regularly attended the Wiltshire sessions; but he did not succeed, though he appears to have made many friends among the lawyers, as the list of subscribers to his "Miscellanies" shows. Perhaps it was this connection with law which gave him some

claim in 1748 to be appointed a justice of the peace for Westminster.

Cowper the poet entered the Inner Temple as a student in 1748, and was called in 1754. He was much averse to his profession, and longed for country life and repose. His necessities, however, compelled him to follow his calling to some extent, and subsequently he was made a commissioner of Bankrupts and a clerk to the Committee of the House of Lords. Like Beaumont, he was of legal descent, his grandfather having been Spencer Cowper, a justice of the Common Pleas.

Of the famous literary Irishmen of the last century, Burke, Sheridan, Moore, and Goldsmith were members of the Middle Temple. Burke joined in 1750, but his health was weak, and he seems to have spent much of his time traveling about in company. He was never called to the bar, for his distaste for the study of law led to his rejection of the profession for which he had been destined by his parents. It is said that this angered his father so much that he withdrew his allowance of £100 a year. When in London, Burke always resided about the Temple, and in 1756 we hear of him lodging above a bookseller's shop at Temple Bar. Sheridan and Moore, who had been together at the school of Mr. Samuel Whyte, in Dublin, were both members of the Middle Temple, but forsook law for literature. It was the success of the "Odes of Anacreon" that led Moore to take this step. One cannot but remark how often success in literature has turned aside the ambition for legal honors. It would seem that the young aspirant for fame takes hold of that which first holds out a hand to him. Moore's nominal connection with the legal profession may have stood him in good stead, for he was made Registrar of the Court of Admiralty in Bermuda. "Poor Goldy," the kind-hearted and sympathetic poet and essayist, first entered the walls of the Middle Temple in 1763. Here he lived, here he worked, here he died, and, by the north side of the church, a plain slab marks his tomb. He first lived for five years in Garden Court, and there he commenced his "Deserted Village." Forster, his biographer, writes: "Nature, who smiled upon him in his cradle, in this garret in Garden Court had not deserted him. Her school was open to him even here, and in the crowd and glare of streets but a step divided him from the cool and calm refreshment. Amongst his happiest hours were those passed at his window, looking into the Temple Gardens . . . . as there he sat, with the noisy life of Fleet Street shut out, and made country music for himself out of the noise of the Old Temple rookery." He removed to No. 2 Brick Court in 1768, and there he lived until 1774, the year of his death. "I have been," says Thackeray, "many a time in the chambers in the Temple that were his, and passed up the staircase which Johnson, Burke, and Reynolds trod to see their friend, their poet, their kind Goldsmith; the staircase on which the poor women sat weeping when they heard that the greatest and most generous of men was dead behind the black oak door."

To the same coterie of the residents of the Temple belonged Johnson and Boswell. They lived in the building of the Inner Temple. "Dr. Johnson's Buildings" still bear testimony of the great lexicographer's residence, where many distinguished persons visited him in his untidy rooms. We can imagine how, many a time, with his greasy old wig all awry on his head, and his stockings and slippers as slovenly as usual, he would drag himself, with Boswell by his side, across Hare Court to visit Goldsmith. And as easily can we imagine all three wending their way in the dark evenings to the "Mitre Tavern," the famous resort of that jovial company. Boswell lived in Farrer's Buildings, at the entrance to Hare Court, and it is said to be here that he first met Johnson, who found in him a patient listener to his mighty sentences.

No one is more embued with the spirit and culture of the Temple than Charles Lamb, the charming essayist. He was born one year after Goldsmith's death, in Crown Office Row, in the Inner Temple, facing the gardens, and lived at a later date in Inner Temple Lane. Whatever he may owe to the Temple, he has amply repaid in his essay, "The Old Benchers of the Inner Temple." In it he has unfolded the influence on his mind of the surroundings of his childhood in a way that suggests "how fit it was that he should have been planted there, a rare growth, nourished by the rich soil of the past; in the one place in all London where everyday life yet keeps something like a saving grace of antiquity." And he tells us that no verses were repeated to himself more frequently or with a more kindly emotion than those of Spenser, beginning: —

Where now the studious lawyers have their bowers,
There whilom won the Templar Knights to bide.

He has given a place in English literature to the sundials, with their moral inscriptions, seeming coevals with that time which they measured, and to take their revelations of its flight immediately from heaven, holding correspondence with the fountain of light. What a dead thing is a clock, with its ponderous embowelments of lead and brass, compared with the simple, altar-like structure and silent heart-language of the old dial! The Temple fountain, too, is one of his sweetest memories, "which I have often made to rise and fall, how many times to the astoundment of the young urchins, my contemporaries, who were almost tempted to hail the wondrous work as magic."

Two great names of more modern times will always be associated with the Temple, from their having immortalized it in their works, namely, Thackeray and Dickens. Thackeray began to study law in the Temple about 1831, when he was twenty years of age, for we find that a note of his, dated Hare Court, Temple, Dec. 16, 1831, records that he has just finished "a long-winded declaration about a mortgage." There is no other mention of his connection with law, though one of his letters, in 1833, is dated from 5 Essex Court, Temple. It is strange that this address was that of Evelyn the diarist. It is not, however, Hare Court or Essex Court around which Thackeray has thrown a perennial interest, but "No. 6 Lamb's Court," the residence of Pen and Mr. George Warrington. It was here Fanny Bolton nursed Pen in his illness, and here afterwards came Pen's mother, Laura, and the major. And it was under the lamp in the Court that Fanny, after she was turned out, used to stand weeping in the evening, listening to the family making merry upstairs with her hero. It was in the room below, too, that Miss Laura amused herself with Mr. Percy Silright's books, wig, and scent bottles.

Dickens has immortalized the Temple fountain, of which he writes so delightfully in "Martin Chuzzlewit," and round which shall forever cling the romance of Ruth Pinch and John Westlock. Many a time Ruth went through the square, where the fountain is, to meet her brother, and "it was a good thing for that same paved yard to have that little figure flitting through it, passing like a smile from the grimy old houses, and the old love letters shut up in iron boxes in the neighboring offices might have stirred and fluttered with a moment's recollection of their ancient tenderness as she went lightly by." It was here she met John Westlock, and nothing can excel the passage in which Dickens, with an exquisite touch, tells of their meeting. "Merrily the tiny fountain played, and merrily the dimples sparkled on its sunny face, as John hurried after her; softly the whispering water broke and fell, and roguishly the dimples twinkled as he stole upon her footsteps." When they met on another occasion, their steps turned towards the fountain, and when it was reached, they stopped and glanced down Garden Court, "because Garden Court ends in the gardens, and the gar-

dens end in the river, and that glimpse is very fresh and bright on a summer day."

Shakespeare has made the gardens famous by his conception (in *Henry VI*, Part I) that the quarrel which led to the Wars of the Roses took place there, the disputants Somerset, Suffolk, Warwick, and Plantagenet having adjourned thither, as "within the Temple hall we were too loud." In these gardens, too, Sir Roger and Mr. Spectator used to walk, discoursing on the beauties in hoops and patches, that hovered about on the green lawn. The hall of the Middle Temple has an unique fame, in that it is the only building now existing in which a play of Shakespeare was acted during the author's lifetime. We learn from the diary of a member of that society that on February 2, 1601, "at our feast we had a play called 'Twelfth Night, or What you will,' much like the 'Comedy of Errors,' or the 'Menaechmi' of Plautus." This performance was at the Readers' Feast at Candlemas, and there on 10th February last the Benchers and their friends held a "revel" when "Twelfth Night" was again acted, in the way it is believed to have been done in 1601.

To enter into a survey of those living writers who are members of the Temple would be a difficult task, so numerous are they. Let it suffice to say that many of those who are now among the successful in literature are claimed as members, and have felt, like Tom Pinch, the strange and mystic charm that hangs around the chambers in the Temple. The very atmosphere suggests a thought of learning and peaceful meditation, and one feels, in passing day by day where once the great ones trod, that their memories seemed to assume, as Coleridge says, "the accustomed garb of daily life, a more distinct humanity, that leaves our admiration unimpaired," and that there is thrown around this ancient home of the Templar Knights a fame as fresh as the memory of those with whom it has been associated.

CHAPTERS IN THE ENGLISH LAW OF LUNACY.

By A. Wood Renton.

I.

REFORM IN ASYLUM ADMINISTRATION.

In common with all other European countries England has reached the present perfection of her system of asylum administration by a long, a tedious, and a painful process. Visit one of her asylums now, and you will find a reign of order, harmony and peace; clean, airy, and well-aired and commodious wards; trained attendants, skilled physicians, comfortable, if not always happy, patients, an alternation of work, rest and amusements, a scientific classification of the inmates according to the nature of their maladies, and a minute and regular, though somewhat complicated, system of government inspection in full operation.

Little more than a century ago every item in this enumeration was reversed. Such asylums as existed were incommodious and unclean; their inmates were huddled together without regard to age or the character of their ailment. No curative treatment was in force; the keepers were ignorant and brutal; the patients were subjected to a regimen of "stripes, fetters and darkness," and the state was unaware of what was going on. The history of the change from this condition of affairs to the present one possesses entrancing interest for lawyers, medical men, and students of philosophy and sociology alike. We propose to trace it in this paper.

No one can read English or continental medico-legal literature from the sixteenth to the eighteenth century without being struck by the constant recurrence in its pages of several strange ideas with reference to the insane. One was that insanity is a mental disease alone. A second was that it was absolutely incurable. A third was that it came as a visitation from God on babes for sin. It is not difficult to understand *a priori* the inferences which these postulates would suggest to those who were practically concerned with the care and treatment of the insane. If lunacy was a mental disease only, if it could not be cured, if it was the outcome of Divine displeasure, there was no use in trying to cure it by ordinary pathological remedies; indeed to attempt to do so would be to incur the guilt of endeavoring to frustrate the Almighty's purposes, and the duty of the Christian was to leave the unhappy *non compos mentis* to his punishment, if not to aggravate it. When we turn from speculation and inference to history, we find these anticipations fulfilled to the letter. Instead of theorizing on the subject, let us take a few concrete instances of it, of which there is the highest authentication. They occur *passim* in the history of Bethlem Hospital and the infamous York Asylum, whose stories are worthy of a digression.

BETHLEM HOSPITAL ("BEDLAM").[1]

In 1247 Simon Fitz-Mary, an alderman and sheriff of London, granted to the Bishop and Church of the Order of St. Mary of Bethlem all his houses and grounds in the parish of St. Botolph, without Bishopsgate, to found a Priory. In 1330 the Priory erected on this site is described as a "Hospital" to collect alms in England, Wales and Ireland, but whether it was then used for the reception of the sick, or as a place of entertainment and shelter—a sense

[1] For full information, see Hack Tuke's "History of the Insane in the British Isles."

which the word "hospital" then, and long afterwards, bore — is uncertain. In 1375 Bethlem was seized by the Crown on the pretext that it was an alien or foreign priory. Twenty-five years later we read of six lunatics being confined there, and the inventory of the instruments kept on the premises for their treatment is curious — "six chains of iron, with six locks; four pairs of manacles of iron, and five pairs of stocks."

In 1547, King Henry VIII granted Bethlem to the City of London. Even before this date, however, it had become known as "Bedlam," and as a receptacle for lunatics. Tyndale, in his "Prologue to the Testament," before 1530, used the expression that it is "Bedlam madde to affirme that good is the natural cause of yvell"; and about the same time Sir Thomas More says, "Think not that everything is pleasant that men for madness laugh at. For thou shalt in Bedlam see one laugh at the knocking of his own hed against a post, and yet there is little pleasure therein."

In 1555 the governors of Christ's Hospital were charged with the oversight of Bethlem, but two years later it was united with Bridewell, subject to the jurisdiction of the citizens of London; and in the reign of George III this union was cemented by an Act of Parliament (22 George III, Ch. 77).

In the time of Henry VIII, Bethlem Hospital is described as having been so "loathsome as to be unfit for any man to enter." In the reign of Charles II, Evelyn reports that he saw patients in chains; and a century later a by no means hostile witness records that "the men and women in old Bethlem were huddled together in the same ward." By the year 1674 the original premises had become utterly unfit for the reception of their inmates, and the city granted land at Moorfields for the site of a new hospital which was completed two years later. There was, however, little change for the better in the asylum regimen. Hogarth's "Rake's Progress" gives an accurate representation of the miseries of life in Bedlam; and a poem on the famous hospital, dated 1776, contains these lines: —

> Far other views than these within appear,
> And woe and horror dwell forever here;
> For ever from the echoing roofs rebounds
> A dreadful din of heterogeneous sounds,
> From this, from that, from every quarter rise
> Loud shouts and sullen groans and doleful cries.
>
> * * * * *
>
> Within the chambers which this dome contains,
> In all her frantic forms distraction reigns.
>
> * * * * *
>
> Rattling his chains the wretch all raving lies,
> And roars and foams, and earth and heaven defies.

As late as 1815* a committee of the House of Commons appointed to investigate the condition of private madhouses in England found in Bethlem Hospital a poor lunatic named Norris secured by (1) a collar, encircling the neck and confined by a chain to a pole fixed at the head of the patient's bed, (2) an iron frame, the lower part of which encircled the body and the upper part of which passed over the shoulders, having on either side apertures for the arms, which encircled them above the elbow, and (3) a chain passing from the ankle of the patient to the foot of the bed.

YORK LUNATIC ASYLUM.

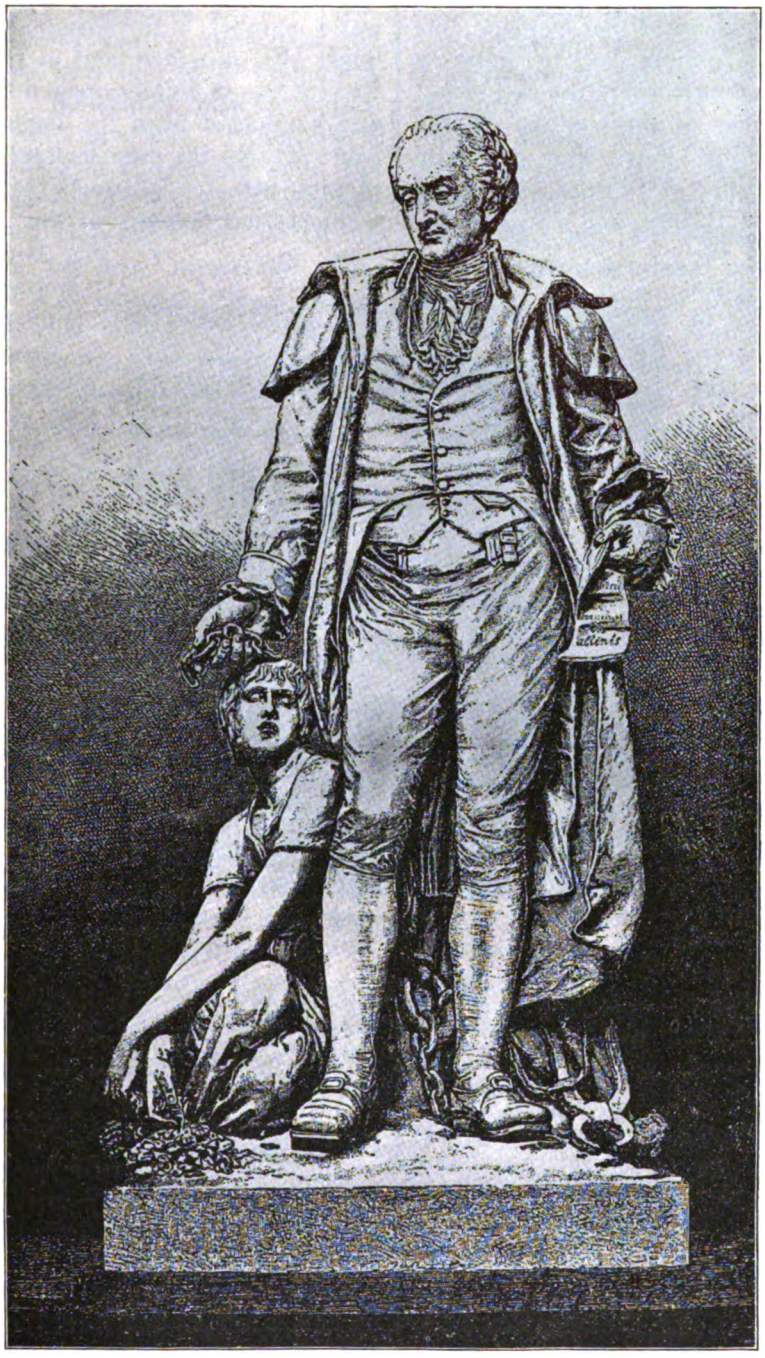
Let us take now York Lunatic Asylum. This institution was erected in 1777 to hold fifty-four patients. From 1777 to 1808 the annual death rate was nine per cent. From 1808 to 1814 it was twenty per cent. A controversy into which the authorities of this asylum indiscreetly plunged with the superintendent of the York Retreat, of which more anon, and several other circumstances, directed the attention of the public and the legislature to their proceedings and a party committee was appointed to inquire into the way in which this establishment was carried on. This committee reported "(1) that the asylum was overcrowded, (2) that opulent

* What was practically a third Bethlem was subsequently erected under an Act passed in 1810.

ORIGINAL BUILDING OF THE RETREAT, YORK. INSTITUTED 1792.

patients and private patients of the physician were admitted and on paying perquisites to the officials received careful attention to the neglect of the poorer patients, (3) that the asylum was in a state of extreme filth, and (4) that there was an entire absence of discipline." A few extracts from the report of this committee may be of interest. "No official visits were paid; no one except the governor could enter the asylum without permission from the physician. The steward, a man of eighty-two years of age, who had full powers over every servant in the house, lived a quarter of a mile from the asylum and was often prevented by infirmity from visiting it in the winter time. An inferior male keeper was intrusted with the key of the beer and bread. The apothecary, Mr. Atkinson, claimed no authority, and the authority of his wife was partial and contested. The back door was never locked and the servants might and did go out night and day. They took the cast-off clothes of the patients when they considered them to have been worn a sufficient time." "On the night of December 28, 1813, when a detached wing of the asylum was destroyed by fire, the physician was away attending a patient at a distance from York; the steward was in his house; the apothecary and his wife the housekeeper had gone out to spend the evening. Of the four servants left in charge of one hundred and twenty male patients one had left a fellow servant to lock them up, and was absent. His fellow servant had put his patients to bed a little before the usual hour of eight, that he might go to a dance; the third attendant was old and asthmatic, and the fourth alone was able to render any competent assistance." Again: "In the asylum investigations concealment appears at every step in our progress. Three hundred and sixty-five patients have died; the number is advertised two hundred and twenty-one; a patient disappears and is nevermore heard of—he is said to be 'removed'; a patient is killed, the body is hurried away to prevent an inquest. The public cry out that a patient has been neglected. There is a levy *en masse* of responsible governors to quell the disturbance and to certify that the patient has been treated 'with all possible care, attention and humanity.'"

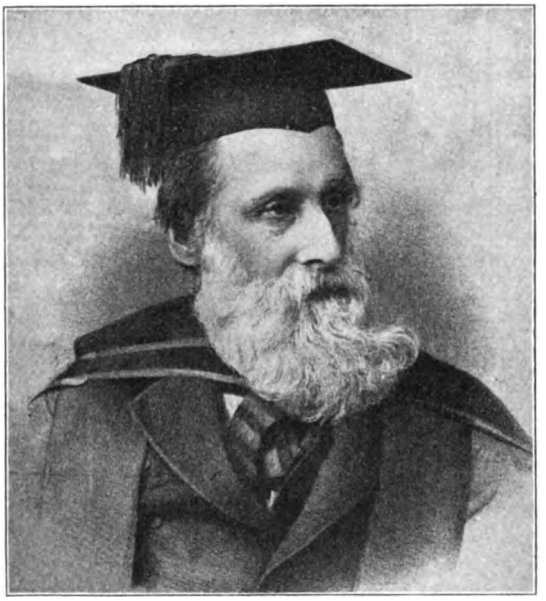
A committee of investigation desire to be shown the house. Certain cells in an extreme state of filth and neglect are omitted to be pointed out to them. The governors examined the accounts. There are considerable sums of which neither the application nor the receipt appears. The servant's books are inquired for. In a moment of irritation (?) he selects for the flames such as he thinks it not expedient to produce. And yet every circumstance of concealment is imputed by some to mere accident, and every attempt to tear off the mask and exhibit the asylum in its true character is stigmatized as a libel or an indelicate disclosure. The last evidence as to the state of matters in York Lunatic Asylum with which we shall trouble our readers is contained in a speech delivered by Lord R. Seymour in the House of Commons on June 17, 1816. "Four cells," said his lordship, "each only eight feet square, were accidentally discovered though they had been some time concealed from the visitors. In these four small cells thirteen females were obliged to sleep every night completely covered with filth and nastiness, and the very holes through which the air was admitted were nearly filled with filth which the unfortunate women had no other way of getting rid of. In this house, too, it was discovered that the male keepers had access to the female patients, the consequence of which was that two patients, who bore good characters before they went into the asylum left it pregnant, the one by the principal keeper, the other by a patient." It appears, by the way, that this keeper was not only not dismissed, but continued to enjoy the confidence of the governors and on his ultimate resignation received from them a testimony of their "approbation of his conduct during a service of twenty-six years."



PHILIP PINEL.

LUNACY REFORM IN ENGLAND.

It is generally assumed that England, like her continental neighbors, owes her entry on the paths of lunacy reform at the end of last and the beginning of this century to the influence of Phillipe Pinel, who gradually abolished the régime of "stripes, fetters and darkness" at the Bicêtre, and whose statue still confronts the tourist at the gates of the Salpêtrière in Paris. This is, however, a mistake. Our present system of asylum administration is of purely English origin. The writings of Swift and Defoe did something to create a public demand for lunacy reform. But the energizing impulse came from William Tuke, the founder of the York Retreat, and the grandfather of Dr. Hack Tuke, one of the most distinguished alienists of the present day. In 1791 the friends of a patient who was confined in the infamous York Lunatic Asylum, of which we have already given a sketch, desiring to visit her, were refused admission, and suspicion was aroused as to the treatment to which she was being subjected. The incident was brought to the knowledge of William Tuke, a prominent citizen of York, and in conjunction with a spectacle which he witnessed in St. Luke's Hospital, London, of lunatics lying on stones and in chains, it filled him with an ardent desire to erect an institution where nothing should be concealed, and where patients should be treated with consideration and kindness. He brought the proposal before the Society of Friends, of which he was a member, in the spring of 1792. The funds were provided, and in 1796 the York Retreat was definitely opened. The Retreat was conducted from the beginning on the principle that the utmost practicable degree of gentleness, tenderness and attention to the comforts and feelings of the insane was, in the language of the "British Review," "in the first place due to them as human beings, and in the next place infinitely the most promising means of effecting their recovery." Mechanical restraint was reduced to an altogether subsidiary place in the regimen of the asylum; and the emotions which the news inspired in the breasts of patients were well described by an unfortunate man who had nearly lost the use of his limbs from being chained in another asylum and who, on being asked by his friends after a short residence in the Retreat what he called the place, exclaimed, "Eden, Eden!"



DR. HACK TUKE.

In 1813 Mr. Samuel Tuke published a "Description of the Retreat." This volume was regarded as an attack upon the York Lunatic Asylum. A letter in reply to it, signed "Evigilabor," but really proceeding from the superintendent of that institution, appeared in the papers. A long and heated correspondence followed. Then a charge of illtreating a patient was made against the superintendent of the York Asylum by Mr. Godfrey Higgins, a magistrate. The select

committee above mentioned was appointed, and the English legislature entered upon a consideration of the question how the proper care and treatment of the insane was to be secured. We cannot trace the legislation that followed in detail. Practically it proceeded upon two converging lines, the one relating to jurisdiction in lunacy, the other to lunacy administration. With the former we are not here[1] concerned. The latter pursued a somewhat uneven course. Private madhouses had already been required to be "licensed" by five Fellows of the College of Physicians. But the Fellows had no power to refuse licenses and no funds to prosecute offenders. Then a body of metropolitan commissioners with wider powers were appointed and *permissive* provision was made for the erection of county and borough asylums. At length in 1845 the present Lunacy Board, with its unpaid and paid commissioners (legal and medical) was created, and subsequent legislation in 1853, 1862, 1890 and 1891 established in its entirety the present system under which every asylum in the land is periodically visited, mechanical restraint is subjected to the most stringent regulation, persons are detained in asylums only under judicial authority, and the utmost freedom consistent with order and safety is enjoyed by all patients.

[1] In another paper we shall give an account of the jurisdiction in lunacy.

THE ENGLISH BAR UNDER A NEW LIGHT.

THE Diamond Jubilee of Queen Victoria was the occasion of a new departure by that most conservative of bodies — the bar of England. The Law and the Gospel in England have always had points of contact. The assizes, notwithstanding the malign memories which the hateful name of Jeffries has attached to the function, still open with a sermon. Once a year the judge proceeds in state to St. Paul's Cathedral to hear afternoon service, and of late years English barristers who belong to the Roman communion, borrowing a hint from the *messe rouge* which has been the initial act of the French legal year for centuries, have held a "red mass" of their own on the first day of Michaelmas sittings. But hitherto the English bar as a whole, which is preponderatingly Anglican, from the religious point of view, has taken part in no annual act of corporal worship. This reproach the Queen's Diamond Jubilee has been the means of rolling away. On the morning of Sunday, the 20th of June, two hundred members of the bar attended the thanksgiving service at St. Paul's Cathedral in their full professional costume. An account of the origin and details of this departure may prove of interest to American readers.

As everyone knows, who has followed even cursorily the progress of the recent Jubilee celebrations in England, the Queen arrested the course of her triumphal procession through the capital on Tuesday, June 22, for the purpose of a brief thanksgiving service, which was held under the auspices of the primates of England and the Bishop of London at the foot of the great steps leading up to the main entrance into St. Paul's Cathedral. This service was intended to be entirely distinct from those that were to be held within the Cathedral on the previous Sunday. But it soon became apparent that the public were confusing the two, and accordingly the Bishop of London wrote a letter to the papers pointing out that the thanksgiving service on the Tuesday was a mere episode or incident in the royal pro-

cession, and emphatically indicating that the real ecclesiastical thanksgiving service would take place in the Cathedral on the Sunday morning. This intimation at once accomplished its object, and representatives of every form of English life and activity began to approach the Dean's Chapter of St. Paul's with a view to obtaining permission to witness the spectacle at this juncture.

It occurred to a learned member at once of the chancery bar and of the House of Laymen, Mr. Digby Thurman, that there was a favorable opportunity for initiating a movement which would be a worthy expression of the loyalty not only of the bar to their sovereign but also the germ of an annual Anglican *messe rouge*. He suggested to the attorney general, Sir Richard E. Webster, that the Dean might be invited to provide accommodation in the Cathedral for a certain number of barristers at the afternoon service which is attended on the 20th of June (Accession Day) every year by the judges in state. The attorney general cordially accepted the suggestion but premised that before he moved in the matter a memorial signed by an adequate number of Queen's Counsel and outer barristers should be presented to him, requesting his intervention. Fifty or sixty representative signatures were obtained without the least difficulty, and Sir Richard Webster preferred his petition to the Dean. Unwittingly that distinguished ecclesiastic, Dr. Robert Gregory himself, gave a great impetus to the *messe rouge* idea. He invited the bar to send representatives to the morning service, at which there would be not only special thanksgiving, but a high celebration of communion after it, instead of to the more prosaic state function in the afternoon. The offer was at once accepted, and the attorney general forthwith nominated two honorary secretaries (Mr. Wood Renton and Mr. Digby Thurman) to make the necessary arrangements on behalf of the bar. A circular was issued, inviting barristers to apply for admission before a certain day and to state in their applications whether or not they desired to bring ladies with them. Within a few days no less than three hundred applications were received — Roman Catholics, Jews, Unitarians, and other leaders of Protestant non-conformity being among the applicants. Meanwhile matters had been developing at the Cathedral itself. It had become known that the Prince and Princess of Wales and other members of the royal family proposed to attend the service. Immediately there was a rush on the space at the Dean's disposal for which even the spacious premier Cathedral was unable to provide a comfortable distribution.

The governor and company of the Bank of England, royal societies of endless description, peers and peeresses, the heads of the medical profession, one and all politely but firmly insisted on seats being allotted to them, with the result that in the long run the Dean was obliged to restrict the accommodation of the bar to two hundred tickets (one hundred and fifty with, and fifty without, ladies). It remained for the secretaries to stem the torrent of applications, allot the available tickets, and satisfy unsuccessful applicants as best they might. A notice was at once inserted in the papers stating that the list was closed. But forensic impetuosity was not to be restrained by paper barriers. Written and personal applications flowed in by fifties a day and soon the list had reached the goodly number of seven hundred. Then came the distribution. The principle adopted was simple and equitable. The gates were closed against the four hundred "after-time" applicants with rigor. Among the three hundred that remained priority was assigned to Queen's Counsel and to the signatories of the original memorial to the attorney general, and then the applicants were taken in strict order of seniority, a process which included those who were called to the bar in 1876. For some days after the final allotment of tickets, however, the waves of forensic excitement continued to surge with considerable

violence, a fact which, although attended with temporary inconvenience, is full of good hope for the success of the Anglican *messe rouge*, which it is now proposed to establish. The actual ceremony in the rendering of which the bar took so prominent a part was one that will live forever in the memories of those that witnessed it.

Soon after matins (the hour for which had been altered from 10.30 to 8 A.M. to make way for the thanksgiving service) had ended, members of the bar in robes or carrying their robes in the blue or (in the case of more distinguished juniors) red bags of the bar might be seen hurrying up the steps of the Chapter House which the courtesy of the venerable Wm. Macdonald Sinclair, the Archdeacon of London, had placed at their disposal for the purposes of robing and forming the procession. Queen's Counsel arrived for the most part in their robes (they were dressed in full court costume, — long bottomed wigs and silk stockings and buckles).

Exactly at quarter to ten the procession was marshaled and before the hour had struck it had started for the Cathedral. The sight was a quaint and imposing one. First came two stewards and the secretaries with badges consisting of the arms of their respective Inns of Court, then the attorney general (Sir Richard Webster) and the solicitor general (Sir Robert Finlay), who wore richly "tufted gowns" to distinguish them from the rank and file of the Queen's Counsel who followed them, walking two abreast. The rear was brought up by one hundred and sixty junior barristers marching four abreast. The picturesqueness of the scene was enhanced by the fact that the junior barristers who held the doctorate of laws of any British university wore the scarlet robes to which their degree entitled them. In fact as well as in name it was a *messe rouge*. Every variety of robe was there, not the least curious being the close-fitting white and scarlet gown of the LL.D. degree of St. Andrew's University, worn by a gentleman who was called to the bar so far back as 1849.

At the top of the steps which lead up to the main entrance into the great Cathedral the procession was met by the Rev. Minor Canon Kelly (who was master of the whole ceremonies and deserves the highest credit for the manner in which he discharged his task) on behalf of the Cathedral authorities and conducted straight up the central aisle to the seats reserved for the bar under the dome on the right side facing the high altar. On the left side were seated the ladies accompanying members of the bar.

The spectacle was brilliant in the extreme. Every inch of space in the vast building was crowded to the uttermost. The altar and standard lights were burning. Behind them rose the lofty reredos with its central crucifix and images of Our Lady and St. Joseph. In a specially reserved seat within the sacrarium sat Archbishop Antonios of Finland, who was sent by the Holy Synod of Russia to represent the Russian Church at the Jubilee celebrations and the Lambeth Conference, and whose presence testified with marked emphasis to the rapidity of the strides with which the Eastern and Anglo-Catholic churches are advancing towards intercommunion.

Suddenly, however, reflections on matters of this kind were arrested by a new sensation. From the corridors sounded forth the first notes of the processional hymn ("O King of Kings, whose reign of old"), and in a few minutes the choir filed slowly up the main aisle into the chancel, followed by the Dean and Canons, the Bishop of London, the Archbishop of Canterbury, before whom the processional cross was carried, the Prince and Princess of Wales and the other members of the royal family.

The thanksgiving service was commendably brief. It consisted only of a few prayers and antiphons. Then the Bishop of London preached a sermon of unusual length on the text, "Honor all men; love the brother-

hood; fear God; honor the King." Dr. Creighton is one of the most accomplished ecclesiastics in the Anglican church. His "History of the Papacy" is one of the few great historical treatises which the past quarter of a century has produced, and in his short tenure of the onerous episcopate of London he has shown himself to be a most competent administrator. Moreover, while the primary function of a bishop is not to preach but to govern, Dr. Creighton has taken a high place among Anglican preachers, although without rising to the supreme level occupied by men of the stamp of Father Stanton of St. Alban's, Holborn. His sermon on Jubilee Sunday was rather under his ordinary standard, however, although one brilliant passage in which he traced the gradual development of the warrior into the constitutional sovereign, as the various functions of government became specialized and decentralized, must be excepted from this criticism.

At the close of the sermon the Bishop proceeded to his throne in the choir and assumed his cope and miter and then the clergy grouped themselves round the altar, after which the choir sang the *Te Deum* to music which was specially composed for the occasion by Dr. Martin and which is universally regarded as a contribution of permanent value to English musical literature. A high celebration of communion to which the Prince and Princess of Wales remained (of course without communicating) followed, the Bishop being celebrant, and the historic service ended with the benediction pronounced by the Bishop, holding his pastoral staff in his left hand.

JOAN OF ARC AND BLUEBEARD.

I.

By R. Vashon Rogers.

WHAT a pair! How different in life, and yet how alike in their death! Companions for a time — toiling for their country side by side, each honored by the king of France, each permitted to quarter on a coat of arms the royal fleur-de-lis, — soon parted: each falling beneath the Church's ban and dying the selfsame terrible death. The maid, and the debauchee. The peasant born, the scion of the noblest stock in France; the untutored girl, the man of unusual culture and deep learning! Heroes both; each tried, condemned, executed by the same church for the same crime, nominally; yet the one rising Phœnix-like from her ashes, with memory adored and fame sanctified; the other ever detestable and detested. Legends and stories innumerable, resting like a halo of light and honor about her life and visions, the Maid of Orleans, — called by her soldiers "The Saviour of France," "Victory's Sweetheart," "The Page of Christ," "The Daughter of God," and to-day well-nigh deemed a saint. Legends and stories innumerable, resting like black and lurid clouds around his deeds and works, Gilles de Rais,— Marshal of France, the Bluebeard of fable and tradition.

All know of the birthplace and lineage and early life of Joan of Arc; ignorant of books was she, but skilled in caring for the kine and in the mysteries of the needle; strong in frame and firm in mind, yet deeply religious and submissive to the mystic voices of her heavenly visitants, St. Catherine and St. Margaret, and the glorious Archangel Michael.

De Rais, seven years her senior, was of the noble stock of Montmorency and Craon, allied with all who were illustrious in the west of France, the head of the baronage of Brittany. Wealthy, possessed of broad acres, early married to a great heiress. At sixteen, already a valiant knight. A man of unusual culture, with restless curiosity and search for the knowledge to be found in books, delighting in rich bindings and illuminations, passionately fond of music and the drama, yet of a fiery nature which ran riot, he grew up devoured with the wildest ambitions, abandoned to sensual excesses of every kind and with passions unrestrained and untamable.

Let us glance at the bright and pleasant pictures we possess of the low-born maid and the knightly cavalier in the times when their stars were in the ascendant. France was lying helpless, hopeless, well-nigh in despair, beneath the conquering hand of England; her treasury was exhausted, the soldiers unpaid and disbanded, the king, — in some strong castle far away from the enemy, spending his days in idleness and his nights in debauchery, or both in melancholy broodings over his woes and meditating the desertion of his realm. For three generations England had been making France a battle-ground; when, early in 1429, the English army besieged Orleans, intending to force the Loire and drive the unhappy Charles still further back, all seemed to promise well to the English arms, the people of Orleans had well-nigh abandoned all hope. At the end of April, however, relief came, and at the head of the succoring army rode a girl of eighteen, well proportioned, above the common height of women, with dark, expressive, melancholy eyes (which exercised an indescribable charm), a lofty forehead, small hands and feet, her voice powerful yet of great sweetness; her manner possessed dignity and grace, repelling familiarity, yet softening and subduing the

boldest soldier; vigorous, agile, graceful, she sat on her white war-horse straight as a lance, clad in armor of the finest steel, plated with silver and ornamented with many designs, and polished like a mirror; upon her head tossed the plumes of a helmet, her sword had lain for ages beneath the altar of St. Catherine at Fierbois, and its whereabouts had been revealed to her by those strange voices that had urged her to come to the rescue of her king and country; before her went her pennon, an angel offering a city to the Blessed Virgin. Beside this wondrous maid rode Gilles de Rais, specially commissioned by the king to watch over the safety of Joan, together with many other noble and valiant lords and esquires, captains and soldiers. Her presence was a very savor of life unto life to her fellow countrymen, and a savor of death unto death to their foes; she was as the cloud in the wilderness, a light to her friends, a threatening portent to her enemies. Courage sprang up in the hearts of the French, the English knees waxed faint. Though she was within two bow-shots of the English siege-works she was allowed to pass into the beleaguered but now rejoicing city. Quickly the siege was raised; to the rescued Orleanists she was an angel of deliverance, to the discomfited Bedford she was "a Desciple and Lyme of the Fiende, that used fals enchantments and Sorcerie."

From victory to victory she lead (urged, we should perhaps say) the Dauphin's forces, and at length dragged, well-nigh against his will, the irresolute Charles to Rheims to be crowned. In the grand old cathedral of that city she stood beside the altar during the coronation, while her much-loved prince was being anointed with the holy oil; her banner, emblazoned with the image of the Father throned on the clouds, — the world in His hand, angels at His feet presenting lilies, and bearing the simple legend "Jesus-Marie," was in her hand. The faithful Gilles de Rais was at her side.

A few weeks later, when her sun was beginning to go down at noon, Joan and the Marshal Rais were in the foremost ranks at the unsuccessful assault on Paris, and though her standard-bearer was shot dead beside her and she herself wounded in the leg, and night was fast coming on, she declined to retreat and stoutly refused to leave the ditch where she had planted herself, and had to be carried off by some of her comrades by main force.

On the 5th of May, 1430, the Maid was taken prisoner while leading a sortie to relieve the town of Compeigne, which was invested by the Duke of Burgundy's followers. The Bastard of Vendome, a follower of Jean de Luxembourg, was her captor. Great were the rejoicings among the Burgundians and English. According to the rules of war she might have been ransomed by her friends. The English resolved to prevent this at all hazards. To them she was a witch who had triumphed by her sorceries; they must lessen her influence and have her condemned by the Holy Church and the Inquisition for her sins in defeating them through the aid of the devil; the charge of witchcraft has sent hundreds of thousands quickly to the grave. Pierre Cauchon, Bishop of Beauvais, in whose diocese the poor Maid had been captured, was chosen by the English council to obtain her from her actual captors; he demanded her that she might be tried for sorcery, idolatry, invocation of the devil, and other matters involving the true faith. Although, he said, owing to these charges against her she ought not to be accounted a prisoner of war, still he offered £10,000 for her. (The price at which, according to the custom of France, a king or royal prince could be bought from his captors.) John of Luxembourg agreed to sell Joan for this if the amount were paid in cash and an annuity likewise secured to the Vendome. It was not until the autumn that the money was raised by the estates of Normandy and paid over. Meanwhile, although to their eternal disgrace be it spoken, neither Charles, to

whom Joan had given a crown, nor his generals, whom she had led to victory time and again, did aught to succor or rescue her; twice, however, had she well-nigh escaped her English enemies. Once she succeeded in bolting her guards into her cell at Beaulieu, but, alas, was spied and caught by the porter; and afterwards, in despair, when she knew she was to be handed over to the English, she jumped from the wall of Beaurevoir. The shock stunned her, and when she came to her senses again her enemies had her safe.

Joan's first experience of the law was when, at the early age of sweet sixteen, she appeared as a defendant in a breach of promise case. An honest citizen of Toul had sought her in marriage, and her parents favored his suit; but her "heavenly voices" told her that God had destined her for higher things than to be wedded to a clown, so she was resolved to remain a virgin until her work was done, and refused to listen to her suitor. He, backed by her parents, cited her before the judge at Toul, to compel her to fulfill the marriage promises made, as he asserted, years before. This "marvelous child" (as the judge called her), was nothing daunted, but trudged bravely the seventeen miles from her village home in Domremy to the place of trial, whither her neighbors had flocked to hear the evidence. (Such trials were as interesting to the men and women of the fifteenth century as to those of the nineteenth.) Joan's "voices" promised her success, so she had no counsel to help her; she herself cross-questioned the too ardent lover and riddled to pieces his evidence of the betrothal and promise of marriage, then gave her own testimony under oath, modestly, calmly and easily. Counsel for the poor man sought to address the court, but the judge refused to listen, dismissed the case and complimented the Maid upon her wisdom and tact.

(*En passant* we may say that actions for breach of promise or contract of marriage brought by the deluded man against the designing woman were not unknown in England in those early days. The records tell of a poor law-student who complained that he was asked to take to wife one Elizabeth Morgan, with whom he should have in hand one hundred marks in ready money; that upon such promises he resorted to the said Elizabeth to his great cost and charges, and delivered to her many tokens; and he sought the aid of the court to have these tokens back again, and to have full recompense for the great cost and charges to which he had been put through his manifold journeys taken to visit her. Men can never hope for justice when plaintiffs in such actions, unless and until the judges are women, the counsel, Portias, and the jurymen are all Graces and Muses.)

Speedily after the English had obtained her, poor Joan was taken to Rouen for trial. Here she was confined in a tower of the citadel, in a room but feebly lighted by a slit in the twelve-foot wall just wide enough to shoot an arrow through. Her enemies, not content with her being shut up within this somber mass of masonry, and watched by half a dozen common soldiers, had her feet chained and fastened to her bed. An iron cage was provided in which to keep her sitting upright chained by neck, hands and feet, but it is not in evidence that this dreadful machine was used. She was ever subject to the taunts and insults of her watchers; at times assaults were made upon her honor, and once the English Earl of Stafford drew his dagger to kill her. Again and again she pleaded to be taken to an ecclesiastical prison, where at least her honor would be safe. The wretched girl deemed the male attire she wore her best protection against outrage.

Cauchon claimed jurisdiction over Joan, as she was taken prisoner within his diocese. Strictly he could only sit in judgment in his own territory, and this he dare not attempt as Beauvais was in the hands of the French

party. After considerable hesitation, the Chapter of Rouen issued letters authorizing Cauchon to proceed to trial in their city. The English thereon handed her over to the tender mercies, and they were indeed cruel, of Cauchon; the proclamation doing so (dated January 3, 1431) recited the crimes of which she was accused and stated plainly that the English Government would retake her into their custody in case she should not be convicted of the aforementioned crimes. Her fate was decided, die she must. Cauchon had a number of assessors, theologians and jurists associated with him; sometimes forty or fifty were present at the proceedings, at other times not more than half a dozen, many were from the University of Paris, others local churchmen. Notwithstanding that the judges were legion, the Inquisitor General of France had to be present himself or by deputy, or else all the steps taken would be null and void. The Inquisitor himself was otherwise engaged, and his deputy had a very tender conscience, and weeks passed ere he considered himself at liberty to sit at the trial. He took the point that he was only commissioned to act in the diocese of Rouen; that while geographically Joan's trial was being held in that diocese, still juridically it was being held in the diocese of Beauvais, and there he had no authority.

Joan's trial (according to the custom of the land) consisted of two parts: first, the inquest, or *informatio præparatoria*, a general and wide-reaching investigation and search for evidence, the material found being used in framing the indictment, and then in proving it; secondly, the trial proper, or *processus ordinarius*, when it was considered whether the evidence was sufficient to prove her guilty. She first appeared before her judges on January 9, 1431, when she was charged with dealings with familiar spirits of a wicked nature, with magic, with dancing round a fairy-tree in far-away Domremy days, with having a sword and banner of supernatural nature, with the use of charms, with wearing men's clothes, using unwomanly exercises contrary to Holy Writ, with attacking Paris on a high festival, with attempting her own life at Beaurevoir, with having stolen a bishop's horse, with pretending to work miracles, especially bringing back a child to life.

Seven weeks had passed since her first appearance, when she was brought again before her judges to be questioned at length upon these charges. Her irons were taken off. She looked pale and shabby as she, a simple, truthful girl of nineteen, stood before abbots, priors, canons, doctors of the law, to answer for her life. Her shrewdness, adroitness, good humor, wit, were wonderful. Although by the law of the Church, being under twenty-one, she was entitled to counsel to aid and advise her, none was allowed to help her; her "voices" were her only counselors. She obstinately refused to be sworn to unconditionally answer the questions put to her. "I do not know what you will ask me; perhaps it may be about things I will not tell you," said the Maid; and at last her judges had to be satisfied with her oath to reply to all questions touching her faith and matters bearing upon the trial, and nothing else. She was questioned at tedious length anent her early life and associates, her knowledge of religion and faith, her voices and military career, the fairy-tree and the magical fountain, her dress, and why she would not marry. At times, half a dozen questions were hurled at her at once. "My good Lords, one at a time," would be the answer. "When St. Catherine and St. Margaret came to her did they speak one after another, or both at once? how did Joan know them apart, were they dressed alike? were they of the same age, did they wear their hair long, had they arms and legs, did they wear ear-rings? was there an angel above Charles' head when she first saw him at Chinon?" These and such like questions were flung at her for six long days. Many

a time she answered these fools according to their folly. One Beaupere, a learned doctor of theology, asked, "Did St. Margaret speak English?" "Why should she, since she is not of the English party?" was the quick response. "Did these saints hate the English?" "They love those whom the Lord loves and hate those whom He hates," answered Joan. "Does the Lord hate the English?" "Of the love, or the hate of the Lord for the English I know nothing. I only know that they will be put out of France, save those who are killed here." "Was St. Michael naked?" he asked. "Do you think the Lord has not wherewith to clothe his angels?" she rejoined. "Did he have hair?" asked the learned theologian. "Why should it have been cut off?" answered Joan. Beaupere pressed for information as to the outward state of the Archangel's head till the girl replied that she knew naught about it. "Joan," said the Bishop, "do you believe yourself in a state of grace?" This seemed a poser, for if she should answer, "Nay," she admitted that she was not an instrument such as God would use; if "Yea," she committed the mortal sin of pride and thus belied her assertion; with heavenly wisdom she replied, "If I am not, please God may make me so. If I am, may God so keep me."

Now, Cauchon had a committee of the assessors appointed to make a digest of the answers given. When this was done he named another small committee with whom he went and baited the poor girl in her miserable cell, traversing ever in a circle, asking the same questions about her voices, and her dress; Would she give it up? "Promise me that I shall hear mass if I dress like a woman, and I'll answer," was her frequent reply.

A wretch, called Loiseleur, was often in her cell. A canon, a chum and tool of Cauchon, he feigned himself her friend and led her on to talk of various matters. The bishop had intended the notary to listen in an adjoining closet and take down what Joan said, but the lawyer was not as black as the bishop or the canon, and refused to do such foul work.

At last she was pressed if she would submit to Holy Church as to whether she had been right or wrong. To her the Church appeared to be Cauchon and his associates; how could she give the lie to all her life by submitting to their judgment? After considering this for some days she offered to submit to the Lord, who sent her, to our Lady and to all the blessed Saints in Paradise. Unfortunately not one of these were among her judges, and few of her judges were ever likely to be with those holy ones. Cauchon explained the difference between the Church triumphant (to which she wished to appeal) and the Church militant, to which he and his friends belonged. "Would she submit to the Pope?" "Take me to him and I'll answer." She would not submit to the Church if it should order her to abandon what the Lord had told her to do. This she would submit only to God.

On the 18th of March the preliminary inquiry was finished. All she had said was read over to Joan and she acknowledged the general correctness of the report. Estivet, the prosecuting attorney, now prepared a digest of it, and this made what we would call the indictment. Cauchon pronounced it sufficient to put her on her trial. There were seventy articles, or counts, in the indictment. Some eight of these were by way of introduction and conclusion; four referred to the use of charms in her youth; six, to the wearing of men's clothes; three, to her political and military conduct; five, her arms and banner; three, her leap at Beaurevoir; a dozen, her visions and voices; one, her refusal to submit to the Church; others, her life in different places, her conduct towards her early suitor, her boastfulness, her presumptuousness and love of riches.

Nearly every count was followed by statements taken from Joan's evidence, but these statements were far from admitting the

charge; in fact, in most cases they were absolute denials. One by one, poor Joan had to answer these charges; sometimes she would refer her judges to what she had already said, at others she would seem to be wearied of the whole affair, and would say she left all to God. After many days thus spent, Cauchon, and a few assessors chosen by himself and of his mind, prepared twelve new articles, which might be called a special verdict. Facts, or what were taken as facts, were simply stated upon which the court might say of Joan, guilty or not guilty. Each article had some support from her own testimony, but was so drawn as to give as much unfavorable impression as consistent with literal truth. They referred to her stories of visions of angels and saints, to the sign given to Charles, the crown brought by St. Michael, to her recognizing saints and angels, to her belief in them, her prophecies and recognition of persons under the guidance of the voices, to her wearing men's clothing and short hair, and taking the sacrament while thus clad; they made mention of her signing her letters with a cross and the word "Jesu," or "Maria" (poor thing she could not write), of her almost breaking her parents' hearts by leaving her home and promising Charles his kingdom, saying that she did all by command of God; of her leap for life and liberty from Beaurevoir, of her assertion that St. Catherine and St. Margaret had promised her paradise did she preserve her virginity, that these worthy saints spoke French and not English; her veneration for her celestial visitants, and belief that they came from God, as she believed in Christ and his passion, and her refusal to obey the command of the Church, if contrary to the pretended command of God through her voices. Copies of these articles were submitted to fifty-eight learned experts, besides the Chapter of Rouen and the University of Paris, and they were asked to say if the words of Joan appeared to contradict the true faith, Holy Scripture or the decisions of the Church, or did her acts appear scandalous, rash, seditious, criminal, immoral or offensive in any way.

Weeks passed ere the decisions were received from all those consulted. Meanwhile there was no peace for the poor victim; sick though she was in body and mind, still Cauchon and his satellites were continually visiting her cell, worrying her over the question as to whether her voices were those of saints or devils, as to her dressing like a man, her obstinacy in refusing entire and absolute submission to Holy Church.

The Chapter of Rouen deemed her a heretic because she would not submit, and nearly all the persons consulted said she was guilty; still the University remained silent. Now Cauchon wanted to secure her submission that she might appear to the world as a self-confessed impostor or witch. He thought to obtain this by rousing Joan's fears. He had her brought into the donjon of the castle, where stood the rack and other implements of torture. He asked her to tell the truth on those matters about which she had lied under her examinations, and told her that the men who stood by were ready to put her to torture so as to bring her back to the ways of truth and salvation. "In truth," said the poor girl, "if you tear me limb from limb, and make my soul leave my body, I will tell you nothing but what I have told you already, and if I shall say anything else hereafter, I will always declare that you made me say it by force." Her voices told her to leave all her deeds to God. She was taken back to her wretched cell, the dread of the rack being now added to her other pangs. A few days after, the Holy Bishop submitted to thirteen of the assessors whether or not torture should be used. Fortunately for the reputation of her judges only three voted in favor of it. The spy who had wound himself into the confidence of the Maid advised that it would be well to torture her for the healing of her soul!

Do not let us blame the Inquisition alone for the use of these hellish means of making the poor accused testify against himself. Tor-

ture was used in ancient Rome,—the rack, leaden balls, barbed hooks; in England, the rack, the scavenger's daughter, the iron gauntlets, the cell "little ease," even in Elizabeth's days. In Scotland, the rack, the thumb-screw, pilniewinkie, the boot, the cashielaws, the long vines, the narrow bore. Spain, France, Italy, all had their peculiar and national modes. The ingenuity of man was exercised to the utmost to find new modes of torturing his fellow. One writer enumerates no less than six hundred different instruments invented for this fell purpose. Throughout civilized Europe Justice blinded her eyes to the writhings, and shut her ears to the groaning of her victims.

SAMUEL JOHNSON ON LAW AND THE LAWYERS.

IT has been said, says the "Law Times," that few books contain so many "good advices" as Boswell's "Life of Johnson"—a circumstance that doubtless gives the reason for the notice that Johnson still procures, and from no one more than barristers of "light and leading," in the courts. In his lifetime, Johnson may have supposed that he would obtain an unconscious forensic canonization from leading barristers in chancery, for it is certain that references to law and lawyers abound in Boswell's pages. One may be pardoned for quoting Johnson's short prayer before the Study of the Law, which, as Boswell says, is "truly admirable": "Almighty God, the giver of wisdom, without whose help resolutions are vain, without whose blessing study is ineffectual; enable me, if it be thy will, to attain such knowledge as may qualify me to direct the doubtful and instruct the ignorant, to prevent wrongs and terminate contentions, and grant I may use that knowledge which I shall attain to thy glory and my own salvation, for Jesus Christ's sake."

It is perhaps a somewhat melancholy illustration of Johnson's own saying as to the frailty of intention, that, after having contemplated a forensic course in so truly an admirable spirit, he should never have had the resolution to engage in it. It is more singular that Johnson should never have become a lawyer, since, to parody a phrase of Junius, some people are bigoted in politics who are infidels in religion. Johnson was almost a bigot in law. There he freely avowed on one occasion: "I would rather have chancery suits upon my hands than the cure of souls." Of one statute at least Johnson had a singular appreciation; he declared, "The *habeas corpus* is the single advantage which our government has over that of other countries." On the subject of the judicial functions, Johnson expressed himself frequently and freely. On the subject of judicial malversation, Boswell relates the following: "Next day we talked of a book in which an eminent judge was arraigned before the bar of the public as having pronounced an unjust decision in a great cause. Dr. Johnson maintained that this publication would not give any uneasiness to the judge. 'For,' said he, 'either he acted honestly or he meant to do injustice. If he acted honestly, his own consciousness will protect him; if he meant to do injustice, he will be glad to see the man who attacks him so much vexed.'"

Johnson made the following interesting observations on Lord Bute's establishing the judges in their places for life by Act of Parliament, instead of their losing them at the accession of a new king. Johnson said: "Lord Bute, I suppose, thought to make the king popular by his concession; but the people never minded it, and it was a most impolitic measure. There is no reason why

a judge should hold his office for life, more than any other person in public trust. A judge may be partial otherwise than to the Crown;' we have seen judges partial to the populace. A judge may become forward from age. A judge may grow unfit for his office in many ways. It was desirable that there should be a possibility of being delivered from him by a new king. That is now gone by an Act of Parliament *ex gratia* of the Crown." It is curious to note that Johnson denounced this measure affecting the judges even more vigorously than Junius. An anonymous writer, Zeno, having urged it as one of the merits of Lord Mansfield that he had made the judge independent of a demise of the Crown, Junius wrote: "First, then, the establishment of the judges in their places for life (which you tell us was advised by Lord Mansfield) was a concession merely to catch the people. It bore the appearance of a Royal bounty, but had nothing real in it. The judges were already for life, except in a demise. Your boasted Bill only provides that it shall not be in the power of the king's successor to remove them. At the best, therefore, it is only a legacy, not a gift, on the part of his present Majesty, since for himself he gives up nothing."

The following passage from Boswell reminds one of Curran's defense of Judge Johnson: "We got into an argument whether the judges who went to India might with propriety engage in trade. Johnson warmly maintained that they might. 'For why,' he urged, 'should not judges get riches as well as those who deserve them less?' I said they should have sufficient salaries, and have nothing to take off their attention from the affairs of the public. Johnson: 'No judge, sir, can give his whole attention to his office; and it is very proper that he should employ what time he has to himself to his own advantage, in the most profitable manner!' 'Then, sir,' said Davies, who enlivened the dispute by making it somewhat dramatic, 'he may become an usurer; and when he is going to the bench he may be stopped—"Your Lordship cannot go yet; here is a bundle of invoices; several ships are about to sail."' Johnson: 'Sir, you may as well say a judge should not have a house, for they may come and tell him, "Your Lordship's house is on fire"; and so, instead of minding the business of his court, he is to be occupied in getting the engine with the greatest speed. There is no end of this. Every judge who has land trades to a certain extent in corn or in cattle, and in the land itself. Undoubtedly his steward acts for him, and so do clerks for a great merchant. A judge may be a farmer, but he is not to geld his own pigs. A judge may play a little at cards for his amusement, but he is not to play at marbles, or chuck farthings in the piazza. No, sir, there is no profession to which a man gives a very great proportion of his time. It is wonderful when a calculation is made, how little the mind is actually employed in the discharge of any profession. No man would be a judge, upon the condition of being totally a judge. The best employed lawyer has his mind at work but for a small proportion of his time; a great deal of his occupation is merely mechanical.' (Boswell, loq.) 'I argued warmly against the judge training, and mentioned Hale as an instance of a perfect judge, who devoted himself entirely to his office.' Johnson: 'Hale, sir, attended to other things besides law; he left a great estate.' Boswell: 'That was because what he got accumulated without any exertion and anxiety on his part.'"

The following conversation, relating to the relative merits of actors and lawyers will be read with some interest, in view of the eminence of the characters who engaged in it, and an incident in modern history. Boswell, loq.: "You say, Dr. Johnson, that Garrick exhibits himself for a shilling. In this respect he is only on a footing with a lawyer who exhibits himself for his fee, and even will maintain any nonsense or absurdity if the case requires it. Garrick refuses a play

or a part which he does not like; a lawyer never refuses." Johnson: "Why, sir, what does this prove? Only that a lawyer is worse. Boswell is now like 'Jack' in the 'Tale of a Tub,' who, when he is puzzled by an argument, hangs himself. He thinks I shall cut him down, but I'll let him hang." (Laughs vociferously.) Sir Joshua Reynolds, loq.: "Mr. Boswell thinks that the profession of a lawyer being unquestionally honourable, if he can show the profession of a player to be more honourable, he proves his argument." Boswell's description of a lawyer as one who only exhibits himself for his fee reminds one of Junius' description of a great lawyer—"his profession sets his principles at auction, and it is reasonable that the highest bidder should command them."

Boswell details the following observation of Johnson on the appellate jurisdiction of the Lords, a question *brulante* so late as 1856: "I mentioned a reflection having been thrown out against four peers for having presumed to rise in opposition to the opinion of the twelve judges, in a cause in the House of Lords, as if they were indecent. Johnson: 'Sir, there is no ground for censure. The peers are judges themselves, and, supposing them really to be of a different opinon, they might from duty be in opposition to the judges, who were there only to be consulted.'"

At this date we read in May's Constitutional History that the appellate jurisdiction of the Lords was exercised by a single judge, Lord Mansfield, while three or four unlearned lords sat mute in the background. But they do not seem to have done so on this occasion.

On the occasion of Boswell's mentioning one who was running through an estate in Scotland, Johnson delivered some observations on the law of entail. "Entails are good, because it is good to procure in a country a series of men to whom the people are accustomed to look up to as their leaders. But I am for leaving a quantity of land in commerce to excite industry, and keep money in the country; for, if no land were to be bought in the country, there would be no encouragement to acquire wealth, because a family could not be founded there; or, if it were required, it must be carried away to another country where land may be bought. And, although the land in every country will remain the same, and be fertile when there is no money as when there is, yet all that portion of the happiness of civil life which is produced by money circulating in a country would be lost." Boswell: "Then, sir, would it be for the advantage of a country that all its lands were sold at once?" Johnson: "So far, sir, as money produces good, it would be an advantage; for, then, that country would have as much money circulating in it as it is worth. But, to be sure, this would be counterbalanced by disadvantages attending a total change of proprietors."

Johnson concluded the conversation by saying: "Why, sir, mankind will be better able to regulate the system of entails, when the evil of too much land being locked up by them is felt, than we can do at present when it is not felt."

Boswell makes the interesting observation that in Scotland entails were indefeasible, since they could not be barred by fines and recoveries, since in the kingdom of Scotland the legal fiction of fine and recoveries was unknown. Like Horace, Johnson had views as to success at the bar. But, unlike modern *lucernae juris* writing to magazines, or presiding at some convivial function, Johnson had no recipe for success. Johnson told Boswell: "You must not indulge too sanguine hopes should you be called to our bar. I was told by a very sensible lawyer that there are a great many chances against any man's success in the profession of the law; the candidates are so numerous, and those who get large practice are so few. He said it was by no means true that a man of good parts and application is sure of having business, though

he indeed allowed that, if such a man could appear in a few causes, his merit would be known and he would get forward; but that the great risk was, that a man might pass half a lifetime in the courts and never have an opportunity of showing his abilities."

Many years later Johnson thus delivered himself to Boswell on the same subject: "Sir, you will attend to business as business lays hold of you. When not actually employed you may see your friends as much as you do now. You may dine at a club every day, and sup with one of the members every night: and you may be as much at public places as one who has seen them all would wish to be. But you must take care constantly to attend in Westminster Hall, both to mind your own business, as it is almost all learnt there (for nobody reads now), and to show that you want to have business. And you must not be too often seen at public places, that competitors may not have it to say 'He is always at the playhouse or at Ranelagh, and never to be found in his chambers.' And, sir, there must be a kind of solemnity in the manner of a professional man. I have nothing particular to say to you on the subject. All this I should say to anyone; I should have said it to Lord Thurlow twenty years ago."

Boswell adds to this his own observations: "The profession may probably think this representation of what is required in a barrister who would hope for success to be much too indulgent, but certain it is that as 'the wits of Charles found easier ways to fame,' some of the lawyers of this age, who have risen high, have by no means thought it absolutely necessary to submit to that long and painful course of study which a Plowden, a Coke, and a Hale considered as requisite. My respected friend, Mr. Langton, has shown me, in the handwriting of his grandfather, a curious conversation which he had with Chief-Justice Hale, in which that great man tells him, 'That for two years after he came to the Inns of Court he studied sixteen hours a day, however (his lordship added) that by this intense application he almost brought himself to his grave, though he was of a very strong constitution, and often reduced himself to eight hours; but that he would not advise anybody to do so much; that he thought six hours a day, with attention and constancy, was sufficient, that man must use his body as he would his horse and stomach, not tire him at once, but rise with an appetite.'"

Johnson's views on legal ethics would at once be presumed to be of interest. He expressed himself on the subject with all his usual force, but without any of the bitterness of Junius. Johnson's language on this subject recalls the neat rejoinder of Cicero, in the *Pro Plaucio*, who, when he was taunted with defending men whom he knew to be bad characters, replied that he would rather that he had powers of defending men in straits than that others should avail themselves of those powers.

Boswell having asked Johnson, as a moralist, if he did not think that the practice of the law, in some degree, hurt the fine feeling of honesty, the learned doctor replied, "Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion; you are not to tell lies to a judge." Boswell: "But what do you think of supporting a cause which you know to be bad?" Johnson: "Sir, you do not know a cause to be bad till the judge determines it. I have said that you are to state your facts fairly, so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why, then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear

the judge's opinion." Boswell: "But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some degree of danger that a lawyer may put on the same mask in common life, in the intercourse with friends?" Johnson: "Why, no, sir. Everybody knows you are paid for affecting warmth for your client; and it is therefore properly no dissimulation; the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk upon his feet."

Boswell once having asked Johnson if he would not allow that there were men of merit at the bar who never got practice, Johnson replied: "Sir, you are sure that practice is got from an opinion that the person employed deserves it best; so that, if a man of merit at the bar does not get practice, it is from error, not from injustice. He is not neglected. A horse that is brought to market may not be bought, though he is a very good horse; but that is from ignorance, not from intention."

Boswell having once said to Johnson that law was a subject on which no one could write well without practice, Johnson said: "Why, sir, in England, where so much money is to be got by practice of the law, most of our writers upon it have been in practice, though Blackstone had not been much in practice when he published his Commentaries. But upon the Continent the great writers on law have not all been in practice; Grotius, indeed, was, but Puffendorf was not, Burlamqui was not."

The following discussion between Johnson and Boswell on the subject of legal morality will be read with some interest: "When we had talked of the great consequence which a man acquired by being employed in his profession, I suggested a doubt of the justice of the general opinion that it is improper in a lawyer to solicit employment; for why, I urged, should it not be equally allowable to solicit that as a means of consequence as it is to solicit votes to be elected a member of Parliament? Mr. Strahan had told me that a countryman of his and mine, who had risen to eminence in the law, had, when first making his way, solicited him to get him employed in city causes. Johnson: 'Sir, it is wrong to stir up lawsuits; but when once it is certain that a lawsuit is to go on, there is nothing wrong in a lawyer's endeavoring that he shall have the benefit rather than another.' Boswell: 'You would not solicit employment sir, if you were a lawyer?' Johnson: 'No, sir, but not because I should think it wrong, but because I should disdain it.' This was a good distinction, which will be felt by men of just pride. He proceeded: 'However, I would not have a lawyer to be wanting in himself in using fair means. I would have him to inject a little hint now and then to prevent his being overlooked.'"

Johnson's views of law reporting in his day were very pessimistic: "The English reports in general are very poor; only the half of what has been said is taken down, and of that half much is mistaken; whereas, in Scotland, the arguments on each side are deliberately put in writing, to be considered by the court. I think a collection of your cases upon subjects of importance, with the opinions of the judges upon them, would be valuable." Talking of the chancellorship, Johnson admitted that the holder of that office was not appointed to that office because he was fittest for it.

The following observations of the doctor, as illustrating the pointed aphorism of a modern French statesman, that the demand for final option is the essence of stupidity, are full of significance: "The more precedents there are, the less occasion is there for laws: that is, the less occasion is there

for investigating principles. In the spirit of the chanson: —

Faut de l'esprit: pas trop n'en faut;
L'excès en tout est un défaut.
Un bon mot est l'éclair qui brille
Son feu parfois peut effrayer;
On mit Voltaire à la Bastille
Pour en avoir trop fait briller.

Johnson once vigorously denounced a proposal mentioned to him by Boswell, of publishing the *bon mots* of Dr. Johnson. But though the following *jeux d'esprit* are related by Boswell, they are not Johnson's; hence there is some excuse for calling attention to them. "The conversation having turned on *bon mots*, he quoted, from one of the Ana, an exquisite instance of flattery in a maid of honour in France, who, being asked by the Queen what o'clock it was, answered, 'What your Majesty pleases.' He (Johnson) admitted that Mr. Burke's classical pun upon Mr. Wilkes being carried on the shoulders of the mob,

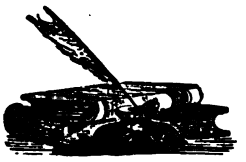
— numerisque fertur
Lege solutus,

was admirable; and though he was strangely unwilling to allow to that extraordinary man the talent of wit, he also laughed with approbation at another of his playful conceits, which was, that 'Horace has in one line given a description of a good desirable manor:

Est modus in rebus, sunt certi denique fines,

that is to say, a modus as to the tithes, and certain fines.'" — *Ex.*

The Lawyer's Easy Chair.



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

∴ ∴ ∴ ∴ ∴ BY IRVING BROWNE. ∴ ∴ ∴ ∴ ∴

CURRENT TOPICS.

ILLEGAL POETRY. — The Chairman always feels a sympathy with a lawyer who writes poetry, for two reasons: first, because the fatal gift hurts him with his clients, and second, it does not help him with the public. So the wisest lawyers have suppressed the inclination or concealed its fruits. Blackstone and Story crushed the deleterious spirit rising in them. (The consequence was that Story's one thin volume of commonplace verse is worth more in the book market than any two of his thick commentaries on law.) Successful poetry depends more upon mellifluous utterance than upon originality of ideas, and so the melodious Longfellow is more popular than the rugged Browning. Lawyers are frequently men of poetic ideas, but seldom have the felicity of phraseology essential to the distinction between poetry and prose. As Landor said in effect to Wordsworth, prose is none the worse for a poetical idea or expression, but one drop of prose in poetry precipitates the whole. The foregoing reflections are renewed in the Chairman's mind by the perusal of a recent volume of poems by a lawyer — "Echoes of Halcyon Days," by Maximus A. Lesser of the city of New York. Mr. Lesser has done some creditable professional work, and it is interesting to know that he has a purely literary side. Mr. Lesser has the poetical conception very frequently; not so often the poetical execution. He has considerable ingenuity and expertness in meters, and a remarkable affluence of rhyme, and the movement is frequently unconstrained and graceful. Some of his poems are poetic throughout, and give unalloyed pleasure. Scholarship, culture, and travel are apparent on almost every page. In short, the poet is recognizable in Mr. Lesser, as distinguished from a mere versifier. His poems are not mere harmonious jingles without meaning, as is too frequently the case among the minor poets — and indeed among some of our modern major poets. He always has something to tell us, and tells it more or less felicitously and impressively, albeit occasionally a little mystically, affectedly, or imitatively. He is at the best in the shorter and more unpretentious poems; in them is least perceptible the one fatal drop of prose. We like him better when he is familiar and semi-playful than when he essays to be grand and deep. Thus we take more pleasure in his extremely clever parody of Poe's "The Bells" ("The Flutes"), than in his "Ode to Liberty," which might have been written to order for the Fourth of July. It may answer for a major poet, like Lowell, to publish his merest twaddle and scrap-basket droppings; not so for a minor poet, and therefore Mr. Lesser might better have omitted "Album Leaves," with their acrostic qualities. Some eccentricities of rhyming are noticeable: "uncouth" and "mouth" for example; "woe" and "unto" remind one too much of the Rev. Mr. Chadband; and "glades" and "Hades" "will never do," although a footnote assures the reader that it was done deliberately. Some accents also are not in consonance with modern authority; for example, "contemplate" should not be accented on the first syllable, nor "incomparable" or "Pantagruel" on the third. In conclusion, let us say that the tendency to imitate Poe, which Mr. Lesser himself acknowledges in one of the playful poems, and which is so apparent in "The Course of Fate," is one of which he stands in no need and which he should eschew. The volume of 165 pages is very elegantly printed.

A MODEL LEGAL BIOGRAPHY. — In this era of fusome and false eulogy of deceased lawyers it is a pleasure to read so candid, discriminating and evidently truthful a sketch as that of the late Chief-Justice Park of Connecticut, by John Hooker, formerly reporter of the Supreme Court of that State. It is almost startling in its bold and unconventional estimate of the dead chief. It is quite refreshing to learn that when he "entered on his judicial life he had acquired but a very limited practice and probably never would have attained a very high success at the bar. . . his mind was slow in its movement, and he was wholly without grace of speech or manner. Withal he had but a very limited knowledge of law. Judge Park was far from being an ideal chief justice. Our State has rarely, if ever, had a judge of its highest court, much less a chief justice, of so limited early education and so little culture. He seemed to

the profession not to have a sufficient sense of the dignity of his high office." And yet the biographer does full justice to his natural endowments and his honorable and useful career. We rejoice to learn that he had "little respect" for "the technicalities of the law." There is nothing of the lying epitaph in this sketch, and we honor the writer therefor. He is truly a "judicious Hooker."

INVALID MURDERERS. — In all the persistent appeals for mercy on behalf of Mrs. Maybrick, nothing more deliciously *naïve* than the following from the "Medico-Legal Journal" has ever been uttered: —

It seems clear that the arsenic (whoever administered it) either killed Mr. Maybrick or did him no perceptible harm. But even if we waive the point, the difference between a life sentence and one for ten years is immense. And what reason have we to think that, if the jury had convicted Mrs. Maybrick of a criminal administration of arsenic which endangered her husband's life, the presiding judge would have imposed the maximum sentence on a delicately nurtured woman in feeble health, and a first offender?

Is it good policy to refrain from hanging a murderer because he is in feeble health, or "delicately nurtured," and is a man entitled to consideration because he has never murdered or tried to murder anybody before? A dog is said to be entitled to one bite, but we have never before heard it intimated that this doctrine extended to reasoning human beings. In another part of the same article, Mr. Clark Bell contends in effect that a woman, especially "a lady in delicate health and a first offender," is entitled to leniency. All this is ultra-sentimental. True public policy is best subserved by holding women to the same degree of criminal responsibility as their husbands and other men. If in the case in question the sexes of the offender and the victim had been reversed, the whole world would have laughed at the contention that mercy should be shown to the husband because he was "a delicately nurtured gentleman," and this was his first attempt at wife-killing. Meantime Mrs. Maybrick holds out surprisingly for a delicate lady.

In this same number of the "Medico-Legal Journal" is much evidence that doctors disagree, for powerful reasoning and startling statistics are given to show that vaccination is deleterious, that habits of intoxication in parents do not necessarily engender unhealthy children; that consanguineous marriages do not give birth to feeble-minded offspring to any great extent; and, in addition, that women have a right to educate themselves to death. Verily, these learned gentlemen sometimes cause us to doubt that anything is true.

THE SIGN OF THE THREE BALLS.

(Goodell *v.* Lassen, 69 Illinois, 145.)

WHY is it that a financier,
  Who lends on chattels small amounts,
Is held in estimate less dear
  Than he who swells his bank accounts
With interest on land and houses,
And sycophancy thus arouses?

Why should there be a prejudice
  Against the sign of triple balls,
Which makes one think it so amiss,
  As youthful poverty he recalls,
To sneak to uncle (or to aunt),
Or as the French say, *à ma tante?*

It had a noble origin —
  The Lombard bankers, Medici,
Imagined not a shame or sin
  In giving their posterity
These golden pills, a punning sign
For future ages to divine.

But Roscoe says, a giant fellow,
  Who hung with triple balls his mace,
And fought against them, one Magello,
  The terror of that early race,
Was by their ancestor o'erthrown
And his club taken for their own.

A pawnbroker in Illinois,
  His humble trade to advertise
Proposed this signal to employ,
  And draw the gaze of wistful eyes
By hanging out his gilded pills,
  "Gold cure" for small financial ills.

His landlord asked the court to stay
  The exposure of this badge of penance,
Alleging it would drive away
  The customers of other tenants
In the same building, and would shock
All who frequented the same block.

But the Court said they couldn't see
  An injury to the reversion;
The plaintiff might quite easily
  Control the matter by insertion
In written lease — question of taste —
What signs were on the building placed;
Besides, the plaintiff mustn't bore 'em —
He'd clearly entered the wrong forum.

So, I suppose the public run
  Whene'er they see those balls of gilt
Glow in Chicago's blear-eyed sun;
  As when Magello rudely spilt
The blood of ancient warriors flying,
And strewed the plains with dead and dying.
The difference in the times succeeding
Is merely in the form of bleeding.

THE PHILISTINE. — This name, long since adopted in common use to denote a matter-of-fact, uncultivated, commonplace person, — the French *bourgeois* type, — has recently been defiantly assumed by one Elbert Hubbard of the hamlet of East Aurora, N.Y., as the title of a little monthly "periodical of protest." Mr. Hubbard says he began this publication as a joke, but so many people took it seriously that he has kept it up until it is now in its fourth year, flourishing and increasing in prosperity. Mr. Hubbard is an extraordinary person, quite out of the common groove. He is a philosopher, a seer, a wit, a gentle cynic, a lover of nature, a sly and slangy humorist, and has all the spirit of poetry even if he does not indulge in meter. Nowhere else in this country can one get so much religion and humor, charity and slang, tenderness and audacity, for a dime as in any number of this little periodical.

There are only two writers who can make the Chairman laugh aloud when he is alone, and they are Dickens and Hubbard. In fact there is much in common between them, the latter, however, having none of the great master's dramatic power. Mr. Hubbard is quite widely known as the author of a very popular series of books called "Little Journeys to the Homes of Great Men and Good," memorials chiefly of his English travels, which exhibit all the qualities mentioned above. In addition to these remarkable pen-gifts, he is one of the best speakers in this country, having a perfectly novel and characteristic style, and the extremely rare power of saying a thing exactly as he wishes and designs in order to produce a given effect. His capacity as an orator is bringing him into constant request on the lecture platform, and to hear him discourse of Shakespeare, Mrs. Browning or Elizabeth Fry, for example, is a delightful privilege. Mr. Hubbard is also a biblical and religious scholar of exceptional merit, although quite unorthodox. His studies of Ecclesiastes ("The Journal of Koheleth"), Solomon's Song, and Job, are among the most appreciative tender and poetical ever written, albeit now and then somewhat startling in their boldness and independence of man-formulated creeds. This author is fortunate not only in his natural and mental gifts, but also in his worldly environment. He is able to gratify his pet hobby of artistic printing. In a back shop at the hamlet aforesaid (some eighteen miles from Buffalo) he has set up a printing press, from which he issues the most beautiful books now or ever printed in America. (The Chairman speaks advisedly, for he himself is an old printer.) His religious studies above mentioned, and Vernon Lee's "Art and Life," have never been surpassed, and his own "Turner and Ruskin" has never been equaled in the typographic achievement of this country. His models in this art are the old Venetian printers, and in the decoration and illumination of these volumes he receives the assistance of his talented and artistic wife. All this work is done by hand. He produces only three or four books a year, and the time is not far distant when a complete set of them, especially of the limited number specially illuminated, will bring ten times the publication price. What a happy fellow one must be to be able to write good books and to print them!

MARITAL LAW. — It is one of the modern ameliorations of the common law of England that a husband cannot legally compel his wife to live with him. This was settled, to the intense disgust of numerous English husbands, in the famous case of Mr. Jackson of Clitheroe. Whether this is so in the South African Republic of the Boers, we do not know, but it seems that, at all events, husbands may there be compelled by legal process to live with their wives. As proof of this curious state of things a correspondent sends us an advertisement cut from a newspaper of that favored country, which we reproduce literally as follows: —

PRO DEO.

IN THE HIGH COURT OF THE SOUTH AFRICAN REPUBLIC.

BEFORE HIS HONOR THE CHIEF JUSTICE, *In re.*

C. J. RENNER, *Plaintiff,*

versus

H. J. RENNER, *Defendant.*

Pretoria, this 10th day of February, A. D., 1888.

After having heard Mr. Adv. Ford, of counsel for the plaintiff, having read the summons and heard the different witnesses,

It is ordered

That an order be, and it is hereby granted, summoning the defendant, Henry Julius Renner, to cohabit with the said plaintiff before the 12th of June, 1888.

By order of the Court,

(Signed) P. J. KOTZE,
Registrar.

Free translation,
CHAS. E. MEINTYER,
Sworn translator.

It is among the mysteries why the plaintiff should have been particularly desirous that the defendant should cohabit with her before June 12. Did she not desire his society after that date? What happened or could conceivably happen in case Mr. Renner did not obey? Could the court enforce its order by a decree of specific performance? Did the sheriff put Mrs. Renner in possession? And so forth. One can imagine the practicability of an order for support, but up to date we have been unable to conjecture how any

court can compel a reluctant husband to cohabit with his desirous spouse, in the ordinary legal sense of that verb. The process seems rather inquisitorial. And yet those Boers think themselves a free people!

NOTES OF CASES.

NUISANCE. — In the modern system of apartment houses tenants must make up their minds to endure some discomfort from unavoidable noise made by other tenants and by the necessary machinery in the buildings. Many years ago a New York court refused to restrain a tenant from trundling his baby carriage over the heads of the plaintiff and his family who lived on the floor next below. In McLaughlin *v.* Bohm, 20 Misc. 338, the New York Supreme Court held the defendant liable to pay his rent, although he claimed an eviction by reason of the noise made by a pump on the premises. The defendant's testimony was that "the vibration caused the chandeliers to rattle, crockery and glassware to fall from shelves, plaster to fall, and produced an illness akin to seasickness in defendant's wife." But the court thought that "in view of the fact that the house was not much more than a year old and that the first floor was constructed with iron beams with concrete and double flooring and sixteen-inch walls, the testimony seems hardly credible."

WASTE OF NATURAL GAS. — Has not a man a right to waste his own property? (For example, the Bradley-Martin ball.) But the Indiana Supreme Court say that he has no right to waste his own when the waste may injure others. In Townsend *v.* State, that court held that an act declaring it a misdemeanor to burn natural gas in flambeau lights is constitutional. The court liken the case to legislative measures for preserving game and fish, and in answer to the argument that the act infringes the citizen's right to "pursue his own happiness," very acutely observe: —

"While our republican government guarantees the right to pursue one's own happiness, yet that government is charged with the duty of protecting others than appellant in the pursuit of their happiness, and hence the inalienable right to pursue one's own happiness must necessarily be subject to the same right in all others. Hence, when that right is asserted in such a manner as to conflict with the equal right to the same thing in others, it is not an inalienable right, nor a right at all, but a wrong. This demonstrates the wisdom of the maxim that true liberty must be regulated and restrained by law. If, therefore, it makes appellant happy to waste natural gas, for the want of which others are made to suffer and be unhappy, as the direct result of such waste, then the pursuit of such happiness is not an inalienable right, but a positive wrong."

EXEMPLARY DAMAGES. — In a recent number of the "American Law Review" Judge Thompson takes the ground that "exemplary damages cannot be bottomed on nominal damages." Of this the "New York Law Journal" remarks that it amounts to little more than a dogmatic personal opinion. Well, how much more? We think Judge Thompson is clearly right. The notion that a man shall be punished in damages for an act that produced no injury seems to us extremely illogical. The "Journal" says: —

"On one side of the controversy may be cited Stacy *v.* Portland Pub. Co., 68 Me. 279, and Girard *v.* Moore, 86 Texas, 675, holding that where no actual damage is shown there can be no recovery of exemplary damages; and on the other, Railway Co. *v.* Sellers, 93 Ala. 9, Hefley *v.* Baker, 19 Kan. 9–12, and Wilson *v.* Vaughn, 23 Fed. Rep. 229, holding to the contrary."

The "Journal" might have added to the former class Kuhn *v.* Chic. etc. R. Co., 74 Iowa. 137; Kennedy *v.* Woodrow, 6 Houston, 52; and to the latter probably Bergmann *v.* Jones, 94 N. Y. 54.

CRUELTY TO WIFE. — A husband may not have a divorce when his wife left him because he suffered his mother falsely to accuse her of larceny and beat her till the blood ran. So say the Virginia court in Hutchins *v.* Hutchins, 93 Virginia, 68. The court observe that the husband is still entitled to "be obeyed and respected as long as he deserves respect and obedience." Respected, yes; obeyed, no! And although the husband still has the right to dictate the place of their joint residence, we deny that he has any right to compel the wife to live with his mother, apart from him, while he is permanently absent in another State, carrying on business, as was the fact in this case.

CHILD. — A minor as large and strong as his father is not a "child" within the statute of cruelty to children. Collins *v.* State, 97 Ga. 433.

A child prematurely born of a mother four or five months pregnant is not a "person" within a statute giving a cause of action for negligent death to the administration. Dietrich *v.* Northampton, 138 Mass. 14; 52 Am. Rep. 242.

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.

LEGAL ANTIQUITIES.

THE quaint reason, given by Bracton and adopted by Lord Coke, why, by the common law, a father cannot inherit real estate by descent from his son, is that inheritances are heavy, and descend, as it were, by the laws of gravitation, and cannot reascend. (Co. Litt. 11. 2 Bl. Comm. 212.)

FACETIÆ.

LAWYERS feed as they are feed.

"How came you here?" said the visitor to a prisoner in the penitentiary.

"I was brought here by my convictions," was the firmly spoken reply.

THE COURT (sternly): "Make that man remove his hat!"

MISS FLIP (indignantly): "I'm no man."

THE COURT (sotto voce): "Then I'm no judge!"

UNDER the old county court system in North Carolina a defendant could only be sued in his own county, whereas in the Superior Court he could be sued in either the county where the plaintiff or defendant resided. When the late Maj. A. M. Lewis was a young lawyer he inadvertently brought suit in the county court of Warren against a defendant who resided just over the line in Henderson, a town in Granville County. Mr. William Eaton, by plea, took advantage of the defect of venue. Major Lewis to cover his inadvertence stated that he had thought Henderson was in Warren. A well-known character, "club-foot Bill" Ransom was in the court room, and remarked, sotto voce, but loud enough to be heard by everyone, "D—n a man who tries to conceal his real ignorance of law by an affected ignorance of geography."

CURRAN, the Irish advocate, was one day examining a witness and, failing to get an answer, said: "There is no use in asking you questions, for I see the villain in your face."

"Do you, sir?" said the man with a smile. "Faix, I never knew before that my face was a looking-glass."

On another occasion he was out walking with a friend who was extremely punctilious in his conversation. The latter hearing a person near him say cur*o*sity for curiosity, exclaimed: "How that man murders the English language!"

"Not so bad as that," replied Curran, "he has only knocked an *i* out."

STRANGE as it may seem, Supreme Court justices occasionally unbend, even while on the bench. Some years ago, Judge Stipp of Princeton was pleading a damage case before the Illinois Supreme Bench. A short time before the court had decided an almost similar case, in which one of the parties had lost fingers, against the injured man, saying in their decision: "The party being an attorney, his injury does not keep him from 'climbing those heights where fame's proud temple shines afar.'" Mr. Stipp was deep in the point of law when his remarks were interrupted by the justice who wrote the former decision, who said:

"Was not this point covered in a decision a short time ago by this court?"

"Yes, your Honor," replied the attorney, it was, but my client has lost his toes, and has no claws to 'climb those heights, etc.'"

The other justices smiled audibly and the lawyer was allowed to finish in peace.

NOTES.

THE following lines have been carved on the tombstone of a North Carolina moonshiner: "Killed by the government for making whisky out of corn grown from seed furnished by a congressman."

IN tearing down the Tombs, New York's famous prison, to make room for a more modern structure, a sealed room was discovered in the garret of the old Franklin Street wing. There was no door or window to it, and a workman discovered it by driving his pick through the laths and plaster. In the room were found two small pine coffins, such as were used for the burial of children who died in the days of the cholera plague. The coffins were empty. In the room were also several old documents, among them a police court complaint, with the examination papers of a man who had been arrested before the Tombs was built, eighty-two years ago.

AN old lady whose home was in Concord, Mass., relates that she was once on her tardy way to school, crying in anticipation of disgrace and possible punishment, when a deep voice by her side said: "What is troubling you, my child?" Between her sobs Annie explained. "I will write a note to your teacher, asking her to excuse you," said the stranger, kindly. The little girl protested. He did not know her teacher. It would be of no use. But the big, black-haired man had written a few words on a page of his notebook and, tearing out the leaf, handed it to the child. "If you give your teacher that, I think she will excuse you," he said, smilingly. Still unbelieving, the little girl handed the scrap of paper to her teacher, who read its contents and promptly excused the delinquent. The note read: "Will Miss —— excuse Annie for being late, and oblige her most obedient servant, DANIEL WEBSTER."

PRESIDENT LINCOLN, when he was a young lawyer practicing in the courts of Illinois, was once engaged in a case in which the lawyer on the other side made a very voluble speech, full of wild statements to the jury. Lincoln opened his reply by saying: "My friend who has just spoken to you would be all right if it were not for one thing, and I don't know that you ought to blame him for that, for he can't help it. What I refer to is his reckless statements without any ground of truth. You have seen instances of this in his speech to you. Now, the reason of this lies in the constitution of his mind. The moment he begins to talk, all his mental operations cease, and he is not responsible. He is, in fact, much like a little steamboat that I saw on the Sangamon River, when I was engaged in boating there. This little steamer had a five-foot boiler and a seven-foot whistle, and every time it whistled the engine stopped."

J. A. MURPHY of the West Superior (Wis.) bar recently delivered an address on "Contingent Fees," in the course of which he told of a brakeman who was strongly impressed with the fact that his lawyer was the sole repository of his mental and moral being. The man had made a contingent contract with an attorney to develop an ordinary spine into a railway spine and institute a resulting damage suit. During the period of the spinal incubation and the pendency of the suit, the railway superintendent met the brakeman on the street and said: "Good morning, James; it's a fine morning." James, a trifle overtrained, replied: "I neither deny it nor affirm it, sir."

THE owner of a valuable Newfoundland dog in New Orleans sought damages from a railroad company for killing it. The case turned on the validity of an act of the Louisiana legislature, recognizing dogs as personal property only when placed on the assessment rolls. The United States Supreme Court sustains the law and refuses damages, since the dog was not assessed, defining the law in regard to dogs as follows: "The very fact that they are without protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals *ferœ naturæ*, in which, until subdued, there is no property, and domestic animals, in which the right of property is complete. They are not considered as being upon the same plane with horses, cattle, sheep, and other domestic animals, but rather in the category of cats, monkeys, parrots, singing-birds, and similar animals kept for pleasure, curiosity, or caprice. Unlike domestic animals, they are useful neither as beasts of burden, for draft, nor for food."

CURRENT EVENTS.

IT is claimed that in the city of Budapest there are 120 gypsy bands, numbering 997 performers, 32 wind bands and 21 orchestras, in which the players are women. The grand total is given as 2,000 musicians in a population of half a million.

LAST autumn the Japanese government placed an order for 13,000 tons of rails with Messrs. Carnegie of Pittsburg, at a price said to be 10 per cent. under that quoted by British makers.

NATURE now supplies the inhabitants of Boise City, Idaho, with hot water. The hot water comes to the surface of the plain at the base of the mountains two miles above the city. Seven years ago, capitalists sunk three six-inch tubes 455 feet, obtaining a steady flow under a strong subterranean pressure of about 1,800,000 gallons daily. The wells are connected with mains, by which the hot water is led to the city, and to which service-pipes are connected, leading the water into the building, where it is made to pass through the coils, similar to steam-heaters. The natural pressure in the city is forty pounds per square inch, and the heat is regulated by waste-cocks, increase of flow increasing heat. Rates are charged on the basis of the size of waste, and are but little higher than coal. Nearly all large buildings and many dwellings use it exclusively for heating. The water leaves the wells at one hundred and seventy degrees, and loses only five degrees traveling two miles, as the mains are substantially non-conductors of heat. The waters are highly mineralized, but are unfit for table purposes, though excellent for skin diseases and bathing.

AN interesting question has recently been decided by the supreme court of the German empire. The defendant in the case had appropriated electric power from the conduits of a company in an unlawful manner. The charge against the defendant was larceny and embezzlement. The lower court held that the act of the defendant was neither larceny nor embezzlement, because electricity or the electric current could not be considered movable property according to the law. The law understood by the term "object" a piece of irrational nature, the body or materialness of the thing or object was its paramount feature according to German civil law, with which the criminal law coincided. Bodyless things, as rights, products of the mind, mechanical power, could therefore not be objects of theft or embezzlement. The supreme court held that the lower courts had argued rightly that only a piece of matter filling space could be called a "thing," hence the materialness, the body of the object, was its paramount feature. The materialness of the electric current not having been established, the court decided that electricity cannot be the object of theft or embezzlement under the present law. As there was no law concerning the case there could be no punishment.

THE feature of the English Budget which will be most popular is the reform of the postal rates and regulations. At a stroke all or nearly all the elaborate rules which distinguish between letters, books and samples are swept away. For the future there will be, with two minor exceptions, only one mail matter and that is to be conveyed at the liberal rate of a penny for a quarter of a pound; practically this means there will be no more weighing of letters. Time as well as money will be saved to the public and time and consequently money to the postoffice. So great a boon has not been conceded, says an eminent writer, since Sir Rowland Hill forced a reluctant department to consent to a penny post.

THE long-debated question of the establishment of a fast steamship service between England and Canada at last appears to be settled. The Canadian government is to be supplied with four steamers equal in equipment to the best Atlantic lines afloat. They must convey 300 first-class passengers, 200 second and 800 steerage. In summer they are to sail from Liverpool to Quebec, going on to Montreal; in winter the Canadian port is to be Halifax or St. John. The subsidy is to be £154,500 sterling, of which the British government supplies £51,000 sterling. The boats are not to call at any foreign port or accept any supplementary subsidies.

DICKEN'S Gadshill clock, lately sold in London, was the subject of the following letter from him to Sir John Bennett:

My Dear Sir: Since my hall clock was sent to your establishment to be cleaned, it has gone (as indeed it always has) perfectly well, but has struck the hours with great reluctance and, after enduring internal agonies of a most disheartening nature, it has now ceased striking altogether. Though a happy release for the clock, this is not convenient for the household. If you can send down any confidential person with whom the clock can confer, I think it may have something on its works that it would be glad to make a clean breast of.

Faithfully yours,

CHARLES DICKENS.

THE news that Great Britain has leased Delagoa Bay for thirty years from Portugal cannot be very pleasant news for Dom Paul. He may wonder if it was good policy to charge Queen Victoria a million sterling for mental and moral damages connected with the Jameson raid. The acquisition of Delagoa Bay gives Great Britain full control of the only seaport of the Transvaal and, were it not for the strained relations between the British and the Boers, this transfer of the Bay from the indolent, thieving Portuguese satraps to a government run on business principles would be the greatest boon to the Boers.

LITERARY NOTES.

THE complete novel in the August issue of LIPPINCOTT'S is "Two Daughters of One Race," by Edgar Fawcett. It is a domestic tale of love and blindness, with a single hero, and two heroines whose characters are in marked contrast. "Private Barney Hogan," by Lieutenant Charles Dudley Rhodes, and "Two Letters," by Frances M. Butler, are brief and pointed army stories. The other contents of this number cover in small space a wide variety of topics. Frank H. Sweet writes with full knowledge of "Bird Artists," and Joanna R. Nicholls of "The Marine Hospital Service." "Our Street Names" are discussed by William Ward Crane.

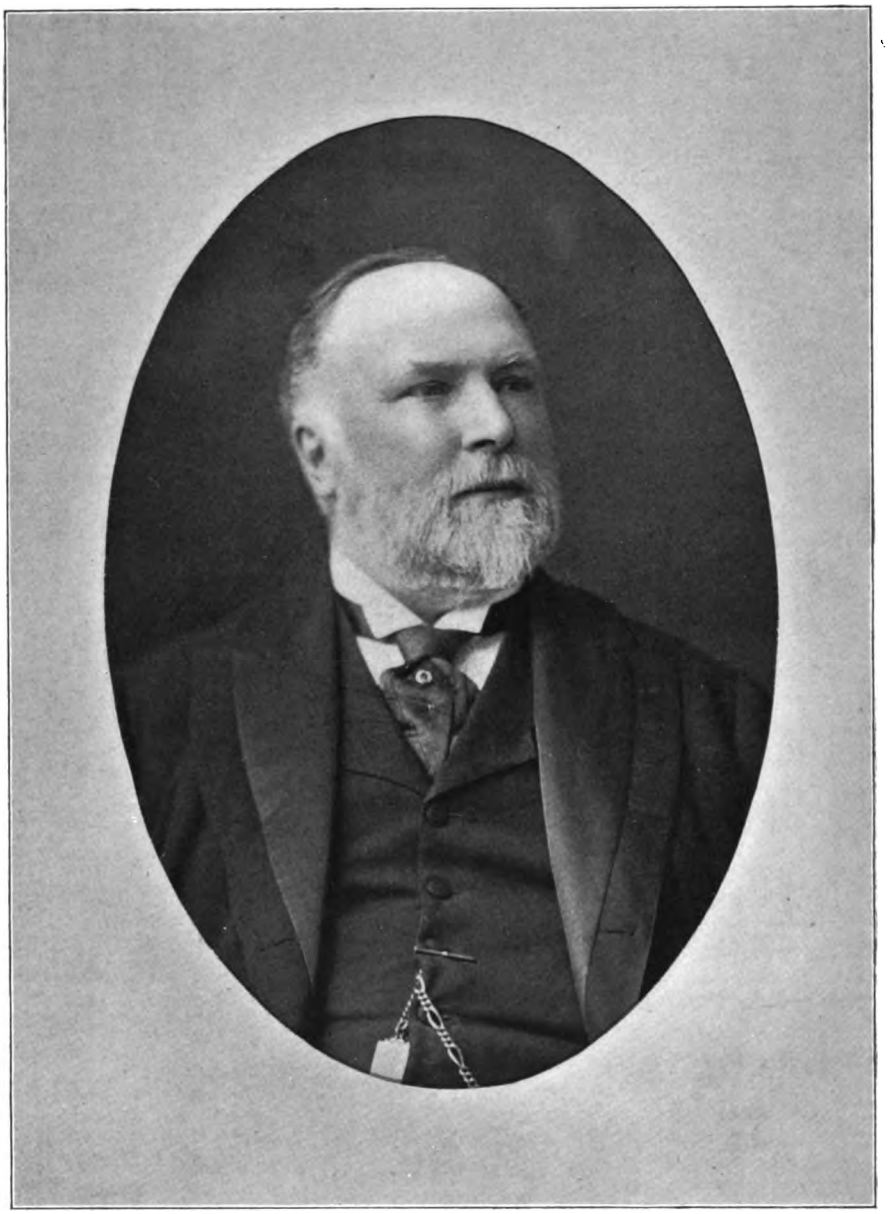
THE August MCCLURE'S is issued as a special Midsummer Fiction Number, and contains a complete novelette by Rudyard Kipling, dealing with school life in England and army life in India. There are four or five shorter stories — stories by Conan Doyle, Robert Barr, John Kendrick Bangs, and others, each more or less novel and enticing in incident and interest. Madame Blanc, the well-known novelist and writer in the "Revue des Deux Mondes," gives a very lively and vivid sketch of the "Paris Gamin"; and in illustration of this, the French artist Boutet de Monvel has made a drawing of the *gamin* from the life, which is the frontispiece of the number. Hamlin Garland, drawing on unpublished documents and the testimony of eye-witnesses, supplies a very precise and detailed description of Lincoln's first meeting with Grant.

JOHN MUIR, author of "The Mountains of California," and the most charming writer about mountains and forests that we have, contributes the opening paper in the August ATLANTIC on "The American Forests." A paper of unusual strength and significance, both on account of the author and the subject, is "Strivings of the Negro People," by W. E. B. Du Bois. The fiction of this number is remarkable both in quantity and quality. Frances Courtenay Baylor contributes the opening chapter of a picturesque story of Virginian life, in two parts, entitled "Butterfield & Co." Other stories are "Out of Bondage," by Rowland E. Robinson; "The Holy Picture," by Harriet L. Bradley; and Guy H. Scull contributes a sketch of unusual quality entitled "Within the Walls."

IN APPLETONS' POPULAR SCIENCE MONTHLY for August Dr. T. D. Crothers considers "New Questions in Medical Jurisprudence," concerning the moral and legal accountability of inebriates, especially for their crimes and their contracts. The use of the thyroid gland in medicine is of special and peculiar interest, because, instead of having been deduced empirically like most other features in medical practice, it has been adopted as a logical conclusion from adequate premises. It is the subject of a paper in this number by Dr. Pearce Bailey.

THE August number of SCRIBNER'S MAGAZINE sustains the well-earned reputation of the previous fiction numbers. It contains six complete short stories by Rudyard Kipling, Kenneth Grahame, Frank R. Stockton, Blanche Willis Howard, Molly Elliot Seawell, and Jessie Lynch Williams, and it appeals to many kinds of taste, for they are, respectively, a railroad story, a story of childhood, a farcical tale, a pathetic story, a fighting story, and a new-journalism story. The cover is one of Gorguet's most effective designs in color.

IN "Around London by Bicycle," the opening article of the September number of HARPER'S MAGAZINE, Elizabeth Robins Pennell details a series of rides which bring the traveler to a greater variety of places of literary interest than is accessible elsewhere within the same compass. "The Milkweed," the last unpublished work of the artist-author, William Hamilton Gibson, is illustrated with his characteristic delicacy. "George du Maurier," by Henry James, a view of the artist and writer as he appeared to an intimate friend and fellow-craftsman, is important as an interpretation and exceedingly interesting. The short stories of the number comprise: A humorous romance of the golf links, "The Lost Ball," by W. G. van T. Sutphen; "The Look in a Man's Face," a sketch of Bohemian life in New York, by M. Urquhart; "Without Incumbrance," a tale of life in a New England fishing town, by Emerson Gifford Taylor, and "Her Majesty," by Marion Manville Pope.



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VOL. IX. NO. 10. BOSTON. OCTOBER, 1897.

SIR MELBOURNE TAIT.

ACTING CHIEF JUSTICE, SUPERIOR COURT, PROVINCE OF QUEBEC.

BY R. D. MCGIBBON, Q. C.

THE Province of Quebec, or Lower Canada, as it is still affectionately called by its people, has, in addition to a number of other interesting peculiarities, a system of jurisprudence and judicature which is comparatively unique.

Its civil law is practically the Code Napoleon, with certain changes, supposed to have been improvements; its commercial law is in effect similar to that of England; its constitutional law and criminal law and practice are distinctively English.

The use of both the French and English languages in the courts is a curious, if at times a cumbersome, feature; and the familiar jest of Mark Twain, when visiting Montreal some years ago, may be repeated. He was being entertained at dinner, and in his speech (Canadians have a wonderful avidity for making and listening to speeches) said he had that day heard a lawsuit concerning six cords of wood tried in two languages, and, no doubt if the litigation had been about one hundred cords, there would not have been enough languages at the Tower of Babel to enable the suit to be tried.

However, every visitor to Montreal or Quebec hears about the dual language, and probably learns at the same time, from some illiterate cabman, that the French spoken in the Province is a rude *patois* and not the pure lingo of the boulevards; the fact being that Canadian French is pure Norman of the 16th century and, as spoken by the educated classes, as good as any dialect of modern France.

One peculiarity, and a regrettable one, of her position as a civil-law province, is that she is isolated from the rest of the legal world, and the decisions of her tribunals and the careers and names of her jurists are unknown beyond the banks of the St. Lawrence.

And yet, from the day when in 1763 Great Britain, after administering, for a brief period, English law in the English language to the French-Canadian habitant, restored the use of the French law, practically the *Coutume de Paris* (codified in 1867), to the present time, Lower Canada has had a long line of able and learned English and French judges. Stuart, a giant in intellect, Sewell, Lafontaine, Duval, Dorion, Johnson, Cross, Ballgeley, Panet, Rolland, Ramsay, Taschereau, Mondelet, Sanborn, Monk, Loranger, Meredith, Tessier and Fournier have, in their time, done judicial work, and pronounced judgments of the highest value; but their names probably were never heard of by the American bar. To the proverbially ephemeral character of legal fame, therefore, an added obscurity is afforded in the case of the Quebec judges.

The Superior Court of the Province is the high court of original civil jurisdiction; all cases of over one hundred dollars are instituted before it. It consists of thirty judges, ten of whom sit in Montreal, four in Quebec, the remainder being scattered over the Prov-

ince in districts, and being summoned occasionally to sit in the cities for the purpose of assisting their brethren. The court has an appellate jurisdiction as well, and three judges of the court sit in revision of judgments at Quebec and Montreal every month. A chief justice and an acting or assistant chief justice are appointed by the Governor General in Council, one residing in Quebec, the other in Montreal.

On the death of the late Chief-Justice Sir Francis Johnson, a man of great ability and an accomplished French and English scholar, a wit, a *bon vivant*, and the hero of all the Canadian Joe Millers, Mr. Justice Tait, the subject of this sketch, was selected to succeed him; but, in accordance with practice, the then Acting Chief Justice, Sir L. N. Casault of Quebec, was promoted to be chief justice, and Mr. Justice Tait made acting chief justice of the court at Montreal.

Sir Melbourne Tait was born in 1842 at Melbourne, a picturesque village on the St. Francis River in the Eastern Townships of the Province. His father was a leading merchant of the place, warden of the county and a Justice of the Peace, and was also a captain in the Canadian militia.

The future chief justice was educated at St. Francis College, Richmond, P. Q., and in 1859 began the study of law in Montreal, entering the law faculty of McGill University, where he graduated B. C. L. in 1862. He was admitted to the bar of the Province of Quebec in the following year and, after practicing law for a short time in his native place, he entered into partnership, in Montreal, with the late Sir John Abbott, Q.C., M.P., then, and for many years, one of the leaders of the Canadian bar, and afterwards Prime Minister of Canada.

The firm of Abbott, Tait and Wotherspoon had probably the largest practice in the Province, and were standing counsel for a large number of corporations, including the Canadian Pacific Railway Company and several leading banks. Mr. Abbott becoming engaged in railway enterprises and subsequently in political affairs, the management of the firm devolved largely on Mr. Tait and Mr. Wotherspoon. Mr. Tait conducted most of the court business of the firm, and the law reports of the Province show that he was leading counsel in many of the heaviest commercial cases tried in Canada. For a number of years he was treasurer of the Montreal bar. In 1882 he was appointed Queen's Counsel and in 1887 he was appointed a judge of the Superior Court, being made acting Chief Justice for the Montreal division in 1894. Sir Melbourne Tait is a D. C. L. of McGill University, Montreal, and of Bishop's College, Lennoxville.

Since his appointment to the bench, he has been an assiduous and painstaking judge and, especially since his nomination as acting chief justice, he has manifested a striking executive ability and the power of organizing his associates successfully. He is a prodigious worker, and has the faculty of inspiring others with a like zeal.

It would be foreign to the scope of this sketch to refer at any length to the cases decided by Judge Tait, but it may be stated that he has been fortunate enough to see a very considerable number of his most important decisions confirmed either by the Supreme Court of Canada or by the Judicial Committee of the Privy Council. To those interested in the subject, reference might be made to The Shefford Election case, 10 L. N. 403; Vipond *v.* Findlay, 7 M. L. R., S. C., 242; Sise *v.* Pullman's Palace Car Company, 1 Off. Reports, S. C. p. 9; Canada Paint Company *v.* William Johnson & Sons (ltd.), 4 Off. Reports, S. C. 253; Lambe *v.* Fortier, 5 Off. Reports, S. C. 47; Canada Revue *v.* Fabre, 8 Off. Reports, S. C. 195; Rendell *v.* Black Diamond Steamship Co., 10 Off. Reports, S. C. 257; Beach *v.* Corporation of Stanstead, 8 Off. Reports, S. C. 178; Montreal Water &

Power Company *v.* City of Montreal, 10 Off. Reports 209, and many others.

The decisions of Sir Melbourne Tait are perspicuous, direct and to the point. He does not indulge in any sententious verbiage nor burden his judgments with jejune platitudes or unnecessary philosophical reflections, and his remarks are delivered in excellent judicial manner. He may possess, but never exercises, a somewhat favorite judicial art or artifice of shirking a difficult point and basing a decision on some minor question, not touched upon by counsel. His demeanor to the bar is excessively courteous and urbane, without in any manner lacking the dignity and repose which befit a magistrate.

In his social life, the learned Judge is a great favorite. When at the bar, he was a member of a well-known Dramatic Society — the Social and Dramatic Club of Montreal — and has performed leading parts in its productions with éclat. He is a member of the St. James Club of Montreal, and a church warden of Christ Church Cathedral. He is also a governor of Bishop's College.

His Knighthood by the Queen, on the occasion of her Diamond Jubilee, was an extremely popular appointment, and the Judge received many felicitations on his honor, and was on September the 10th presented with a congratulatory address by the Bar of Montreal. Lady Tait is an American, a native of Rhode Island. Sir Melbourne has an interesting family, his eldest son, Mr. Thomas Tait being Eastern manager of the Canadian Pacific Railway Company.

In the prime of life, possessed of a vigorous and robust constitution, fond of his work and competent to do it, respected and implicitly trusted by the profession and the public, Sir Melbourne Tait's lot is indeed an enviable one. But his freedom from the vanity and petulance which sometimes mar the judicial character, and withal, the unaffected modesty of his nature, render it impossible for his successes to excite the lower forms of envy or to evoke other feelings than the belief that he thoroughly deserves his good fortune and the hope that he may long be spared to perform the important duties he is so admirably qualified to discharge.

JOAN OF ARC AND BLUEBEARD.

II.

By R. Vashon Rogers.

When the judgment of the University came, it was clear and distinct: Joan's visions and "voices" were lies, either manufactured by herself, or proceeding from Satan, Belial or Behemoth; her story of the sign was a presumptuous, seductory and pernicious lie, derogatory to the Church; she was declared to be rash in her beliefs, guilty of superstitious divination and vain boasting, murderous, cruel, bloodthirsty, seditious, tyrannical, a blasphemer of God and his commandments and revelations, undutiful to her parents, and the maker of rash promises to her king; she was called a coward and would-be suicide in leaping from Beaurevoir; she was uncharitable, and spoke contrary to the true faith in her statements about her saintly visitants; an idolater, invoker of devils, unsound in the faith, a swearer of unlawful oaths, a blasphemer of God, a despiser of His sacraments, a transgressor of the Divine law, Holy Writ and canonical ordinances, a follower of the customs of the heathen and the Saracen (in wearing men's clothes), a schismatic, a misbeliever, a heretic. When such was the verdict, what doubt could there be as to the sentence? St. Paul had forbade short hair, Moses prohibited a woman wearing that which pertained unto a man, such thing being an abomination unto the Lord God; and the stern old Jew had also said that a stubborn and rebellious child, disobedient to parents, should be put to death (far down the ages in Connecticut and New Haven that grim sentence was reëchoed). According to the Canon Law, to attempt suicide was infamous, and a self-destroyer died in mortal sin and could no more enter Paradise than could Judas, surnamed Iscariot; it held out no hope of mercy *inter pontem et fontem, inter gladium et jugulum*. To invoke devils was heresy; blasphemy then was punished by death, as it was in Scotland (unless a person was distracted in his wits), in Virginia, Maryland and New England, even in the seventeenth century. In the Middle Ages heresy was not merely a sin, but the worst of all crimes; the Old World had short and summary ways of dealing with heretics and schismatics for centuries after the sweet Maid was done to death, and the New World, when its day came, learned and practiced the same dread lesson. Such being the judgment, such the law, no hope was left for Joan.

Even after these decisions were read to Joan she refused to obey and submit herself to the Church. On the morning of May 24th, she was taken from her cell to the cemetery of St. Ouen for sentence and execution. The pile was ready for lighting; a sermon was preached exhorting her to repentance and submission; priests earnestly, persistently urged her to submit, but she would leave all to God and to our Holy Father the Pope. Nothing seemed able to alter her determination. Cauchon at last began to read the sentence of condemnation which gave her over to the secular arm, that is, to death; then, to entreaties, promises and threats, the poor girl yielded and offered to submit; she suffered her hand to be guided in scratching the sign of the cross to the form of abjuration. Cauchon then gladly pronounced another sentence, which he had ready with him, setting forth her crimes, her abjuration, her contrition and return to the bosom of the Church, her release from excommunication, her sentence to perpetual imprisonment on the bread of adversity and the water of affliction. Vainly she begged to be sent to an ecclesiastical prison. Back she had to go to the vile cell she had known so long, to the

rough soldiers who kept ward over her. In the afternoon she put on woman's apparel, and had her hair arranged in feminine style. Her male garments were left in her cell.

Most of the English in Rouen were furious at the idea that Joan had escaped them; they thought Cauchon had betrayed them. But the Bishop was playing a deep game with a sure hand.

What happened during the next two days to Joan is a secret that lies buried in her dungeon. Doubtless her brutal guards, enraged at her escape from the flames, abused her shamefully; some say they beat her, dragged her by the hair, offered violence to her, until she felt that her man's dress was her only safety; others, that her "voices" reproached her for her weakness in recanting; others say that Warwick had her clothes removed as she slept; suffice it that in two days she had put on again her old time tunic and cloak and leggings. In a couple of days Cauchon, with the vice-inquisitor, several assessors and the notaries, went to the prison to establish formally the fact of Joan's relapse. She said at first merely that she had taken the dress; then, that it was more suitable for her where she was, that she had never sworn not to resume it; faith had not been kept with her, she had not been suffered to hear mass, she had not been released from her chains; could she hear mass and be released, she would return to the woman's dress; but she would sooner die than remain as she was; her "voices" had been with her, those of St. Catherine and St. Margaret, they came from God, and she believed them. Rambling, incoherent, contradictory, were her statements, far different from her manner during her trial, evidence that her jailers had done their work well and broken her spirit.

Cauchon had been successful at last. Joan was a self-confessed relapsed, and the Church had nothing to do with her, save abandon her to the secular arm; so the judgment was on the 29th of May pronounced, "*Relinquenda justitiae seculari.*" This meant death by burning; the ecclesiastical tribunal could not shed blood, but they were as willing as the Jewish priests of old that others should do it for them. When the dread sentence was announced to her, she was at first overcome with terror, but soon grew calm, saying she would not have relapsed had she been in one of the Church prisons; then she put on her woman's dress, confessed, and received the sacrament.

The next morning she was drawn on a tumbril to the Old Market, clad in a long black gown, with a high paper mitre on her head covered with the words "Heretic, Relapsed, Apostate, Idolater." The inevitable sermon was preached at her, asserting that she had been found guilty of schism, idolatry and witchcraft; that she had not truly repented of them, but had returned to her evil ways like a dog to his vomit. The English soldiery, wearied with the sermon, became restless; in the confusion the Bailiff of Rouen, as representing the State, forgot to pass the sentence of death. Joan was delivered over to the executioners; on the scaffold on which she was placed was the superscription written, "Joan, called the Maid, liar, wrongdoer, deceiver of the people, witch, superstitious blasphemer of God, presumptuous unbeliever, braggart, idolater, cruel, lewd, sorceress, apostate, schismatic and heretic." She kissed the crucifix; the flames were kindled. In her mortal agony her heavenly visitants came to her again. She was heard to speak the name of St. Michael, and the last words on her lips were "Jesu, Jesu." When her garments were burned away, the executioner parted the burning wood so that all might see that she was indeed a woman. Her ashes were gathered together and tossed into the Seine.

Twenty-four years afterward her mother and brother petitioned the Pope for a new trial. The Pope issued a bull to the Archbishop of Rheims and others to reopen the case. The court sat in the splendid cathedral of Paris. The mother, weeping bitterly, told amid the shouts and cries of the sym-

pathizing multitude the story of her daughter's wrongs. Counsel pronounced panegyrics on the Maid, and vehemently abused Cauchon and his satellites; witnesses innumerable were examined: princes of the blood, her old warrior comrades, royal counselors, burghers and their wives, — who had known and loved her, — old friends and neighbors from Domremy, her attendants, the notaries at the first trial, even the wretch who had then been ready to stretch her on the rack. A year went past in taking evidence and hearing argument, and then, on the 7th of July, 1456, in the palace of the Archbishop at Rouen, judgment was pronounced by these new judges, declaring that the articles set forth in the judgment pronounced against Joan were corruptly, deceitfully, calumniously, fraudulently and maliciously put together from her confessions by *suppressio veri* and *suggestio falsi;* and the articles and judgment were avoided and annulled, and ordered to be taken off the files and destroyed. They decreed and declared that the proceedings and judgment contained fraud, calumny, injustice, inconsistency and manifest error in law and fact, and pronounced that Joan and her kinsfolk had received no mark or stain of infamy by reason of such proceedings; and they ordered proclamation should be made of this new judgment, and sermons preached where she had suffered, and a cross erected to keep her in everlasting remembrance, and to provoke prayers for her salvation and that of other departed souls. Little this mattered to the Maid of Orleans, who had long been with the church-at-rest, awaiting patiently the days of the Church Triumphant.

To return to De Rais. In 1433 he gave up the camp and yielded himself up to extravagance and voluptuousness. Soldiers and priests, actors and builders, cooks and feasters, were the outward and visible objects of his attention and wild lavish expenditure. But within the dark and lonely recesses of his castles of Champtoce and Machecoul he abandoned himself to unnatural lusts — his victims were children whom he quickly slew, finding his chief enjoyment in the death throes of these helpless ones, gloating over their sufferings as he skillfully mangled them, and drew out to fearful length their agonizing tortures. When death had come, this Herod would criticise the beauties of these innocents, and kiss those parts that pleased him most. Rachel wept for fourscore or more of her children.

Still greater sins in the eyes of the Inquisition were committed by De Rais. He sought long and earnestly, and ever hopeful of immediate success, for the philosopher's stone; and to his study and practice of alchemy he added that of necromancy, had dealings with devils and familiar demons, and summoned spirits from the vasty deep to help him in his search for gold — gold — gold. One Francisco Prelati was his chief magician. He had a familiar spirit yclept Barron, who always came when the Italian was alone, but was too shy when the knight was present. Once the demon spread countless ingots of gold around the room, but told Prelati not to let them be touched for some days. When Gilles heard this good news, he wanted at the very least to feast his eyes upon the treasure. Prelati took him to the door of the room to show him the sight, but on opening it he cried out that a great green serpent was coiled upon the floor, and, taking to his heels, Gilles followed suit; the valiant knight seized a crucifix in which was a piece of the true cross, and then he was brave enough to want to return, yet on being warned that these holy articles only made the danger greater, he desisted. In the end the mean devil turned the ingots into tinsel, which, when handled, became a tawny dust. Gilles tried to make agreements with the demon to obtain knowledge, wealth and power, signing them with his blood; he even offered through Prelati a child's hand, heart, eyes and blood,

but all in vain. It was this demon (or some kindred spirit) that in spite or rage changed Gilles de Rais's splendid beard of red into a brilliant blue. And even yet the peasants around Tiffauges, Champtoce and Machecoul know this baron by the name of Bluebeard.

Demons were numerous in those days. Old Burton tells us that Paracelsus stiffly maintains that the air is not so full of flies in summer as it is at all times of invisible devils. The blessed Reichhelm, about 1370, received from God the gift of being able to discern the aërial bodies of these creatures; he often saw them as thick as dust or as motes in a sunbeam, or thickly falling rain; all material sounds, water falling, stones clashing, winds blowing, according to this worthy abbot, are but their voices.

In that day a man who invoked a demon, thinking it to be no sin, was a manifest heretic; if he knew it was a sin, he was not a heretic, but was to be classed as such; while to expect a demon to tell the truth was the act of a heretic. To ask a demon, even without adoration, that which depended upon the will of God, or man, or upon the future, was heresy, and heresy was cognizable by the Church alone, and its punishment was death.

Those who practiced magic were prosecuted with the utmost rigor of the law; crucifixion or the beasts was the sentence under the Roman Empire, and the fagot and stake remained for long centuries the punishment of such impostors. Even to understand the art was banishment or death, according to the rank of the criminal.

Justice, though lame of foot, at last appeared on the scenes. In view of his extravagances, De Rais's friends had already obtained from Charles VII, in due legal form, an edict enjoining him from alienating his lands and revenues, and all persons from buying them from him. However, there were in those days, as ever since, money lenders willing, for consideration, to take risks. At length two of his chief creditors, Duke Jean of Brittany and Jean de Malestroit, bishop of Nantes, were anxious (as moderns would say) to realize on their securities, and perchance both Church and State hoped to gain by forfeitures that might result from De Rais's conviction of the crimes, rumors of which filled the air.

The Marshal precipitated matters. He had sold the castle of St. Etienne de Malemort to the treasurer of the duke, and delivered seisin thereof to the purchaser's brother, who had received the tonsure and wore the habit of a clerk. Some quarrel arose, and the Marshal with armed followers seized the castle, and took the monk in church while hearing mass, carrying him off a prisoner, laden hand and foot with chains. Gilles was forced by the duke to give up his captive and the castle; then he imagined all was well again, but the Church was not inclined to overlook his sacrilege in violently interrupting mass, and his sin in violating its immunities in the person of the monk. On the 13th of September, 1440, the bishop launched his thunderbolts, charging Gilles with murdering many children after gratifying his lust on them, and with invoking a demon with horrid rites, with entering into compacts with him, and other crimes and offenses savoring of heresy, and citing the accused to appear for trial on the 19th.

Gilles made no resistance and, when at the hearing the public prosecutor accused him of heresy, he boldly offered to purge himself before the bishop, or any other ecclesiastical judge. A day was fixed for his appearance before the bishop and the vice-inquisitor of Nantes. Meanwhile, his servants were examined; had these proved unwilling witnesses, or prevaricated or equivocated, there was the gentle persuasion of the torture chamber (which was even more freely used on witnesses than on principals) to refresh their memories and loosen their tongues. Information was gathered, the matter was noised abroad, sorrowing parents came upon

the scene clamoring for their despoiled and lost ones. On October 8th he was brought before his judges, and the articles of accusation were orally stated by the prosecutor. Gilles appealed from the court, but his appeal was promptly dismissed. Without counsel, or legal assistance, he was called upon, without aid or preparation, to defend his life. The prosecutor took the oath *juramentum de calumnia*, to tell the truth and avoid deceit, and demanded that Gilles should do the same. He, however, stoutly refused, though threatened with excommunication, denouncing all the charges as false. On the 13th he again was brought up, and the accusations, in a formidable list of forty-nine articles, were presented. Again he refused to plead; they were not his judges, he had appealed. Then his knightly spirit rose and he roundly denounced the right reverend ecclesiastics as simoniacs and scoundrels before whom it was a disgrace for him to appear. However, the dire indictment was read and as he refused to answer it, save by stigmatizing the charges as a pack of lies, he was pronounced contumacious and excommunicated, and he was given forty-eight hours in which to frame his defense. (In England, from early in the fifteenth century until 1772, a prisoner who refused to plead was subjected to *peine fort et dure*, that is, he was pressed to death. Poor Margaret Clitherow in 1586, for hearing mass, died beneath some seven or eight hundred weight; the Inquisition deemed a prisoner standing mute, as contumacious, or the act was considered equivalent to a confession, and the obdurate accused was forthwith handed over to the secular arm.)

The indictment contained well-nigh every charge that could be made against the unfortunate man: the charge of sacrilege and violation of clerical immunity committed at St. Etienne, immoderate eating and drinking, child murder, unnatural crimes, heretical apostacy and the invocation of demons.

The poor wretch now saw, from the details given him, that his accomplices had betrayed him, and when next brought before the court humbly submitted to his judges, craved pardon for insulting them, and absolution from the excommunication, confessing in general terms his guilt; but, when required to answer in detail, denied the invocation of demons and many other crimes, promising, however, to admit any evidence produced against him. Witnesses were examined, and day after day Gilles admitted accusation after accusation. The prosecutor was determined to wring the whole story from the unhappy man, and obtained an order that he be put to the torture. All was in readiness, the hero of many a well-fought field trembled at the thought of the pangs he would endure, and humbly begged for a brief respite. It was granted, and then the Marshal of France, who had so often braved death, quailed at the idea of being suspended by a cord wound round his wrists, and being jerked up and down while heavy weights were fastened to his feet, and confessed everything "freely and willingly, and without evasion of any kind," as the official report declared. No further talk of torture by the prosecutor, no effort made by the once haughty baron save to win pardon from God and the Church, and the parents of the murdered children.

On the 25th, the court gave judgment, both judges finding him guilty of heretical apostacy and horrid invocation of demons, by which he had incurred excommunication and other penalties, and for which he would be punished by canon law. The bishop alone (for he alone had jurisdiction on these points) condemned him for unnatural crimes, for sacrilege, and violation of the immunities of the Church. No punishment was mentioned, but condemnation for heresy carried with it total confiscation of the heretic's property, and inflicted certain disabilities for two generations. The charge of murder had been left to the secular court, where it properly belonged. It had served

its purpose, in exciting popular odium — in fact, the whole ecclesiastical trial was useless, save as assisting the civil process, and leading up to a confiscation of his estates. On bended knee, with sighs and groans, the convicted man asserted that he had not knowingly lapsed into heresy, but as the Church asserted that he had, he begged for pardon, and to be received back into the fold and absolution for his transgressions. All these were accorded.

Next, he had to appear before the secular court, which had been proceeding against him while the ecclesiastical trial was in progress, and which had already condemned to death two of his accomplices. On arraignment, he pleaded guilty of murder, and freely confessed his transgressions. Quickly came the sentence; his goods were declared forfeited, and he was condemned to be hanged and burned, and that he might have opportunity to crave mercy from God, his execution was delayed until the next day at an hour after noon. At his urgent prayer he was allowed to be executed with his two convicted servants, that (as he said) being the cause of their sins, he might admonish them, and show them the example of a good death, and by the grace of God be the cause of their salvation. The clergy also were requested to attend the execution.

The next day saw the clergy and well-nigh the whole population of Nantes marching through the streets, singing solemn litanies, and praying for the salvation of those about to die. As they went to the scaffold Gilles assured his old servants and fellow sinners that so soon as their souls left their bodies they would all meet in Paradise. The men were as penitent and as full of the grace of assurance as their master. All mounted platforms over piles of faggots, the halters round their necks were attached to the gallows above, the stands were pushed away, the bodies swung off, and their souls went — ah! whither? The piles of wood were lighted, the bodies of the servants were burnt to ashes, but when the rope around Gilles' neck burnt through and his body fell, the noble dames of his kindred rushed forward and rescued it from the fire. It was honored with a magnificent funeral, some of the bones being first abstracted to be kept by his family as relics of his repentance.

His widow married a year afterward.

SOME OLD LAW BOOKS.

LAW books are certainly among the things that have kept pace with the population. It is especially true of legal treatises that of the making of them there is no end; and there is scarcely a lawyer who would not add that much study of them is a weariness of the flesh. Although law books were amongst the earliest works that issued from the printing press in England — the statutes of Henry VII were printed by Caxton himself — yet Coke, writing some two hundred and fifty years ago, could not count more than fifteen treatises on the law. Now the libraries in the Inns are scarcely less spacious than the dining halls, and the text-books, to say nothing of the reports and statutes, are to be numbered by their thousands. Copies of all the ancient works mentioned by Sir Edward Coke may be found in the libraries of the Inns and, though most formidable in appearance, some of them possess an interest for the general reader as well as the legal student. To Ranulph de Glanville, who was chief justice in the reign of Henry II, belongs the distinction of writing the first treatise on the law. He combined with the learning of the lawyer the valor of the soldier, and he is known to fame not only as the father of legal literature in England, but also as the captor of the king of Scots at the battle of Alnwick. Among the most precious volumes in Lincoln's Inn Library is an MS. copy of his treatise more than five hundred years old. A peculiarity of Britton's work, which is believed to have been written under the direction of Edward I, is that the words are put into the mouth of the King. This treatise was written in French, in which language law books continued to be written for nearly four centuries. During the same reign the commentary on English law called "Fleta" was written. Nothing is known of the author except that he commenced and completed the work while he was confined in the Fleet Prison, a fact which explains its curious title.

Littleton, who bears among Cook's fifteen authors the most familiar name, was a judge of common pleas in the time of Edward IV. His celebrated work, the first edition of which was printed in 1841, is devoted to an explanation of the law as to the tenure of land. Its fame has, of course, been largely preserved by the remarkable commentary of Coke, which, according to the enthusiastic and eloquent Fuller, will be admired "by judicious posterity, while Fame has a trumpet left her and any breath to blow therein."

A modern legal writer, who arranged his work in the form of a dialogue, would be regarded as frivolous. Yet this was the form in which two of the old jurists cast their works. Fortescue, who wrote his treatise in the reign of Henry VI, while in exile in France with the Prince of Wales and other members of the Lancastrian party, represented himself as conversing with the young Prince on the laws of England, and proving their superiority to those of other lands. "Doctor and Student," which was written early in the sixteenth century by Christopher Saint Germain, of the Inner Temple, is a series of dialogues between "A Doctor of Divinity and a Student in the Laws of England, concerning the Grounds of those Laws." Perhaps the most interesting fact about this quaint production is that it was cited as an authority by the judges at the trial of Hampden. On a fly leaf of the Lincoln's Inn copy of Fitzherbert's "Grand Abridgment of the Law" is the following curious inscription: "Of your charity, pray for the soul of Robert Crawley, sometimes donor of this book, which is now worm's meat, as another day shall you be that now art full lusty e, that remember, good Christian. Farewell in the Lord. 1534."

The first edition was printed in 1516, and this is the date in the copy in Lincoln's Inn Library, which is singularly rich in ancient volumes. It would appear that the producers of law books in Fitzherbert's days were gifted with a greater love for art than is possessed by the authors of modern law books. Some of their pages were adorned by the most elaborate designs. The first part of "Fitzherbert" contains a wood-cut of the king on his throne, whilst the second is ornamented by a wonderful collection of the Royal arms, a dragon and a greyhound, two angels, some scrolls, and a rose. It would be difficult for an illustrated law book to command the serious attention of lawyers in these days, even though its artistic embellishments came from Sir Frank Lockwood.

After speaking of such writers as Bracton and Littleton, one hesitates to describe Blackstone's Commentaries as an old law book. It was first published at Oxford, one hundred and thirty-seven years ago. But legislation moves so fast that to glance at an early edition of the famous work is to believe that it is older than it actually is. No law book has ever enjoyed so great a measure of popularity. As many as twenty-one editions were published before any alteration was made in Blackstone's text, and innumerable attempts have since been made to adapt it to the ever-changing law. How far these endeavors have been successful may be judged from the fact that the value of the Commentaries is now solely historical. As was once said, "The cannonade which has been playing on the Commentaries exposing, as they do, so wide a front, has rendered them, as they were left by their author, a mere wreck." Not a little of their popularity was due to the impressive style in which they were written. Never in a law book has lucidity been wedded so happily to felicity. It is clear, notwithstanding the complaints he addressed to his fellow tenant in Brick Court, that Blackstone's literary powers were unaffected by the boisterous sounds in Goldsmith's rooms overhead. The basis of the Commentaries was a series of lectures which Blackstone delivered at Oxford, and this may partly account for their sonorous note. Like most of the eminent legal writers of the old school, Sir William Blackstone was a judge. Here again a change may be observed. The bench is no longer recruited from the ranks of text-writers. Judges whose stepping-stones to fame were books are still to be found in the court. Lord Justice Lindley, for instance, owes his judicial seat largely to his standard work on partnerships. But there is now a strong tendency to exclude text-book writers from the active practice of the law, to make them a separate class of superior persons whose refined minds ought not to be devoted to anything less noble than the theory of the law. Among the first six leaders of the bar there is not one with any reputation as an author.

During the past thirty years, the publication of leading cases has been under the control of a council representative of both branches of the profession. "The Law Reports" have not, however, caused such old established reports as the "Law Journal Reports" to disappear. The earliest reports in the libraries of the Inns were issued in the reign of Edward II. Until the time of Henry VIII the business of reporting was in the hands of lawyers, who were paid by the Crown. Their reports, which were published annually, are known as "Year Books." These are among the most quaint and valuable volumes in the libraries. To modern eyes, it is true, neither their bulk nor price is imposing. At the end of the tenth book of Edward IV's reign, which consists of forty pages, are these words: "The price of thys book is iiiid unbounde." The ordinary reader who looked for entertainment in these time-worn pages would suffer some disappointment, but it is said that Serjeant Maynard "had such a relish of the Year Book, that he carried one in his coach to devert his time in travel, and chose it before any comedy."

After the Crown ceased to supply the courts with reporters, the business of preserving the important decisions of judges was undertaken by a succession of eminent lawyers, among the number being Coke and Plowden. Law reporters grew so numerous after the Restoration, that a diminution in their number was regarded as imperative, and an act was passed prohibiting the publication of law books without the license of the judges. The rapid increase of reporters had, however, no peculiar relation to the restoration of the Stuarts, for Bulstrode, the foremost reporter during the Commonwealth, alluded to the multiplicity of reports in these picturesque terms: "Of late we have found so many wandering and masterless reports, like the soldiers of Cadmus, daily rising up and jostling each other, that our learned judges have been forced to provide against their multiplicity by disallowing of some posthumous reports, well considering that as laws are the anchors of the republic, so the reports are as anchors of laws, and therefore ought to be well weighed before being put out." — *Dublin Globe.*

THE BARBARIAN CODES.

By Guy Carleton Lee.

FOR centuries Rome imposed her legal system upon the world. But the time arrived when the world was no longer the shores of an "Italian lake" and the Roman Law found rivals. It is true that at no period could these rivals claim a position or prestige comparable with the system that emanated from the Tiber or the Bosporus, yet in certain districts and for considerable periods barbarian codes rivaled and even temporarily triumphed over the Roman Law.

In considering the Barbarian Codes, so-called, we are working in the sources of Germanic law. We are investigating the beginnings of those great systems which, in their subsequent developments and alterations, have, and are, dominating the Europe of to-day.

It is beyond the scope of this paper to attempt to mention all those barbarian codes that have been preserved in whole or in part, and those which are known to us through evidence *dehors* the texts are equally foreign to our inquiry. It will be sufficient for our purpose to consider several typical collections of laws or codes.

At the outset it is a matter of prime necessity that we should agree upon matters of terminology. We must, therefore, think of a code as a collection of legal prescriptions relative to this or that people. Each tribe had its code and these have to a large extent been preserved and are to-day accessible to scholars through the principal libraries of the world. The price and rarity of the best modern editions of the texts preclude their general possession by students.[1]

[1] It is well to note the following collections: —

Canciani, Barbarorum leges antiquæ. Venice. 1781–1789. 5 books in 3 vol. folio.

Walter, Corpus juris germanici antiqui, 1824. 3 vol. Complete, but its value is greatly diminished by recent research that has rendered much of Walter's work and texts obsolete.

Gengler, Germanische Rechtsdenkmäler. 1875.

Pertz, Monumenta Germ. hist., Leges. 5 vol. folio. Also Leges nationum germanicarum, in 4to.

Biener, De Germano lege sua vivente, in Biener, Opuscula academica, 1830. T. 1. ff. 427–440.

Klimrath, Travaux sur l'histoire du droit français, ed. Warnkönig, T. 1. 1843, ff. 342–351.

Davoud-Oghlou, Histoire de la législation des anciens Germains, Berlin, 1845, 2 vols.

Stobbe, Personalität und Territorialität des Rechts und die Grundsätze des Mittelalters über die collisio statutorum, in Jahrbuch des gemeinen deutschen Rechts, T. VI. 1863, ff. 1–60.

Schröder, Lehrbuch der deutschen Rechtsgeschichte T. 1. 1887, ff. 219–256.

We should bear in mind that the codes enjoying complete or partial authority among the Bavarians, Saxons, Lombards and the other tribes and peoples are by no means exact analogues of such modern collections as the Code Napoléon or the typical American code, that of the State of New York.

If we were to institute a comparison between the Barbarian Codes and their modern successors, it would not be with them as a whole but with the division known as the Criminal Code. This for the reason that the ancient codes consist in great part of prescriptions of Wehrgelds, and statements of punishments. for such codes were compiled when the office of the state was rather to determine the customary punishment for crime and thus to limit private vengeance than to punish the offender or to regulate civil controversies and dealings. A brilliant Frenchman speaking of the resemblance between barbarian and modern codes says, "Ils leur ressemblent comme les arrière-petits-fils peuvent ressembler aux aïeux."

However much the laws of the tribes differed among themselves, they possessed in the manner or extent of their application one common characteristic that sharply demarcated them from the Roman Law. The applicability of the law of the tribes was personal; that of the Romans was territorial. That is to say, during a Teutonic predominance each person subject to it was judged by the laws of the tribe or nation to which he belonged. For example: If a Roman, a Visigoth and a Burgundian lived in the territory of the Salian Franks, the Roman might be judged by the Roman Law, the Visigoth by the Liber Judicum, the Burgundian by the Lex Gondobada, and the Salian by the Lex Salica.

The principle of the personality of the law, however adapted to scantily settled districts and loosely organized peoples, was ill suited to the state of society that followed the solidification and centralization that produced the nations of the Middle Ages. "Personality" was succeeded, though not without a long continued and bitterly contested struggle, by "territoriality."

Divergent customs coalesced and modernized rules stood in the place of obsolete traditions. Thus the way was prepared for the next step in legal development. This was taken when all the inhabitants of the same territory submitted to the same rule. When this forward movement was accomplished, as in the Middle Ages, "personality" disappeared.

The Barbarian Codes furnish a wide field of research. The scholar hesitates as to the point of attack. In this present inquiry we must decline the investigation of the Anglo-Saxon, Frisian, Thuringian codes, as well as others of importance. Yes, even the vast body of Lombard law that survived in portions of Italy down to the sixteenth century must yield precedence to the legal collections of the Franks, Visigoths and Burgundians, for the codes of these peoples are peculiarly illustrative of the phase of legal development by which the distinguishing character of the Barbarian Codes was eliminated.

Of the Frankish codes that known as Salic law or the law of the Salian Franks is perhaps the most familiar to the general body of scholars. This familiarity arises from interest excited by the dynastic effect of that error in interpretation which has excluded females from royal succession in France as well as other so-called Salic lands. This error has given to the Salic law an importance in royal affairs that equals that of the Golden Bull or the Dispositio Achillea.

Two other Frankish codes must be considered, that of the Ripuarian Franks and that styled by Gaupp, Solim, de Coulange and others, Lex Francorum Chamavorum.

The Salian Franks, even before the earliest date which scientific research has put upon

Brunner, Deutsche Rechtgeschichte, T. 1. ff. 254–412. I take pleasure in referring the reader to the bibliographies to be found in the erudite work by M. Paul Viollet entitled Histoire du Droit Civil Français, Paris, 1893. I acknowledge my indebtedness to M. Viollet's research.

their codes, were now and again influenced by Rome. The Salic law was, however, a more or less official transcription of customs that antedated Justinian by many centuries. These customs were purely Teutonic, and consequently the code was also. Indeed, "it was the most purely Germanic of all the Barbarian Codes."

Yet the Salic law, as it has been handed down to us, is not without its Roman side. But it is not the form or contents of the code, but the vehicle by which the laws have been transmitted, that is, through the Latin in which the manuscripts are written, that has given rise to the impression that the Salic law was largely affected by the Roman Law. Yet, aside from the language, it is generally admitted that Roman influence was extremely slight. So much so that the Salic law may rightly be called Teutonic.

The testimony of the language employed is neither conclusive nor important in determining the character of the Salian or other barbarian codes, for the manuscripts that have been preserved are in all probability copies in Latin of earlier copies in the Frankish tongue. If the Latin manuscripts are not translations of earlier written codes, then they can at best be but the written evidences of ancient oral traditions. As Latin was the language of the educated portion of the community in the earliest period of written codes it is reasonably certain that the Salian customs, whether oral or written, were preserved unaltered by the current medium of thought, and the *Malberg* glosses go far to substantiate this theory.

The date of the Salian code is uncertain. The most probable period assigned to its compilation seems to be the reign of Chlodwig (Clovis). We may perhaps regard the years 468–488 as approximately correct. The various manuscripts of the Salic law exhibit such differences as to cause them to be divided into classes, the number of which Pardessus (*Loi Salique*) places at five, and Hessels (*Lex Salica*) at eight.

The code of the Ripuarian Franks, or the Lex Ribuariorum, dates from the eighth century. Unlike the Lex Salica, the various manuscripts fall more or less readily into one class and thus one of the greatest difficulties attending a critical study of the code is absent. The text is, however, of a complex and heterogeneous nature. Sohm (Zietschrift fur Rechtgeschichte t. V.) has thrown much light upon this code.

The Lex Francorum Chamovorum is the least important of the Frankish codes. The text is very short and contains little that is original. The consensus of authority classes it as a collection of local usages peculiar to a somewhat uncertainly defined area known, among other names, as *Amor* or *Hamaland*.

The Frankish codes were for Franks, and the many Romans under subjection to the Franks were judged by Roman Law and that too by a Roman Law with which the Franks concerned themselves little if at all. They neither codified nor adapted it. Indeed, its very declaration and interpretation was for years left to the subject Romans themselves.

The Visigoths and Burgundians were, during the centuries next following the Wandering, as tenacious of the principle of "personality" as the Franks. But the Roman influence in Spain and Burgundy exerted an earlier and more permeating effect upon the legal systems of those countries than on those of France and Germany. This influence was destined to establish the modern doctrine of "territoriality."

The Burgundians and the Visigoths not only codified their own laws but promulgated a modified and rearranged Roman code of Law.

The Visigotho-Roman code of Spain preceded by one hundred years the first purely Visigothic collection of laws of which a manuscript has been discovered. This Visigotho-Roman code was published by Alaric II (483–506) in the first decade of the sixth century. It is cited as the Liber Aniani—

from the official countersignature of Anianus the referendary that was attached to each authentic copy — as the Lex Romana Visigothorum or as the Breviarium Alarici, and it is under the last name or rather its anglicized version, the Breviary of Alaric, that we best know this important code. Important because for centuries in western Europe it was the Roman Law, and when that law was cited the reference was to the Breviarium of Alaric and not to the Code of Theodosius. Important because before the discovery of the palimpsest of Verona (1816) we know scarcely anything of the Institute of Gaius or the Sentences of Paulus save from the Breviarium Alarici.

This "Barbarian Code" contained by no means contracted abridgments of the Code of Theodosius, the Novelles of Theodosius and his successors, the Institutes of Gaius, the Sentences of Paulus, Papinian, and other juris-consults. All these texts, save the Institutes of Gaius were accompanied by a commentary styled the Interpretatio.

Although the manuscripts of the Romano-Visigothic code antedate the purely Visigothic code, yet the laws contained by the latter were centuries older in usage among the Goths than the Roman laws. But the preservation of these early laws has been such that they have come to us in a series of fragments concerning which unsettled controversies still rage. These fragments have been attributed to the Kings Euric (466–483); Theudis (531–548); Alaric II (483–506); and to Leovigild (570–586).

It is, however, that code attributed to Recceswinth (652–672) which is an enlargement and continuation of the code of Chindaswinth (644–652) that is of the greatest importance to our present inquiry. Chindaswinth and Recceswinth gave a decided forward impetus to the long process of amalgamation between the Goths and the Spanish or descendants of the Roman provincials, when they deprived the Spanish of their Visigotho-Roman law-book, the Breviarium Alarici, and substituted what was perhaps the first draft of the code known to the middle ages as the Liber Judicum or Forum Judicum.

The Forum Judicum is by no means as purely Teutonic as the Lex Salica or Lex Ribuariorum. It is strongly tinctured by the Roman Law although the Roman Law was formerly interdicted by it. By this interdiction a powerful blow was struck at the "personality" of law. In the middle ages the Forum Judicum was translated into Castilian and became the celebrated Fuero Juzgo, under which name it enjoyed a long success and high authority in Spain.

The Burgundians were old neighbors and allies (fœderati) of the Romans. Indeed, they were called to the aid of Rome by Valentinian I (370), and later in the middle of the fifth century were sought by the Gallo-Romans. In short the Burgundians were friends and imitators of the Romans, and it is therefore natural that Roman Law should find a place of honor in the Burgundian code, or codes, for, as among the Visigoths, there were two codes. The first of these was the Burgundian code proper. This was known by various titles: Liber constitutionum; Lex inter Burgundiones et Romanos; Liber legum Gundobati; Liber Gundobati and Lex Gundobada. Perhaps the most common citation was to the Lex Gundobada.

Gondobad, King of the Burgundians, gathered the customary law and the edicts of his predecessors and promulgated two codes. That cited by his name is his second code, revised by his son Sigismond in 517. The Lex Gundobada is impregnated with Roman Law. It differed from the Frankish codes in that it did not preserve the doctrine of "personality." It differed from the Gothic Liber Judicum, for by that law the strict "territoriality" of the law was enforced. The Lex Gundoba illustrated an intermediate stage of legal development in that it allowed the Burgundians in certain process to be judged by the Burgundo-Roman Law.

This code promulgated for the Romans of Burgundy has been styled variously: Lex Romana, Liber legis Theodosii et Novellarum, Papianus, or Lex Papiania and it is by the name of Papinian that we most frequently read of it. The ascription of this code to the Roman juris-consult Papinianus is an error which has arisen from an error of an early copyist often repeated by later scribes.

The Lex Papiania is an adaptation of the Theodosian code. It presents indications of a common parentage with the Interpretatio of the Breviarium Alarici. It contains fragments of the work of Roman jurists that have not elsewhere been preserved. By this code the Wehrgeld system for centuries so peculiarly Germanic, is reimposed upon the Romans. With the Visigothic and Burgundian codes "territoriality" triumphs.

What does all this amount to? Why should we study the Barbarian Codes or any other section of historical jurisprudence? The answers are plain. By such study we obtain a knowledge of legal foundations, we broaden the bases of legal principles, we anchor theories to firm facts. Again, these codes and other ancient laws afford a clear, and in many cases the only, guide to important periods of history.

Johns Hopkins University. *October*, 1897.

INTERSTATE ROBBERY.

By John Albert Macy.

WHEN July heat upon the city bore
And summons came from mountain, plain, and shore,
Inviting all with thermal woe oppressed
To come and revel in a month of rest;
When each mosquito whetted well his bill,
Expecting soon his hungry self to fill;
When hotel men, with nervous-handed greed
Prepared the summer multitude to feed,
She packed her trunk, forsook the city's heat,
And hastened far afield with eager feet.
There in a world of solitude and shade
For many weeks has lovely Phyllis stayed.
Hear now a crime that strikes the soul with awe!
Judges, give judgment! Lawyers, read the law!
Hear ye the charge of robbery and the grounds:
While in the country Phyllis gained ten pounds;
Now, if the riches of the jeweled East
Were piled together and the pile increased
A thousandfold, not all the treasure there
With Phyllis's little finger could compare.
So if she brings from out another State
Ten pounds of worth too priceless to relate,
New Hampshire bears incalculable loss,
When such a wealth its boundary line shall cross.
And still the lovely robber goes at large,
Unmindful of the weight of such a charge.

CHAPTERS IN THE ENGLISH LAW OF LUNACY.

By A. Wood Renton.

II.

THE CRIMINAL RESPONSIBILITY OF THE INSANE.

THE English law as to the criminal responsibility of the insane has had a curious history, in which America has borne a highly honorable part. For practical purposes the earliest attempt to deal with this branch of our law was made by Coke in 1625. "In criminal causes," said that great institutional writer, "as felony, etc., the act and wrong of a madman shall not be imputed to him, for in those causes *actus non facit reum nisi mens sit rea*, and he is *amens*, i.e., *sine mente* without his mind or discretion and *furiosus solo furore punitur* — a madman is only punished by his madness." And again Coke says: "The execution of an offender is for example *ut poena ad paucos malus ad omnes perveniat*, but so it is not when a madman is executed, but should be a miserable spectacle, both against law and of extreme inhumanity and cruelty — and can be no example to others." When we endeavor to extract from Coke, however, any definition of irresponsible insanity, little light or leading is to be extracted from his works. After assuring us that *non compos mentis* is the best term to describe "a man of no sound memory," he proceeds as follows: "*Non compos mentis* is of four kinds: (1) an idiot who, from his nativity by a perpetual infirmity, is *non compos mentis*; (2) he that by sickness, grief or other accident wholly loseth his memory and understanding; (3) a lunatic that hath sometimes his understanding and sometimes not — *aliquando gaudet lucidis intervallis* — and therefore he is called *non compos mentis* so long as he hath not understanding; (4) he that by his own vicious act for a time depriveth himself of his memory and understanding as he that is drunken. But that kind of *non compos* shall give no privilege to him or his heirs as for a drunkard who is *voluntarius dæmon* he hath no privilege thereby but what hurt or ill soever he doth his drunkenness doth aggravate it. *Omne crimen ebrietas et incensit et detegit.*"

The most cursory student of these passages, with their curious garniture of Latin, will observe that Lord Coke throws no light on the test by which the existence of that degree of *non compos* which the law recognizes as an excuse is to be determined. Fifty years later than Coke's time we meet with the first attempt at anything of this kind in the works of Sir Matthew Hale, who became Lord Chief Justice of the King's Bench in 1671 and died in 1676. Hale divides insanity into (1) *dementia naturalis*, or *a nativitate*; and (2) *dementia accidentalis*, or *adventitia*; and then subdivides (2) into partial and total insanity. He then goes on to explain this famous subdivision. "There is a partial insanity and a total insanity. The former is either in respect to things — *quoad hoc vel illud insanire* — (some persons that have a competent use of reason in respect of some subjects are yet under a particular *dementia* in respect of some particular discourses, subjects or applications), or else it is partial in respect of degrees, and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears or griefs and yet are not wholly destitute of the use of their reason, and their partial insanity seems not to excuse them in the committing any offense for its matter capital. It is

very difficult to determine the invisible line that divides perfect and partial insanity, but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature or, on the other side, too great an indulgence given to great crimes. The best measure I can think of is this: such a person, as laboring under melancholy distempers hath yet, ordinarily, as great understanding as a child of fourteen years hath, is such a person as may be guilty of treason or felony."

SIR NICOLAS TINDAL.

Here we have the earliest legal criterion of punishable insanity. Sir James Stephen demolished it in two brilliant sentences. "Surely no two states of mind can be more unlike than that of a healthy boy of fourteen and that of a man labouring under melancholy distempers. The one is healthy immaturity, the other diseased maturity, and between them there is no sort of resemblance." The phrase "partial insanity" is also quite misleading and has been productive of great mischief in the development of our criminal law. But we shall deal with this point later on. At present it may suffice to notice the fact of the advance made by Hale on the views of Coke. Let us now take a few of the *causes célèbres* which led to the growth of the English law in regard to the criminal responsibility of lunatics. We shall confine our attention to those that are *loci classici* in the best sense of the term.

In 1723 Edward Arnold was tried at Kingston for firing at and wounding Lord Onslow. The judge was Mr. Justice Tracy. It was shown that the prisoner labored under delusions and imagined that Lord Onslow sent devils into his room at night to disturb and plague him. Mr. Justice Tracy told the jury that a prisoner, in order to be acquitted on the ground of insanity, must be totally deprived of his understanding and memory and not know what he is doing any more than an infant, a brute, or a wild beast. Of course Arnold was convicted after this summing up; but the capital sentence passed upon him was afterwards commuted to one of imprisonment for life, at Lord Onslow's instance. Mr. Justice Tracy has often been severely criticised for his adoption of this ignorant and inhuman test, which has been scornfully styled the "wild beast" theory. But no one who keeps in view the asylum system which was in vogue in his day, and for a century later, and the deadly regularity with which it must have reduced all forms of insanity to the type of either mania or dementia, will be disposed to reflect too strongly on the memory of a judge who declined to extend to a prisoner whose disease did not conform to either of those types the protection of the law.

The next case in the series with which we are dealing is that of Earl Ferrers, who

was tried in 1760 for the murder of his steward. The murder was planned deliberately; but the accused made no attempt to escape, and the evidence plainly showed him to be insane. He was, however, convicted and executed. The only points of interest in connection with the case are the solicitor-general's statement that the prisoner should be convicted unless it was proved "that he had not sufficient capacity to form a design and to know its consequences," and Smollet's extraordinary suggestion that lunacy should not be a bar to punishment at all.

"Perhaps," says the historian, "it might be no absurd or unreasonable regulation in the legislature to divest lunatics of the privileges of insanity and in cases of enormity subject them to the common penalties of the law; for, though in the eye of casuistry consciousness must enter into the constitution of guilt, the consequences of murder committed by a maniac may be as pernicious to society as those of the most criminal and deliberate assassination, and the punishment by death can hardly be deemed unjust or rigorous when inflicted upon a mischievous being, divested of all the perceptions of reason and humanity." To the credit of England, it should be added, this argument has never, since Smollett's time, been put forward by any responsible public man.

In 1800 James Hadfield was tried in the court of King's Bench, before Chief-Justice Kenyon and Justices Grose, Lawrence and Le Blanc, for having attempted to shoot King George III in Drury Lane Theatre. He was prosecuted by Sir John Mitford, afterwards Lord Redesdale, Sir William Grant, afterwards Master of the Rolls, and Mr. Law, afterwards Lord Ellenborough, and defended by the Hon. Thomas Erskine, the greatest of English advocates and the ablest of English chancellors. Hadfield had at one time been a private in a dragoon regiment, had got his head severely wounded by sabre cuts at the battle of Limelles in 1794, and had been discharged from the army on account of insanity. He imagined that he had constant intercourse with the Almighty, that the world was coming to an end and that, like our Saviour, he was to sacrifice himself for its redemption, and though he would not be guilty of suicide he wished to precipitate these events by the appearance of crime in order that his life might be taken away from him by others. Erskine defended him with great, though sometimes over-estimated, ability, and he was acquitted. Lord Kenyon said to the jury, "If a man is in a deranged state of mind at the time, he is not criminally answerable for his acts. The material part of the case is whether, at the very time when the act was committed, the man's mind was sane." This statement of the law marks a distinct improvement on the test prescribed by Mr. Justice Tracy, but it was not destined to hold the field. In Bellingham's case in 1812, Sir James Mansfield summed up in the following terms: "There is a species of insanity where people take particular fancies into their heads who are perfectly sane and sound of mind upon all other subjects; but that is not a species of insanity which can excuse any person who has committed a crime unless it so affects his mind, at the particular period when he commits the crime, as to disable him from distinguishing between good and evil or judging of the consequences of his action." His lordship then put the case to the jury thus: "The question is this, whether you are satisfied that the prisoner had a sufficient degree of capacity to distinguish between good and evil and to know that he was committing a crime when he committed this act [the murder of the prime minister, Mr. Perceval]; in that case you will find him guilty."

We come now to the great case which settled the English law as to the criminal responsibility of the insane on its present basis — The Queen *v.* McNaghten. On Friday and Saturday, the third and fourth of March, 1843, Daniel McNaghten was

tried at the Central Criminal Court, Old Bailey, London, before Chief-Justice Tindal, Mr. Justice Williams and Mr. Justice Coleridge, on a charge of having murdered Mr. Edward Drummond, the private secretary of Sir Robert Peel, then prime minister of England. The prosecution was conducted by Sir William Follett, the solicitor-general; and Mr., afterwards Sir, A. E. Cockburn was the leading counsel for the defense. The material facts of the case lie within small compass. The prisoner was the natural son of a turner in Glasgow. Having served with his father as a journeyman for three years, he was apprenticed, and then settled in business on his own account. He was of steady temperate habits, but taciturn of disposition. After a time McNaghten began to labor under the well-known "mania of suspicion." He believed that he was persecuted and haunted by spies night and day. Apart from this delusion he was rational and shrewd, with the shrewdness of his race. In 1842, he went to London. Sir Robert Peel was Tory prime minister, and McNaghten seems to have been possessed with the idea that if his life were taken away the persecution to which he thought himself subject would cease. He watched the movements of the premier closely and hung about the Government buildings near Whitehall. On Friday, January 20, Mr. Drummond was returning from Charing Cross to the prime minister's official residence in Downing Street. McNaghten, who was on the outlook, mistook his identity and shot him from behind. The unfortunate gentleman died January 25. The fact that McNaghten had done the deed was indisputable and undisputed, and his only chance of escape was a plea of insanity.

The English law as to the criminal responsibility of the insane was then, as we have seen, in the second stage of its development The "wild beast" theory promulgated by Mr. Justice Tracy in King *v.* Arnold had been replaced by the "general right and wrong theory," in the twilight of which Bellingham and Bowler were judicially murdured. In defending Hadfield, in 1801, Erskine had endeavored to make delusion the test of criminal responsibility in mental disease. But there can be no doubt that the accepted law of England in 1843 was correctly stated by Sir William Follett in his opening speech on the prosecution of McNaghten. "The whole question will turn upon this — if you believe the prisoner at the bar, at the time that he committed this act, was not a responsible agent; if you believe that when he fired the pistol he was incapable of distinguishing between right and wrong; if you believe that he was under the influence and control of some disease of the mind which prevented him from being conscious that he was committing a crime; if you believe that he did not know that he was violating the law, both of God and of man, then, undoubtedly, he is entitled to your acquittal. But . . . nothing short of that will excuse him upon the principle of the English law. To excuse him, it will not be sufficient that he labored under partial insanity upon some subjects; that he had a morbid delusion of mind upon some subjects which could not exist in a wholly sane person; that is not enough if he had that degree of intellect which enabled him to know and distinguish between right and wrong; if he knew what would be the effect of his crime and consciously committed it, and if with that consciousness he willfully committed it." Now if this were — and it was — an accurate exposition of the law, there was no evidence that McNaghten was legally insane, and he ought in strictness to have gone the way of Bellingham and Bowler. But Cockburn proved himself no unworthy successor of Erskine, and gained a signal victory, not only over the Crown, but over the law. The exordium of his speech, although somewhat flowery, is singularly effective, and as it is a fair example of his early forensic style we shall give a few extracts from it:

"I rise to address you on behalf of the unfortunate prisoner at the bar, who stands charged with the awful crime of murder, under a feeling of anxiety so intense, of responsibility so overwhelming, that I feel almost borne down by the weight of my solemn and difficult task. Can I dare to hope that, even among you who are to pass in judgment on the accused, there can be one who has not brought to the judgment seat a mind imbued with preconceived notions on the case which is the subject of this important inquiry? In all classes of this great community, in every corner of this vast metropolis, from end to end, even to the remotest corner of this extensive empire, has this case been already canvassed, discussed, determined, and that with reference only to the worth of the victim and the nature of the crime; not with reference to the state or condition of him by whom that crime has been committed; and hence there has arisen in men's minds an insatiate desire of vengeance; there has gone forth a wild and merciless cry for blood[1], to which you are called upon this day to minister? Yet do I not complain. I am not unmindful of the presence in which I am to plead for the life of my client. I have before me British judges to whom I pay no idle compliment when I say that they are possessed of all the qualities which can adorn their exalted station, or ensure to the accused a fair, a patient and an impartial hearing. I am addressing a British jury, a tribunal to which truth has seldom been a supplicant in vain. I stand in a British court, where Justice, with Mercy for her handmaid, sits enthroned on the noblest of her altars dispelling by the brightness of her presence the clouds which occasionally gather over human intelligence and awing into silence by the holiness of her eternal majesty the angry passions which at times intrude beyond the threshold of her sanctuary and force their way even to the very steps of her throne. In the name of that eternal justice, in the name of that God, whose great attribute we are taught that justice is, I call upon you to enter upon the consideration of this case with minds divested of every prejudice, of every passion, of every feeling of excitement. In the name of all that is sacred and holy, I call upon you calmly to weigh the evidence which will be brought before you and to give your judgment according to that evidence. And, if this appeal be not, as I know it will not be, made to you in vain, then, gentlemen, I know the result, and I shall look to the issue without fear or apprehension." Having thus aroused the interest and sympathy of the jury Cockburn proceeded to deepen the impression he had made. By the law of England, insanity was undoubtedly and with eminent reason an exculpatory plea. His contention would be that McNaghten was, and had been at the critical period, insane. This contention would be supported by the evidence of the prisoner's relatives and friends, and by testimony still more unimpeachable — from medical experts and from the authorities of his native place. The existence of insanity was a question not only of fact but of science, and those that were brought into daily and hourly contact with the insane were alone "competent to judge of the nice and shadowy distinctions which mark the boundary line between mental soundness and mental disease." Here any interference with the functions of the jury was disclaimed by the subtle advocate: "I do not ask you to place your judgment at the mercy, or to surrender your minds and understandings to the opinions of any set of men — for, after all, it must be left to your consciences to decide. I only point out to you the value and importance of this testimony."

Then followed a brilliant picture of the

[1] Serjeant Shee borrowed a hint from this passage for the exordium of his defense of Palmer in 1856 — "You know that a conviction of the guilt of the prisoner has impressed itself upon the whole population, and that by the whole population has been raised, in a delirium of horror and indignation, the cry of blood for blood."

eighteenth century asylum system, when "darkness and solitude . . . the dismal cell, the bed of straw, the iron chain, and the inhuman scourge were the fearful lot of those who were best entitled to human pity and to human sympathy as being the victims of the most dreadful of all mortal calamities." *The then recognized tests of responsibility in mental disease were the product of that age of ignorance, folly and crime.* Having administered this deadly blow to the "wild beast" theory and the "general right and wrong" theory and, having once more driven home into the minds of his audience the conviction that science was far in advance of law as regards the nature of mental disease, Cockburn went on to analyze Erskine's, or as he said, "Lord Erskine's," defense of Hadfield, treating it as if it were a charge or a judgment instead of a forensic oration, and put forward with consummate skill the two main points on which he relied. Insanity and delusion were inseparable, and *partial* insanity both might and did exist, and ought, where it existed, to entail irresponsibility as a consequence. "By anyone of the legion of casualties by which the material organization may be affected, any one or all of the various faculties of mind may be disordered — the perception, the judgment, the reason, the sentiments, the affections, the propensities, the passions — and the mistake, existing in ancient times which the light of modern science has dispelled, lay in supposing that in order that a man should be mad it was necessary that he should exhibit those symptoms which would amount to total prostration of the intellect; whereas modern science has incontrovertibly established that any one of these intellectual and moral functions of the mind may be subject to separate disease and thereby man may be rendered the victim of the most fearful delusions, the slave of uncontrollable impulses impelling or rather compelling him to the commission" of crime.

Cockburn fortified his position by the authority of Dr. Ray. If sound, it was clearly an answer to the case for the Crown. McNaghten might well be rational in the ordinary affairs of life and yet the victim of partial delusion. The act was motiveless. It was committed in broad daylight and there was no effort at escape. Cockburn closed his speech with effective quietness. "Gentlemen, the life of the prisoner is in your hands; it is for you to say whether you will visit one, on whom God has been pleased to bring the heaviest of all human calamities, the most painful, the most appalling of all mortal ills, with the consequences of an act which most undoubtedly but for this calamity never would have been committed."

The result could not be doubtful. After hearing the evidence for the defense, Chief-Justice Tindal stopped the case and the prisoner was justly, but illegally, acquitted on the ground of insanity. This verdict provoked a remarkable outburst of public feeling, and the "general right and wrong theory" died hard. One member of Parliament, Sir Valentine Blake, moved for leave to bring in a bill abolishing the plea of insanity in cases of murder, except where the accused was known and reputed to be a maniac and not afflicted with partial insanity only, and that the standing orders of the House should be suspended till the bill was passed! But the gallant member found no contemporary legislator hardy enough to second his motion, and this piece of inchoate legislation was happily strangled at its birth. In spite of this exhibition of good sense, however, the crusade against the doctrine of partial insanity was carried briskly on. Sir Nicholas Tindal was generally condemned for having stopped the prosecution of McNaghten. Even the sober Scottish judgment of Lord Campbell was disturbed. At length the House of Lords submitted to the common law judges a series of questions relating to the criminal responsibility of the insane. The answers of the judges — known

as "The Rules in McNaghten's Case" — established what has been called the "particular right and wrong theory," whereby the test of responsibility in mental disease is made to consist in the prisoner's knowledge, not of the difference between right and wrong in the abstract, but of the nature and moral quality of the particular crime with which he is charged.

These rules have, since 1843, been riddled with medical and legal criticism, for Henry Maudsley, in his "Pathology of Mind," pointed out the absurdity of expecting lunatics to reason sanely from their delusions as premises. The late Sir James Stephen argued that the word "know" was wide enough to excuse a man who was prevented by mental disease from taking a clear and comprehensive view of the consequences of his actions. Dr. Ira Ray, the great American medical jurist, collected innumerable cases where the will and not the intellectual faculty of insane persons is diseased. Judge Palmer of Alabama, in his memorable opinion in Parsons *v.* The State, restored the sound view indicated by Chief-Justice Kenyon in Hadfield's case. Other American judges have followed suit, and the English Bench itself is now ripe for the admission of loss of self-control arising from mental disease as exculpatory plea in criminal cases.

INVIOLABILITY OF THE HUMAN BODY.

By Irving Browne.

THE law is very punctilious about the sanctity of the human body, and will not tolerate any invasion of one man's body by another, against the will of its owner, except when directed by the ministers of public justice or the authorized custodians and trainers of the frame. In aid of this protection the law extends the arm of criminal justice. There are a few persons privileged to make an assault — the sheriff, the policeman, the father, the school teacher, the railway conductor, the janitor of a public building, the master (of an apprentice), and most frequently of all, the slippered mother. In olden days it was commonly said, but never adjudged (except once in Mississippi), that a husband could lawfully chastise his wife; but we have changed all that, and now it is held that he may not, even if she is drunken and saucy and keeps forbidden company. Com. *v.* McAfee, 108 Mass. 458; 11 Am. Rep. 383. And even Mississippi has come into line, Harris *v.* State, 71 Miss. 462, and repudiates this "revolting precedent." One pagan court has decided that a parent is not punishable for excessive chastisement of his child, unless malicious and permanently injurious or disfiguring. State *v.* Jones, 95 N. C. 583; 59 Am. Rep. 282, and another absurd court decides that a pedagogue may chastise a pupil for fighting away from school and out of school hours. Hutton *v.* State, 23 Tex. Ct. App. 386; 59 Am. Rep. 776; and so where the offense was profanity on the way home. Deskins *v.* Gore, 85 Mo. 485; 55 Am. Rep. 387. I doubt the propriety of lengthening the arm of the pedagogue to this extent, or of investing him with the parental power of correction in matters of manners disconnected from the school.

This anxious legal care of the human body begins at a very early period — as soon as it is conceived — and protects the child in its mother's womb against the destructive inclinations of others, even of its own parents. But the law does not go so far in its protection in matters of mere civil contract. Therefore it has been adjudged that a railroad company is not answerable for the death, through its negligence, of an unborn infant present on its train in the person of its passenger mother. Walker *v.* Gt. North. R. Co., 28 L. R. Irish, 69; 32 Cent. L. J., 197. The child, however, when born, may maintain an action of damages for the death of his mother caused by negligence. The George and Richard, L. R. 3 Adm. 465. The same is held of a child whose father is killed by intoxication caused by another, although born after the father's death. Quinlan *v.* Welch, 141 N. Y. 158. These results come through the medium of Lord Campbell's Act and the Civil Damage Acts. Though father and mother forsake the child when born, yet humane societies will take it up, and protect its budding frame from the greed of theatrical exploiters of infant prodigies, and circus exhibitors of child acrobats, and the legislature will intervene to prevent avaricious employers from stunting its growth by long or late hours.

So careful is the law of the human body that it regards the slightest intentional angry or unlawful touching of it as constituting an assault and battery, punishable criminally. The ancient books lay it down that to throw water on the clothes, or spit on the person, or throw a firecracker at, or set a dog on, or cut off one's hair, or strip off one's clothing, constitutes a criminal offense, although no injury is done to the

body. Shylock complained that the merchant had "spit upon his Jewish gaberdine," and the Venetian court practically held that his own proposal of revenge was an assault. In Draper *v.* Baker, 61 Wis. 450, a verdict of $1,200 against a man for spitting in a woman's face in a courthouse was deemed not excessive. In People *v.* McMurray, 1 Wheel. Cr. Cas. 62, Mrs. Parker, "a respectable woman, living in the Bowery," having sold the defendant Jane some paint, and, going to her house to dun her for payment, found her painting, and some of the very paint from her brush was dropped out of a second-story window on Mrs. Parker while retreating, "which effectually destroyed her silk dress." This was really too much — to have her gown ruined by the paint which had not been paid for, — and the court held this an assault if proved. The counsel do not appear to have made the point that Mrs. P. was contributorily negligent in going collecting in a silk gown. But the jury found the defendant not guilty, and so the respectable Mrs. Parker not only lost her gown but also her paint, except that which she brought away on her gown.

The law goes even further and holds that there may be an assault even where there is no touching or threat of touching, provided the acts in question indicate the purpose to assault, as where one enticed a child into a secluded place, and was there detected near her indecently exposed. Hays *v.* People, 1 Hill, 351.

If the act is intrinsically and grossly careless or dangerous, the force need not be directly nor even intentionally communicated. As in the famous ancient case of Scott *v.* Shepherd, 2 Bl. 892, where the firework was tossed from hand to hand by several trying to avoid it, and the original thrower was held responsible for its final explosion; and so where one pushed a drunken man against another and hurt the latter, Short *v.* Lovejoy, Bull. N. P. 16; and so where one whipped his horse until it ran away and against a man, Gibbons *v.* Pepper, 4 Mod. 405.

If the act is so grossly negligent or reckless as to indicate a disregard of human life or safety, the actor may even be punished criminally. As in the case of a careless railway conductor, or a careless keeper of a dangerous wild beast, or one who "did not know it was loaded." Reg. *v.* Spencer, 10 Cox C. C. 525; Com. *v.* Hartwell, 128 Mass. 415; 35 Am. Rep. 351; State *v.* Hardie, 47 Iowa, 647; 29 Am. Rep. 496.

But ordinarily the act must be intentional. It does not arise from mere ordinary negligence. So if a man should break his wife's ribs while lovingly embracing her, it would not be a criminal assault. Queen *v.* Clarence, 22 Q. B. Div. 23; and so if he injures another while driving fast. Com. *v.* Adams, 114 Mass. 323; 19 Am. Rep. 362. The wife and the foot passenger must keep out of the way.

In all such cases, however, there may be a recovery of damages in a civil action, although the criminal intent is lacking. As for example, when a careless bicyclist rides down a foot passenger, Mercer *v.* Corbin, 117 Ind. 450; 10 Am. St. Rep. 76; or where one is injured by the glancing of a bullet carelessly fired at a mark, Welch *v.* Durand, 36 Conn. 182; 4 Am. Rep. 55; or is killed by a discharge of musketry in practice by a regiment at the command of the colonel, one gun being carelessly left loaded, Castle *v.* Duryea, 32 Barb. 480; or where an infant shoots another while playing with a gun, Conway *v.* Reed, 66 Mo. 346; 27 Am. Rep. 354; or negligently shoots another while hunting, Haskins *v.* Watkins, 77 Hun. 360; or while "firing a salute" to induce a restaurant keeper to open unto him, Daingerfield *v.* Thompson, 33 Gratt. 136; 36 Am. Rep. 783. In none of these instances of mere carelessness without malicious intent is there any criminal liability, but the careless party must respond in money. Nor can he invoke the principle

that he is not answerable for inevitable accident or the act of God, if his act was unlawful or the injury intentional or committed with an original design rendering the injury possible. See notes, 1 Eng. Rul. Cas. 208, 209.

The law formerly made so much allowance for the ignorance of physicians that it would not punish for murder the quack Thompson, who was the founder of the "Thompsonian" school of vegetable remedies, sweating and purging, and who purged one patient of his life. (This precious imposter had two remedies which he called "tom-cats" and "well-my-gristle.") Com. *v.* Thompson, 6 Mass. 134. And this reprehensible doctrine is followed in State *v.* Schulz, 55 Iowa, 698; 39 Am. Rep. 187. But the Massachusetts court has gone back on the old doctrine, Com. *v.* Pierce, 138 Mass. 165; 52 Am. Rep. 264; and Arkansas is of the same mind, State *v.* Hardister, 38 Ark. 605, 43 Am. Rep. 5. So the prudent traveler will seek Boston or Hot Springs, rather than Des Moines. It seems to have been the ancient notion, however, that if a sick man intrusted his body for treatment to one whom he knew for a quack, or not to profess skill in the particular disease, it was at his own risk, for the trustee should not be held to a kind or degree of skill that he did not possess. Sir William Jones says (Bailments, 100): "A man who had a disorder in his eyes called on a farrier for a remedy, and he applied to them a remedy commonly used for his patients; the man lost his sight and brought an action for damages, but the judge said no action lies, for if the complainant himself had not been an ass he never would have employed a farrier."

So sacred does the law regard the human body that it strongly resents any violence to anything connected with it, although temporarily, and not even forming a customary appendage to it. As for example, driving against a carriage in which, or striking a horse on which, another is riding, or striking a cane held by another. In *Res publica v.* De Longchamps, 1 Dallas, 114, the chevalier defendant, having a grievance against the French consul-general, Francis Barbe Marbois, addressed abusive words to him in French at the consulate, and subsequently struck his cane which he was carrying, in the public street, which cane the latter thereupon applied to the person of the chevalier "with great severity." It was held that as the chevalier committed the first assault, he was worthy of punishment in spite of his being a dragoon of Noailles, and for his "atrocious violation of the law of nations" he was sentenced to pay one hundred French crowns to the commonwealth, to be imprisoned for two years, and to give security to keep the peace in a thousand pounds, and to pay the costs. Probably if the chevalier had foreseen what a price a blow on that cane was to cost him he would have applied it to the body of the Monsieur Marbois.

A still more remarkable case is State *v.* Davis, 1 Hill (S. C.), 46. Robertson, a deputy sheriff, took possession of a negro slave by virtue of a chattel mortgage, and, having occasion to stop over night at an inn to prevent the evaporation of the property, he chained it to the bedpost, and tied it with a rope to his own body in the bed. The defendants broke the chain, cut the rope, and carried off the negro, without any force to the body of Robertson, and this was held an assault and battery. "The rope was as much identified with his person, as the hat or coat which he wore, or the stick which he held in his hand." The court made no allusion to injury to feelings on account of Robertson's strong attachment to the negro.

So in Dubuc De Marentille *v.* Oliver, Pennington, 275, it was deemed an assault to strike a horse which another was driving; and so in Clark *v.* Downing, 55 Vt. 259; but it was held to the contrary in Kirland *v.* State, 43 Ind. 146. The court

approved the Davis case, on account of "The close and intimate connection which existed between the prosecutor and the negro; but no such identity or connection between the prosecutor and his horses in the case in judgment is shown." That is to say that violence to the person may be communicated through a rope tied to that person, but not through reins held in the hands of that person! And yet in an ancient case, it was adjudged that excessive beating at the door of a house in which the prosecutor was sitting was an assault! Rex *v.* Hood, Say, 167. In this case the knocking at the gate was more awful than that in "Macbeth," for it caused the miscarriage of the prosecutor's wife. Another case, involving the like unfortunate consequences, is Com. *v.* Taylor, 5 Binney, 277, in which the prisoner, being inside the house, made a great and frightful noise, against the peace of the commonwealth and of Mrs. Strain. Judge Brackenridge, a wise judge and a merry, treated the subject with entertaining humor and learning. The court did not precisely christen the offense, but called it a misdemeanor. It was held of old that upsetting a chair or carriage in which one was sitting, or a ladder on which one was standing was an assault. Hopper *v.* Reeve, 7 Taunt. 698; Collins *v.* Renison, Say, 138.

It even seems that an insult to a counterfeit presentment of the human body may constitute a criminal offense. Thus in the famous case of Mezzara, 1 City Hall Recorder, 113, this doctrine was invoked in protection of a portrait. The defendant was a portrait painter, who, having painted a portrait of Mr. Palmer, counselor and attorney-at-law, master in chancery and notary public, which was not satisfactory to the sitter and which he declined to accept, added a pair of ass's ears to it; it was seized by the sheriff on an execution in favor of Palmer, and exposed for sale, and the defendant himself drew attention to the picture by advertisement of the sale in a newspaper. It was contended for the defendant that he had not published the libel, that the publication was by Palmer himself through the sheriff as his agent, and that the painter merely intended to turn the portrait into a picture of Midas. There was a conviction, and defendant was fined $100. The reporter indulged in classical allusion to Midas, and in some tolerably amusing comment, but posterity will never cease to regret that he did not give instead the speech of William Sampson for the prisoner.

It is undoubtedly the law that one is not without remedy against another who assumes to exhibit or sell his portrait without his consent, as in the case of a photographer, or one who puts a lady's portrait on his merchandise, as for example, on cigarettes, to commend it to the purchasing public. The court will interpose its injunction to prevent such an outrage. Pollard *v.* Photographic Co., L. R., 40 Ch. Div. 345; Moore *v.* Rugg, 44 Minn. 28; Corliss *v.* E. W. Walker Co., 64 Fed. Rep. 280. But this right is strictly personal, and a father has no such proprietorship of his child's body as will enable him to restrain the publication of its picture. Murray *v.* Gast Lithog. Co., 8 Misc. 36.

But it seems that a stage representation or caricature of a person is not so unfavorably regarded as to warrant an injunction against it, however it might be held of an action of libel. So at least it has been thought in England. It would indeed be a pity to have Dixey restrained from imitating Irving as "Hamlet," although it seems that the court would interfere to prevent the exhibition of a wax figure of a man who had been tried and acquitted of murder. Monson *v.* Tussaud [1894], Q. B. 671.

It is familiar law that a mere threat of assault, in circumstances evincing the intention and ability to commit it, will constitute an assault. Thus to drive a horse intentionally so near a person as to endanger his person is an assault. State *v.* Sims, 3 Strob.

137. In an extreme case it was held that where a negro ran after a white woman, through the woods, shouting "Stop!" this was an assault with intent to commit rape, although the defendant relinquished the pursuit. State *v.* Neely, 74 N. C. 75; 21 Am. Rep. 496. The court put this on the notorious instinct and common practice of the blacks, with a reference to the gallinaceous and the canine race, and scouted the suggestion that he might have intended mere robbery. Two judges dissented, and the decision was fairly overruled by general laughter, and the court frankly took it back in State *v.* Massey, 86 N. C. 658; 41 Am. Rep. 478.

There is a good deal of learning and nice discrimination in the books respecting a contingent threat of assault. For example, if the prisoner said, "If it were not for" something or another which effectually demonstrates that he could not possibly or certainly would not commit the threatened act, it is not an assault. Thus all the recent oral violence of our distinguished fellow-citizens, Messrs. Corbett and Fitzsimmons, at safe distance, constitutes no assault. As we do not intend this article to be learned or exhaustive, we refer the reader to sundry citations concerning contingent threats which were made in a serious vein in a note, 39 Am. Rep. 712, and in Browne's Criminal Law, p. 37.

The law entertains so high a regard for the physical safety of some of the most worthless members of society that it will not permit them voluntarily to hurt one another. At least so it is held in England, in case of an angry tussle. Reg. *v.* Lewis, 1 C. & R. 419. And so in King *v.* State, 4 Tex. Ct. App. 54; 30 Am. Rep. 160; Shay *v.* Thompson, 59 Wis. 540; 48 Am. Rep. 588, where two old men "fought with great spirit and brutality," and the defendant "gouged both eyes of the plaintiff," all about a disputed wire fence; State *v.* Newland, 27 Kan. 764; Grotten *v.* Slidden, 84 Me. 589; Barholt *v.* Wright, 45 Ohio St. 577; 4 Am. St. Rep. 535. In this country, as to prize-fighters, it has been adjudged both ways. Chamber *v.* State, 14 Ohio St. 437; Com. *v.* Colberg, 119 Mass. 350; State *v.* Burnside, 56 Vt. 445; 48 Am. Rep. 801. As might be supposed, the New England courts are stricter than that of Ohio on this point. The Massachusetts court draw a just distinction between "manly sports calculated to give bodily strength, skill and activity, and 'to fit people for defense, public as well as personal, in time of need,'" and encounters that "serve no useful purpose, and tend to breaches of the peace." This was before the days of the favorite Boston hero, John L. Sullivan. A friendly set-to with soft gloves in private is not objectionable, but if the parties should fight till one was killed it might be manslaughter. Reg. *v.* Young, 10 Cox Cr. C. 371. The Divine law forbade mutual combats (Exodus, xxi, 18, 19), and this was followed in civil actions in Adams *v.* Waggoner, 33 Ind. 531; 5 Am. Rep. 230; Bell *v.* Hansley, 3 Jones Law, 131; Dole *v.* Erskine, 35 N. H. 503.

It has even been held "that one may not maim himself, because that unfits him for fighting for his lord, the King; and consequently another may not maim him at his request"; both are guilty. Rex *v.* Wright, 1 East Pl. Cr. 396; People *v.* Clough, 17 Wend. 351; 31 Am. Dec. 303. But if one merely whips another, at his request, he commits no offense. State *v.* Beck, 1 Hill (S. C.), 363; 26 Am. Dec. 190. The complainant being found by the defendant in possession of property stolen from him, earnestly entreated him to whip him rather than send him to jail, and he complied reluctantly and *molliter*. The judge observes: "A surgeon who, for his patient's health, cuts off a limb, is not guilty of mayhem; or if one plucks a drowning man out of a river by the hair of his head, this is no assault. If according to the prescription of the physician in the Arabian Nights, a physician should beat his

patient with a mallet for the *bona fide* purpose of restoring his health, though this might be malpractice, it would be no assault." This doctrine is applied, in the absence of statutes of abortion, to the case of a woman consenting to an abortion upon her person. Com. *v.* Parker, 9 Metc. 263; 43 Am. Dec. 396; State *v.* Cooper, 2 Zab. 52; 51 Am. Dec. 248. But if one kills another at his request, it is murder. Blackburn *v.* State, 23 Ohio St. 146. A curious action was brought recently in Germany against a surgeon for the recovery of the plaintiff's leg which he had amputated and assumed to carry away. I should think that title would not pass without consent and delivery.

It would be superfluous to dwell on legislation against duelling and challenges to duels, or to remark on the amelioration of the ancient law by which trial by combat was permitted. And so of the inhibition and detestation of suicide at common law, so different from the respectability of the act in classic times and countries.

But where the assault cannot be effectuated without the active, innocent assistance and co-operation of the assaulted person, courts differ. As for example, where one delivers to another a deleterious drug which the latter incorporates into his own frame. In Com. *v.* Stratton, 114 Mass. 303; 19 Am. Rep. 350, the prisoner having given a young woman figs containing "love powders," to wit: cantharides, of which she ate, this was held an assault and battery; and so in People *v.* Blake, 1 Wheel. Cr. Cas. 490, it was held where a "young black woman" put cow-itch into Mrs. Blyth's bathing water (although no stress was laid on the prisoner's youth or color); and this was followed in Carr *v.* State, 135 Ind. 1; 41 Am. St. Rep. 408; 20 L. R. A. 863; but in Gamet *v.* State, 1 Tex. Ct. App. 605; 28 Am. Rep. 425, it was held to the contrary in respect to putting strychnine in coffee, and to the latter effect are English cases. Reg. *v.* Hassam, 2 C. & K. 912. If there had been a law court in Eden, it is impossible to imagine what it would have held of Eve's administering the apple to her spouse.

The law sometimes deems that a person has been assaulted even where he was ignorant of it. As where a woman is deceived by her physician as to the surgical necessity or propriety of his interference with her body. Reg. *v.* Case, 1 Den. C. C. 580. And so if the complainant was asleep or otherwise insensible at the time, or had not sense enough to know that the act was unlawful. Com. *v.* Stratton, *supra*. And so if a wife consents to intercourse with a stranger, supposing him to be her husband. Rex *v.* Williams, 8 C. & P. 286. And so where a boy of eight ignorantly acquiesces in indecent liberties. Reg. *v.* Lock, L. R. 2 C. C. 10. The doctrine that a woman may not complain of familiarities or violence to which she consented is too familiar to justify the citation of authorities. It has generally been held that where a wife yields to a stranger supposing him to be her husband, it is not rape. Bloodworth *v.* State, 6 Baxt. 614; 32 Am. Rep. 546. But in Ireland they hold rule more humane and consistent with morality. Queen *v.* Dee. 15 Cox C. C. 579.

But though the law does not allow one to assault himself, nor consent to an assault on himself by another, yet it will countenance him in assaulting another to protect himself. As in the famous case of Laidlaw *v.* Sage, 73 Hun. 125, where the defendant, fearing a crank who had come into his office demanding money with a threat of blowing him up with a dynamite bomb which he had in his bag in case of refusal, slyly pulled the plaintiff between the crank and himself, under pretense of shaking hands with him, and the plaintiff was in consequence badly shattered by the explosion. Mr. Sage is the notorious "put and call" broker of New York, but the court held that as Laidlaw had not called for this action, Sage could not lawfully put him in the position of a human shield. At

last accounts the shield had recovered $25,000 damages, but the end is not yet.

It is common law that a husband is entitled to have his wife's body inviolable from the wily seductions or forcible attacks of others. One court goes so far as to hold that if a druggist sells her opium, and thus demoralizes her body, the husband has an action against him. Hoard *v.* Peck, 56 Barb. 202; Holleman *v.* Harvard, 119 N. C. 150; 34 L. R. A. 803. But it has been held by the former court that the husband has no criminal redress for an assault on her person invited by her. People *v.* Bushnell, 5 Barb. 156. And that he cannot recover damages for a surgical operation upon her at her request, provided it is reasonably deemed necessary to prolong her life, although it deprives the husband of a part of her body. State *v.* Housekeeper, 70 Md. 162; 2 L. R. A. 587. But again it has been adjudged that he may have damages of a physician who brings a layman to her bedside to assist him in her *accouchement*, this being regarded as equivalent to Clodius's penetration into the mysteries of *Bona Dea*. De May *v.* Roberts, 46 Mich. 160; 41 Am. Rep. 154. A wife has a corresponding theoretical monopoly of her husband as against erring sisters or envious brethren who entice it away from her. So say the courts of New York, Ohio, Connecticut, New Hampshire, Indiana, Michigan, Colorado, Missouri, Nebraska and Iowa; but Minnesota, Maine, Wisconsin and Tennessee are of the contrary opinion.

But the husband's right to his wife's body is valid only as against interlopers; he cannot imprison his wife, in the absence of her misconduct, nor compel her to live with him. So it was declared in the celebrated case of Jackson *v.* Clithero, 25 Am. Law Rev. 254, to the intense disgust of English husbands, who overwhelmed the columns of "The Times" with their complaints.

In the recent English case of Miss Beatty, a hospital nurse, who sued an eminent surgeon for removing both her ovaries when she had restricted him to one, she was held to be without remedy because the surgeon thought the double operation necessary. (See 9 GREEN BAG, p. 136.)

The absence of all malice and the evident intention to be merry will not justify an assault. As where one in sport threw a piece of mortar at A and hit B. Peterson *v.* Haffner, 59 Ind. 130; 26 Am. Rep. 81. In the "City Hall Recorder," which contains a good deal of humor and scholarship on the part of the reporter, we find in Volume I at page 167, the case of Duffie *v.* Matthewson and several others, in the marine court, presided over by Henry Wheaton, the head note of which runs as follows: "The captain and crew of a vessel on the high seas have no right to permit or excite Old Neptune to shave a passenger and immerse him in a tub of water, contrary to his will." The British ship "Thomas" had no sooner begun to stir up with her prow the schools of cod on the Newfoundland Banks, than the crew began playing those pranks customary on crossing the equator. Refusing the demand of Neptune for "a bottle of cognac or rum," the recalcitrant Mr. Duffie was seized upon by the nautical masqueraders, shaved with a razor formed from an iron hoop, and then dropped into a tub of sea water. Duffie had enjoyed the lark when it was at the expense of Ann Jones, another passenger, — it does not appear that the lady was shaved, — but objected that when applied to him the custom was unreasonable and invalid, that it was not such an essential incident of the contract of carriage that he must have been presumed to contract with reference to it, and that it was an assault and battery not alleviated by the humorous intention. The jury gave him forty-six dollars damages. The case is reported in a mock-heroic and classical strain which is quite amusing. The legal view of practical joking is somewhat set forth in a note, 40 Am. Rep. 591, annexed to the case of the playful gentleman who put gunpowder in

the plaintiff's smoking tobacco, and thereby caused him optical injury. The "lark" is a bird not specially beloved of the judges. Although a good deal of latitude is allowed to schoolboys, yet the court in Markley *v.* Whitman, 95 Mich. 236; 35 Am. St. Rep. 558; 20 L. R. A. 55, could not bring itself to countenance the practice of "rushing," or the "horse game." In this game a line of boys is formed, one behind another, an unsuspecting victim is found in front, and then the foremost boy is rushed against him by those in the rear. In this instance the victim's neck was nearly broken and he permanently lost his voice. The foremost lad in the human catapult was adjudged to pay $2,500 damages. And so, regardless of his intent, a schoolboy was held in damages for kicking one of his young mates on the shin in school hours. Vosburg *v.* Putney, 80 Wis. 523; 27 Am. St. Rep. 47; 14 L. R. A. 226. The court said it would have hesitated to hold the defendant if the injury had been inflicted in sport on the playground, but the act was unlawful because kicking shins was not in order during study time.

In like manner the absence of intent to hurt will not justify the creditor in laying hands gently on his debtor, while sleeping in his bed, to wake him up in order to present his bill. Richmond *v.* Fiske, 160 Mass. 34. And so also where the intention was merely to express admiration, as where the gallant railway conductor kissed the female passenger against her desire. Croaker *v.* Chicago, etc. Ry. Co., 36 Wis. 657; 17 Am. Rep. 504. As this was not in the apparent course of the conductor's employment it cost the employers $1,000. So the poet's denunciation of the fellow who lays hands upon a woman save in the way of kindness may even be extended to kind acts which are not invited.

But where no corporeal injury is inflicted, nor capable of being inflicted, as for example, where one points an unloaded gun at another, knowing it to be unloaded, there is a difference of opinion whether the terror of the person pointed at will sustain a complaint of assault and battery. That it will, is held in Com. *v.* White, 110 Mass. 107; that it will not is held in Chapman *v.* State, 78 Ala. 463; 56 Am. Rep. 42; State *v.* Godfrey, 17 Oreg. 300; 11 Am. St. Rep. 830; and other cases *pro* and *con* are cited in these. It seems to the writer that the Massachusetts doctrine is preferable. The presenter of the weapon should be estopped by the appearance, for very few persons would have presence of mind to inquire if the gun is loaded before getting frightened.

"Oh! why does the white man follow my path?" exclaimed the Indian chief. That was what Chappell asked about Stewart, in 82 Md. 323; 51 Am. St. Rep. 476; but the court refused to enjoin the following, and watching, although it annoyed Chappell, injured his business and credit, and brought him into suspicion.

The law even extends its care of the human body after death, and insists that it shall have proper burial. This was laid down in Reg. *v.* Stewart, 12 Ad. & El. 773. In Kanavan's case, 1 Maine, 226, it was held indictable to cast a dead human body into a river, and the court grew eloquent over the enormity of the offense. So laws against disinterring dead bodies for the purpose of dissection are almost universal. Dickens gave voice to the common and humane sentiment on this subject when he represented Mrs. Cruncher as assiduously "flopping" in prayer to turn her husband, Jerry, from his unholy course in this regard. But cremation instead of burial is not infrequent in this country, and our courts have had nothing to say against it, while the English court has distinctly approved it. Queen *v.* Price, 12 Q. B. Div. 247. The law has long outgrown its ancient prejudice against suicides, which denied them the rites of Christian sepulture, and did not even grant them the "maimed rites" which the poet gave to poor distracted Ophelia, but buried their bodies at the crossroads with

stakes driven through them. Even the recent peculiar legislation of New York, which made an unsuccessful attempt at suicide a penal offense, has become practically a dead-letter, owing to the difficulty of enforcing it.

One striking exception which the law makes as to the inviolability of the human body is when it deems an unusual exposure and exhibition of it necessary to the attainment of criminal or civil justice. The courts are by no means unanimous in their views on this point. In civil cases, a majority of the courts hold that where one sues for an injury to his body, either he is bound to submit to a surgical examination on the demand of the other party, or the court may in its discretion order him so to submit. The cases to this effect are cited in Railroad Co. *v.* Botsford, 143 U. S. 250. In that case, however, a vigorous decision to the contrary was announced, and this has been followed, or had previously been adjudged, in Missouri, Illinois, New York, Indiana. Michigan has recently attached herself to the majority (Graves *v.* Battle Creek, 19 L. R. A. 641.) In New York a law has recently been enacted giving the right which her courts had denied. The chief, and it seems to me the unanswerable argument against this power, is that the law has no authority to compel a private suitor to produce any particular class or measure of evidence, or any evidence whatever. If his evidence fails to satisfy the jury, he simply fails in his contention. The argument of delicacy, propriety and policy has force, but the other seems overpowering.

There is a similar but less serious conflict on the question whether one on trial for crime may be compelled to expose parts of his person which are usually kept covered, or to do unusual acts, in order to identify him; as for example, to strip his arm to show a mark upon it, or to put his foot in a track. There is certainly no objection to the jury's viewing those parts of the body which are commonly visible, but to stretch the rule beyond this seems to infringe the constitutional privilege of the accused to refuse to give or furnish evidence tending to criminate himself. The cases and the arguments on this point are arrayed in GREEN BAG, Vol. IV, 555. The most recent ruling is that in New York, that a prisoner may be compelled to stand up in court for the purpose of being identified, but this comes within the class of usual acts. In England a statute compels a prisoner accused of forgery to "show his hand," if required; *i. e.* to write in court.

Having thus traced the legal inviolability of the human body from its conception to its dissolution and burial, there remains only to remark that the same principle subsists even after its burial. The public man, it is true, is subject in his last moments to a terror worse than death, namely, the liability to have his effigy stuck up in some public place, like those ridiculous statues, in frock coat and trousers, which disfigure the parks and squares of Boston and New York. This is one of those penalties which is imposed on greatness, or the commonplace qualities which are supposed to be akin to greatness. But the law will take care that no private man's person shall be thus perpetuated or caricatured against his will or that of his family. Such was the humane decision of the court in Schuyler *v.* Curtis, 64 Hun. 594, where the exposure of a public statue of a very excellent and very modest woman was prohibited on the petition of her descendants, although the design was purely complimentary, and was to exhibit the statue at the late Columbian Exposition, at Chicago, under the title, "The Typical Philanthropist." In this case the court *obiter* deny the right of strangers to erect statues even to public men against the will of their families or descendants, observing that no one "thereby surrenders his personality while living, and his memory when dead, to the public to be used or abused, as any one of that irresponsible body may see fit. . . It

cannot be that by death all protection to the reputation of the dead, and the feelings of the living in connection with the dead has been absolutely lost. . . But it is probably the first time in the history of the world that the audacious claim which is here presented has ever been advanced."

This ruling, however, was reversed by the court of appeals (147 N. Y. 434; 49 Am. St. Rep. 671), the court remarking: "Whatever the rights of a relative may be, they are not, in such a case as this, rights which once belonged to the deceased, and which a relative can enforce in her behalf and in a mere representative capacity, as, for instance, an executor or administrator, in regard to the assets of a deceased. It is not a question of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us all of rights in the legal sense of that term, and, when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living which it is sought to enforce here. That right may, in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living and not that of the dead which is recognized." The court observe *obiter:* "If the defendants had projected such a work in the lifetime of Mrs. Schuyler, it would perhaps have been a violation of her individual right of privacy, because it might be contended that she had never occupied such a position towards the public as would have authorized such action by anyone so long as it was in opposition to her wishes." This was affirmed in the United States Supreme Court. So it seems even a private woman may be subject to the annoyance of expecting a posthumous public statue of herself to be set up in a gown ridiculously out of fashion. And it has been decided that: The picture or photograph of a public person, such as a great inventor, may lawfully be published in a newspaper, magazine, or book, if a copy can be obtained without breach of contract or violation of confidence. Corliss *v.* E. W. Walker & Co., 57 Fed. Rep. 434; 64 ibid. 280; 31 L. R. A. 283.

Another exception sometimes made by the legislatures, if not by the courts, to the inviolability of the body, is in regard to vaccination. It has sometimes been enacted that the community should be vaccinated in order to prevent the rise or spread of contagion from small-pox. This seems a rather tyrannical interference with the person, but it was defended on the grounds which justify the blowing up or pulling down of houses to prevent the spread of conflagration. The right has been very strenuously denounced, and even forcibly resisted. No case has come in question in this country involving the right of the citizen to resist the vaccination of his own body where the provisions of the statute had been precisely complied with. In England the public authorities may order a child to be vaccinated. Reg. *v.* Justices, L. R. 17; Q. B. 191, and other cases cited in notes, 25 L. R. A. 152. In this country it was early held that a tax to pay the expenses of vaccinating the inhabitants of a town was valid. Hazen *v.* Strong, 2 Vt. 427, and it has been held that a school board may exclude pupils who refuse to be vaccinated. Duffield *v.* Williamsport School District, 162 Pa. St. 476; 25 L. R. A. 152. So a statute authorizing such actions by school boards is valid. Bissell *v.* Davison, 65 Conn. 183; 29 L. R. A. 251; Abeel *v.* Clark, 84 Cal. 226. If a statute authorizes vaccination only of persons infected or exposed, it confers no authority to vaccinate or quarantine an express proprietor on the ground that his business carries danger of infection. *Re* Smith, 146 N. Y. 68; 28 L. R. A. 820.

Whether it is arson for a prisoner to fire a jail for the mere purpose of escaping has been variously decided. Although it would seem the duty of a good citizen to await his trial, and vindication or punishment, with composure, yet some highly respectable courts have allowed so much to the natural longing for liberty of person as to excuse the act and pronounce it not arson. People *v.* Cotteral, 18 Johns. 118; Jenkins *v.* State, 53 Ga. 33; 21 Am. Rep. 255; State *v.* Mitchell, 5 Ired L. 350; Delaney *v.* State, 41 Tex. 601. Mr. Bishop says, "Unhappily on this side are the majority of cases." But to the contrary are: Luke *v.* State, 40 Alabama, 30; 20 Am. Rep. 269; Smith *v.* State, 26 Tex. Ct. App. 357; 50 Am. Rep. 773, overruling Delaney *v.* State, *supra*. He is bound to stay although the jail is unhealthy and filthy. State *v.* Davis, 14 Nev. 439; 33 Am. Rep. 563. He may be punished for escaping although he was acquitted of the charge on which he was confined. State *v.* Lewis, 19 Kansas, 260; 27 Am. Rep. 113.

It seems that as one arrested on a charge of crime is presumably innocent, he may not be compelled to sit for his likeness, to be added to the "Rogues' Gallery." If this has not been judicially decided, it was in effect decided by the House of Commons, in 1879, in the case of Mr. Ambrose Fortescue, an American gentleman, incarcerated in Newgate on a charge of forgery, whom the governor of the prison manacled and "shored up" and thus took a photographic copy. The home secretary, on the call of the House of Commons, admitted that it was wrong, and against the rules of the prison. The sitter probably did not assume a cheerful expression. I have not learned that he ever sued the governor for damages for infringement of copyright. Probably, after conviction and sentence, a sitting might be enforced without any breach of personal rights.

Where the superintendent of a cemetery carelessly and willfully disinterred the remains of the plaintiff's child, it was held actionable. Meagher *v.* Driscoll, 99 Mass. 281; 96 Am. Dec. 759. So where one wrongfully dissected the body of the plaintiff's husband. Larson *v.* Chase, 47 Minn. 307; 28 Am. St. Rep. 370; 14 Lawyers' Rep. Annotated, 85; Foley *v.* Phelps, 1 App. Div. 551 (N. Y.); or of his child. Burney *v.* Children's Hospital (Mass. Sup. Ct. June, 1897). But consult Young *v.* College of Physicians and Surgeons, 81 Md. 358; 31 L. R. A. 540.

Courts are so sensitive at the sight of human corpses that they will not tolerate the exhibition of exhumed human bodies in mere cases of civil contract, such as actions on life insurance policies. Wehle *v.* U. S. M. Acc. Ass'n, 153 N. Y. 116; Grangers' Life Ins. Co. *v.* Brown, 57 Miss. 308; 34 Am. Rep. 446.

A CARLYLE WILL IN AN AMERICAN COURT.

By Owen B. Jenkins.

THE possession of talent has been in some subtle and powerful way so connected in the minds of men with the genealogy of its possessor as to give rank to his kin in most countries and honor in all. While it has been said that genius has no pedigree, men have uniformly acted on the contrary supposition, and have usually allowed merit to all branches of a family, any one of whose members has given them signal cause for esteem. Among the many illustrations of this tendency was the toil of the Scotch lawyer, Gracie, of Dumfries, whose genealogical labors set forth in a tree six feet high and two feet wide, prepared in 1862, traced the descent of Thomas Carlyle through ten generations from a certain Lord Carlyle of Torthorwald who died in 1745, and which the great Thomas said was "probably correct in essentials." Men recognized as altogether fitting that one who did so much to ennoble the thought and life of his fellows should have been connected by blood with the nobility of the past, and were not surprised that excellence should have come from mediæval ancestry likewise pronounced excellent by its contemporaries.

A side light on the vigor of the Carlyle constitution and the ability of those endowed with it to keep to the front is furnished by a glimpse of the life of Alexander Carlyle. He gives us a bit of biography in his will, which instrument, dated October 21, 1814, and signed at Philadelphia, where he resided, subsequently was submitted to the Supreme Court of Pennsylvania for construction. In it he says: "I was born in Castlebank near Ecclefechan, about ten miles from Dumfries in Scotland, which place I left when young and served my time in England in the trade of a tanner before I came to America." Then, after making certain specific bequests, the testator gives the remainder of his estate to his nephew "John Carlyle, the grandson of William Carlyle, and his four children, namely, John, William, Alexander and Rachel Carlyle, and also William Renew, to be equally divided among them during their natural lives, and afterwards to revert to the male heirs in a lineal descent of my nephew John Carlyle whose male heirs are only to possess my estate in tail, and their male issue who bear the name of Carlyle forever."

The opinion of the court was delivered by Judge Duncan, himself of Scotch descent, who, in holding that the nephew of the testator took by devise in special tail male said: "There can be no good reason why the high constable of this good city should not be indulged in the gratification of his family pride, equally with the proudest baron, and make what is very usual in his native country, Scotland, a Tailzie."

It appears from this statement that Alexander Carlyle, who had accumulated at the time of his decease personal property amounting to $5,000, and numerous houses and lands, was at the head of the constabulary of the then foremost city in the country, being in fact director of public safety. In 1810 the population of Philadelphia city was over 50,000 souls, and the surrounding county contained as many more, so that the position and influence of Carlyle were not insignificant, although the word constable has fallen from the high estate it occupied when worn by a De Lacy or a Montmorency. Among the purchases made by Alexander Carlyle was a lot of land near 10th and Race Streets in Philadelphia, bought in 1781 at public auction, held by the Supreme Executive Council of Pennsylvania pursuant to an action

of Assembly of that State, "for striking the sum of 100,000 pounds in bills of credit for the present support of the army, and for establishing a fund for the certain redemption of the same," and a certain other act "for the better support of public credit by an immediate sale of the lands therein mentioned and fully securing the purchasers thereof in their titles." So that Alexander Carlyle was an active patriot and had firm faith in the new government, a wealthy and influential citizen and proud of his family name and lineage, nor at all unhappy dwelling in the home of Democracy, a residence that subsequently would have been a great bugbear to his distinguished relative.

While the relationship between this Alexander Carlyle and the great man of letters is assumed, it is not susceptible of actual proof. The Christian names of Thomas Carlyle's family and those of Alexander's are the same, the two men had the same birthplace, and the self-respect with which the Philadelphian announces his identity, and the pride with which he provides for the perpetuity of his family name, to some people sound not a little unlike the far-off echo of Teufelsdrockh's author, nor is there wanting room for Alexander on the Gracie sketch in Scotland. Through the kindness of Professor C. E. Norton of Harvard, to whom innumerable lovers of Carlyle are indebted for a careful and intelligent editing of his correspondence, the writer was put in communication with Mr. Alexander of Edinburgh, a nephew of Thomas Carlyle, who found the place on the family tree in all probability belonging to the Philadelphia tanner and high constable, thinking he was actually a collateral relative to his uncle, but being unable to establish it as a positive fact.

The New World has been the home of several scions of the Carlyle stock including one of Thomas's brothers, nor has this continent been less hospitable to the writings of that celebrated litterateur than to his relatives. The American public were in advance of his English readers in the warmth and promptitude of their welcome to his books, and furnished him with substantial pecuniary aid when it was sorely needed. While international marriages, the forces of modern society and the improvements of civilized life daily cement us closer to Britain, it is pleasant knowledge that we can include in the roll of our fellow citizens one of kin to her most notable modern man.

LONDON LEGAL LETTER.

LONDON, Sept. 5, 1897.

WITHOUT doubt, the most important result of the legislation of the Parliament which has just adjourned for its annual grouse-shooting, at least so far as those who practice law are concerned, is the Employer's Liability Act. It does not go into operation for nearly a year and cannot, therefore, work any immediate change in practice, but in a number of respects it differs fundamentally from the existing law. The Act of 1897, though it does not expressly repeal the Act of 1880, nor abrogate the common law, will, when it comes into operation next July, practically supersede both, so far as certain trades, which are specifically enumerated, are concerned. It so alters, both in precept and principle, the common law fictions of the employer's liability, of contributory negligence and of common employment, that their best friends, if they have any friends at all, will not be able to recognize them. Of all these fictions, that of the doctrine of common employment is the least excusable and the most irrational, and anything which tends to get rid of it ought to be hailed with joy by the large class of lawyers in America who have to do with the ever increasing volume of litigation growing out of actions for damages for personal injuries.

It may not be remembered that this doctrine was laid down for the first time in this country sixty years ago in the now famous case of Priestly *v.* Fowler. Fowler, a butcher, sent Priestly, one of his workmen, to deliver goods in a van. The van, which was overloaded by other workmen of Fowler, broke down, and Priestly fractured his thigh. The jury awarded him, for this, a hundred pounds, a sum which in these modern days of ever increasing awards by American juries, must appear contemptible to those lawyers who take such cases on contingent fees and who have to divide and divide again with the agents to whom they are

indebted for their practice. But, small as the award was, the Court of Exchequer set it aside and held that Priestly could not recover because the liability of the master would lead to alarming consequences under such circumstances. Reason might have suggested that if the master is liable for the act of his agent, as, for example, when a servant, contrary to his master's orders, drives rapidly down a street he has been forbidden to enter and runs over a pedestrian, the same liability should attach to the act of an agent engaged in loading a butcher's van. But the Court of Exchequer thought differently, and the doctrine of common employment was invented in the praiseworthy effort to save the employer from making compensation for possibly unreasonable claims. Lord Abinger, who delivered the judgment, suggested a number of imaginary difficulties which might arise in domestic employment and which, he contended, justified the court in formulating the new doctrine; but as this was when railways were in their infancy, and long before street travel and traction had assumed their present proportions and when mills and foundries and workshops were small affairs, his views are not entitled to the weight they then received. He would doubtless have been startled had he known to what extravagant and ridiculous lengths this doctrine of common employment would have been pushed. Here, as late as 1865, it was held that a miner was a fellow-servant with the certified manager of a colliery appointed pursuant to a statutory obligation, and, therefore, though the miner was killed by the negligence of the manager, the widow could receive nothing from the proprietor of the colliery. In 1880 the law was modified in an effort to remedy this intolerable feature, although the doctrine, in general, was preserved. It was provided that an employer should be answerable to his workmen for the negligence of anyone in his employment whose orders the injured workman was bound to obey, unless the one thus injured knew of the defect which caused the accident and did not give information thereof to his superior.

The Employer's Liability Act of 1897 applies only to railway men, miners, quarrymen, engineers, factory hands, building operations on a large scale and laundries worked by mechanical power. Within these trades it provides at the sole cost of the employer a limited scale of compensation for all accidents disabling a man for a fortnight or more, arising in the course of the employment, and not due to the willful misconduct of the victim himself. The sums which the workman may thus recover are, judged by the standard of the awards of American juries in cases of actions for damages for injury to the person, ridiculously small, but no objection appears to have been made to the Act by trades unions or workmen on this score. In fact, the force which has impelled the bill through its various stages at this session, where other measures of much importance have been crowded out, is that which has been generated by organized labor movements, and the opposition has come from employers. Such a law would undoubtedly be strenuously opposed by the lawyers in America, but here the contingent fee is unknown and, in consequence, damage suits form but a very small part of the volume of litigation; and when verdicts are recovered they commonly range from $50 for slight injuries to $1,000 for graver ones.

The courts closed nominally on the 12th of August, but practically several days earlier, and will not reopen until the last week in October. During all this time there will be no opportunity for work by those who desire it or who are compelled to live by it. The layman suffers as well as the lawyer, for all remedies, except those of an extraordinary nature, are denied him. Such a state of things is a constant source of irritation to both branches of the profession and to the community generally. Unfortunately those in whose hands alone the matter of reform lies are the judges, by whom always a vacation is gladly welcomed, and the leaders of the bar, whose labors, while the term lasts, are excessive, and whose emoluments are so large that they can take their well-earned rest without considering either the expense of it or the temporary deprivation of their incomes. These fortunate individuals are, however, no matter what their weight of influence, not more than five or ten per cent, in point of numbers, of those to whom the long period of enforced idleness is an occasion of complaint and even suffering.

There are now no less than ten judges of the High Court who have completed the statutory term of fifteen years' service and are, therefore, eligible for retirement on pension. At the head of the list is the Master of the Rolls (Lord Esher), who recently celebrated his eighty-second birthday and who has been on the bench over twenty-nine years. There are others who have completed nearly a quarter of a century. Mr. Justice Carr has resigned, his resignation to date from the end of the long vacation. Lord Justice Lopes has been elevated to the peerage and is in poor health, so that it is probable that he may retire, but the others give no indication of yielding their comfortable places to younger men.

STUFF GOWN.

The Lawyer's Easy Chair.

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

BY IRVING BROWNE.

CURRENT TOPICS.

TOO MUCH LEGISLATION. — Governor Griggs of New Jersey made a very suggestive address at the August meeting of the American Bar Association on the manifest evil of too much law-making. He called special attention to the proposition, which is undeniable, that while the interpretation of the law is a science, the statutory making of laws is not. Judges, learned in their profession, carefully construe, classify and apply each new enactment, and in the case of a majority of laws they must receive judicial interpretation before they become actually operative. On the other hand, the legislators who prepare and enact the laws are not as a class experienced in the study of law. Lawyers may predominate in the legislature, but this does not prevent bills that are valueless in design and faulty in construction from being rushed through. The majority of the measures introduced fall by the wayside, but the mere fact that they are introduced complicates the work of the legislatures and affords too little time for the consideration of such bills as are really beneficial in character. An evident reason why legislation cannot be a science is that a vast amount of legislation is proposed in the particular interests of politicians and men of business who have no care for the general welfare, but have an axe of their own to grind. No one has more clearly and forcibly demonstrated the fact and the evils of excessive legislation than Mr. Moorfield Storey of Boston, who has made it the subject of several public addresses. That the community is awake to the fact is evident from the restriction in most of the States of legislative sessions to one in every two years, and the denial of compensation to legislators after a specified number of days. Governor Griggs adduced some interesting statistics concerning the amount of legislative work during the last sessions. In New York 4,533 bills were introduced in both houses, of which about 1,300 were finally passed, and only 797 received executive approval and became laws. The New Jersey Legislature passed 297 bills out of 657 presented, and the governor allowed 207 to go on the statute books. The number of bills introduced in Pennsylvania was 1,566, of which 483 passed and 400 became laws. Illinois made a somewhat better showing, viewed in one way, for only 195 bills out of 1,174 were passed, and of those passed only three were vetoed. As to any remedy for this serious condition, the governor was vague. He declared: "We do not want the system changed; it is only necessary that our legislative bodies shall be controlled, restrained and regulated by a proper sense of the solemnity and responsibility that pertain to the power they exercise; that they shall learn to respect the wisdom of conservatism, to value stability more than experiment."

It is indisputable that the system is not to blame. It would be unwise and undemocratic to put the law-making power in the hands of any one class, for laws designed for the promotion of the general welfare should be devised by a body composed of representatives of the various interests of the community. It would be absurd to constitute lawmakers out of a class or a few classes, as it would be to choose the executive officers of the government in the same way. But the governor's truisms above quoted amount to no more than saying that the way to cure a man of fever is to enable him to get well. The laws of a community are always good enough for it. They fairly represent its moral sense. Just as soon as the community will send proper men to the Capitol, just so soon they will have proper laws, and not a moment before that time. There is much, however, to be said in favor of a council of legislation whose recommendation of proposed bills should be influential, if not essential. A sound objection may be raised to allowing any special body to determine what measures shall and what shall not be considered by the legislature, but such a body may well be advisory, and may be especially valuable in passing on the form of bills. As the matter now stands, there cannot be much difference of opinion among reflective citizens that we "are ruined," not "by Chinese cheap labor," but by too much legislation. Fewer laws and wiser laws should be the endeavor of our legislative bodies.

THE RETIREMENT OF JUDGES. — The Chairman does not very often suffer anybody else to sit in his chair, but once in a while he makes an exception in

favor of some peculiarly suggestive and agreeable sitter, and just now he is glad to rise and offer his seat for a few moments to a writer in the London "Law Journal," who has the following to say on a novel topic: —

"The disinclination of judges to retire is a very natural one; it is the disinclination to self-effacement. Nobody likes to be shelved, least of all the children of this generation; for if there is one quality more than another characteristic of the nineteenth century it is the passion for notoriety — 'digito monstrari et dicier hic est.' All have it — politicians, actors, authors, artists; and it is a passion which grows. How morbid it may become is shown in the case of the man who set fire to York Minster merely to enjoy celebrity — 'volitare per ora virum.' Lawyers are not exempt. Even so great a judge as Chief-Justice Cockburn liked, so Lord Bramwell tells us, a page of the 'Times' devoted every day to him and his doings, and picked out *causes célèbres* for his list. There is another cause operating in the case of successful lawyers which accentuates the disinclination to quit a post of honor, usefulness, and emolument, and it is that the lawyers have less than most men other resources, other pursuits and hobbies to fall back upon. No profession is so absorbing as that of the law, where the lawyer is in the full tide of professional ambition. No galley-slave chained to the oar toils harder than does the much-retained leader at his briefs. What is the moral? Lawyers should be wise and cultivate while they still have leisure some pursuit, some study, which will furnish recreation for the evening of life. Fearne, of 'Contingent Remainders' fame, found time to construct optical glasses and musical instruments. The late Mr. Justice Grove gained not only relaxation but renown in the abstruse problems of the correlation of forces in science. The late Lord Coleridge had his happy hunting-ground in literature. Lord Justice Fry is a devotee of botany, and Lord Davey of gardening — 'sua cuique voluptas.' With studies and pursuits like these, retirement can never be dull. It means to rest, but not to rust."

Our substitute might very well have added Lord Justice Bowen, who alleviated the austerities of the law by translating Virgil. Doubtless a very interesting catalogue might be constructed of famous lawyers and judges who had some pet accomplishment, as for example, the great Chief-Justice Gibson, who fiddled, filled teeth and painted, and Chief-Justice Parsons, who experimented in microscopy, telescopy, electricity, optics and chemistry, knew French, read Dante in the original, relaxed his mind in mathematics, made bows and arrows for his son, and models to illustrate problems in conic sections; also riddles.

The aversion of judges to retire is eminently illustrated in this country in the case of Mr. Justice Field of the Federal Supreme Court, who has now "beaten the record" by having been a judge longer than Chief-Justice Marshall, and scouts the privilege of retiring upon his well-earned pension. Some animadversion has always been made, and is now making in the case of Chief-Justice Andrews of New York, against the compulsory retirement of judges at the age of seventy. Doubtless the old rule, which retired Kent at sixty, was absurd, but all things considered, we incline to believe the present rule a wise one. It is discreet to have some limit, and seventy is probably the best. Some men might usefully serve the State after that, but many more could not. Unless there is a limit of age, the bench is in danger of being incumbered by veterans who lag superfluous. The Wise Man was right on the point of three-score-and-ten. Whenever the Chairman has been visiting friends he has inexorably gone home when they were begging him to stay longer, so that he would be regretted and asked again. So the right time for the judge to descend to private life is when all men are praising him and asserting that he is "good" for many years to come. So it may seem, but men frequently go to pieces rapidly after seventy; their physical faculties become impaired suddenly, and, like old favorites on the operatic stage, they are regarded with leniency and patience only because of the remembrance of what they once were. Lawyers may be dull, but the judges should have the physical capacity to hear them and to keep awake under the infliction. Old age is sometimes excusably crabbed, but the exhibition of ill-temper or impatience on the bench is peculiarly painful. No man of eighty is so alert, vigorous, attentive, or capable of continuous exertion as he was at sixty or seventy. Wise is the vocalist who stops singing at fifty; wise the poet who desists from writing at seventy; and wise the magistrate who doffs his judicial gown at the latter age.

JUDICIAL CRICKET. — The Chairman once got himself into some trouble with his London editorial contemporaries by essaying the jest that some of the English judges had descended from bench to cricket. They saw no point in it; and when he explained that "cricket" meant a low stool, they said it might be American, but was not English. After a time someone over there admitted that the word was used in Yorkshire in that sense. But he learned never to try that joke on an Englishman again.

Last summer, as the Montreal "Morning Star" informs us, "a large number of gentlemen were present yesterday afternoon on the grounds of 'Elmcroft,' the beautiful farm of Mr. R. D. McGibbon, Q.C., near Strathmore, to witness the cricket match between the Bench and the Bar and the St. James Club. After luncheon, served by Scott in a spacious marquee, the wickets were pitched, the St. James eleven going to the bat. The Bench and Bar won the match by seven wickets, and, after cheers for each other and a united cheer for Mr.

McGibbon, a most delightful afternoon was brought to a close." Then follow the names of an appalling array of big-wigs, and the statement in conclusion that "a large number of the players and spectators subsequently dined at the Forest and Stream Club." The rest is silence. The eminent host writes us: "You will be gratified to observe that the lawyers succeeded in defeating their clients." On the contrary, we think it would have been more just for the clients to have beaten for once. It would not have cost the lawyers anything, and would have invested the relation with a variety pleasant at least to the clients. Recent personal experience has led us to believe that it is less agreeable to be a client than a lawyer. We sincerely hope that the clients took their revenge at the dinner.

NOTES OF CASES.

EXCESSIVE FEES. — Judge Hatch of the New York Supreme Court (well known to the readers of THE GREEN BAG through his able article in these pages on "The Trial of Christ") makes some forcible and well-warranted observations on the subject of attorneys', referees' and stenographers' fees, in Halbert *v.* Gibbs, 16 App. Div. 126. He says:

"In the present case we think that nothing appears which justified the attorney in the abandonment of his client in the midst of the trial. We have rehearsed the facts for the purpose of showing what we regard as the unjustifiable delay in the prosecution of this action and the enormous expense, comparatively, which has attended it. This class of actions, while complicated as to items as a house is of parts, is not, beyond that fact, difficult or extraordinary. Such actions engage the attention of the courts at each term and are disposed of with but little delay when proper effort is made to that end. This suit has now been before the referee for four years. The fees already paid amount to $6,600 more than the plaintiff's original claim. The item now demanded by the defendant's attorney is $3,410, making the claims paid and those demanded, of which we now know, the sum of $10,010, and the end is not yet. For a long time the fees of referees led the procession of fees and frequently amounted to more than the sums paid to counsel. But the established order cannot always maintain itself. Stenographers looked with jealous eye upon this fatness of fees. Modestly, but with determination, pertinacity and legislation to aid, they crept up, desire ever keeping pace with opportunity, until it has brought them to the top, with appetites whetted and keen scent for more. It is the usual thing now that stenographers' fees are greater than referees' fees. We read in the present record: 'The referee has been paid about seventeen hundred dollars. The stenographer has received about nineteen hundred dollars.' And more is to come. The defendant surely can testify that the sentimental age, when honor and renown was the motive which brought men to devotion in the law, has passed away. He seems to have met only the hardest kind of hard, practical facts, and is at present being ground between the upper millstone of the plaintiff's active efforts and the lower millstone of his attorney's refusal to act, or to permit anyone else to do so. It is these things which bring the administration of justice into disrepute. This practice courts should lay hold of with an iron hand, setting their stern disapproval upon such methods. The system impoverishes litigants, amounts to a denial of justice, and is the cause of just complaint by the the people."

AN ALLOPATHIC VERDICT. — In Krug *v.* Pitass, 16 App. Div. (N.Y.) 480, an action of libel of a physician in his professional capacity, the report does not show what the libelous words were, except that Follett, J., in a dissenting opinion, says: "As I read the article, the only expression that can be construed to refer to the plaintiff in his professional capacity is, 'Can we trust the health of ourselves and our families to the care of such a man as Dr. Krug, who hates us in such a manner that he would drown each of us in a spoonful of water?'" From this we infer that the Doctor was a homœopath, but the verdict was not of that order, for it was $6,250 and the court sustained it! The case is poorly reported. It is not even disclosed in what the article was published, although it is inferable that it was in a newspaper.

"WINE V. WATER." — Under this head the "Albany Law Journal" recently gave a very amusing speech of a humorous lawyer in response to a toast, in which he held a brief for Wine, and ingeniously showed that Water had been more destructive to the human race than Wine. In looking over 16 App. Div. (N.Y.) it seems that honors in that volume are about even, for there is one case of damages for injury by a beer-wagon and one by an ice-wagon.

EXPOSING SERVANT TO INFECTION. — In Kliegel *v.* Aitkin, 35 L. R. A., 249, the Supreme Court of Wisconsin have recently held that a master is liable for exposing to a contagious or infectious disease a servant who is ignorant of the danger and unable to know of it by the exercise of ordinary care, and who thereby contracts the disease, if the master knew, or in the exercise of ordinary care ought to have known, of the danger, and did not warn the servant. The court relied on Gilbert *v.* Hoffman, 66 Iowa, 205; 55 Am. Rep. 263, a case of a guest at an inn getting small-pox from another guest there, and Smith *v.* Baker, 20 Fed. Rep. 709, a case where defendant took his whooping children to a boarding-house, where they communicated the cough to the child of the housekeeper and kept away other boarders.

NEW TRIAL ON ACCOUNT OF COMMENTS OF COUNSEL. — This subject, on which this magazine published a number of papers several years ago, rarely arises in the East, although in the more fervid South and West new trials on account of intemperate remarks of counsel are quite common. The New York Court of Appeals, however, have recently granted a new trial on this ground, in Halpern *v.* Nassau Electric Railway Company. The action was for death of the plaintiff's intestate by negligently running over her with an electric street car. The following from the opinion show the proceedings on the trial and the conclusion of the court:

"Mr. Church: 'Your Honor, the counsel makes a statement I would like to correct.'

"The Court: 'You had better wait until he gets through and then make the correction.'

"Mr. Smith continued his summing up as follows: 'They killed that lady, Mrs. Halpern, making the one hundred and thirty-fourth victim of the trolley cars in Brooklyn. They kept it up until the people rose up in their might, until the press cried, "Halt! Enough." But they would not stop. First one and then another and then another ordinance were passed. I read one of them to you, passed on the 13th of March, 1895, saying to these railroad companies: "Stop killing our people; run your cars slower; bring them down to eight miles an hour." They passed another ordinance that the judge wouldn't allow me to put in, about fenders. Counsel gets crazy when I mention fender. "Don't, for heaven's sake, mention that word in my presence or I will drop dead. Don't say anything about fender; I will get crazy; I will get sick." He says he is sick. I don't know what it is, whether it is the fender or whether it is this great mass of evidence here brought against him. I think if I were in his place I would be in a hospital. It is enough to make a man sick on the other side.'

"After Mr. Smith finished his summing up the following took place:

"Mr. Church: 'If your Honor please, in obedience to your direction, I did not ask to correct counsel, when he was summing up, for misstatements of facts, but when the counsel deliberate goes outside' —

"The Court: 'Don't make any argument.'

"Mr. Church: 'I just want to call your attention to this fact: That I think that I am justified in excepting to statements that have no foundation in the evidence. Counsel stated to the jury that there was a war between our company and the Long Island Railroad; that we were both rushing our trains at the fastest rate possible.'

"The Court: 'That has nothing to do with the case.'

"Mr. Church: 'I except to the counsel making that statement. I ask your Honor to say to the jury that there is absolutely no evidence to that effect, and that it was an improper statement for counsel to lay before the jury in summing up.'

"The Court: 'I will charge the jury that that has nothing to do with the case whatever, and they must disregard the statement if he made it. I did not hear it.'

"Mr. Church: 'He went on to state, if your Honor pleases, this fact: That the people of Brooklyn had arisen and passed an ordinance with relation to a fender, requiring fenders to be placed upon the cars, and that our car was not equipped with a fender, although your Honor ruled the evidence out; and that that was the cause of this accident. I ask your Honor to charge the jury that when his evidence on that point had been ruled out it was an improper statement to make to the jury.'

"The Court: 'I charge the jury it has nothing to do with the case.'

"Mr. Smith: 'I was stating, your Honor, that they had no fender on the front of the car.'

"The Court: 'You wandered from the case a little. I do not think, on the evidence, that the absence of the fender had anything to do with the accident, and I so charge the jury.'

"Mr. Church: 'I ask your Honor to charge it was an improper statement to make to the jury.'

"The Court: 'I am not called upon to charge on counsel's conduct. I can charge on the statements.'

"Mr. Church: 'I have an exception to his remarks on that point.'

"There was no evidence in the case that one hundred and thirty-four persons had been killed by the trolley cars in Brooklyn, nor that there was a war between the defendant company and the Long Island Railway Company in respect to rushing trains at any rate of speed, nor was there any evidence that an ordinance had been passed requiring trolley cars to be equipped with fenders. There was evidence that there was no fender upon the car in question.

"When the defendant's counsel attempted to stop the reference of the plaintiff's counsel to exclude evidence, or to matters not in evidence, he was directed by the court to wait until the conclusion of the plaintiff's summing up. This was fair notice to plaintiff's counsel that he was transgressing the rules of propriety, but, instead of heeding the remonstrance, he persisted in making unjustifiable statements, not founded upon evidence or founded upon excluded evidence.

"At the close of the plaintiff's summing up, the defendant's counsel excepted to the remarks of the plaintiff's counsel, before referred to."

The court cited Koelges *v.* Guardian Ins. Co., 57 N. Y. 638; Williams *v.* B. E. R. Co., 126 N. Y. 96; Utitchum *v.* State, 11 Ga. 616; Tucker *v.* Henniker, 41 N. H. 317; Rolfe *v.* Rumford, 66 Me. 564; and concluded:

"We do not think that the learned court was justified in permitting the plaintiff's counsel to continue his remarks upon extraneous matters and excluded evidence. Indeed, it was his duty to have stopped the remarks of the plaintiff's counsel upon his own motion. It is impossible for us to believe otherwise than that the counsel introduced these subjects into his address for the purpose of inflaming the minds of the jury against the defendant as one of the trolley roads which he stated had killed one hundred and thirty-four victims, and which had been racing its cars with the Long Island Railroad.

"We by no means intend to say that every irrelevant or improper comment made by a counsel through inadvertence or excess of zeal would require or justify setting aside a verdict, but in this case the conduct of the counsel was persistent and continuous, and its fault flagrant.

"We are not unmindful of the fact that by our decision the error of the plaintiff's counsel will be visited upon his client, but that fact cannot be permitted to effect our judgment; all the more that, possibly, this decision may have a salutary influence in restraining the introduction by counsel, in their summing up, of matters not connected with the issues on trial, to the end that the rights of parties litigant may be protected and not abused, and that juries may be limited to the consideration of evidence affecting the issues submitted to them, and to that evidence alone."

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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.

"ONE book," says Phillips, "well digested, is better than ten hastily slumbered over."—"Studii Legalis Ratio," p. 188.

FACETIÆ.

"To me, I swear, you're a volume rare—"
But she said, with judicial look,
"Your oath's not valid at Common Law
Until you've kissed the Book."

—*Life.*

A WITNESS who was very prolix, and tested the patience of the bench, jury, and even the counsel who had called him, was suddenly asked by Judge Joseph F. Daly, "What is your business?" He answered, "I lead the orchestra at a music hall." "I thought," responded the Judge, with a weary look at the court-room clock, "that you must be an expert at beating time."

JAILER: Ha, here you are again! I thought your first punishment would have made you better.

PRISONER: So it did, but I wished to become still better.

AN Irish witness was being examined as to his knowledge of a shooting affair. "Did you see the shot fired?" the magistrate asked. "No, sorr. I only heard it," was the evasive reply. "That evidence is not satisfactory," replied the magistrate, sternly. "Stand down!" The witness turned round to leave the box, and directly his back was turned he laughed derisively. The magistrate, indignant at this contempt of court, called him back, and asked him how he dared to laugh in court. "Did ye see me laugh, your Honor?" queried the offender. "No, sir, but I heard you," was the irate reply. "That evidence is not satisfactory," said Pat. And this time everybody laughed except the magistrate.

A SCOTTISH judge, Lord Hermand, one of the band of pragmatical judicial ruffians who sat on the bench under the reign of the Dundases, delivered a celebrated ruling in the case of a young gentleman, who, when tried for "culpable homicide," put in this defense: He and his friend had sat up drinking one night after the theater, and, in a quarrel, he had stabbed his companion to death. All the judges were for short imprisonment. But Hermand, who was a notorious drunkard himself, fiercely demanded transportation. "We are told," he croaked out in his judgment, "that there was no malice, and that the prisoner must have been in liquor. In liquor! Why, he was drunk! And yet he murdered the very man he had been drinking with. My lords," he added, with tragic solemnity, if he will do this when he is drunk, what will he do when he's sober?"

NOTES.

THE mobs that kill negroes, and the communities that excuse the killers, are barbarous. The men engaged in the bloody work in Tennessee and Alabama are murderers, and should be hanged. If the communities permit them to go free, they are, to that extent, uncivilized communities in which passion is superior to the law. The judge in Kentucky is worse even than the lay offenders, for he has studied the law, knows, if he does not feel, its spirit, and is sworn to administer it fairly, justly and thoroughly. Besides conniving at and encouraging murder, he has violated his oath, and if the community in which he lives were wholly fit to govern itself, he would be driven from the bench.

We may properly continue to shudder at the cruelty of Turks and Japanese and Spaniards, to deplore the brutality of the black savages of Africa and the red savages of America, but until we tame and civilize our own white savages, until we treat all illegal killing as really murder, and until we drive from the bench such judges as the man who has recently disgraced the State of Kentucky, we would best make up our minds that the tasks we have at hand are so exacting that we have no time for interference in foreign countries or with strange populations, either through advice or annexation. —*Harper's Weekly.*

CHRISTIAN K. ROSS, the father of Charlie Ross, whose abduction on July 1, 1874, from his parents' home in Germantown, was one of the most sensational crimes ever committed in this country, died in Philadelphia a short time since. He was a well-to-do man twenty-three years ago, when his youngest child was kidnapped, but he was reduced to poverty by his constant search for his stolen son. Acting on the advice of the police, he did not pay the twenty-thousand-dollar ransom first demanded by the abductors, but the search cost him more than sixty thousand dollars, and the child was never found. One of the two men supposed to have committed the crime was shot dead in a burglary a few years later, and the only other man who seemed to have any knowledge of the affair maintained a stolid silence through a long period of imprisonment and has not spoken to this day.

THE question as to whether the naming of the baby belongs, as a matter of right, to the baby's father or the baby's mother, is raised in a queer lawsuit originating in Eastkill, in the heart of the Catskill Mountains. The plaintiff is Ole Halverson, a Swede, who has sued for damages the Rev. J. G. Remerton, a German Lutheran minister of the same place, and the pleadings set forth the following state of facts: Mr. and Mrs. Halverson have a son of tender years. The former desired that the boy should be called Oscar, after the present monarch of Mr. Halverson's fatherland. Mrs. Halverson dislikes the name of Oscar, and was determined that the baby should not be burdened therewith. Mr. and Mrs. Halverson took the baby to the clergyman to be christened. Mr. Halverson requested the minister to name the child Oscar, but Mrs. Halverson had already talked the reverend gentleman over, and to Mr. Halverson's surprise and indignation the boy was christened not Oscar, but something else, whereby Mr. Halverson suffered serious disappointment, loss of authority in his household, laceration of feelings, etc., for which he prays damages. The clergyman's defense is that he christened the child in accordance with the wishes of its mother, whose premises he considered paramount. The case brings up a novel question in jurisprudence, the decision of which will be regarded with interest in thousands of families throughout the land.

SWITZERLAND'S National Council has voted unanimously to make insurance against accident and sickness compulsory on all citizens.

MRS. CAREW, the woman who murdered her husband in Yokohama some months ago, and whose sentence of death had been commuted to imprisonment for life, had an unpleasant experience learning the severities of convict life. When she was admitted to Victoria jail, the head jailer lined her up in the yard with the other prisoners and told her to take off her hat. She stared in surprise at the man who dared so to address a lady, but did not move. "Take off your hat, I say," the jailer commanded in angry tones, and off it came. His command that she take off her shoes was obeyed with more alacrity. She was then taken to another room, had her luxuriant hair cut off, and put on the coarse prison garb. Her idea of "imprisonment for life" must have been curious, for she took with her to Hongkong a pet parrot and several trunks.

MARK TWAIN proposed some time ago to start a crusade against the insolence of menials and the encroachments upon individual rights by corporations or servants. He must have mourned the death in England the other day of Rev. William Jenkins, rector of Fillingham, Lincolnshire. Jenkins was a man after Mark's own heart. He had during his whole life carried out the principles which the novelist advocated. He was known in London by every cabman and tramway conductor, for he was a terror to all who tried to extort from him more than the law allowed. He never went

abroad without a copy of the acts of Parliament, from which he expounded the law to those who tried to get more than their share. He knew to a penny what the legal fare to various parts of the city was, and he was versed in all municipal regulations. If the cabbies tried to gouge him, as they frequently did, he hauled them before a magistrate and insisted that the law deal with them. He became the terror of all drivers in London, and gained the sobriquet of "the litigant." He compelled the railways to provide everything which the law demanded and to grant every privilege which their charter called for. Many considered him a very disagreeable person by reason of his sturdy insistence in his rights, but he is responsible for many accommodations being granted to travelers and citizens generally which would never have been granted if it had not been for his severe sense of justice. The fact that he died of liver complaint is said by the London newspapers to explain much, but his irregular liver has done a great deal for his fellow citizens.

SIR WALTER SCOTT had his share of curious experiences shortly after being called to the bar. His first appearance as counsel in a criminal court was at Jedburg assizes in 1793, when he successfully defended a veteran poacher. "You're a lucky scoundrel," Scott whispered to his client when the verdict was given.

"I'm just of your mind," returned the latter, "and I'll send you a maukin" — namely, a hare — "the morn, man." Lockhart, who narrates the incident, omits to add whether the "maukin" duly reached Scott, but no doubt it did.

On another occasion Scott was less successful in his defense of a housebreaker, but the culprit, grateful for his counsel's exertions, gave him, in lieu of the orthodox fee, which he was unable to pay, this piece of advice, to the value of which he (the housebreaker) could professionally attest: First, never to have a large watchdog out of doors, but to keep a little yelping terrier within, and, secondly, to put no trust in nice, clever, gimcrack locks, but to pin his faith to a huge old heavy one with a rusty key. Scott long remembered this incident, and thirty years later, at a judges' dinner at Jedburg, he recalled it in this impromptu rhyme: —

> Yelping terrier, rusty key,
> Was Walter Scott's best Jedburg fee.

SIBERIA, by a recent ukase, is to have a new system of law courts, removing the inhabitants from the arbitrary rule of government officials. Justices of the peace will be appointed by the Crown; there will be superior courts at Tomsk, Tobolsk, Chita, Krasnoyarsk, Irkutsk, Yakutsk, Blagovestchensk and Vladivostock, and a court of appeal at Irkutsk. The change is made, the decree states, on account of development of the country and the changes in civil life brought about by the Siberian railroad.

AMONG the early Greeks suicide was uncommon until they became contaminated by Roman influence. Their religious teaching, unlike that of their Asiatic contemporaries, was strongly opposed to self-destruction. While a pure and manly nation, they regarded it as a heinous crime, and laws existed which heaped indignity upon the body of the suicide. By an Athenian law the corpse was not buried until after sunset, and the hand which had done the deed — presumably the right hand — was cut off and buried separately, as having been a traitor to its owner.

The only suicides ever spoken of with respect, or anything approaching commendation, by the early Greeks, were those of a purely patriotic character, like those of Themistocles and King Codrus, both of whom were considered patriots. The latter, when the Heraclidæ invaded Attica, went down disguised among the enemy with the intention of getting slain and, having picked a quarrel with some soldiers, succeeded in his object. The reason for this act was that the oracle had pronounced that the leader of the conquering army must fall; and the king sacrificed his life in order that his troops might be victorious and his country saved. Themistocles is said to have committed suicide rather than lead the Persians against his own people. — Lawrence Irwell, in July *Lippincott's*.

A HIGHWAYMAN named Nevison — or Nicks, as he is more generally known — had a blood-mare, a splendid bay, whose courage and endurance were such that Nicks determined by means of these qualities to prove an *alibi* in case of danger.

About four o'clock upon a certain morning he robbed a traveler on the road near Gadshill, then

turned and rode straight off to Gravesend. He was obliged to wait there an hour for a boat, and he made the best use of this time by baiting his mare. Then, crossing the water, he dashed across Essex full tilt to Chelmsford, where he rested half an hour and gave his horse some balls. Then he mounted again and dashed on to Bramborough, Bocking, and Wetherfield; fast across the downs to Cambridge; quick by roads and across country he slipped past Godmanchester and Huntingdon to Fenny Stratford, where he baited the good mare and took a quick half-hour's sleep. Then once more along the north road until the cathedral grew up over the horizon larger, larger, and whizz he darted through York gate. In a moment he had led the jaded mare into an inn stable, snapped up some food, and in a fresh green velvet dress and gold lace strolled out gay and calm to the Bowling Green, then full of company. The Lord Mayor of the city happened to be there; Nicks sauntered up to him and asked him the hour. "A quarter to eight," said the Lord Mayor, graciously. "Your most obedient," returned Nicks, with a profound bow.

Later, when Nicks was apprehended and tried for the Gadshill robbery, the prosecutor swore to the man, the horse, the place, and the hour, but Nicks brought the Lord Mayor of York to prove an *alibi*, and the jury promptly acquitted the resolute and sagacious thief.

JOURNALISTIC enterprise has led to a curious insurance case in Paris. M. Henri Martin, chief editor of the "Courier de Lyon," was found dead in his room, hanging from a cord passed over a hook in the ceiling and attached to a dog-collar round his neck. His life was insured for 30,000 francs, which the insurance company refuses to pay on the ground that he committed suicide. He had, however, been publishing articles on the scientific side of hanging, and was preparing one describing the sensations of a hanged man. The counsel for his family will contend that he was making experiments on himself, and that his death was accidental.

ONE day, while dining together, the French ambassador and a Grand Duke of Russia were discussing the cleverness of the pickpockets of their respective countries.

The Grand Duke claimed that the Russian pickpocket was the more skillful. Seeing the ambassador incredulous, he told him he would, without knowing it, be relieved of his watch before leaving the table.

He then telephoned to the head of the police to send at once the cleverest pickpocket he could lay his hands on.

The man came and was put into livery, and was told to wait at the table with the other servants. He was to give the Grand Duke a sign directly he had done the trick.

But this was not given very soon, for the ambassador was very wary, and always kept on the alert, and held his hand on his fob, even when conversing with the most distinguished guests.

At last the Grand Duke received the preconcerted signal. He at once requested the ambassador to tell him the time. The latter triumphantly put his hand to his pocket, and pulled out a potato instead of his watch.

To conceal his feelings he would take a pinch of snuff — his snuff-box was gone. Then he missed his ring from his finger, and his gold toothpick, which he had been holding in his hand in its little case.

Amid the hilarity of the guests the sham lackey was requested to restore the articles; but the Grand Duke's merriment was changed into alarm and surprise when the thief produced two watches, two rings, two snuff-boxes, etc.

His Imperial Highness then made the discovery that he himself had been robbed at the same time that the French ambassador had been despoiled so craftily.

CURRENT EVENTS.

THE city of Birmingham now builds and runs its street railways, gas works, electric-light plant, water-supply plant and Turkish baths. It buys the food that is sold in the market of Birmingham and owns the market, selling the food itself. It builds houses for artisans and rents them. It owns and operates a farm, a printing establishment and a woolen mill. It is in the egg business and runs pawnshops. In 1871 the city had the reputation of being one of the dirtiest cities in Great Britain. To-day it is the cleanest and one of the best governed cities in the world.

OF fifty-six cases of typhoid fever about one-third were said to be traceable to the eating of shell fish.

THE executors of Dr. Holmes's will are having a good deal of trouble in proving that his famous "Autocrat of the Breakfast Table" was copyrighted. It has already been decided by one court that the book was not so protected and an appeal to the Supreme Court has been taken. The book itself was copyrighted in November of 1858. Subsequent renewals were secured, extending the right of the copyright privilege to the year 1900. It appears, however, that the work was published in parts running through the "Atlantic Monthly" from October, 1857, to October, 1858, and that neither the magazine nor the separate parts were copyrighted. This the court held was a fatal defect, the law requiring that a copy must be deposited before publication. The contention that the whole was something different from its parts and therefore entitled to a copyright, notwithstanding the previous publications of the separate chapters, the court said was a refinement of distinctions that the statutes did not warrant.

RECENT strikes and disturbances in Russian cities have brought about the enactment of a new labor law, which goes into effect January 1, 1898. The working day is fixed at a maximum of eleven and a half hours; for Saturdays and the days preceeding holidays at ten hours; on Sundays and holidays there is to be no work. Workmen who are not Christians will not be compelled to work on the days held sacred by their sects. For night work, eight hours is the limit.

MACON, Georgia, sends out a lesson in convict labor. It had a large piece of ground near the city, which it had been leasing out for five dollars per acre. The authorities concluded to cultivate it, with the aid of the city convicts. They enrich the soil with the refuse from all the stables of the police and fire departments, and from other quarters, and the first year have harvested a crop worth, in clear gain, sixty dollars an acre, and with it all have benefited the prisoners, who were before kept in idleness.

THE discovery of petroleum is reported from Alaska. Several months ago some gold prospectors came across what seemed to be a lake of oil. It was fed by many springs and the surrounding mountains were full of coal. Samples of the oil were taken to Seattle and tests proved it to be of as high grade as any ever taken out of the Pennsylvania wells. It is close to the ocean and the experts say the oil oozes out into the salt water. The owners have filed claims on 8,000 acres, and it is said have already received offers from the Standard Oil Company.

PROFESSOR FORBES, the electrician who has just returned to Cairo from Wady Halfa, expresses a highly favorable opinion about using the power of the cataracts for generating electricity and considers the general circumstances of Egypt exceptionally well adapted for its use as motive power. Irrigation could be extended as well as cheapened by the saving in cattle and especially in coal which becomes very expensive in Upper Egypt owing to the expense of transport from Alexandria. He considers that the cataract would be available the entire year for working the railway, cotton-ginning mills, sugar factories, irrigation machines, etc., also that it could be supplied at distances of several hundred miles at a cost much below that of coal. Professor Forbes is soon to make a complete survey and present the government with a project for utilizing the electricity to be generated at the Nile cataracts.

AN announcement has been made that the famous old Milan opera house, La Scala, is to be torn down. It has long been a losing investment to the box-owners, who held their property under the municipality, and they are now suing the municipal council for discharge from the terms of the lease. The municipal council has therefore voted for the destruction of the historic house. It has for years been one of the most famous of musical landmarks.

THE statistics of the Swiss saving banks show larger per capita deposits than those of almost any other country.

LIEUTENANT BERSIER of the French navy has invented a compass which steers the vessels automatically in a course set by the navigator.

LITERARY NOTES.

THERE is more than a spice of adventure about the September CENTURY. "What stopped the Ship," by H. Phelps Whitmarsh, is a story setting forth a mid-ocean mystery. A tale of peril in Alaska, called "An Adventure with a Dog and a Glacier," is by John Muir, whose timely paper on "The Alaska Trip" was printed in the August CENTURY. A subject of current interest is treated in a paper on "Cruelty in the Congo Free State," with striking photographs and notes of travel made by the late E. J. Glave, in whom there is now an additional interest connected with his explorations in the Yukon region.

THE AMERICAN MONTHLY REVIEWS OF REVIEWS for September has a good deal to say about the Andrews incident and Brown University — not so much on account of the personal interests involved in the case as because of the far-reaching principles affecting academic life and liberty which have become matters at issue. Among the contributed articles are sketches of the three members of the new Nicaragua Canal Commission — Admiral Walker, Capt. O. M. Carter, Corps of Engineers, U. S. A., and Prof. Lewis M. Haupt. These sketches are illustrated with portraits. The Hon. J. L. M. Curry, formerly our Minister to Spain, contributes an estimate of the murdered Premier of Spain, Señor Canovas del Castillo, and his relations to modern Spanish politics.

THE editorial matter of the September number of CURRENT LITERATURE is able and interesting, and the selections well chosen and abundant. The verse departments are this month enriched by the addition of two pages of love songs selected from the poems of the late Jean Ingelow. There is also an appreciative sketch of her life and work taken from the London Academy, and a portrait of Miss Ingelow in the department "Gossip of Authors," where also amongst others appears a very interesting account of Maurus Jókai, the Hungarian novelist.

MRS. ELLEN M. HENROTIN, President of the General Federation of Women's Clubs in the United States, contributes to the October NATIONAL MAGAZINE a strong article on "Women in Finance." Mr. Hayden Carruth begins in this number a short serial entitled "Starting 'The Burntwood Breeze.'" And there is a very clever article, "From Out the Purple Grape," by Mr. Henry Haynie.

THE September SCRIBNER'S has a number of outing articles suited to the dog days. William Henry Bishop describes picturesquely the famous watering-place in northern Spain, San Sebastian. The fashion and gayety of the place lead him to call it "the Spanish Newport." Frederic Irland describes "a lazy cruise" in a schooner along the north shore of the Gulf of St. Lawrence, east of Tadousac, with excursions up some of its wonderful salmon streams. It is a wild and beautiful region, absolutely divorced from the tyranny of the railway or steamers. "The Durket Sperret," a novelette by Miss Sarah Barnwell Elliott, will run through the fall numbers of this magazine.

HARPER'S MAGAZINE for October opens with the first installment of "Spanish John," by William McLennan, a novel of adventure dealing with the fortunes of the Scotch Pretenders to the throne of England. The action takes place partly in the army of the King of Spain operating in Italy, and partly in Scotland. The unprecedented popularity of golf in all parts of the United States is celebrated by Casper Whitney in THE GOLFER'S CONQUEST OF AMERICA. A. B. Frost contributes a series of character studies of the humors of bad form in golfing, and a series of illustrations of correct form of using various clubs. The leading clubhouses and links of the country are illustrated by E. C. Peixotto and Henry McCarter, and the portraits of the leading golfers are engraved by Schladitz. The short stories are: "Mrs. Upton's Device," a tale of match-making, by John Kendrick Bangs; "Psyche," a story in dialogue, by George Hibbard; and "There and Here," a story by Alice Brown.

NEW LAW-BOOKS.

THE FEDERAL COURTS, their organization, jurisdiction and procedure. By CHARLES H. SIMONTON, U. S. Circuit Judge. B. F. Johnson Publishing Co., Richmond, Va. Cloth, $1.50.

Judge Simonton in this little volume gives the legal profession an exceedingly interesting and useful work. All lawyers practicing in the United States Courts will find it of great value as a guide as to the best manner of handling their cases. The work should find a place in every law library.

NEW LAW-BOOKS RECEIVED.

THE LAW OF SALES OF PERSONAL PROPERTY. By FRANCIS M. BURDICK. Little, Brown & Co., Boston.

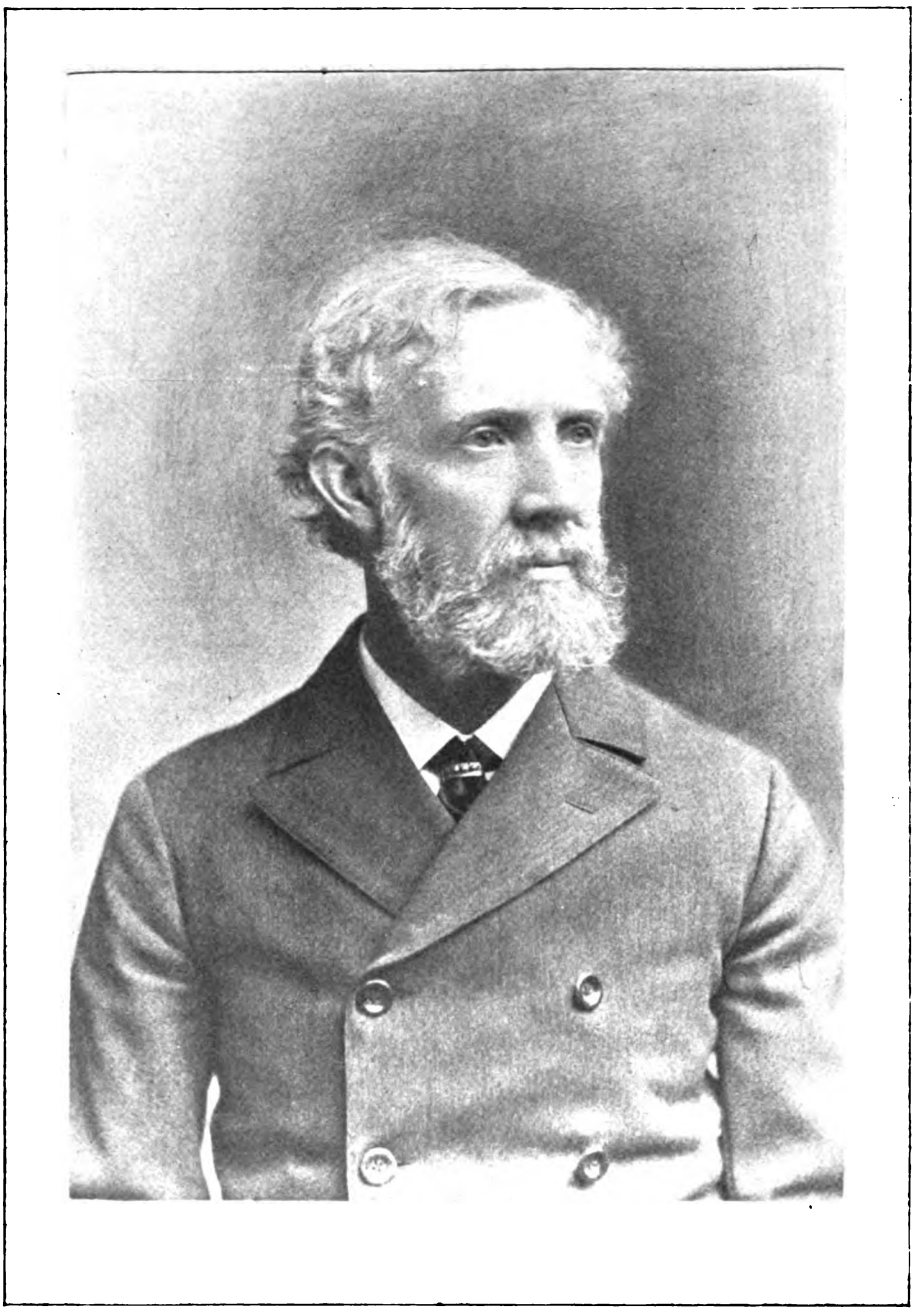
PROBATE REPORTS ANNOTATED. Vol. I. Baker, Voorhis & Co., New York.

A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS. By EDWIN H. WOODRUFF. Baker, Voorhis & Co., New York.

THE CODIFIED NEGOTIABLE INSTRUMENTS LAW OF THE STATE OF NEW YORK. Matthew Bender, Albany, N. Y.

THE LAW OF TAXABLE TRANSFERS, STATE OF NEW YORK. Matthew Bender, Albany, N. Y.

AMERICAN STATE REPORTS. Vol. LV. Bancroft-Whitney Co., San Francisco.



The Green Bag.

VOL. IX. No. 11. BOSTON. NOVEMBER, 1897.

RECORDER JOHN W. GOFF.

VETERANS of the New York bar have not failed to note a great physical likeness between the recorder of New York City whose portrait is the frontispiece of this number and the late Nestor of their profession, Charles O'Conor. There is for each the same shaped head, in a phrenological view, surmounted by similar silvery hair; also the similar logical forehead; the similar nose and firm mouth; similar side whiskers and thin beard at the throat; and almost identical, small, piercing blue Hibernian eyes which are now soft and feminine, and again blazing with manly earnestness of expression. There comes a difference, however, in the voices, for that of Recorder Goff is always soft and euphonious and at times exceedingly tender and cooing in tone, while that of Charles O'Conor often took on a raspy harshness, for he knew how to be pungently aggressive and sarcastic; while the Recorder's voice seems incapable of rugged severity, yet always firm in conscientious enunciation. Both stood impressively erect and strongly knitted in bone and muscle with thin, spare and wiry frame. Both were natives of the Emerald Isle, and left it as juvenile emigrants in paternal care towards the same city; and both fought their way into professional note without any adventitious aids during their earlier battles of life.

The judicial office of recorder is one of the oldest in London history. While the Lord Mayor was rather a municipal figure head, the recorder was the city spokesman and the arbitrator between the people and the Crown. Thus in the tragedy of Richard Third, Buckingham, in telling the usurper how the populace received mention of his name said: —

> "I asked the Mayor what meant this wilful silence;
> His answer was, the people were not used
> To be spoke to but by the Recorder."
>
> Act III, Scene 7.

In every criminal trial for an high felony at the Old Bailey the recorder must be one of the judges. When, therefore, the English succeeded the Dutch in rule over New York City it was but natural when the Crown gave it charter that the office of recorder was ordained, modeled after the London functions. During two centuries New York's recorder has been its principal magistrate and judge in criminal jurisprudence. The New York recordership is now the oldest judicial office in the entire United States. Down to 1894 it was second in age to the New York common pleas, but in the last named year that court was abolished by a new Constitution.

With only two exceptions the long line of New York recorders has always comprised able lawyers; but in 1839 a commercial citizen through a partisan freak was chosen recorder; and in 1852 a lawyer — Francis R. Tillon — versed only in conveyancing at the civil side of the bar. With the exception of the present recorder all the line have been Knickerbockers born and bred. Yet Recorder Goff, in feeling and familiarity with, and knowledge of, the great Knickerbocker city, may be regarded as a worthy adopted son of that mythical Father Knickerbocker whom the vivid fancy of Washington Irving constituted as the

Gog and Magog of New York and the guardian patron of its power, privileges and immunities. Local history proudly refers to the patriotism and wisdom of Recorder Varick; to the deserved popularity of Recorders Riker and Hackett; to the polished sway of Recorder Jones, and the early and the later Hoffman; to the learned and even Chesterfieldian Tallmadge; to the politic James M. Smith (lately sketched in THE GREEN BAG), and to the impressive Smyth, now a justice of the Supreme Court. All have been of, and from, and for, the people, and gifted with that knowledge of human nature so necessary in a judge who tempers justice with mercy when deciding upon the crimes or pecadilloes, and in the apportionment of punishments appertaining to his erring constituents. The name of Goff — as that of the mysterious regicide in early colonial times — is well know to New England history, and it is now a household word in New York business and professional circles.

Mr. Goff in his seventeenth year decided to turn towards the legal profession and was fortunate enough to obtain for its study the patronage and educational supervision of the late Samuel G. Courtney, who after having served as district attorney in Albany had removed to New York City and there became one of President's Lincoln's Federal district attorneys. Young Goff united the duties of supervisory messenger and clerk with those of student; and naturally his bent of mind turned toward criminal jurisprudence, as its influence was prominent in the Courtney office. Admitted to the bar in the spring of 1876, he was offered by Mr. Courtney the post of managing clerk at a tempting salary. The stipend was a temptation, but the young attorney thought — similarly to the maxim about the mortgage — "once a managing clerk perhaps always a managing clerk," and resolved to "hang his banner on the outward wall," when perhaps the cry would be, as regards clients, "still they come." The Hamilton building on Broadway opposite the City Hall was then a favorite locality for offices, and thither he repaired in search of one; and, finding a room suited to his slender purse, presented himself to the landlord, John C. Hamilton, — son of the great Alexander, — as a tenant. The former asked security for the rent, which young Goff was delicate about asking from friends; so he paid a month's installment, and said, "If I am unable to pay the second month you can turn me out, and it being summer time you can readily obtain my successor for the fall campaign." Goff was already a tactician, and he charmed the landlord by pleasant references to his family name and relationship to the founder of the Republic, so that the proverbially hard-hearted landlord was induced to say, "I see that you are a likely young man and I'll risk it." There Goff continued in private practice for a decade, and slowly prospering. While a law student he had become identified with the current Fenian movement, and had made many friends in Irish business circles, which brought him clients.

A Fenian episode wherein he was actor is interestingly worth a digression. Disaffection with the measures of the British government toward Ireland had crept among the officers and privates of a dragoon regiment of Her Majesty stationed in Dublin, and some of them were tried and convicted of treason and sent to the Australian penal settlement. Among these were John Boyle O'Reilly and a color sergeant who had carried the flag into the charge of the six hundred at Balaklava. Incipient bard O'Reilly was a very handsome soldier and man. There came love passages between him and the daughter of his Scotch warder which resulted in her planning for him some personal liberty. One day walking on the beach he observed a large boat about to land from a ship in the offing, flying the American flag. O'Reilly lingered

for its approach, and it proved to be a launch from a New Bedford whaling ship, and her captain was in the stern. Finding O'Reilly's plight he sympathizingly aided in conveying him in the launch back to the ship and thence in due time to America. The escape was chronicled in marine news and Boyle O'Reilly's advent expected. The ship containing him first made the port of New York and Goff was among the first to welcome him. The incident led to the formation of an association of Fenians bent upon aiding in the pardon or escape of O'Reilly's convict comrades, and Goff became secretary and counsel of the body. It endeavored to obtain pardons but Prime Minister Beaconsfield proved inexorable. Then the Association resolved upon aiding an escape. Money was subscribed, a whaling brig purchased, refitted, provisioned and manned, and sent to the penal settlement, and all done under perfect secrecy. Irish freemasonry effected underground communication with the Fenian convicts and they duly escaped from shore to the brig, which, although it was pursued by a British cutter, proved to be the fleeter. In the enterprise lawyer Goff was conspicuously employed, and his connection with the affair gave him personal and political prestige. There came out a good joke in the affair. The chief of police at the penal settlement supposing the brig to have been a whaler, cabled the head of the New Bedford police full particulars of the escape and asked detention and arrests. But in the complications of fate the recipient of the dispatch happened to be the very captain who had procured O'Reilly's escape and who had since left the sea to become an official landlubber.

In 1886 Mr. Goff's standing at the criminal bar and his new political prestige among his countrymen procured from the district attorney of New York City the offer of an assistantship at a salary of $7,500. In that post he soon rose to prominence. His first *cause célèbre* came in a prosecution of a plaintiff in a divorce suit, — no other than New York's high sheriff, — his son, a referee and a court clerk, for a conspiracy to procure a fraudulent decree. The district attorney having been a personal and political pal of the accused sheriff, named Flack, the prosecution was intrusted to Assistant Goff, who readily procured a conviction of Flack, who was sentenced to the penitentiary but released on a stay and bail pending appeal; after which the highest court reversed the conviction on the ground that the presiding judge, in charging the jury, had usurped their functions by saying as he held the incriminatory documents in his hand, "these fraudulent papers have," etc., etc. The judge undoubtedly intended to say "these 'alleged' fraudulent papers," but *currente lingua* he omitted that potent participle. The reported case shows how precisely stenography fixed the error, and how strictly jealous the appellate court was of a usurpation by a judge of the jurisdiction of jurors over questions of fact, although that the papers were fraudulent had been conceded. The conviction was, however, necessary in order to perfectly absolve the judge, who, relying on the apparent regularity and good faith of the papers before him (fraudulent in fact although they really were), had granted a decree of divorce that he subsequently vacated. The verdict not only absolved the judge (now Justice Bookstaver of the Supreme Court) but a committee of the legislature sealed that absolution by refusing articles of impeachment presented by his political enemies.

Assistant District Attorney Goff subsequently tried several capital cases, and among them convicted the last murderer who suffered death by hanging under the execution laws of New York, and also the first convict to suffer the new electrocution that superseded the scaffold. The latter incident became notable in a newspaper way, because on the day of the electrocu-

tion the calendar of the New York City prison for the first, and indeed last, time in its long history, was devoid of the name of a single prisoner charged with homicide. With the end of the district attorney's term, Goff's employment as assistant prosecutor also closed. Resisting offers of continuance from the new incumbent, he returned to private practice, taking as partner Cranston W. Pollock, who is still active before the courts. When a new election for district attorney came around, Mr. Goff accepted the Independent Citizens' nomination, as opposed to the political machines of the Democratic and Republican parties; but, although unsuccessful, proved to be a good third in the race, and especially in reputable residential districts. About the same time, as a member of the Bar Association, which was engaged in ferreting out election frauds, such as double voting or manipulating the returns, he was appointed prosecuting counsel. In accepting the post he stipulated that he should have free scope and full discretion, intimating that it was his intention to legally waylay the political wire-pullers and the poll officials, and no longer to allow scapegoats to be made of underlings, as he had found were made while he was assistant prosecutor. That being acceded to, he unearthed frauds to the extent that eighty-six indictments were ordered by the grand jury against election inspectors and canvassers belonging to both political parties; and some, on conviction, suffered imprisonment. All of which was done while forcing the prosecutions through public sentiment and vigorous coöperation with the stated and timid authorities. Since then election frauds in New York City have ceased to exist.

Mr. Goff was also employed by the Parkhurst Society for the Suppression of Vice as their counsel in defending their investigating agent, named Gardner, against whom a revengeful conspiracy had been formed to falsely accuse him of blackmail upon evil-doers, and whom false testimony had caused to be indicted and put on trial. In the course of the defense the district attorney called as a witness a cab driver, whose identification of Gardner was deemed necessary. Told that Gardner was somewhere among the spectators — and he sat in full view — the witness was asked to point him out. Unable to do so the district attorney then called upon Gardner to stand up in aid of the identification. His counsel, Goff, whispered to him not to comply, and he did not; whereupon the then recorder trying the case repeated the request as an order. Goff rose to protest and claimed that the court was thus unconstitutionally compelling his client to become a witness against himself. But his objection was strangely overruled. Then Goff audibly advised his client not to comply, as he had a constitutional right to refuse. Angered at this the then recorder ordered two court officers to take Gardner by the arms and raise him to a standing position. Whereupon the witness readily said, "That is the man," aided (as Goff contended in taking an exception) by the emphasis of the physical direction and action upon his client. The recorder decided preliminarily that Goff had incurred a contempt of the court, but postponed regular procedure toward establishing it. The trial had begun at 9 A.M. and had continued without luncheon until 6 P.M., when the recorder announced a recess until 8 P.M., to be followed by an evening session. Goff was physically worn out and begged adjournment until morning, and the district attorney did not object; but the then recorder was irreconcilable and insisted. On the reassembling, Goff announced that physical exhaustion, under medical advice, prevented his further continuance, at that time, of defense. The judge, however, insisted upon proceeding, when Goff announced his necessary withdrawal, and added, "as my client is now without counsel, it is the duty of the court to assign him counsel, with, of course, allowance of

time for consultation and preparation." His honor, now finding himself in a dilemma, became willing to take a recess until the morning, when Goff promised to resume duty. On the following day the then recorder came into court with a written order for Counsel Goff to show cause why he should not be prosecuted for contempt of court, and filed the usual interrogatories for the accused to answer, and postponed argument until the ensuing day. Leading members of the Bar Association agreeing with Goff in his constitutional views that had precipitated the contempt proceedings counseled him to resist. Messrs. Choate, Robert Sewall (now recently deceased), and James C. Carter volunteered, without fee, as Goff's counsel; but the client availed himself only of Choate's services, who, as regards the alleged contempt of advising his client to a resistance of a compulsion to make him a witness against himself, as well as of withdrawing from further trial without leave of court, made an argument of exceptionable learning, power and eloquence. But ineffectually; for Goff was adjudged guilty and a fine of two hundred dollars imposed. The culprit had already provided himself with a Gladstone bag containing toilet articles and apparel, expecting to be sent to the county jail, and was intending to submit to imprisonment instead of paying the fine and as a protest; but Choate objected, saying that he owed it to the dignity of the profession not to be personally demeaned, and so the fine was paid, while a score desired to contribute towards it. Not a member of the bar was found who supported the judge in these rulings.

In 1893 New York police scandals had become so rife and rampant that the legislature sent from Albany an investigating committee, with an eminent lawyer from Buffalo, named Sutherland, as counsel. But the Citizens' Association and the Chamber of Commerce, which had sympathizingly taken part in preparing the investigation, claimed that Mr. Sutherland lacked knowledge and experience in city affairs and metropolitan life, and therefore suggested Goff as counsel to the committee, and the latter accepted the proposition, the Chamber of Commerce providing the fee. Accordingly, through weeks of investigating police wrongs — mainly involving charges of bribery and blackmail of bagnio keepers and liquor saloons — Goff devoted his whole time to seeking witnesses, serving them with subpœnas and conducting their examinations. The proceedings are reported in a bulky volume; and these resulted in the appearance of a political reform ticket at the November city polls in 1894, which election, among other results, placed Mr. Goff upon the bench as recorder for a term of twelve years and a salary of $15,000, against the minority vote for his opponent, and the very incumbent who had prosecuted him for contempt. That result seems to have been a vindication of the Buddhist law of compensation in lifetime for injuries incurred during life. The writer knows of only one other instance of similar compensation, and that was when Senator James O'Brien of New York City sat as member of an impeaching court at the trial of Justice George G. Barnard, who, when as recorder years previously, and when Mr. O'Brien was a young lad, had sentenced him at the manifest behest of politicians to a short term of imprisonment for what was really only a boyish freak of disorder, and at the utmost deserving of only a fine. Thus a whirligig of time brought the traditional revenges in these instances of Judge Barnard and O'Brien, or Goff and his vanquished old prosecutor. It was said that the impeached justice keenly felt the vote of O'Brien, and the ex-recorder the victory of his successor recorder.

During the past two years of Recorder Goff's term on the bench he has presided over several *causes célèbres*, all widely reported over the Union. One was known as the Barbieri case — of a young Italian girl,

who killed her perfidious lover; another of an Italian named Nino, who shot his wife; and a third of a native named Scott, guilty of the same crime. Before Recorder Goff Marie Barbieri was convicted; but, on a new trial after a reversal by the court of appeals, she was acquitted. The reversing opinion will be found in 149 Court of Appeals Reports, page 256, and is notable for the extraordinary manner in which the judge writing the leading opinion entered upon a personal criticism of the recorder. Judge Vann seems to have deprecated this, for he gave this note to a reporter: "I concur in the result." This is the, perhaps unprecedented, kind of language used at the conclusion of his opinion by Judge Miles O'Brien, formerly attorney general of the State: "The questions already discussed are sufficient to dispose of the appeal, and to show that the appellant did not have a fair trial; but the record discloses other rulings difficult, if not impossible, to defend, but to consider them would unnecessarily extend the discussion. A careful examination of the whole charge leaves the impression from its general tone and entire character that the learned recorder passed the line which limits the judicial function." Quoting from a Federal case, Judge O'Brien continues, "When a charge takes the form of animated argument the liability is great that the propositions of law may become so intermingled with inferences springing from forensic ardor, that errors intervene which the pursuit of a different course would have avoided."

The conviction of Nino was also reversed (155 N. Y. Court of Appeals Reports), but only at the expense of practically reversing the celebrated McNaughton case, where Chief-Justice Tindal of England gave the opinion in behalf of the twelve judges. Judge Bartlett, then recently elected, with only civil law experience, in delivering the opinion boldly says, after quoting the McNaughton opinion, "Such is not the law of this State." But the extent, or limitation of mental and moral responsibility, as there defined by Chief-Justice Tindal, had been previously adopted in many previously reported cases in New York State and in other States.

In the Scott case (157 N. Y. Court of Appeals Reports) the appellate court in affirming Recorder Goff seems to have repented of the semi-personal views it gave to him in the Barbieri case; for the Scott opinion contained expressions of marked kindness toward him, and the bench was substantially composed of the same judges.

In addition to his judicial duties (which are shared by four associate judges of recent creation, in order to aid in dispatching criminal cases, yearly increasing in a population fast approaching two millions of inhabitants), Recorder Goff is *ex officio* member of a commission that apportions the metropolitan expenses; also of another commission which cares for the Sinking Fund of the Corporation; and of a third which adjudicates on appeal assessments for local public improvements. And in these semi-civic and semi-judicial coördinate duties, Recorder Goff has given acknowledged popular satisfaction to associates and constituents.

Recorder Goff cannot be called an eloquent orator, nor has he ever aimed to be one. But he is master of the colloquial method which is nowadays at the bar believed to be more efficacious at *nisi prius*, in chamber practice and in *banco* than in such flights of oratory as pertained to the elden times of Erskine and Brougham, or those of Wirt, Prentiss, Webster, Rufus Choate and David Paul Brown.

Recorder Goff seldom has disagreements among the juries that he charges. He speaks without hesitation; deliberately, yet by no means prosily; is magnetic in voice and look when addressing a jury; conversationally logical, never attempting persuasion, avoiding even implications of personal views when marshalling facts, and preferring simple Saxon words to those of Latin or Norman

origin. One of his recent jury charges is now presented as an average sample, and indeed it may be accepted as a model charge presenting the kernel of law without superflous shell:

"Gentlemen of the jury, it is proper for me to call your attention to certain rules for your guidance in the determination of this case.

"The defendant at the bar is presumed to be innocent until the contrary be proved. That presumption remains with him until the moment when your mind is convinced by evidence to be contrary. When that moment arrives, then the presumption ceases.

"It is the privilege of the defendant to take the witness stand in his own behalf. He may exercise that privilege or not, as he deems proper. If he does not exercise the privilege, his failure to do so must not be taken to his prejudice.

"The burden of proof rests upon the prosecution. The people are bound to prove every material fact necessary to the conviction of the defendant by a preponderance of evidence and beyond a reasonable doubt.

"Arguments of counsel are proper to be considered by you when based upon evidence in the case, but beyond that, the opinions or conjectures of counsel should have no weight with you.

"You are the judges of the credibility of each witness on the stand. It is with you to say what witness to believe or to disbelieve; what portion of any witness's testimony to credit or to discredit.

"You are the exclusive judges of the facts in the case. The court is the exclusive judge of the law, and you are bound to accept the court's interpretation of the law without question, but upon the facts you are the exclusive judges.

"These are general rules which you will observe and be guided by in your determination of this case.

"The issue in this case is one of fact, to be determined by you upon the evidence before you, and upon that alone; and the issue is, whether or not this defendant is guilty of receiving stolen goods with the knowledge that they were stolen. That is the one supreme issue which you have to decide, and you will be careful in your deliberations to keep that in view at all times, and not to permit your discussions or your minds to wander upon collateral questions."

Recorder Goff has now a full decade of term left to him. But it will only be a judicial term, for the charter of the Greater New York removes his civic duties as member of the municipal boards. He is officially styled Recorder of the City and County of New York. As a city officer, he on New Year's day becomes *functus officio*, but he will remain a county officer and judge. There was a time when, as a county officer, the recorder presided over the County Board of Supervisors. His court of general sessions remains a county tribunal.

After New Year's Day the island of Manhattan, heretofore statutorily called New York City, becomes on the statute book the borough of Manhattan. And the recorder will remain both a New Yorker and a Manhattaner. On that day he can in his civic capacity echo the plaintive and monotonous answer on the trial of Queen Caroline, made by her loyal Italian courier, who was vainly asked questions tending to incriminate her, — *Non mi recordo.*

HISTORIC COLLISIONS BETWEEN BENCH AND BAR.

"GOOD feeling," says Mr. Oswald in his work on "Contempt of Court," "nearly always exists between the bench and bar, and when it is interrupted the reason for it may generally be found to exist on both sides. There is scarcely any instance upon record in the superior courts of a conflict between the bench and bar becoming so acute as to lead to the committal of an advocate for contempt while conducting his client's cause. Even Chief-Justice Jeffreys (who is said to have browbeaten and sometimes threatened counsel) does not appear to have put in force the power of committal against counsel. And during the progress of the once celebrated Reg. *v.* Castro, or Tichborne case (which in its hearing occupied the time of the court for a longer period than any other trial on record, except that of Warren Hastings), although there were frequent conflicts between the bench and the advocate for the 'Claimant,' and several reminders to him by the judges of the weapon with which the law armed them, the court never went to the length of depriving the client of the services of his advocate. The natural disinclination of the court to interfere with counsel in such a way as to take his services from his client ought to form a strong reason for counsel not assuming too great a license." This passage may be taken as a good, short exposition of the true position, and of a correct appreciation of what the proper relations should be.

It is difficult to find a clear case of a barrister being punished for contempt while actually pleading for his client in court. *Re* Pater is, however, such a case (12 W. R. 823). Of two other cases cited by Mr. Oswald, where both persons committed were litigants, and apparently solicitors, *Carus* Wilson's case (7. Q. B. 984) may be, for the present purposes, worth looking at; in the other (Reg. *v.* Jordan, 36 W. R. 589) Mr. Justice Cave said that the observation, "That is a most unjust remark," however said, is a gross insult to any court of justice, and if not withdrawn amounts to a contempt. *Re* Pater does not help us much. Mr. Pater, a barrister practicing at the Middlesex Sessions in 1864, feeling himself aggrieved by certain interruptions on the part of the foreman of the jury, remarked in his speech for the defense, "I thank God there is more than one juryman to determine whether the prisoner stole the property, for, if there were only one, and that one the foreman, from what has transpired to-day, there is no doubt what the result would be." For this he was ultimately fined £20. On appeal to the Queen's Bench, Chief-Justice Cockburn said: "It appeared that Mr. Pater was fined for certain words uttered in his address to the jury, and I quite agree with Mr. Pater's counsel [Denman, Q. C., McMahon, and Kenealy] that the words in themselves are words which any counsel might have uttered in the honest discharge of his duty, and if they had been so uttered, though they might have been harsh and unpleasant to the party affected, that could not have been construed into contempt. But, on the other hand, if, though used in the course of his address to the jury, they were not used for the purpose of inducing the jury to come to a conclusion in favor of his client, but for the purpose of wantonly insulting one of the jurors, then I say they are an abuse of the privilege of counsel, and properly punishable as contempt of court."

The court refused any relief. It will be noticed here that the contempt was not for words uttered to the bench, but the deputy assistant judge stated in his affidavit that, on his imposing the fine, Mr. Pater said:

"This shall not rest here. I will bring the subject under the notice of Sir George Grey, and very probably your removal from the bench will be the result." With other instances of barristers punished (by fine or commitment) for contempt on grounds totally different to those in question, there is no need to deal here.

There are some historic precedents of impassioned dialogue between the representatives of the two orders. To begin with, there is the classic story of Wedderburn in 1757. Lockhart, being against him in the Inner House at Edinburgh, showed "even more than his wonted rudeness, and superciliousness," and called him "a presumptuous boy." "When," says Campbell (Life of Lord Loughborough in the Chancellors, vol. 6, p. 47), "the presumptuous boy came to reply, he delivered such a furious personal invective as never was before or since heard at the Scottish bar." Wedderburn's language, reported by Campbell, was an outrage on decency. "Lord President Craigie, being afterwards asked why he had not sooner interfered, answered, 'Because Wedderburn made all the flesh creep on my bones.' But at last his Lordship declared in a firm tone that 'this was language unbecoming an advocate and unbecoming a gentleman.' Wedderburn, now in a state of such excitement as to have lost all sense of decorum and propriety, exclaimed that 'his Lordship had said as a judge what he could not justify as a gentleman.' The president appealed to his brethren as to what was fit to be done, who unanimously resolved that Mr. Wedderburn should retract his words and make an humble apology, on pain of deprivation. All of a sudden, Wedderburn seemed to have subdued his passion, and put on an air of deliberate coolness, when, instead of the expected retractation and apology, he stripped off his gown, and, holding it in his hands before the judges, he said: 'My Lords I neither retract nor apologize; but I will save you the trouble of deprivation; there is my gown, and I will never wear it more — *virtute me involvo.*' He then coolly laid his gown upon the bar, made a low bow to the judges, and, before they had recovered from their amazement, he left the court, which he never again entered."

Another Scotchman, who also rose to be Lord Chancellor of England, played a nobler part in his contention with the bench. In 1784 the Dean of St. Asaph was indicted at Shrewsbury for seditious libel, and he was defended by Thomas Erskine. The jury found him "Guilty of publishing only." Buller, J.: "If you find him guilty of publishing, you must not say the word 'only.'" Erskine: "By that they mean to find there was no sedition." — Juror: "We only find him guilty of publishing. We do not find anything else." — E.: "I beg your Lordship's pardon, and with great submission. I am sure I mean nothing that is irregular. I understand they say, 'We only find him guilty of publishing.'" — Juror: "Certainly, that is all we do find." — B.: "If you only attend to what is said, there is no question or doubt." — E.: "Gentlemen, I desire to know whether you mean the word 'only' to stand in your verdict." Jurymen: "Certainly." — B.: "Gentlemen, if you add the word 'only' it will be negativing the innuendoes." — E.: "I desire your Lordship, sitting here as judge, to record the verdict as given by the jury." — B.: "You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment." — Juror: "Certainly." — E.: "Is the word 'only' to stand part of the verdict?" Juror: "Certainly." — E.: "Then I insist it shall be recorded." — B.: "Then the verdict must be misunderstood; let me understand the jury." — E.: "The jury do understand their verdict." — B.: "Sir, I will not be interrupted." — E.: "I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded." — B.: "Sit down, sir,

remember your duty, or I shall be obliged to proceed in another manner." — E.: "Your Lordship may proceed in what manner you think fit; I know my duty, as well as your Lordship knows yours. I shall not alter my conduct." (Campbell, *Ibid.* p. 432.)

The verdict was finally entered "Guilty of publishing, but whether a libel or not we do not find."

Valuable as this precedent is, the comment of Campbell, himself a judge and Lord Chancellor, is equally precious: "The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. This noble stand for the independence of the bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor, during the struggle, no less than its spirit, and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England."

Another hot forensic *mêlée* is recorded about 1817 (2 Law and Lawyers, 357). Serjeant Taddy was examining a witness in the Common Pleas, and spoke of the plaintiff "disappearing" from that neighborhood. Park, J.: "That's a very improper question, and ought not to have been asked." — T.: "That is an imputation to which I will not submit. I am incapable of putting an improper question to a witness." — P. (angrily): "What imputation, sir? I desire that you will not charge me with casting imputations. I say that the question was not properly put, for the expression "disappear" means 'to leave clandestinely.'" — T.: "I say that it means no such thing." — P.: "I hope that I have some understanding left, and, as far as that goes, the word certainly bore that interpretation, and therefore was improper." — T.: "I never will submit to a rebuke of this kind." — P.: "That is a very improper manner, sir, for a counsel to address the court in." — T.: "And that is a very improper manner for a judge to address a counsel in." — P. (rising, very warmly): "I protest, sir, you will compel me to do what is disagreeable to me." — T.: "Do what you like, my Lord." P. (sitting down): "Well, I hope I shall manifest the indulgence of a Christian judge." — T.: "You may exercise your indulgence or your power in any way your Lordship's discretion may suggest, and it is a matter of perfect indifference to me." — P.: "I have the functions of a judge to discharge, and in doing so I must not be reproved in this sort of way." — T.: "And I have a duty to discharge as counsel which I shall discharge as I think proper, without submitting to a rebuke from any quarter." Serjeant Lens was about to interfere. Taddy protested against any interference, but Lens said, "My brother Taddy, my Lord, has been betrayed into some warmth. ——" "I protest," said Taddy; "I am quite prepared to answer for my own conduct." — P.: "My brother Lens, sir, has a right to be heard." — T.: "Not on my account; I am fully capable of answering for myself." — P.: "Has he not a right to possess the court on any subject he pleases?" — T.: "Not while I am in possession of it, and am examining a witness." — "Mr. Justice Park then, seeing evidently that the altercation could not be advisably prolonged, threw himself back into his chair, and was silent."

Lord Brougham mentions a strange scene, of which he was witness, amusing rather than of good example. At Durham (about 1810?) a cause was being tried before Baron Wood. "There was heard an undergrowl on the other side from the Serjeant (Cockell), abusing Topping for his insolence and ingratitude, and the Baron for his ignorance and partiality, and calling for his clerk to bring him some of the stomach tincture,

which we knew would console him, as it was generally brandy with some water added, to give it a name rather than materially alter its nature." (Works, Vol. 4, p. 384.)

Something has been said about Kenealy's case above. As a matter of fact, his utterances in court never formed the subject of inquiry by any professional tribunal, but the important point to notice is that it was his Inn, Gray's, which set the Lord Chancellor in motion (on account of his editorship of the *Englishman*), with the result that he was dispatented, and which disbenched and disbarred him on the same ground.

It will be clear from all the instances that no formula can exactly define to what length of retort or freedom of speech in addressing a judge counsel may with propriety — (as to safety, there is practically no question) — go. Obviously, a genuine instinct of self-respect will inspire an advocate with the exact measure of what is due to himself, and what is due to his professional superior, just as it will antagonists in any other controversy. This is what Campbell called in Erskine, "the felicitous precision with which he meted out the requisite and justifiable portion of defiance." Without that instinct it matters little at the bar, or anywhere else, on which side the merits of the dispute are; it cannot be conducted in a seemly way by him that lacks it.

Perhaps the true "rule" may be collected from a dictum attributed to Curran *arguendo*. He offended Judge Robinson, who exclaimed furiously, "Sir, you are forgetting the respect that you owe to the dignity of the judicial character." "Dignity? my lord," said Curran. "Upon that point I shall cite you a case from a book of some authority, with which you are perhaps not unacquainted. 'A poor Scotchman, upon his arrival in London, thinking himself insulted by a stranger and imagining that he was the stronger man, resolved to resent the affront and, taking off his coat, delivered it to a bystander to hold. But having lost the battle he turned to resume his garment, when he discovered that he had unfortunately lost that also — that the trustee of his habiliments had decamped during the affray.' So, my Lord, when the person who is invested with the dignity of the judgment-seat lays it aside for a moment to enter into a disgraceful personal contest, it is in vain, when he has been worsted in the encounter, that he seeks to resume it — it is in vain that he endeavors to shelter himself behind an authority which he has abandoned." Robinson exclaimed, "If you say another word, I'll commit you." — "Then, my Lord, it will be the best thing you'll have committed this year." The judge did not do as he threatened, any more than was done in any of the cases already mentioned, or indeed in any recorded; but it is instructive to read that "He applied to his brethren to unfrock the daring advocate," but they refused. The true principle may be adduced from Curran's apologue. So long as a judge speaks in that capacity, be he right or wrong, he is entitled to all respect of demeanor and all courtesy of language. The moment he descends to personalities, invective or criticism not warranted or required by his duty to the court, that is, to the public, he strips himself of his judicial function, and the person aggrieved by his language is entitled to speak to him as man to man, a relation which, of course, still includes that of gentleman to gentleman.

In such a competition the judge, of course, starts with everything in his favor; if he is worsted, or reduced to silence, it must be his own fault. That some judges have succeeded in being severe without being insulting, may be seen from Roger North's account of his brother, the chief justice (about 1675). "There were yet some occasions of his justice, whereupon he thought it necessary to reprehend sharply. As when counsel pretended solemnly to impose nonsense upon him, and when he had dealt with them and yet they persisted — this was what he

could not bear — and if he used them ill, it was what became him, and what they deserved. And then his words made deep scratches; but still with salvo to his own dignity, which he never exposed by impotent chiding." — *The Law Times.*

SQUIRE TERRY.

By Elmer E. Ferris.

SQUIRE TERRY had been county sheriff for twelve consecutive years up in Vermont, and his experience in court had familiarized him not only with the forms and ceremonies of legal procedure, but also, to a considerable extent, with rudimentary principles of law. Therefore, when he removed to Wisconsin, in an early day, and took up a farm near the incipient village of L——, he soon impressed himself upon the community as a legal factotum of no small consequence and, in recognition of his abilities in this regard, he was elected justice of the peace and became known throughout that section as "Squair Terry."

The Squire had brought with him from Vermont a book of common law forms which he kept in his private room; he had the true legal instinct, for, whenever he had occasion to draw up an instrument, no matter how simple the matter might be, he would incorporate within it such a mass of legal verbiage (taken mostly from the book of forms) that, when the document had been duly read and signed and the Squire had pasted a red sticker upon it and affixed his notarial seal (which he did to all his papers), one could not escape the conviction that, so far as it lay in human power to make a thing legal and binding, this matter was so.

Be it remembered, however, that the Squire was no imposter, for, aside from his harmless vanity over his legal acquirements and his fondness for legal punctilio, he was a man of equity and good conscience and possessed a large fund of native common sense and sagacity which made him a safe adviser; furthermore, his court experience up in Vermont had so thoroughly convinced him of the wastefulness and folly of unnecessary litigation that his good offices were most frequently exercised in adjusting differences between neighbors and keeping them out of court; hence it was that he became a most useful member of the community, and enjoyed the confidence of his fellow-citizens to an unusual degree.

One day, in the latter part of October, he was summoned to the home of a German farmer named Christian Boch, who lived about two miles north of the village. The Squire had, in times past, done some business for Christian; but, since the mortgage on the farm had been paid off, Christian had not been in need of much legal advice, hence the Squire was somewhat puzzled to surmise the nature of this particular business. "Must be a will," he muttered to himself as he bustled about preparing for the trip, "Yes, that's it; Christian hes got into pooty good shape and wants to make his will." However, as was his custom, he put into his valise the Revised Statutes, his book of forms, some blank deeds, bills of sale, mortgages, promissory notes and a liberal supply of legal cap. Then, jumping into his buggy, he started for the Boch farm with a feeling of placid satisfaction quite pardonable in a virtuous justice of the peace who is about to exercise his favorite function; for the drawing of wills was the Squire's especial delight, and incidentally the gathering in of a five-dollar fee therefor.

Arrived at the farm the Squire tied his horse and proceeded deliberately toward the house, fully prepared for that hearty Ger-

man greeting with which Christian and his wife Katie had always met him, for they were both warm admirers of his and were fully sensible of the honor conferred upon their humble home whenever he paid them a visit; but, to the surprise — not to say discomfiture — of the Squire, Katie met him at the door without the least demonstration or sign of pleasure and, stepping to the back door, she called in a shrill, angry voice, "Chreestion, Meester Terry he coam."

Presently Christian appeared, and he too greeted the Squire in a most uncomfortable and evasive fashion.

"Wal, Christian," said the Squire, rubbing his hands together with a show of cheeriness, "what kin I do for ye to-day?"

"Vell," replied Christian doggedly, "I vant you make oud sebaration papers mit me und Katie."

"What!" gasped the Squire in amazement, "you and Katie want to separate?"

"Yas," broke in Katie shrilly, "ve sebarate; I didn't vould lif noder day mit dot ole hog."

"Naw you vouldn't heh!" snarled Christian savagely, "I yous so soon lif mit a lousy olt chessie cat already."

"Stop! wait!" cried the Squire, recovering his professional decorum and perceiving that here was the culmination of a deep-seated family row, "I can't hev sech talk in the presence of the court; it's an intercate perceeding to separate accordin' to law, and we mustn't hev no quarrelin' or wranglin'; the fust thing is to git the facts in order."

He opened his valise and took out, first the legal cap, then the Revised Statutes, which he opened and laid upon the table to give the proceeding a greater show of legality. Then, calling for a pen and ink, he took the matter judicially in hand.

"Les see; how many years hev you ben married?" he asked, peering at Katie over the tops of his spectacles.

"Twanty-tree year," she replied, fingering her apron nervously.

"Twenty-three years," repeated the Squire, as he wrote it down, "and now want to separate!" he shook his head in grave disapprobation.

"How many acres ye got in this farm, Christian?"

"Two hundred und twanty."

"Too bad, too bad," muttered the Squire, writing the answer down; "you and Katie worked so hard to clear that mortgage off, and now the farm hes got to be divided up." He shook his head again and heaved a sigh.

"Vell, Katie she didn' vant to vork some more," urged Christian angrily. "She radder vould be fine lady und schtay in house und blay organ already."

"Chreestion he lie bout dat, Meester Terry," broke in Katie hotly. "I vant organ for Louise, like oder girls haf, aber Chreestion he vont buy notting; und den ven I git rhumatiz und can't vork oud in field, Chreestion he growl all time; den he say I dond kees him some more: you tink I kees a ole hog like dat?" and she snapped her fingers at Christian contemptuously.

"Aw you kees de Davil," growled Christian sullenly.

"Order! order!" commanded the Squire, rapping the table severely and looking about with an air of ruffled dignity; "the law don't allow sech language in a judicial perceeding; I'll overlook it this time, but don't talk that way agin; now les hev a list of your pers'nal property."

It took a long time to get up this list; the Squire insisted that every article should be separately listed and described, and he inquired into the history of many of them; that easy chair, for instance, was bought fifteen years ago; it was their first piece of parlor furniture, they bought it at Blankenburg's, and they couldn't help remembering what a pleasant ride they had coming home from town that day with the chair in the back of the wagon. They were just beginning to get ahead a little then, and that sofa and parlor stove and rocking chair, and those

family pictures, each had its peculiar family history which the Squire brought out in detail. During these enforced reminiscences of their married life, Christian and Katie glanced uneasily at one another.

"Wal, anything else?" the Squire asked, when the list was finally nearing completion.

"Yas, ve got an olt cradle, aber dot ain't vort notting," said Katie evasively.

"Oh, yes, put everything in," persisted the Squire; "when did you buy it?"

"Ve bought it ven liddle Hans vas born, he vould be nineteen years olt now."

"Dead?" the Squire asked gently.

Katie nodded her head.

The last thing on the list was a trundle bed; the Squire asked all about this. Each of their children had slept in it, — little Fritz, their youngest, slept in it now.

"Wal, the one who gits little Fritz will take the trundle bed, I s'pose. Now we must take down the children."

They had six children living, — had buried three. The Squire talked about them in a sympathetic way. Yes, he remembered the last one who died, little Annie. He had often seen her at the village and noticed how much she looked like Katie, only she had Christian's big blue eyes. He was at the funeral, the Squire was, and stopped in at their house on the way back from the graveyard, didn't they remember? Katie remembered. Christian was twisting his thumbs and looking gloomily out of the window.

"Wal, you've got to divide the children up between ye and ye might as well begin with little Fritz, — here he comes now."

"Say, fader!" shouted little Fritz as he scrambled headlong into the room, "dere's a voodshuck in de orchard und I chase him under —" He stopped short upon noticing the Squire and the troubled looks of his father and mother.

"Come here, Fritz," said the Squire, and he drew the boy gently toward himself, "your pa and ma ain't goin' to live together any more; your ma is goin' to leave your pa. Now, Fritz, would you rather go and live with your ma, or stay here and live alone with your pa?"

Little Fritz gave the Squire a frightened look and ran over to Katie, "Vy — vy — moder," he faltered in childish reproach, "you vouldn't go off und leaf fader all alone, vould you, moder? vat could fader do mitout you und little Fritz — he — he vouldn't haf anybody to blay horse mit if I vas gone." His lips trembled and his voice choked so that he could say no more. Suddenly he ran into the corner and grabbed up a wooden bit which had a long string tied to each end.

"Coam on, fader," he cried, forcing a mirthless smile through his tears, "coam on und blay horse mit little Fritz," then dropping the bit he ran to Katie again and pleadingly clutched her by the apron and began to jump up and down in an agony of childish grief.

This was more than Katie could endure, she covered her face with her apron and began to cry with a violence which she could not control.

Christian's eyes grew moist and he pulled out a big red handkerchief, and began to blow his nose vigorously.

"The fact is, Christian," said the Squire confidentially, "while it hain't in the jurisdiction of the court to interfere, still I must obsarve that you and Katie air doin' a fool thing; I kin draw up these separation papers if ye want 'em, but they'll hev to go through the circuit court, and the costs will be more'n two hundred dollars. You kin buy a organ fer sixty dollars and, so fer as Katie's workin' outdoors is consarned, she'll git sick if she does that much more, — she's gittin' too old, and ye know doctor's bills air high. We can't divide up them children, neither, look at little Fritz there."

A tear began to course down Christian's weatherbeaten cheek.

"Wal, whut d' ye say," urged the Squire, pushing his advantage, "shell I finish the papers?"

"Vell," said Christian slowly, "I buy de organ for Louise, und Katie she need'n vork oud doors some more, aber mebbe Katie she dond vant — vant," he glanced wistfully at her and his voice trembled with apprehension.

"Wal, whut d' ye say, Katie, Christian will buy the organ, and he says ye needn' work outdoors any more. Christian has worked hard fer you and the children, Katie, he's ben a pooty good husband to ye after all, whut d' ye say?"

Katie wiped her eyes nervously with the corner of her apron, she glanced down at the tearful face of little Fritz and then over at Christian, who was sitting with his eyes fixed upon the floor. Suddenly she rushed over to where he sat and clutched him by the arm, "Ve try dot over agin, Chreestion?" she asked.

"Yah!" shouted Christian, slapping his knee and springing to his feet, "ve try dot over agin, Katie."

"Wal, this here case is jest about stip' lated out of court," remarked the Squire jocosely; then, resuming his professional bearing, "howsumever, this thing must be fixed up accordin' to law; them separation papers hes ben partly executed and it's the opinion of the court," here he turned the leaves of the Statute slowly, "thet the only safe percedure is to enter into a new recognizance. Stand up, Christian; you too, Katie; hold up yer right hands; 'You and each of ye, do solemnly swear that you will well and truly conduct yerselves the one to the other as a faithful and obedient husband and wife, accordin' to the statutes in sech cases made and pervided, so help you God;' do you so swear, Katie?"

"Yas."

"And you, Christian?"

"Yah."

"'Then, by virtue of the authority vested in me, I do hereby vacate and set aside all acts and doin's lookin' to a separation from the conjugal staitus of matrimony, and do solemnly restore the martial relations between ye in statoo quo, and hereby ratify and confirm ye as lawful husband and wife.' The reg'lar statutory fee fer this is five dollars, Christian, but I'll throw off two dollars and make it three."

Christian pulled out his leather wallet and paid it promptly.

When the Squire reached the end of the lane and turned into the main road, he glanced back at the house. Christian had the wooden bit in his mouth and was capering clumsily about the yard, while little Fritz was hanging to the string and shouting lustily. Katie stood in the doorway watching them, her arms akimbo and a broad grin on her face.

"Wal, that's better'n a lawsuit," muttered the Squire, nodding to himself in satisfaction, "g' long Bill."

RECOLLECTIONS OF ABRAHAM LINCOLN.

By Louisa A'hmuty Nash.

WE know an old gentleman here, — a wagon-maker by trade, — who commenced plying the same craft when young at Mechanicsville near the town of Springfield, Illinois, immortalized by Abraham Lincoln.

He knew him well when he was just a smart young lawyer, smarter than most of them, and so sought after in difficult cases.

The cartwright had a case to win or lose, connected with his trade. On the other side the best lawyer of his little town was employed and his own was no match for him. The eventful day had come and his father-in-law quaked for the result.

"Son," he said to him, "you've got just time. Take this letter to my young friend,

Abe Lincoln, and bring him back in the buggy to appear on the case. Guess he'll come if he can!"

So he set off. He found the young lawyer, not in his office, but at a street corner, surrounded by a troop of small urchins, he laughing heartily at the fun. The letter was handed to him. But, being otherwise engaged, he said:

"All right, wait a minute, I must clean out these young 'uns at 'knucks' first!"

The operation went on amid peals of laughter. That concluded, he proceeded to accompany the son-in-law of his friend in his buggy to the neighboring town. And the peals of ringing laughter continued, as Abe recounted story after story in his inimitable way, so much so, that the driver says, to-day, he never had such a job to hold his lines and guide his horse in his life. At length, so convulsed was he that the horse guided himself, — into the ditch, — turned over the vehicle, upset the occupants and smashed up the buggy.

"You stay behind and look after the buggy," said Lincoln, "I'll walk on."

This he did in time for the court, went in and won the case.

"What am I to pay you?" inquired the delighted client.

"I hope you won't think ten or fifteen dollars too much," answered the young lawyer, "but I'll pay the half-hire of the buggy and half the cost of getting it repaired."

. . . . . .

"There was another young lawyer in Springfield, Illinois, at that time, who was reckoned as smart as Abe Lincoln," continued the old gentleman of the wagon factory, "and by some considered smarter. If one was engaged on one side in a case, the other was sure to be selected by the other side as his opponent. They were forever tilting one against the other in court. Outside they were the best of friends and when the case was over would leave the courtroom arm in arm. Church (that was the other man's name) took to drinking. He would sober up for a time and then go at it as bad as ever. This went on, drinking down and sobering up, year after year. Finally, just at the time the war was thickest, Church thought he would go right away from his old haunts and see if he could not do better.

"As he was moving along he got tangled up with the guerillas on the Confederate side and was taken prisoner with a lot of them. He denied being one of them, but would not give his name and could bring no proof. Consequence was, he was condemned to death, but took it mighty cool. He said he knew he'd get off! The day for the execution came along, but the man was as cool as ever. On the morning he scribbled off a bit of a telegram and asked to have it sent at once. It was to the President, signed with a gibberish name of three letters that meant nothing, it seemed. In an hour came the telegraphed orders from President Lincoln, 'Set my friend Church at liberty at once.'

"It appeared the three-lettered signature was some pet name Abe Lincoln had formerly for his chum.

"Church was, of course, liberated at once; he disappeared into parts unknown, and has never been heard of since."

CHAPTERS IN THE ENGLISH LAW OF LUNACY.

By A. Wood Renton.

III.

MORAL INSANITY.

CLOSELY associated with the criminal responsibility of the insane, and yet sufficiently distinct from the subject to deserve separate treatment, is the famous doctrine of "moral insanity." In the propagation of this doctrine nearly all the leading nations of the world have borne a part. Long resisted by a section of the medical and the entire legal profession in England, it has eventually, although, as we shall see, in a modified form, been practically accepted by medical jurists as embodying a truth which administrators of the law cannot afford to disregard. For our present purpose we may define "moral insanity" as a lesion of the moral or affective, without any apparent disturbance of the intellectual, faculties of the mind. The existence of this disease was first affirmed by Philippe Pinel, to whose work for the insane we referred in the opening article in the present series. Pinel supported his theory by such cases as the following:

"A. had an *irresistible desire* to seize an offensive weapon and to strike the first person that came in his way. A sort of conflict, he said, went on within him unceasingly between the savage impulse of his destructive instinct and the profound horror with which the idea of crime inspired him. There was no sign of aberration in his memory, imagination or judgment. He confessed to me during his seclusion that his murderous impulse was absolutely forced and involuntary; that his wife, in spite of his affection for her, had all but been his victim, and that he had just had time to warn her to take refuge in flight." Or again: "B. was a mechanic confined in the Bicêtre. The access of his disease was preceded by peculiar symptoms — a feeling of burning heat in the intestines, with intense thirst and marked constipation. This sensation of heat spread by degrees over the chest, the neck and the face, of which it raised the color . . . Finally the nervous excitement reached the brain and then the patient was overcome by an irresistible desire for blood, and if he could get possession of a sharp instrument would attempt in a kind of fury to take the life of the first person who came in sight."

The last of Pinel's cases, which we shall give, is an instance of "abstract fury," familiar to all readers of Dr. Ira Ray's "Medical Jurisprudence of Insanity": "An only son, brought up under the eye of a foolish and indulgent mother, acquired the habit of yielding to every caprice and every impulse of a passionate and disordered temper. The impetuosity of his spirit increased and strengthened with his years. The money which was lavished upon him seemed to remove every obstacle to his imperious desires. Opposition or restraint roused him to fury; he would attack his opponent and seek to overcome him by force. His whole life was spent in quarreling and strife. If any animal, a dog, a sheep or a horse, gave him any trouble he would kill it on the spot. If he were present at any assembly or fête, he lost control of himself, gave and received blows, and came away bleeding. He was quite reasonable when he was calm, was the owner of a fine estate which he managed wisely, discharged the other duties of society, and made himself known by acts of kindness towards the unfortunate. But a piece

of gross misconduct put an end to his acts of violence — enraged with a woman who had called him names, he threw her into a well. He was condemned to seclusion in the Bicêtre."

Now the obvious and proper criticism for the legal profession to pass on these *observations* was that they did not exclude the possibility, nay the probability, that the patients in question were suffering from intellectual as well as moral insanity, and that consequently there was no need to raise this form of mental alienation to the dignity of a separate and distinct disease. But, instead of this, lawyers, juries and lay writers in England banded themselves together into a confederacy whose object was to extinguish Pinel's heresy, as they deemed it, with contempt and ridicule. The course which they pursued is thus summed up by a writer in the "New York Medico-Legal Journal": "Sometimes the criticism takes the form of epigram, e.g. an irresistible criminal impulse is simply a criminal impulse not resisted, or, if moral insanity is a disease, it must be cured upon the scaffold. At other times there is an affectation of logical precision. 'Syllogistically stated,' observes one intellectual athlete, the position may be stated thus:

"'Men of unsound mind are irresponsible; men of unsound mind have reason, judgment and memory. ∴ Men having reason, judgment and memory are irresponsible.' Another gentleman" (supposed, by the way, to be Francis Jeffrey, the well-known Scottish lawyer and critic), "breaks out into verse (the quotation which follows is from the 'Craniad'):

"'Nature is sick and crime is her disease,
Rogues are indicted, tried, convicted too,
And sentenced for what Nature bade them do.
'Tis true they're rogues, but Nature more than they,
She made the brain that led the rogues astray,
She makes men lie, and cheat, and steal, and kill.
She gets the better of their better will.
Soon shall the glorious blissful age arrive,
When man with Nature shall no longer strive,
When thieves and murderers shall be known to be
Afflicted with a sad calamity.'"

PHILIPPE PINEL.

Judges of Lord Bramwell's school took a similar line on the bench. "Your lordship," said a defending counsel, on one occasion, to this stern, and yet, according to his lights, eminently fair and just judge, "has heard of the disease kleptomania." "I am here to cure it," was the reply. And nothing was more common, half a century ago, than to hear occupants of the English bench, whose gentle spirits were incapable of such grim utterances, declare to juries that if the plea of moral insanity were accepted, all that a man had to do was to nurse a criminal impulse till it became irresistible and then yield to it with impunity.

Badinage and criticism of this kind produced their natural results. Instead of modifying their statements, as wider inductions would have led them to do, the French alienists and their American disciples clung to the theory of moral insanity in its original and exaggerated form with all the unswerving fidelity of a persecuted sect. Thus Esquirol, Pinel's pupil, who uttered the noble

sentiment, *Pour être utile aux aliénés il faut les aimer beaucoup et savoir se dévouer pour eux*," in an age when the *fame vinculis plagis coercendus est* of Celsus was still the accredited regimen in asylums for the insane, at first denied that in cases of moral insanity the intellectual faculties of the patient are undisturbed, but soon afterwards — one cannot doubt to some extent under the pressure of hostile criticism — accepted Pinel's theory in its entirety. Marc, Pagan, Prichard, Ray and Conolly were equally firm — and so the controversy stood till after the middle of the present century. Then a reaction commenced. Trélab, Du Saulle and other continental writers began to insist that deep-seated intellectual lesion underlay all these cases of supposed moral insanity. Dr. Alfred Swaine Taylor, the prince of British medical jurists followed suit with equal force and moderation. "It does not seem probable," he said, "that moral insanity as thus defined" (i. e. as lesion of the moral, without any injury to the intellectual, faculties), "ever exists or can exist in any person. The mental powers are rarely disordered without the moral feelings partaking of this disorder, and conversely it is not to be expected that the moral feelings should become to any extent perverted without the intellect being affected, for perversion of moral feeling is generally observed to be one of the early symptoms of disordered reason. The intellectual disturbance may sometimes be difficult of detection, but in every case of true insanity it is more or less present and it would be a highly dangerous practice to pronounce a person insane when some evidence of its existence was not forthcoming. . . Until medical men can produce a clear and well-defined distinction between moral depravity and moral insanity, such a doctrine, employed as it has been for the exculpation of persons charged with crime, should be rejected as inadmissible."

JOSEPH GUISLAIN,
THE PINEL OF BELGIUM.

At the same time, Sir James Stephen was engaged in attacking the legal doctrine laid down, as we have seen, after the acquittal of Macnaghten in 1843, which made the responsibility of a person, alleged to be insane, for a crime, depend on whether he knew its nature and quality at the time of committing

it. Sir James Stephen attacked this view very much in the same way that the late Dr. Newman attacked the thirty-nine articles in Tract No. 90, which produced a crisis in the Oxford movement. Newman "tested the elasticity" of the articles, and showed that they could be made to sanction nearly all the doctrines supposed to be distinctive of the Church of Rome. So Stephen contended that the words "know the nature and moral quality of his act," if liberally and properly construed, covered the doctrine of moral insanity, which they were designed to exclude. He suggested that the law of England should run thus: No act is a crime if the person who does it is at the time when it is done prevented either by defective mental power, or by disease affecting the mind, (a) from knowing the nature or quality of his act, or (b) from knowing the act is wrong, or (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default. But an act may be a crime although the mind of the person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to the act. Speaking of the knowledge of right and wrong, the same great judge said: "I think that anyone would fall within that description (i.e. inability to know the quality of his act) who was deprived, by disease affecting his mind, of the power of passing a rational judgment on the moral character of the act which he meant to do." And again, "knowledge and power are the constituent elements of all voluntary actions, and if either is seriously impaired, the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts, as that a man who does not know the nature of his acts is incapable of self-control." This enlightened view, which gives a rational place to moral insanity as an exculpatory plea in criminal cases, has now annexed the support of practically the whole English bench.

JEAN-ÉTIENNE-DOMINIQUE ESQUIROL.

It may be interesting and instructive to substantiate this statement by reference to a few modern cases which are probably not very well known on the other side of the Atlantic. Mr. Justice Stephen repeatedly applies his own views in practice. Thus, at the trial of a man named Burt, at Norwich assizes, on 9th November, 1885, on a charge of feloniously causing grievous bodily harm, he stated that "if a man were in a state of passionate rage, excited by disease, which violently interfered with his actions, so that he had not a fair capacity to weigh what he was doing, he was not responsible." Again, in 1888, at Glamorgan assizes, on the trial of a man named Davies, his lordship said to the jury: "Knowing the act is wrong means nothing more or less than the power of thinking about it, the same as a sane man would; the power of attaining to a full con-

ception of the horrible guilt there would be in murder; the power of knowing that we are doing that which will destroy life and your soul, and cause sorrow and terror and every kind of frightful consequence; the power of thinking about this which every sane man possesses. That is the law, as I understand it, which by guilt implies the power of discriminating between right and wrong. That is the test of responsibility."

It was an application, in brief, of the same doctrine that led Mr. Justice Cave to say, on the trial of a man named Brocklesfield at Cheshire, some years ago: "The question is, whether he was insane at the time." This ruling, it will be observed, throws the "knowledge of right and wrong" test overboard, and reverts to Chief-Justice Kenyon's language on the trial of Hadfield. In another case — the Queen *v.* Ware — tried at Shrewsbury in 1885, Sir Henry Hawkins told the grand jury that, while the prisoner knew what he was doing in committing the crime charged against him, he was assuredly not responsible for the act. In yet another case, Lord Blackburn told a jury that there were "exceptions" to the law laid down after the acquittal of Macnaghten, and that the case before them was one of these. The jury promptly acted on the hint. Only a few years ago, in a murder case at Cardiff, Mr. Justice Lawrence expressly put to the jury as law the proposed statement of Sir James Stephen above quoted.

JEAN-PIERRE FALRET.

Medical men have often been challenged by lawyers to produce a single typical case of moral insanity. A *locus classicus* of this kind has recently been laid before the British Medico-Psychological Association by Dr. Hack Tuke, one of the most eminent alienists of the century, who has just passed from us by death. We are enabled to conclude this paper by a citation of it. It is without exception the most extraordinary case on record and may prove of interest — and possibly service — to American lawyers and medical men in their professional conflicts:

"W. B. was born at Swansea, Wales, on June 26, 1843. In his tenth year he migrated to Canada with his father, stepmother and brothers. He was not known to his stepmother until about a fortnight before leaving for Canada, as he had been away at school. His stepmother states that he has been of a sullen disposition ever since she has known him; uncommunicative, idle, sly and treacherous; that at an early age he evinced a disposition to torture domestic animals, and to cruelly treat the younger members of the family.

"On one occasion he took with him his young brother, a lad five or six years of age, ostensibly to pick berries, which grew wild not far away. On arriving at a secluded spot, he removed the clothes from the child, and proceeded to whip him with long, lithe willows, and, not satisfied with this, he bit and scratched the lad terribly about the arms and upper part of the body, threatening that if he made an outcry he would kill him with a table knife, which he had secretly brought with him. The cries of the boy attracted the attention

of a laborer, who promptly came to the rescue and in all probability saved the little fellow's life. Shortly after this act of cruelty to his brother, B. was apprehended for cutting the throat of a valuable horse belonging to a neighbor. For some little time prior to this act considerable anxiety had been felt by people in the neighborhood where B. lived for their livestock. Horses were unsafe at night in the pastures, as several had been found in the mornings with wounded throats. In the stables they were equally unsafe, as a valuable beast was killed in its stall in broad daylight. About this time also, people in the neighborhood observed an unaccountable decrease in the number of their fowls. When B. was apprehended for cutting the horse's throat, he confessed that he not only did this vile act, but also that he had maimed the other animals to which reference had been made, and that he had killed the fowls, twisted their necks, and then concealed them in woodpiles, etc. For these offenses he was sentenced to twelve months in gaol. When he returned home, after serving out his sentence, his family were more suspicious of him, owing to past experience, and he was more carefully looked after. He was watched during the day, and locked in a separate room at night. These measures were necessary to protect the family, as he had made an effort to strangle a younger brother while occupying a dormitory with him.

FELIX VOISIN.

"One day, soon after his discharge from gaol, B.'s stepmother left a little child asleep upstairs, while she proceeded with her household duties, not knowing that B. was in the house. In a short time she was informed by one of the other children that the baby was crying, and on going to the room where she had left the sleeping baby she discovered that it had disappeared. B. had taken the little child to his own room, put it in his bed, and then piled a quantity of clothing, etc., on top of it. When rescued, the child was nearly suffocated, and was revived with difficulty. Immediately after this attempt to suffocate his baby sister, B. abstracted a considerable sum of money from his father's desk, and attempted to escape with it; he was recaptured, however, and the money taken from him. For this offense he was tried, found guilty, and sentenced to serve seven years in the penitentiary. While serving out this sentence he was transferred to the criminal asylum connected with the prison, but on the expiration of his sentence he was discharged. On being released he crossed over to the United States and enlisted in a cavalry regiment. In consequence of the horse assigned to him not being a good one he was obliged to fall behind on a march, and, taking advantage of this, a favorable opportunity offering, he drove this animal into a deep morass and belabored the poor beast until it was fast in the mire; there he left it to its fate, and it was found dead the next morning. B. now deserted, and after undergoing some hardships again returned home, where he was, as before, carefully watched.

"His next escapade was the result of an accident. B. and his father were at a neighbor's one evening, and while paring apples the old man accidentally cut his hand so severely as to cause the blood to flow profusely. B. was observed to become restless, nervous, pale, and to have undergone a peculiar change in demeanor. Taking advantage of the distraction produced by the accident, B. escaped from the house and proceeded to a neighboring farmyard, where he cut the throat of a horse, killing it.

"Recognizing the gravity of his offense, he escaped to the woods, where he remained in concealment until circumstances enabled him to commit another and still graver crime. Observing a young girl approaching the wood, he waited until she came near to his hiding-place, when he rushed out, seized her, and committed a criminal assault on her; for this last crime he was condemned to be hanged, but the sentence was commuted to imprisonment for life. While serving sentence he was again transferred to the prison-asylum. After serving about ten years of his sentence he was pardoned; *why* he was pardoned remains a mystery. On his way home from prison, and when within a short distance of his father's house, he went into a pasture, caught a horse, tied it to a telegraph pole, and mutilated it in a shocking manner, cutting a terrible gash in its neck, another in its abdomen, and a piece off the end of its tongue. For this act of atrocity he was tried, and though there was no doubt of his guilt, he was acquitted on the ground of insanity and, by warrant of the lieutenant-governor, transferred to Kingston Asylum. He was received at the asylum on the 29th of September, 1879, and placed under careful supervision.

GUILLAUME-MARIE-ANDRÉ FERRUS.

"On the 19th of August, 1884, he made his escape while attending a patients' picnic. He had only been absent from the asylum about an hour, and while almost in sight of pursuing attendants, overtook a young girl whom he attempted to outrage. Her cries, however, brought help, and his designs were frustrated. For this offense he was handed over to the civil authorities, tried, convicted, and sentenced to six months in gaol. He is now serving out this sentence, and on its expiration will, no doubt, be released — to commit, it is to be feared, more crimes.

"Dr. Clarke, the assistant medical officer at the Kingston Asylum, writes to me that the trial seems to have been conducted in a very remarkable manner, and that the question of the prisoner's sanity or insanity was not gone into. 'Poor B. was brought in "guilty," and the judge sentenced him to *six months' hard labor in gaol*, stating that he must *be lenient under the circumstances*. What the *circumstances* were, the asylum authorities have not yet discovered, but we may expect very interesting developments at the end of six months. We should not blame a foreigner if he asked the question, "You have a Criminal Asylum — why do you *punish* criminals who are insane?"'

"His grave offenses have been enumerated in the preceding statement, but, besides these, B. was guilty of very many minor offenses, both while at home and while in the prison and asylum. While in the Criminal Asylum he attempted to castrate a poor imbecile inmate with an old shoe knife, which he had obtained in some unknown way. Another helpless imbecile he punctured in the abdomen with a table fork until the omentum protruded; not satisfied with this, he bit the poor fellow, who had not even sense enough to cry out, in many places over the abdomen and chest.

"He killed many small animals and birds, such as dogs, cats, doves, fowls, etc. He taught many innocent patients to masturbate, and introduced even more vicious habits.

"He is a great coward, and was never known to attack any person or thing that would be likely to offer resistance.

"Young girls, children, helpless lunatics,

animals, and birds were selected for his operations.

"The very sight of blood, as we have seen, had a strange effect on this man, and worked a wonderful transformation. His countenance assumed a pallid hue, he became nervous and restless and, unless he was where he could be watched, he, so he stated, lost control of himself, and indulged in the proclivities for which he was notorious.

"If so situated that he could not indulge his evil propensities, he was a quiet and useful man, but he could never be trusted. He had a fair education, and enjoyed reading newspapers, letters, etc., sent to him.

"It is very doubtful if he entertained much affection for anyone. He seemed to like his stepmother better than anyone else, but even she, who had been a mother to him since early boyhood, he, according to his own confession, planned to outrage."

DR. JOHN CONOLLY.

A summary of the American decisions on the subject of this preceding paper may be of use to our readers. The *dicta* of the English judges in Reg. *v.* Macnaghten were at first followed in some of the States, notably Pennsylvania, Massachusetts, Michigan, Alabama and Ohio. They were, however, soon repudiated in the following cases: State *v.* Pike, per Chief-Justice Doe, 49 N. H. 399, 50 N. H. 369; Kried *v.* Com., 5 Bush (Ky.), 362; Smith *v.* Com., 1 Duv. (Ky.) 224; Oljarnette *v.* Com., 75 Va. 576; Cunningham *v.* State, 56 Miss. 269; State *v.* Johnson, 40 Conn. 136; State *v.* McWhorter, 46 Iowa, 88; Hopp *v.* People, 31 Ill. 385; Bradley *v.* State, 31 Ind. 492; Harris *v.* State, 18 Texas Ct. of App. 87; Coyle *v.* Com., 100 Pa. 573; Roberts *v.* State, 3 Ga. 310; Com. *v.* Rogers, 7 Metc. (Mass.) 500; People *v.* Daly, 7 Med. Leg. Jour.; and above all, Parsons *v.* The State, per Somerville, J. (Ala.), (*ib.*).

Moral insanity, as recognized by the American courts, appears to mean disease of the brain affecting the moral faculties, and so impairing the volition as to prevent an intelligent discrimination between right and wrong. Compare Com. *v.* Moster, 4 Pa. St. 266, per Gibson, C. J; Forman's will, 54 Bar, 274; Boswell *v.* Alabama State, 63 Ala. 307; St. Louis, etc., Insurance Co. *v.* Graus, 6 Bush, 268; Anderson *v.* State, 43 Conn. 515.

CRIMINAL LUNATICS

We shall in this paper complete our account of the relations of lunacy to the English criminal law by a sketch of the provision made in England for the custody of criminal lunatics, and of some of the most notorious specimens of this class.

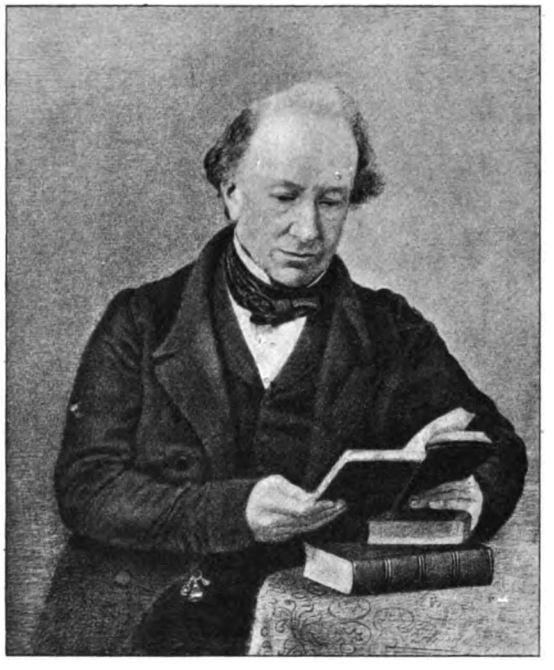
It should be observed at the outset that the term "criminal lunatic" is used to include classes of persons very different from one another. It is now defined in the Criminal Lunatics Act, 1884, as including (1) any person for whose safe custody during Her Majesty's pleasure, Her Majesty or the Admiralty is authorized to give order, and (2) any prisoner whom a secretary of state or the Admiralty has, in pursuance of any

Act of Parliament, directed to be removed to an asylum or other place for the reception of lunatics. In point of practice, however, the words "criminal lunatic" are applied to three classes of persons:—

First, those who, put upon their trial on some criminal charge, are found guilty, but insane at the time of the offense; secondly, those who are found insane upon arraignment. These persons cannot, of course, be assumed to be criminals, but as they are liable to be tried on recovering their sanity, their detention differs in character from that of ordinary lunatics. In connection with these may be mentioned persons apparently insane under remand and awaiting trial. Thirdly, convicts and other persons undergoing sentences who have become insane in prison. These are strictly criminals, but it is only while they are criminals, i.e. during the currency of their sentence, that they are criminal lunatics. There are, thus, two great categories of criminal lunatics in England,

(*a*) Queen's pleasure } lunatics.
(*b*) Secretary of state's }

The term in question is often, however, inaccurately applied to other classes to which it is necessary to refer. Persons, for instance, who were at one time criminal lunatics, but who have been absolutely discharged from the custody of the state, either because they are cured or on the completion of their sentences have ceased to be criminals, and, therefore, as we have already seen cannot any longer be called criminal lunatics. So, also, persons who have at some period of life been either convicted of crime, or in prison under a criminal charge, and who have left prison in a state of sanity, but who afterwards became insane, neither are, nor ever have been criminal lunatics. It will be seen, therefore, that the distinction between persons who are, and those who are not criminal lunatics, is that the former are in custody by virtue of the order of a court of law or of a secretary of state. It should be added that no criminal lunatic can be discharged without a warrant signed by a secretary of state.



DR. I. C. PRICHARD.

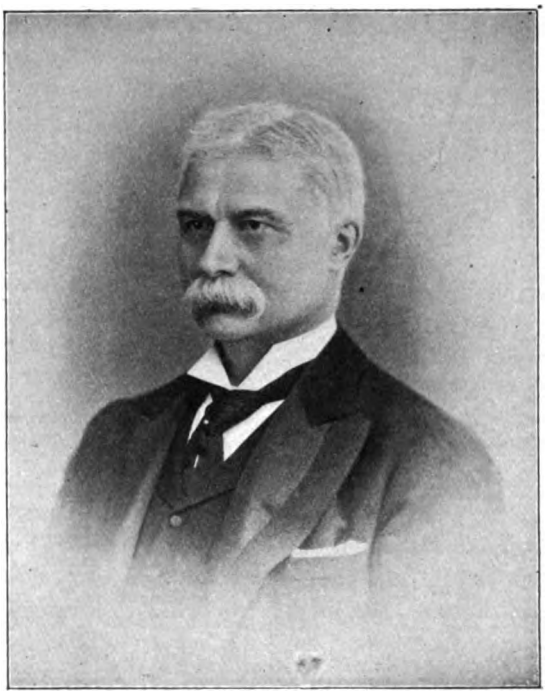
Historical sketch of the law as to criminal lunatics. Prior to the attempt made by Hadfield, in 1800, on the life of George III, the mode of procedure in regard to the treatment of criminal lunatics was varying and uncertain. But when Hadfield was tried and found insane, and the question arose what was to be done with him, the law on the subject was found to be in so unsatisfactory a condition that no further time was lost in amending it. The trial of Hadfield took place on the 26th of June, 1800, and an Act "for the safe custody of insane persons charged with offenses" was passed on the 28th of July in the same year. This is the oldest of the statutes, relating to criminal lunatics, of which any part is still in

force. Under its first and second sections, persons acquitted on the ground of insanity, or found insane upon arraignment, may be ordered by the court to be kept in strict custody until the sovereign's pleasure is known — hence the origin of the phrase, "Queen's pleasure lunatics." The fourth section contained a provision (which curiously enough has not yet been repealed or adjusted to modern conditions) that insane persons by whom the sovereign's life is endangered may be kept in safe custody by order of the privy council or secretary of state, pending further inquiry; and the detention of such persons in confinement rests with the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal. We shall find later on, however, that the legislature has discovered a more effective mode of treating persons who are seized with an itching desire to harass the sovereign than either prosecution for high treason or detention under an order of the privy council.

DR. R. SWAYNE TAYLOR.

In 1807 a select committee on criminal and pauper lunatics recommended "that a building should be erected for the separate confinement of all persons detained under the above-mentioned Act for offenses committed during a state of insanity; but the hour of Broadmoor was not yet. Nothing was done except, six years later, to attach to Bethlem Hospital wards for criminal lunatics, at a cost of £25,144, upon the understanding that the government would defray the annual charge of maintaining such lunatics as might be kept there, but that their control and management should be under the superintendence of the governors of Bethlem, and that they should be attended to by the medical and other officers of that establishment. This constituted, however, a beginning. A few years later it was found necessary to double the accommodations at Bethlem Hospital. Afterwards, still further provision was required and, accordingly, in 1849 an arrangement was entered into between the secretary of state and the proprietors of Fisherton House, near Salisbury, for the erection of detached wards in connection with that asylum, for the accommodation of those criminal lunatics who were in excess of the number for whom provision existed at Bethlem. In the meantime a select committee, appointed by the House of Lords in 1835, strongly recommended that "persons whose trials have been postponed, or who, having been tried, have been acquitted on the ground of insanity, shall not be confined in the prisons or houses of correction." The wards provided in 1849 at Fisherton House, as well as those previously provided at Bethlem, having become filled and further accommodations being still required, instructions were given by the secretary of state, in 1856, for the erection of the Broadmoor Asylum. In 1860, an Act of Parliament known as the Broadmoor Act

was passed to make better provision for the care and custody of criminal lunatics and the regulation of criminal lunatic asylums. By the 1st section, Her Majesty is enabled by warrant to appoint any asylum or place in England that may be deemed suitable to be an asylum for criminal lunatics; and, under sections 4 and 5, the secretary of state is empowered to appoint a council of supervision, as well as officers, attendants and servants, for any asylum provided under this Act, and to make rules for its government. As yet, Broadmoor Asylum, which was opened in 1863, is the only place so appointed.



DR. ORANGE.

In February, 1875, on the recommendation of the then secretary of state, the treasury sanctioned the establishment of a lunatic wing at Woking convict prison, at a cost not to exceed £7,000, in order that insane convicts might thereafter be sent to it instead of to Broadmoor. This plan was carried into execution, but the lunatic wing was not appointed under the Broadmoor Act "an asylum for criminal lunatics." In 1883 a change was made in the law as to the trial of lunatics. Theretofore, persons who were proved to have been insane at the time of committing offenses imputed to them were found "not guilty on the ground of insanity." It was thought that persons who were only partly mad at the time they formed a resolution to commit a crime, would be more deterred from so doing if the verdict was one of guilty of committing the act, but insane at the time charged. A verdict in these terms was accordingly enjoined. The result is entirely the same after the verdict has been given as it used to be. In 1884, a partial consolidation of the criminal lunacy law was effected. But much still remains to be done in this field of effort.

Modern procedure in regard to criminal lunatics. Five classes of cases arise. 1. A person charged with a crime may not be arraigned at all. He may have manifestly shown himself to be insane while in prison. In this case, he may be removed direct to a criminal lunatic asylum by an order of the home secretary. Under section 16 of the Criminal Lunatics Act, 1884, an instance of the exercise of this power recently occurred in London. A man Matthews was charged with a murder at Bethnal Green. When his case was called on at the police court, it was stated that he had already been removed to an asylum by order of the secretary of state. The magistrate was in some doubt as to how to mark the charge sheet. The prosecution had to be dismissed; but the prisoner could not be said to have been "discharged," as he was liable to be reindicted on recovering his sanity. Ultimately the magistrate created a precedent. He marked the charge sheet, "Removed to a lunatic asylum by secretary of state's order." There is a good deal of prejudice, however, against this procedure in legal circles, as it deprives a prisoner of the benefit of the verdict of a jury as to his

sanity, to which if he had not been a prisoner he would have been entitled under the Lunacy Act, 1890. 2. A prisoner on being arraigned may not plead, and yet neither the prosecution nor the defense may suggest that he is insane, or his insanity may be practically admitted by the prosecution. In these unopposedcases a few medical witnesses are examined sometimes by the defense at the instance of the judge, sometimes by the prosecution; a verdict is returned in accordance with the evidence, and an order for the prisoner's detention during the Queen's pleasure is made by the court, and counsel for the defense may submit that a prisoner is unfit to plead, while counsel for the prosecution may maintain the contrary. Here the *onus probandi* of course rests on the defense. 3. If the jury empaneled to determine the issue find that the prisoner is sane upon arraignment, the defense may still raise the plea that he was insane at the time of committing the offense with which he is charged. 4. The defense of the prosecution may insist that the accused is unfit to plead, while the latter maintains the contrary. The case of Bellingham, who was tried for the murder of Mr. Perceval in 1812, and who thanked the attorney general of the day for making light of the plea of insanity, which his counsel had set up on his behalf, is a *locus classicus* in this connection. In Reg. *v.* Pearce (1840, 9 Car. and Payne, 667) it was decided that counsel defending a prisoner may set up on his behalf the defense of insanity although his client objects to it. Here Mr. Justice Bosanquet allowed the prisoner to suggest questions to be put by his lordship to the witnesses for the prosecution to negative the supposition that he was insane, and also allowed additional witnesses to be called on his behalf for the same purpose. 5. The accused may be mute upon arraignment. Here a jury is empaneled to inquire "whether the prisoner stands mute out of malice or by the act of God." If the verdict is "mute out of malice," a plea of not guilty is entered, and the trial proceeds in the usual way; if it is "mute by act of God" an order is made for his detention.

Even after a prisoner is sentenced, an inquiry is frequently instituted as to the state of his mind by order of the Home Office, and if the experts are in doubt as to his sanity, he is treated as a criminal lunatic. Laurie, the arson murderer, escaped the scaffold owing to a post-trial inquiry of this sort.

We have referred above to the section in the Act of 1800 which was designed to secure the person of the sovereign from attack. It failed of its purpose, at least insofar as the present reign is concerned. Shortly after Queen Victoria's accession to the throne, quite a mania seized a certain class of the weak-minded public. Edward Oxford set the example in 1840. He was clearly insane and was acquitted on that ground. Other offenders of stronger senses but equal vanity followed suit. Then the legislature intervened and enabled the judges to annex a sound whipping to the ordinary punishment in such cases. This amendment of the law effectually stamped out the desire for notoriety which led boys and youths to present loaded and unloaded firearms at Her Majesty or threaten to strike her with sticks, as she drove out and in among her people. Life at Broadmoor was sketched in some detail in a previous number of THE GREEN BAG (Vol. V, page 165), and we need not here repeat what was there said as to the régime of this great asylum, or the violence which its three leading physicians, Dr. Meyer, Dr. William Orange and Dr. Daniel Nicolson, have suffered at the hands of its inmates. It may be interesting, however, to give a few notes as to some of the patients.

Daniel Macnaghten was for ten years after his trial under the care of Sir Charles Hood. But as Broadmoor was not then in existence, it may suffice to state that his mind gradually decayed from the ordinary

course of brain disease. The verdict of acquittal in his case was therefore justified by the event. The case of Christiana Edmunds was one of great interest. This woman, who moved in a respectable sphere of society, was charged at the central criminal court in January, 1872, with the murder of a boy at Brighton. The deceased ate some sweets purchased in a confectioner's shop and died in a short time with the symptoms of poisoning by strychnine. Strychnine was found in his stomach. The prisoner had procured sweets from this shop by the agency of little boys, had deliberately poisoned them with strychnine, and had then returned them to the shop. She had herself on various occasions left poisoned sweets about in shops. She had previously attempted to poison the wife of a medical man, and she imputed the poisonings to the carelessness of the confectioner. Dr. Taylor gives the following account of and verdict upon this case:

"The confectioner was able to show that his sweets as purchased were wholesome, and by a chain of circumstances the crime of poisoning them was clearly fixed upon the prisoner. She had shown much cunning in her proceedings. She had procured strychnine on four different occasions under false pretenses, had borrowed the poison book of a druggist and torn out the leaves to conceal the fact that she had purchased the poison. The defense was insanity, but there was no proof of intellectual insanity about her. She had shown all the skill of an accomplished criminal in carrying out her plan of general poisoning, and in using the most artful means to conceal it, and to throw the imputation upon the confectioner. Impulse could hardly be pleaded, for her criminal acts were extended over weeks and months. Edmunds was convicted. She then, with a view of averting or delaying punishment, put in a plea in bar of execution, but the capital sentence was afterwards remitted, and the prisoner was sent to Broadmoor Asylum on the statement that she was of unsound mind. It appears that her father had died in a lunatic asylum when of middle age, having suffered for years before his death from homicidal and suicidal mania. Her brother died at Earlswood Asylum an epileptic idiot; her grandfather was a subject of cerebral disease; her sister suffered from hysteria; other relations were afflicted with nervous diseases of some kind; and she herself appears to have exhibited, some eighteen years before, symptoms of hysteria and hysterical paralysis. This proved hereditary tendency to insanity in her family, and was the main cause of the commutation of the capital sentence. If we except the nature of the crime, showing, as it did, an utter recklessness for human life, there was nothing to indicate unsoundness of mind, either in a medical or legal sense, in this woman."

On our last visit to Broadmoor Asylum — on December 17, 1893 — we found her engaged in fashioning out of wool the text, "Peace on earth and good-will to men," for the decoration of the chapel hall for the Christmas services.

Another curious case was that of Reg. *v.* McKane. The prisoner was tried at Salisbury summer assizes for the murder of Mr. Lutwidge, a commissioner in lunacy. McKane had been confined in Fisherton House for many years and was anxious to be removed to Broadmoor. He had threatened to do something which would bring about his removal but was not treated as a dangerous lunatic. As Mr. Lutwidge was going round the asylum for purposes of inspection, McKane rushed at him and struck him violently on the temple with a nail wrapped in a cloth. It penetrated to the brain of Mr. Lutwidge and he died in a week. The prisoner was, of course, acquitted on the ground of insanity.

A recent case which excited great interest in London was that of the Queen *v.* Reginald Sanderson. The prisoner was the son of an Irish magistrate. His intellect was known to be weak, but he was never considered dangerous. Unfortunately, however, his disordered imagination was inflamed by reading the story of the South End murder and he stabbed a woman near Hyde Park. He escaped to Ireland but could not forbear from talking about the murder and was soon arrested. Of course he was found "guilty, but insane." When he was brought up before the magistrate he suddenly bolted out of the dock and endeavored to get away. There was no real doubt, however, as to his irresponsibility.

A TRAGEDY AND TRIAL OF NO MAN'S LAND.

By H. B. Kelly.

ONE of the most important trials in the history of Federal courts, involving life and entailing expense upon government, occurred in the month of July, 1890, in the United States district court at Paris, for the eastern district of Texas, the culmination of a four years' strife between the towns of Hugoton and Woodsdale in Stevens, a southwestern county of Kansas. The boundary lines of the county had been established during the special session of the legislature in the winter of 1886, the site of Hugoton having been selected and settlement commenced in June of the previous year, that of Woodsdale following a year later.

This was at the beginning of "the boom period" in the "short grass" counties of western Kansas, during which thousands of people in comfortable circumstances, allured by the delusion of the disappearance of western arid regions, occupied the lands, and driving therefrom the herds of grazing cattle, vainly sought to convert the plains into fields of grain and homes of comfort.

In June of that year C. E. Cook resigned the postmastership of McPherson, to which he had been appointed by President Cleveland and, removing to Hugoton, became manager for the town company and the recognized leader of the townspeople. In the spring of the same year, Sam Wood, who had been closely identified with the history and politics of Kansas from the date of his entrance into the Territory in 1854, located the town of Woodsdale, selecting a site for his town six miles north and two to the east of Hugoton. Between the towns a range of sand hills crosses the county from east to west, creating a natural division between the sections, this division tending to the creation of adverse local interests and the stimulation of strong partisan feeling, among the settlers, for their respective towns.

By early summer the population of the county was sufficient to entitle it to political organization under the laws of the State, the initiatory looking to such organization having been taken by Hugoton in making enumeration, securing the appointment of the requisite temporary officials and the designation of that town as temporary county seat. The town of Woodsdale was not ready for these important preliminary movements, and Wood, its founder, at once assumed an attitude of hostility thereto, threatening delay by a move to enjoin organization with numerous other technicalities with which he had grown familiar in previous contests of a similar character.

When the census was taken and the report completed for presentation to the governor, Wood, on his way with the purpose of asking the intervention of the courts, was overtaken by a party from Hugoton, kidnapped and carried into a remote section of Texas, where he was detained some three weeks, during which time the work of organization went forward.

The temporary organization, having been secured, was followed by an election for permanent county officers and county seat, the Hugoton people winning in the contest. This, however, did not settle the strife, but tended rather to increase the intensity of the conflict as elections in aid of railroad construction and other matters came up. The rivalry between the towns engendered personal hostility between the residents thereof, this condition offering special inducement to the typical cowboy, "dead shot" tough,

who in due time came and was installed as town marshal, Sam Robinson for Hugoton and Ed Short for Woodsdale, each becoming to the other the embodiment of the hostility of their respective towns.

In July, 1888, C. E. Cook, Orin Cook, A. M. Donald, and Robinson, with the wives and children of three of the party, left Hugoton in wagons, with the necessary tents and equipage for an outing, fishing and plumming in the Strip.

The "Strip," or "No Man's Land," is thirty-three miles in width from north to south, by two hundred and ten miles from east to west, is bounded on the east by the Cherokee Strip, on the south by the northern projection of Texas, known as the "Pan Handle," on the west by the Territory of New Mexico, and on the north by Kansas and Colorado. This tract of land, left out in the formation of surrounding States and Territories, was never provided with courts, nor was it attached for judicial purposes to any adjoining State or Territory until 1890, when, as Beaver County, it became a part of Oklahoma. Prior to 1850 it was a part of Texas, that State having extended north to the Arkansas River and west to the Rio Grande.

In that year Congress purchased from Texas all that portion of the State lying north of thirty-six degrees and thirty minutes north latitude, the present northern boundary of the Texas Pan Handle, and then the Missouri Compromise line, purchasing also the territory west of the one hundred and third meridian west longitude, the present eastern boundary line of New Mexico. The line between the Cherokee Strip and "No Man's Land" having been established years before, the fixing of the northern line of the Texas Pan Handle and the eastern line of New Mexico in 1850, left "No Man's Land" a jog one-half degree south, on the south side of the public domain that lay to the west of the Missouri River. In the establishment of Kansas and Nebraska as Territories in 1854 the south line of Kansas, from east to west, having been established conforming to the thirty-seventh degree north latitude, created the north boundary line of "No Man's Land."

Upon learning the destination of the Cook-Robinson party for an outing in the Strip, Short, with two or three men, went in pursuit, coming upon the Hugoton people in camp upon the Beaver, a stream in the Strip. At a distance of a couple of hundred yards the Short party halted, made demand upon the Cook party for the surrender of Robinson, and upon their demand being refused opened fire with Winchesters. To save the women and children from danger, Robinson mounted a fleet horse he had with him and made off at full speed in the opposite direction from the attacking party, pursued by Short and his followers.

This proved the immediate beginning of the bloodiest conflict in the history of Kansas, growing out of county organization! The Cooks, Donald, and the women returned to Hugoton, where a squad of eight or ten men was organized and went to the rescue of Robinson. A like party of rescuers from Woodsdale having been sent to Short's assistance, the rival towns had sent out armed squads until twenty-five to thirty men from each were in the Strip in quest of friends. Among others, Sheriff Cross of Woodsdale, with a party of four men, at the close of a day's ride, on Saturday, July 25th, at about nine o'clock in the evening, dismounted for the night, at the camp of some haymakers, ten miles in the Strip. There were no settlements in the Strip save an occasional ranchman's cabin.

On the same day, at four o'clock in the afternoon, the last rescuing party left Hugoton for the Strip. Of this party, numbering twelve men, six were in buggies and six were on horseback. At six o'clock the party halted for supper, and while preparing their meal were joined by Sam Robinson, who, after a three days' chase, had

eluded his pursuers and was returning to Hugoton along an old cattle trail. On reaching the supper station of the rescuers one of the party was sent back to Hugoton to carry the news of Robinson's safety to his wife, and Robinson, joining the rescuing party, turned southward to the Strip, the destination for the night having been the haystacks distant about eighteen miles from the supper camp.

The six horseback men, headed by Robinson, took the lead, followed by the buggies, containing C. E. Cook, Orin Cook, Cyrus Freese, Jack Lawrence, J. B. Chamberlain and John Jackson.

The hay camp was reached between 10 and 10.30 o'clock. The moon, fairly up, was shedding its rays unobstructed by tree or hill upon that wild, unsettled strip of land, over which courts for years had exercised no jurisdiction, wherein every man was a law unto himself, and where the prowess belonged to him alone who could maintain it.

When the horseback men reached the hay camp, the buggy party, perhaps two hundred yards in the rear, heard quick and rapid firing and hurried forward to find that a battle had occurred in which Sheriff Cross and three of his men were killed, and another, a young man Tonney, supposed to be fatally wounded. On reaching the stacks Cross and his men had unsaddled and were lying down, and here, in the trial of the case, conflicting testimony between the two haymakers arose as to which party fired first, one testifying that the Cross party had opened fire, the other that the Hugoton party was first to fire. The young man Tonney recovered, and at the trial testified that the shooting was all done by the Hugoton party. The witness having likewise testified to the presence of a number of Hugoton men in the party that night, who proved that they were not within twenty-five miles of the stacks at the time of the tragedy.

Immediately following this tragedy every man in and about Hugoton and Woodsdale armed themselves with Winchesters and revolvers. Guards were stationed around each town, travel was prevented, and people were not permitted to pass about the country, the two towns presenting the appearance of military camps. Excitement ran high, and the governor ordered three companies of militia to the county, where they remained until quiet was in a measure restored.

No arrests were made until November, when the United States district attorney for Kansas, upon the theory of jurisdiction by the Kansas court, together with the theory that a conspiracy had been formed in Kansas for the commission of crime in another place, caused the arrest of perhaps a score of the leading citizens of Hugoton. The parties were taken to Topeka and arraigned before Judge Foster of the district court of Kansas, but were discharged upon the ground of no jurisdiction, by the Kansas court, in the Strip.

Wood, like an avenging Nemesis, went next to the Texas courts, first to the court for the northern district of that State, the judge declining to act in the matter. He then appealed to the United States district court at Paris for the eastern district of the State. This was a new court over which Judge Bryant, a recent appointee, presided; this judge directing the grand jury to investigate the case. Indictments were lodged against a dozen men, the arrest of all of whom soon followed, the men arrested appealing to Judge Brewer of the United States circuit court at Leavenworth for discharge upon writ of habeas corpus, the grounds upon which the discharge was asked having been want of jurisdiction by the Paris court.

The petition for release was refused, and the prisoners, twelve in number, were put upon trial in the July term of the Paris court. After the first arrest and discharge by Judge Foster, the six men, who were on

horseback the night of the killing, disappeared, and hence were never arraigned in the Texas court. Sam Robinson, having gone to Colorado, was shortly arrested charged with robbing the mail, and is now serving a twenty-one years' sentence in the Colorado penitentiary. Another one of the horsemen employed counsel to look up some country with which this had no extradition treaty for murder and, finding Belgium the only one with which no such treaty existed, went there, where he has since remained. Nothing has ever been heard of the other four horsemen of the Cook party.

Wood and his witness Tonney went to Paris where they spent the time between the indictment and trial of the Hugoton people in July cultivating the friendship of the people and creating prejudice against the accused. The man Tonney became a teacher in one of the Sunday-schools, and Wood, securing the appointment of deputy marshal, subpœnaed the Kansas witnesses for the prosecution. In the preparation and trial of the case Wood was the real prosecutor, the district attorney having been a mere figurehead. Wood had freedom to subpœna whomsoever he saw fit, his list of witnesses running something like three hundred, many of whom had no knowledge of the matter or men. A coach load of this class reached Paris at six o'clock one evening, registered the following morning, were then excused by the prosecuting attorney, received their certificates of attendance, averaging perhaps a hundred dollars each, and started home the same day.

Wood engaged in the business of purchasing certificates where he could, at a discount, which, with his pay for services as deputy marshal, netted him a handsome sum, his profits resulting from the trial having been variously estimated at from ten to fifteen thousand dollars.

Of the twelve men put upon trial for their lives, six proved an alibi, and six — C. E. Cook, Orin Cook, Cyrus Freese, Jack Lawrence, J. B. Chamberlain, and John Jackson, — were pronounced guilty and sentenced to hang December 19, 1890.

The judge conducted the case and gave instructions to the jury, not upon the theory of killing by any of the convicted, but upon the theory of a conspiracy to kill, overlooking the impossibility that the Hugoton party should have known or even suspected the presence at the haystacks of any Woodsdale party. The defendants were not tried to ascertain their guilt or innocence, but were tried to be convicted. The court, recently established, had proven expensive in comparison with punishment meted out to criminals, the member of Congress for the district having written that less arrests, more convictions and less expense must result, or the court would be abolished; hence the town became the backer of the prosecution, with Wood manager-in-chief of the case.

When the verdict and sentence of death was pronounced, C. E. Cook, the leader, made a brave and stirring speech which had the effect of arousing widespread sympathy for the convicted men. Following which, measures were adopted to reverse public sentiment which from the first had been against the men.

Four of them had served in the Union Army. C. E. Cook was a member of the Traveling Men's Association of Kansas, and all were members of the Knights of Pythias or Knights of Honor. These several organizations were appealed to and made liberal contributions of money. The people of Nashua, New Hampshire, the boyhood home of the Cooks, raised twenty-two hundred dollars, and Judge Freese of Ohio, brother of the condemned Freese, raised a goodly sum, the donations reaching altogether about five thousand dollars.

The case was taken on writ of error to the Supreme Court, George R. Peck and W. H. Rossington, assisted by J. F. Dillon and Judge Freese, volunteering their services free, Peck and Rossington having been led

to do so through the influence of Cook's speech, upon receiving sentence of death. Attorney-Gen. Miller, who appeared for the government, acknowledged gross error in the rulings of the lower court, and hence the case was remanded back for rehearing. A strong plea was made against jurisdiction, the court's decision having been what might be termed "judicial legislation."

After reversal of the case, Judge Horton of Washington, special agent of the Department of Justice, was sent to Paris and to Stevens County to make full investigation of the killing and the trial, and upon the report of this official the United States district attorney who prosecuted the case was wired peremptory dismissal. Judge Bryant was also severely reprimanded and barely escaped dismissal, while the men were released upon their former bonds.

But the case still pending, a petition for unconditional pardon, signed by thirty-eight of the forty members of the Kansas State Senate, and by every one of the State officers, was presented to the President. The case from start to finish having cost the government one hundred and fifty thousand dollars, four men having been killed and six sentenced to death, the President was loth to act and referred the matter to the attorney general, who, after hearing the case, referred it to his first assistant, that officer also having declined to act in the matter. The case, however, was not pressed to trial, but was allowed to pass at each term of court for four years without the presence in court of any of the defendants. During this time, among the Woodsdale parties to the prosecution, Wood was killed by a man named Brennan, Short, the Woodsdale marshal, was killed in the Territory, Wood's partner committed suicide, while three others of less note either died or met violent deaths, and at the fall term of court, 1895, the case against the six men was stricken from the docket, thus ending one of the most important and expensive criminal cases ever tried in the Federal courts.

The town of Woodsdale has vanished, one house only remaining, while Hugoton has dwindled to a population of not more than fifty, the two being typical of the decadence of boom towns in the short grass regions of western Kansas.

HOW THE CITY OF LONDON MAINTAINED ITS CHARTER.

By John De Morgan.

THE discussion of the proposed new charter for the Greater New York has caused many to be interested in the charters of other and more ancient cities.

Perhaps the City of London has the most ancient charter in the world. Other cities existed prior to London, but they underwent such changes that their present system of government bears no similitude to that of five hundred years ago, whereas London has practically the same rights, privileges and customs as it had from its foundation.

The city proper is only a small territory, once surrounded by walls, pierced by four gates, which bore the names of Aldgate, on the east, Aldersgate on the north, Ludgate on the west, and Bridgegate over the river on the south.

But the city grew, and the means of ingress and egress became too limited, so other gates were made, which bore the names of Bishopgate, Moorgate, Posterngate, Cripplegate, Newgate and Dowgate.

As the city spread itself beyond the walls, barriers were set up and bars erected on the roads marking the city boundaries. Of these only one remains known to the present generation, that of Temple Bar, but even that exists

only in name, as it was removed some years ago, and only a pillar marks its ancient position. The walls have disappeared, the gates are only kept in remembrance as the names of streets, and yet the City of London, a city within a city, guards its rights and privileges as tenaciously as it did five hundred years ago.

It is impossible to give the date of the first charter, although Geoffrey of Monmouth asserts that the city was founded by Brutus, nephew of Æneas, and called Trinovantum or New Troy, and that King Lud built the walls round it, called it Caer-Lud, or Lud's Town, and granted it a charter. But that was so far in the misty past that we may well relegate the story to the realm of legendary ancient history, and look at its charter in the light of more modern times.

A perusal of the history of its charter shows the great number of times the city has had to contend with monarchs for the maintenance of its rights.

The citizens were ready at all times to forfeit property, money, and other valuables, so long as the rights, privileges and customs of the city were undisturbed. They showed a loyalty and patriotism which ennobles their memory.

In the ninth year of Richard I, it cost the citizens 1,500 marks, a mark being equal to 13s. 4d.; King John extracted 3,000 marks from them; Henry III, in the second year of his reign, threatened the city with an abrogation of its charter unless the citizens paid him one-fifteenth part of the value of their movable goods. The citizens agreed to be mulcted, on condition that the King would guarantee not to interfere with them again. To this he readily consented, and the people paid the tribute. Alas for kingly honor! Henry, in the ninth year of his reign, revoked the liberties of the city, and when the Lord Mayor and aldermen knelt before him and asked that the charter should be restored, they were insulted, and told that he had other ideas. However, he restored the charter on the payment of another fifteenth of their property; in the thirty-sixth year of his reign he made the city give him 500 marks; three years after that he got 600 more marks; the next year he compelled the payment of 4,000 marks; and in the fiftieth year he again levied on the city for the sum of 20,000 marks. These sums were not paid willingly, but as the king abrogated the charter each time, the citizens submitted in order to have their rights restored.

When Edward I came to the throne he obtained 3,000 marks from the city, whilst Edward II borrowed £1,400, a sum which it is needless to say is still owing. In 1392 Richard II wanted the city to loan him £1,000, but the burghers refused, whereupon the King imprisoned the Lord Mayor and aldermen and took all their privileges from them, and the citizens were glad to get them back by paying the king £20,000, and giving a number of jewels for the queen's crown. Henry VI had another way of making the city pay for its rights. He compelled the Lord Mayor, at each inauguration, to attend before him and prove the citizens' rights to certain privileges, taking care to make the incoming mayor pay a goodly sum before the proof would be admitted.

Charles II seized the charter and made certain alterations in it, which the citizens had to accept, for there was a reaction politically, after the commonwealth, and for the first time in history the City of London bent the knee before the king's power. The principal changes were in giving the king the right to approve of the selection made by the citizens for the various offices, and in giving the king power to remove any mayor who should be obnoxious to him.

The Lord Mayor's procession to Westminster, on the ninth of November, is for the purpose of obtaining the monarch's consent to his appointment to that high office.

In the thirty-fifth year of his reign, Charles II made some serious inroads into the rights of the city, and used the power, which he

had obtained, in an arbitrary manner. He placed its magistrates on the same footing as those of other boroughs, by appointing them himself, as he did elsewhere. This disfranchised the aldermen from being justices of the peace, whilst some discretion was given the wardmotes in the election of aldermen. The city appealed to the court of King's Bench to decide whether the king had the power to seize the corporate rights. This was just what Charles wished. The judges were all his appointees, and he held them in complete subjection. The court decided that the king had done right, and gave judgment "that the franchise should be seized into the king's hands, but the entry thereof respited until the king's pleasure was known in it." The city was powerless, for it had been a consenting party to the change, and many were the murmurs heard in the coffee houses and taverns, as well as in the Council Chamber.

When the first threat of an invasion of the Prince of Orange was heard in the city, the citizens rejoiced, and bonfires were lighted, church bells rung, and a general holiday proclaimed. King James II became alarmed and hastened to appease the city by sending back the abrogated charter and restoring to the city all the rights previously possessed.

In the second year of William and Mary the city made terms with the new monarchs by which the loyalty of the city was assured, and in return an act of Parliament was passed declaring that all that had been done by the King's Bench in upholding the legality of the action of Charles II was illegal and arbitrary, and everything done in consequence was declared void. The victory of the city was a great one, and no monarch since has attempted to infringe the rights granted by the ancient charter. The citizens had fought nobly, not only for their own rights, but for the independence of the cities generally.

When in recent years the Parliament called into existence a new government for the entire district called London, placing all local affairs in the hands of a County Council, the city was powerful enough to compel Parliament to leave it out of the Council jurisdiction. And, more recently, when a Royal Commission was appointed to prepare a plan for the unification of London, with the city as its center, the Commission had to admit that only the entire force of Parliament and the crown could compel the city to submit to the recommendations made to the crown by the commissioners.

While there is much that savors of a bygone age in the government of the City of London, the world is deeply indebted to its sturdy citizens for the fight maintained through several centuries against the arbitrary rule of a king.

The Lawyer's Easy Chair.

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

BY IRVING BROWNE.

CURRENT TOPICS.

THE BLASTED BLACKSMITH.

Mitchell *v.* Prang (Michigan), 34 L. R. A. 182.

There stood beneath a spreading chestnut tree
A smithy where the anvil clearly rang
In daily practice of a lawful forgery,
Like his of whom the gentle poet sang,
And underneath that very humble roof
The smith shod horses for his own behoof.

A neighbor, distant several hundred feet,
In digging up a trench encountered rocks,
And could not stir them from their ancient seat
Without occasioning some heavy shocks
Of sound of dynamite or of gunpowder,
Like blowing of a scolding wife, though louder.

The smith was holding in his aproned lap
A horse's leg while duly shoeing him,
When one of these said shocks, by dire mishap,
Occasioned sudden spasms in the limb;
The beast smelt battle, cried ha, ha! and kicked
That blacksmith prostrate on the flooring bricked.

How long he lay or how much hurt I know not,
But he arose at length and brought an action;
All minor matters the report doth show not
But only that the court said no infraction
Of law or neighborly duty was disclosed, —
The blaster did all things on him imposed.

"Suppose the shoeing of a nervous lady,
Who kicked the shoemaker in his abdomen,
Or case of nurse who dropped a fragile baby
On hearing that loud crash of direful omen;
Who would contend that any blame be cast
On the far-off igniter of the blast?

"And it is not pretended that a blaster
Is bound to go around the neighborhood
And search, in order to prevent disaster
And manifest a disposition good,
And census take of residents who marry,
Lest their expectant ladies should miscarry.

"The court no such allowance makes for nerves;
We can't be fidgeted with starts and fits
Or deem such blasting any blame deserves
Save when conducted carelessly it hits
A horse with stick or stone on front or rear,
And doesn't simply trespass on his ear."

That blacksmith "goes on Sunday to the church,"
Like him of whom the poet sang so sweetly,
And thinks how law has left him in the lurch;
And when the parson reads the Psalmist meetly:
"A horse is a vain thing for safety," he
Nods his approval very vigorously.

MARRIAGE AND DIVORCE. — The Liberal Club of Buffalo, N. Y., gave up an evening recently to the discussion of the subject of divorce in America. The principal address was made by the Hon. R. Wayne Parker of New Jersey, formerly a member of the commission of that State for promoting uniformity of legislation, and at present a member of Congress. His address was scholarly, eloquent and instructive, giving a rather optimistic view of the matter grounded on the high ideal of marriage generally held in this country, and the fact that the marriage rate is higher here than anywhere else. These two propositions may not be denied, but it is equally undeniable that the divorce rate here is the highest in the world, and is out of proportion to the increase of population. In the last thirty years there have been nearly half a million of divorces. There are various causes for this: the increased independence of married women, and a sort of general mania and discontent on the subject; but the chief cause, in our judgment, is the laxity of courts in respect to what constitutes "cruelty," the principal ground of divorce. Absurd and trivial pretexts are regarded by grave courts as quite sufficient to warrant the severing of the marriage bond, and even a single act of so-called cruelty — as for example, a single accusation of unchastity made by the husband against the wife, — has been repeatedly adjudged sufficient by highly respectable courts to justify divorce. This seems to be an era of divorce — it is in the air, like a contagious or epidemic disease. Attempts toward reformation on this subject are like attempts at the reform of criminals — the prison is the wrong place for the latter, and the divorce court is the wrong place for the former. The effort in both cases should be toward formation rather than reformation. Good citizens can be constructed only in the cradle and the tenement-house, and faithful and contented husbands and wives can be reared only by

home education to the proper ideal of marriage. It is a singular fact that in respect to the most solemn and important relation of human life there is absolutely no home education, by way of suggestion, instruction or warning. Young people are left to "fall in love" as they are to get the measles, or rather more so, for they are generally guarded from danger of the latter, so far as practicable. The father advises his son about his education, and setting out in business, and his personal habits; the mother advises her daughter about her gowns and her manners, her parties and her embroidery, but marriage is a matter that both father and mother "fight shy of." It is the last contingency which either parent seems to regard as probable. The result is that there is no business of which the boy or girl is so ignorant as this, the most exacting and inexorable in all their lives. They learn only by experience. The only warning which they get on the subject is when they form an engagement displeasing to their parents, and when opposition is generally too late; or when they are charged by the church at the altar, not to enter into this state rashly or unadvisedly, a warning that falls on heedless ears after "the cards are out" and the "rehearsal" has been held. Mothers are highly blamable in this regard. They may be excused from teaching their daughters the mysteries of household duties, because they may never have occasion to practice them; but it is absolutely unpardonable that a mother should allow her daughter to enter into marriage completely ignorant of its sexual duties and its physiological consequences. It is an injustice to her daughter, and to the man who marries her. Prudery seems to deprive wives of all conscience at this point.

There is another point at which there seems to be need of grave consideration in regard to formation of marriage, and that is its relation to the State and to possible criminality. Should marriage be allowed between habitual and incorrigible criminals? Should marriage be allowed where either party is drunken, or epileptic, or predisposed to insanity by heredity, or afflicted with an incurable organic disease? Some of these questions form the subject of an interesting essay on "The Marriage Contract," by Dr. E. T. Rulison, in the May number of the "Buffalo Medical Journal." Some extracts from this paper will be found instructive:

"It seems strange, when this great fundamental law of hereditary transmission has been understood for years, and has been applied to animals (as well as to the human race, when dollars and cents were concerned), yet it is ignored entirely when we see children begotten every year with pedigrees which would send our domestic animals to the abattoir, or place them under the ban of a health commissioner. Darwin says:

"'Man scans with scrupulous care the character and pedigree of his horses, cattle and dogs before he matches them, but when he comes to his own marriage, he rarely or never takes any such care.'"

"One of the greatest obstacles to our reaching a more ideal civilization is the fact that the low, diseased and vicious marry at an early age and beget many offspring, whilst the careful and virtuous marry later in life and have comparatively few children. Mr. Greg says:

"'The careless, squalid, unaspiring Irishman multiplies like rabbits; the frugal, foreseeing, self-respecting, ambitious Scot, stern in his morality, spiritual in his faith, sagacious and disciplined in his intelligence, passes his best years in struggle and in celibacy, marries late and leaves few behind him. Given a land originally peopled by a thousand Saxons and a thousand Celts, and in a dozen generations, five-sixths of the population would be Celts, but five-sixths of the property, of the power of the intellect, would belong to the one-sixth of the Saxons that remained. In the eternal struggle for existence, it would be the inferior and less favored race that had prevailed — and prevailed by virtue, not of its good qualities, but of its faults.'"

"Interesting, though startling, is the fact that the increase of crime during the decade ending 1890, over that ending 1880, is from 1 to 299 per cent, and is to be seen in nearly every State and Territory in the union. The number of prisoners in the United States in 1890 was 82,329, of which 901 were insane. The number of inmates of juvenile reformatories the same year was 14,846. The number of inmates of benevolent institutions, public and private, June 1, 1890 (not including hospitals for the insane, schools for the deaf and blind, or asylums for the feeble-minded), was 112,263, of which 55,316 were males, and 56,947 were females. The number of paupers was 73,045. The number of divorces in 1867 was 9,937; in 1886, 25,535, or a total of 328,716 in twenty years, which shows a greater percentage of increase than the increase of population. The expenditures for the care of the insane in the State of New York amount to $4,000,000 annually, a sum larger than for any other department.

"The criminal expense of this country is enormous. Recent statistics show that there are 52 penitentiaries in this country and over 17,000 jails. The first cost of these buildings was $500,000,000. The annual expense of these institutions is $100,000,000, and during the last year, for which statistics have been prepared, 900,000 people were incarcerated. Erie County expended, during the last year, for the insane, $259,782.41; schools, $241,597.64.

"These are a few statistics that go to show the prevalence and rapid increase of unfavorable social conditions. To simply give the names of inebriety, tuberculosis, syphilis, idiocy and epilepsy, is sufficient to remind us of the fact that the burden we are carrying is almost overwhelming. Then the first duty of a state or nation is, or should be, to protect the lives of coming generations, as well as the lives and property of those now living. It should also be its duty to teach its people to know how to obtain and preserve health, and compel the healthy ones to protect their offspring, by marrying the strong and vigorous only."

"This may appear to be going a little too far, to deny the poor man the privilege of having a so-called home of his own, but I do not mean the poor man who has it in him to work and gradually improve his condition, but the

one who is the natural mendicant, the one who would feel decidedly uncomfortable if he had a nickel ahead. This class of people, who revel in poverty and beget a numerous progeny, should be controlled as thoroughly as the diseased and the criminals. Imbeciles, confirmed epileptics and drunkards, those who have been insane more than once, habitual criminals and paupers should all be denied the right of procreation. In preventing those not qualified to marry, it should be remembered that if it prove a hardship to a few who would undoubtedly have a strong desire to do so, the greatest good to the greatest number must always be considered. The child takes his life from his parents; it is his heritage, his estate; he cannot pass it over to someone else; he can only lay it down when the angel of death comes to bear it away. The responsibility of such a condition is to be exceeded by one only, and that of the one who brought it into being. While the consent of the parties is universally deemed necessary to make the contract of marriage legal, this seems to be the only safeguard one has to protect him from serious consequences, the law cannot redress or remedy. Of course, there are plenty of laws for all the incidents arising from the relationship. There are also laws sufficient to protect your life and property, but none to protect you from a fate that may be worse than the loss of either or both."

"If we are to be left perfectly free to follow out the impulse of passion, or the ambitious promptings to attain wealth or social position through the matrimonial gate, regardless of physical consequences, then I can see no relief for the great majority of our people, but perpetual ill-health and misery. Our schools, pulpits and periodicals might enlighten our boys and girls, but will they do it? And would it do any particular good if they did? I imagine the same physical misalliances would be formed as heretofore. Social misalliances are sometimes made, but the parties to them always know they are breaking the unwritten law of social ethics. It may seem hard to some not to be allowed to traverse the road the spirit of love and poetry direct; but when a social law is such a perfect barrier, why should not a carefully framed statute, calculated to bestow constantly increasing blessings, he made and executed?"

"As an embodiment of an idea, which can be changed as experience may dictate, I would suggest that the state (or, better, the nation) appoint a medical staff of three experts for every county in the state, to examine all boys and girls at the age of from twelve to fifteen, relative to their physical condition and family history, and a record be kept of all applicants. I would have three distinct classes. Class A — Those being physically and mentally sound, of good habits, and having no history of any hereditary disease (not mentioned in this paper as prohibitory to marriage), for at least three preceding generations. Class B — Same qualifications as in Class A, but family history to descend to grandparents only. Class C must necessarily be applied to all those not included in Classes A and B. Certificates for Classes A and B should be granted by the medical examiners. No one should be allowed to marry outside of the class to which he or she belongs, and those having certificates should be required, when about to marry, to make an affidavit that they are free from all communicable diseases and are temperate in their habits. This would tend to make Classes A and B constantly stronger and better, and a growing desire to be so. Class C, at first, would greatly predominate, but a few generations would suffice to make it the smallest. In those possessing hereditary taints, and deprived of the privilege of mating with the healthy, nature soon solves the problem by eliminating them."

These suggestions are not new, but they have not hitherto been received with any favor, nor with any tolerance outside the ranks of physicians, old maids, and bachelor statesmen. The moral argument is a strong one, — stronger than the social one put by Dr. Rulison, — what right have diseased human beings to beget children to suffer and be unhappy? It is hard on the State to tolerate this, but it is harder still on the innocent and helpless offspring. If it is urged that it would be tyrannical in the State to prohibit marriages on the score of this danger, the sufficient answer in morals would seem to be that it is wickedly selfish in such persons to marry.

But, after all, the practical answer seems to be that the regulation proposed would do no good. It is futile to legislate against the sexual passion. (We are quite serious in saying that it would be much more merciful and practicable to prevent procreation between unhealthy or criminal parties by surgical methods than to deny marriages to them.) Persons forbidden to marry would nevertheless come together, and the world would be filled with unhappy and criminal classes to whose present misery the taint of illegitimacy would be added. In addition, it must be clear that, unless the proposed remedy should become national, it would be ineffective, for the prohibited classes could emigrate to some other State where there was no similar prohibition, and there contract valid marriages, just as is now done in the evasion of the prohibitory provision in divorce laws.

It will require a very long period of education to bring society up to the high plane of Dr. Rulison's scheme. His scheme is ideally right. All men ought to be virtuous, healthy and unselfish. It would not be difficult to prohibit marriage of confirmed criminals, for the existence of the objectionable condition would be easily ascertainable of record; but questions of insanity, drunkenness, disease, and danger of heredity could be pronounced upon only by a council or tribunal of physicians, which would be as little likely to agree as any imaginable body of men. Diagnosis and medical science are too uncertain and fallible to encourage the community to intrust a few physicians with this arbitrary and tremendous power. It is bad enough at present when a man may be dragged from his home and imprisoned in an insane asylum, temporarily at least, upon a certificate of two doctors, and it will be a long day before these professional powers will be extended.

Men intrusted with such powers are quite apt to become impracticable purists and, as Mr. Comstock would deprive the world of a great deal of good literature because he thinks it diseased and demoralizing, so these wise men would so grow so conservative — conceding that by chance they should agree in any particular case — that they would bring the country to a standstill in this class of production. Law is quite uncertain enough, but medicine is even more uncertain.

NOTES OF CASES.

TOO MUCH SENTIMENTALITY.— It is not often that a new trial is awarded on account of excess of sentimentality on the part of the judge, but it was done in Last Chance Mining & M. Co. *v.* Ames, 23 Colo. 167. This was an action by an employee against his employer for a personal injury by defective machinery. In respect to the amount of care requisite on the part of the master, the court charged that it must be such as an ordinarily prudent man would exercise having regard for his own safety "and the safety of those nearest and dearest to him." The words quoted spoiled the verdict. Such men are extraordinarily prudent.

PROXIMATE CAUSE. — A very singular case of the application of the doctrine of proximate cause is Wood *v.* Penn. R. Co., 177 Pa. St. 306; 35 L. R. A. 199, where it was held that failure to give warning of the approach of a fast train which strikes and kills a woman at a crossing near a depot, and hurls her body against a man standing on a station platform, is not the proximate cause of an injury to the latter, and does not make the company liable for such injury. The court relied much on Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 293; 27 Am. Rep. 653, where an oil train was thrown from the track by a recent landslide, and the tanks bursting, the oil was ignited, ran down into a neighboring creek, swollen by recent rains and, flowing down the creek, fired the plaintiff's buildings, three or four hundred feet distant; and the damage was held too remote. In the present case the Court said:

"But does anyone believe the natural and probable consequence of standing fifty feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger. They feel as secure as if in their homes. To them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable or foreseeable to anybody else, should defendant, under the rule laid down in Hoag *v.* Lake Shore & M. S. R. Co., be chargeable with the consequence? Clearly it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequences of the neglect to give warning."

"PERSON."— A man's trousers, folded and placed under his pillow while he is asleep, are not a part of his "person," within the statute of larceny. People *v.* McElroy, California Supreme Court, April, 1897. But a man's "pants" are a part of his "person or property," within a statute as to injuries by dogs. Schaller *v.* Conners, 57 Wis. 321. Probably not so of the dog's pants. In the latter case the plaintiff sued for fifteen dollars, of which he alleged three dollars and a half was for the "pants." The defendant alleged tender of fifty cents, which was paid into court. The plaintiff recovered one dollar and a half before a justice of the peace. This was affirmed in the circuit, and again in the Supreme Court. Decidedly a case *de minimis*. The court agreed with counsel that no appeal ever should have been taken, but inasmuch as the appeals seemed to have been in good faith, declined to award double costs by way of punishment. One is curious to know how the justice of the peace divided the damage between person and pants. There have been some amusing legal definitions of "person." An Indian, a judge, an infant and a woman have been adjudged to be persons; but not so of a dog or a colt. A dog is not personal goods (State *v.* Doe, 79 Ind. 9; 41 Am. Rep. 599). The birth of a child is not a "personal transaction" between him and his mother, so as to exclude her from testifying as to the time (Will *v.* Paige, 6 Alb. L. Journ. 126). And it has several times been adjudged that improper conduct of a husband toward another woman is not a "personal indignity" toward the wife.

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.

FACETIÆ.

"I HAVE been told, Coke," said Blackstone to the celebrated jurist, "that you are of royal descent."

"Bosh!" said Coke. "*I?* Pooh! From what king, Judge?"

"Old King Cole," replied Blackstone.

"PERHAPS he isn't all he might be, but he stood by me in my hour of trial, and —"

"What was he, an officer of the court?"

THERE are some things of which it is just as well for the court to take "judicial notice."

At a criminal trial a hotel proprietor, while giving evidence respecting a robbery that had taken place within his establishment, stated that the prisoner entered the bar and ordered a "nip of whisky."

The judge, not considering it consistent with judicial dignity to affect to know what the modest measure alluded to was, asked: "What is a nip?"

The witness smiled and remarked: "Eh, my lord, you once knew well what a 'nip' was, for many a one have you called for and drunk in my hotel when you was an advocate."

The bench did not further press for a definition of the term "nip."

A BRITISH lawyer recalls a good story about Sir Richard Bethell in connection with a case that in duration and magnitude has probably never been surpassed. Somebody proposed to defer a minor point till "the day of judgment." "Won't that be a very busy day?" said Sir Richard.

"ONCE I had as a client," said a Chicago lawyer, "a farmer who brought suit against the city for something or other. After it had progressed for a long time he came in one day and we traced for him the progress of the case, explaining among other things:

"We filed a praecipe, and later on a declaration, subsequently a demurrer. The demurrer being overruled, we filed a plea; the next time the case came up we got a judgment; then there was a motion for a new trial, but it was overruled, and judgment entered on the verdict; and finally it went from the Appellate to the Supreme Court, which affirmed the judgment.

"'Dear me, dear me, what a wonderful thing the law is,' said my client.

"'Well, the only thing now is to have a mandamus.'

"'A man-dam-us,' he repeated, with sudden impatience. 'When will we get to the —— d—us?' and I replied:

. "'As soon as you get my bill.'"

AN Irishman, charged before a magistrate with marrying six wives, was asked how he could be so hardened a villain. "Plase, your Honor," replied the prisoner, "I was only trying to get a *good one*."

OLD Judge Cloud of North Carolina was a rough diamond — not very much of a lawyer, but honest as the day, and with a fund of common sense. On the circuit it is customary for lawyers and leading citizens to ask the judge and lawyers to tea. At Salisbury there was a leading citizen who was noted as a "manager," who on one occasion had extended an invitation of this kind. A lawyer passing the hotel saw the Judge still sitting on the porch, and, in surprise, asked, "Judge, are you not going to D—'s?" "Well," said the Judge, slowly, "not unless somebody explains the object of the meeting."

LIVES of rich men oft remind us
We can make our lives like theirs,
And, departing, leave behind us
Lawsuits to engage our heirs.

NOTES.

"Hon. J. N. Dean of Xenia, Probate Judge of Greene County, in making out the papers, a short time since, for committing a man by the name of J. W. Murphy to the insane department of the county infirmary, absent-mindedly inserted his own name in the papers where that of the crazy man's should have appeared, and the mistake was not discovered until Constable Matthews presented Murphy at the Infirmary. The officer then came back to town and informed the Judge that he had proper papers for his commitment to a madhouse, and asked if he would go quietly or would have the handcuffs on. The Judge altered the papers and grimly remarked that he would beg to be excused just now."

The little community of Burgsinn in the Bavarian district of Lower Franconia will shortly be able to celebrate the not over-enviable tercentenary jubilee of a lawsuit. On the 21st of June, 1596, this community brought suit at the Imperial Court, then sitting in Speyer, against the Barons von Thüngen, concerning a magnificent oak and beech forest of nearly eight thousand hectares in extent, which may to-day be estimated worth about two million marks, and which both parties claim as their own. It speaks volumes for the indomitable grit of these peasants, who, despite their poverty through three long centuries, generation after generation, managed to put up among themselves enough money to carry on the suit, and who, in view of a recent decree, may ultimately consider themselves the *beati possidentes*.

In commenting upon the recent decision of the Supreme Court of the United States against traffic agreements, "The American Law Review" takes occasion to make the following pointed remarks concerning the jurisdiction of courts and legislatures:

"Constitutional law has so far run mad in the United States that it is a common thing to find, in judicial decisions declaring statutes unconstitutional, long harangues against the policy or propriety of the legislation which the judicial courts assume the power to set aside. Before a judge can refuse to enforce an act of the legislature on the ground that it contravenes the constitution, he ought to be able to put his finger upon some provision of the Constitution to which the act of the legislature is plainly and distinctly opposed. It is not for him to put forward his views as to the policy of such legislation. He is not elected or appointed to perform any such office. Such views are uncalled for, and ought to be regarded as indecent and offensive. It is precisely as though the legislature, in the preamble to a statute, should arraign a particular judicial decision. The legislature often repeals the rules of law laid down in particular decisions, but, so far as we have observed, no legislature has ever done so by referring specifically to any legal judgment. The legislature repeals the law made by the judges except where the law consists of interpretations of the Constitution, because, as the law-making power, the legislature is above the judges. In theory the judges are not law-makers, though in point of fact they make much more law than the legislatures make, and much of it equally as bad. This new habit which the judges are taking on, of discussing the policy of acts of legislation which are challenged before them, is simply an assumption of superiority over the legislature in matters which are purely legislative; whereas their true position is exactly the reverse. In ordinary legislative matters they are inferior to the legislature. In other words, outside of the province of declaring the state of the supposed preëxisting common law, they have no legislative power at all, their mere function being to administer the laws.

"The so-called 'general law' is almost always held by the judges to be reasonable, because the judges themselves made it. To construe every statute which alters or repeals a rule of this reasonable judge-made law, so as to make it reasonable, would be to write it out of existence, and leave the law in that reasonable condition in which it stood before the legislature enacted the statute. That is precisely what the dissenting judges would have had the courts do."

Enterprising New England hunters who live near the boundary line of Maine and New Hampshire, taking advantage of the bounty laws of each State, are getting double pay for each bear killed. New Hampshire pays so much for each pair of ears, while Maine keeps tally by the nose.

CURRENT EVENTS.

GREAT credit and honor should be given the Czar Nicolas II for the many reforms he is starting in Russia. In the future there will be no banishment to Siberia, the offenders will be imprisoned in Russia, and large institutions are about to be erected to serve this end. The Czar has canceled his father's order which decreed that every non-Orthodox person who married an Orthodox person should sign a document declaring that the children of such a union would be baptized and educated in the Orthodox faith. Even more important has been the removal of the restrictions against the Roman Catholic faith in the province of Poland; the Catholics are now as free to practice their religion as the Orthodox. Through a special ukase Nicolas II abolished the ten percent tax on rents. The next ordinance was to restore municipal government to those Polish towns which had been deprived of it after 1863. He also decreed the establishment of a Zemstor or county councils, a favor so many times asked for by the people. The censor of the Polish press has been even more arbitrary than the censor at St. Petersburg, but the governor general, with the permission of the Czar, has reversed these circumstances and the Polish press enjoys greater freedom than the rest of Russia. M. Sienkiewicz, the author of "Quo Vadis," and the greatest living Polish writer, has been made censor of plays at Warsaw, taking the place of a man who did not even understand the Polish language. Many other favors have been shown the Polish people, and it is no wonder that when the Czar visited Poland he was greeted by an outburst of enthusiasm such as had never before greeted any Russian czar.

THE police commissioners of Boston have issued a decree that henceforth every itinerant street musician must pay a license fee, wear his number on his cap, and move 300 feet away whenever he is requested to do so.

THE works established by the municipality of Shoreditch, London, are designed to destroy the local refuse, generate electric light and supply hot water to the public baths and laundries. Carts will convey the street trade and household refuse to the works, which will consume yearly 20,000 tons of refuse, hitherto carried to barges and dumped into the sea at great expense.

A WRITING pen provided with a small electric lamp has lately been patented in Austria. By this device it is said that the paper in front of the writer is kept well lighted, the disagreeable shadow of the pen being entirely done away with.

THE Bank of England contains silver ingots which have lain in its vaults since 1696.

NIAGARA FALLS is reckoned to do as much work as 226,000,000 tons of coal could do in a year.

THE Chilian government has decided to appropriate five hundred thousand dollars for encouraging the development of iron and steel foundries in that country. A hundred and twenty thousand is to be given to an American syndicate as a bonus for establishing an iron factory. The residue of the sum will be similarly distributed.

THE council of Toledo, Ohio, has, at the suggestion of the mayor, decided to do away with the system of giving contracts for public work. Labor in the direct employ of the city is to be used in street paving and in the disposition of garbage. The selection of the employees for the city will be by civil service rules.

SOME interesting correspondence, recently published, between the British Iron Trade Association and the Board of Trade, reveals the fact that the Board of Trade is arranging, with the aid and consent of the British government, to take active measures to counteract the efforts of manufacturers of the United States to secure a place in South American markets. A "colonial intelligence committee" has been appointed to disseminate information gathered by consuls and agents, and a commission has been appointed to travel in Central and South America and report upon trade conditions.

WHEN so many papers are entering into the discussion of why more men do not marry, it is interesting to know that by the census of 1890 there are a million and a half more men than women in America, the only trouble being that the women are not properly distributed. In the East there is an excess of 184,000 women, while in the West there is a great scarcity, California leading the list with nearly a 200,000 deficiency of the gentler sex. In the far West women are appreciated and in great demand, and if a couple of hundred thousand of the Eastern women would go West, the problem of why more men do not marry would be easily settled.

LITERARY NOTES.

CURRENT LITERATURE for November is an excellent number. The editorials are forceful and interesting, and the selections as usual representative of the month's best literary output. Special readings are given from Moses Coits Tyler's "Literary History of the American Revolution," Mrs. Burton Harrison's new novel, "A Son of the Old Dominion," the anonymous "House of Dreams," and E. Hough's interesting "Story of the Cowboy," and from Mrs. Madeleine Lucette Ryley's successful new play "The Mysterious Mr. Bugle."

THERE are one or two articles of such peculiar timeliness in the October ATLANTIC that their publication in this number is a striking example of editorial farsightedness. The opening contribution is nothing less than a review of the new "Life of Tennyson." The reading public of both the Eastern and Western Hemispheres has been looking forward with interest to the publication of the authoritative life of the great poet by his son. Another article, which fittingly appears in this number, is a paper, by Ira N. Hollis of Harvard University, formerly of the United States Navy, on the Frigate Constitution. One hundred years ago, on October 21, Old Ironsides was launched in Boston, and from that time dates practically the history of our navy. A literary paper of unusual importance is "Forty Years of the Bacon-Shakespeare Folly" by John Fisk. Whenever this great student of men and affairs takes up a subject, it is sure to be treated not only in a scholarly manner, but whatever he writes proves entertaining reading.

THE leading article in HARPER'S MAGAZINE for November is "With the Greek Soldiers," an account of experiences and observations during the Greco-Turkish war, by Richard Harding Davis. It is a description of the second battle of Valestinos — one of the two brilliant and stubbornly contested battles of the war. In "Daniel Webster," a critical biography by Carl Schurz, is presented the first adequate estimate of the life, character and motives of the most complex of the great American statesmen of the past generation.

This number also contains a characteristic story by W. D. Howells, entitled "A Pair of Patient Lovers," "Who Made the Match?" by Ruth Underhill, and "Number 1523," by Willis Boyd Allen.

IN MCCLURE'S MAGAZINE for November is the first authoritative account of Edison's latest — and apparently greatest — achievement. This number also contains three chapters from Mark Twain's forthcoming book on his recent journey round the world; the first installment of Charles A. Dana's "Reminiscences of Men and Events of the Civil War"; and the first of three papers by Ferdinand Brunetière, the French critic and the editor of the "Revue des Deux Mondes," giving his impressions of America.

THE October number of SCRIBNER'S MAGAZINE contains Mr. Norman's inside history of the diplomacy that preceded the war in Greece, now told for the first time. He was in confidential relations with the Greek government, and his narrative is therefore of authoritative value. A. B. Frost contributes six full-page golf pictures, which will delight all lovers of the game. The remarkable success in portrait painting achieved by Miss Cecilia Beaux of Philadelphia is described by William Walton, with reproductions of some of her best work.

IN the October number of THE NATIONAL MAGAZINE, over the signature of "Vassar Girl," appears a very entertainingly written and attractively illustrated sketch on "College Life at Vassar." Wagner admirers and enthusiasts will find much to hold their attention in Joe Mitchell Chapple's article, "The Wagner Bayreuth." It describes how this shrine and Mecca of music lovers receives each season the thousands of American, French, German and English tourists. An illustrative sketch of William T. Adams (Oliver Optic) appears in the tale of contents by his friend, J. A. MacPherson.

IN the issue of LITTELL'S LIVING AGE of November will be given the first installment of a new serial story, "With All Her Heart," translated for THE LIVING AGE from the French of M. Rene Bazin.

THE complete novel in the October issue of LIPPINCOTT'S, "A Knight of Philadelphia," is a lively tale of adventures during the War of Independence, by Joseph A. Altsheler, who is rapidly making a reputation in this field. Other stories are "Mrs. Meriwether's Wedding," by Clarinda Pendleton Lamar, and "The Strike at Barton's," by William T. Nichols.

HON. THEODORE ROOSEVELT contributes a paper to the October CENTURY on "The Roll of Honor of the New York Police," his article being one of the series in this magazine on "Heroes of Peace." In "Wild Animals in a New England Game-Park," Mr. G. T. Ferris describes the great game preserve of twenty-seven thousand acres established by the late Austin Corbin

among the abandoned farms of New Hampshire. "Letters of Dr. Holmes to a Classmate," edited by Mary Blake Morse, are for the first time printed. There is a short story by Lucy S. Furman, entitled "The Flirting of Mr. Nickins," and one by Louise Herrick Wall, "The Heart of a Maid."

PROMINENT among the articles of special interest in APPLETON'S POPULAR SCIENCE MONTHLY for October is Prof. William Z. Ripley's paper on the "Racial Geography of Italy," in which he takes up the much-disputed question as to the origin of the ancient Etruscans. "Franklin's Kite Experiment with Modern Apparatus," by Alexander McAdie, describes some interesting electrical phenomena, and shows the importance of the kite in modern meteorology. Guglielmo Ferrero, the eminent Italian anthropologist, has an article on "The Idea of Murder among Men and Animals," in which he attempts to show that it is man alone who has any clear idea of the distinction between life and death, and that the comprehension of this difference was probably one of the earliest and most powerful forces in giving him ascendency in the animal world.

WHAT SHALL WE READ?

THE early fall publications offer a tempting array of new stories, and the reader who cannot find among them matter suited to his taste must be hard to please. Bret Harte's latest novel, *Three Partners*,[1] shows this gifted author at his best. He is never so happy as when depicting scenes of California mining life, and the plot of the story gives him full scope for the exercise of his inimitable humor and touching pathos.

Another very readable book, especially for those who delight in dialect, is Rowland E. Robinson's *Uncle Lisha's Outing*.[2] Those who have read the author's "Danvis Folk's" will welcome the reappearance of many familiar characters whose sayings and doings they will find as entertaining as ever.

A book which will appeal particularly to lawyers is *The Federal Judge*.[3] The judge, the very personification of honesty and integrity, unwittingly becomes the tool of a great railway magnate, who uses him to further his own interests. The book is powerfully written and aside from its interest as a story is really an exposé of the manner in which mere political influence is often allowed to be a factor in the appointment of our judiciary.

One of the most charming books we have read for a long time is Paul Leicester Ford's *The Story of an Untold Love*.[4] It is written in the form of a journal, and is a delightful poem in prose. Unlike most modern love stories the tone is pure and elevating, with no tinge of the insipidity and mawkishness with which so many writers seem to find it necessary to treat the subject.

Boys will find a treat in *The Secret of the Black Butte*,[5] a story which is interesting from beginning to end. The two boys who succeed in deciphering a cryptogram and discovering a rich gold mine have no end of exciting adventure, but all difficulties are successfully overcome.

Another mining story which will interest the older reader is entitled *The Golden Crocodile*.[6] The plot, which is somewhat complicated, is well worked up, the pictures of mining life are graphic and well conceived, and altogether the story is one well worth the reading.

The Revolt of a Daughter[7] is the story of a girl whose mother, desiring to spare her the troubles and trials of life, brings her up with the idea of keeping her a child as long as possible. Naturally, however, the daughter as she grows older revolts, the principal incentive to the revolt being a love affair. The story is well told, the characters are well drawn, and the reader's interest is kept up to the very end.

Diaries, as a rule, are not the most entertaining reading and but few in the English tongue have attained to much fame. Among these few may be included that of Samuel Sewall, the sometime business man, councillor and judge. Taking this diary as the basis of his work, Rev. N. H. Chamberlain has written a book of exceeding interest entitled *Samuel Sewall and the World he lived in*.[8] The reader is given an insight into the old Puritan life and customs and, best of all, a graphic picture of that staunchest of all Puritans, Samuel Sewall himself. The work is one which appeals especially to the legal profession and we commend it to their attention. It is beautifully illustrated.

[1] THREE PARTNERS, or the Big Strike on Heavy Tree Hill. By Bret Harte. Houghton, Mifflin & Co., Boston and New York, 1897. Cloth. $1.25.

[2] UNCLE LISHA'S OUTING. By Rowland E. Robinson. Houghton, Mifflin & Co., Boston and New York, 1897. Cloth. $1.25.

[3] THE FEDERAL JUDGE. By Charles K. Lush. Houghton Mifflin & Co, Boston and New York, 1897. Cloth. $1.25.

[4] THE STORY OF AN UNTOLD LOVE. By Paul Leicester Ford. Houghton, Mifflin & Co., Boston and New York, 1897. Cloth. $1.25.

[5] THE SECRET OF THE BLACK BUTTE, or the Mysterious Mine. By William Shattuck. Roberts Brothers, Boston, 1897. Cloth. $1.50.

[6] THE GOLDEN CROCODILE. By F. Mortimer Trimmer. Roberts Brothers, Boston, 1897. Cloth. $1.50.

[7] THE REVOLT OF A DAUGHTER. By Ellen Olney Kirk. Houghton, Mifflin & Co., Boston and N. Y., 1897. Cloth. $1.25.

[8] SAMUEL SEWALL AND THE WORLD HE LIVED IN. By Rev. N. H. Chamberlain. DeWolfe, Fiske & Co, Boston, 1897. Cloth.

NEW LAW-BOOKS.

STATE CONTROL OF TRADE AND COMMERCE by National or State Authority. By ALBERT STICKNEY of the New York Bar. Baker, Voorhis & Co., New York, 1897. $2.25 *net.*

This treatise cannot fail to deeply interest all students of political science whether lawyers or laymen. The subject is one of much importance at the present time, and Mr. Stickney has collected a great amount of very valuable material bearing upon it. He treats it from a historical as well as legal standpoint. Beginning with a history of English legislation on prices, consisting of divers attempts to regulate prices by statute and by statutory tribunals, he shows that these attempts to regulate prices covered both labor and merchandise, and that the right to regulate both was placed on the same legal footing. These attempts to control prices by statute went beyond a mere fixing of prices, gave to buyers the definite legal right to buy at the prices so fixed, and provided a legal procedure for enforcing the buyers' legal rights. Therefrom naturally and logically came the statutes which made the selling at prices above the lawful rates a crime. The offense was the same, whether by an individual or a combination of individuals. Out of this position came the statute making it a criminal conspiracy to combine for the raising of prices, whether of labor or merchandise. This entire body of legislation, as the author shows, rested on the assumption, which was universally conceded in ancient times, that the state had the legal right to fix the prices of labor and merchandise of all classes. The author then traces the growth of the distinction between public and private employments, which is in the main a development of the American law. He then shows that both in England and America the development and tendencies of the law, until very recent decisions in two of the highest courts in this country, have been steadily towards complete contractual freedom in private employments, and, on the other hand, towards a high degree of State control in public employments.

A TREATISE ON THE LAW AND PRACTICE OF FORECLOSING MORTGAGES ON REAL PROPERTY, and of Remedies Collateral thereto, with Forms. By CHARLES HASTINGS WILTSIE. With a SUPPLEMENT bringing the work down to March, 1897, additional chapters on MORTGAGE REDEMPTIONS, by JAMES M. KERR of the New York Bar. Williamson Law Book Co., Rochester, N. Y., 1897. Law sheep. $6.50 *net.*

Mr. Wiltsie's original work on Mortgage Foreclosure, although designed as a New York book, has an interest and importance to practitioners generally. Mr. Kerr's "Supplement" is practically a new treatise on the same general plan and arrangement adopted in the enlarged edition of Wiltsie. The chapters on "Mortgage Redemption" are, however, entirely new and contain a very exhaustive and thorough treatment of the subject. Those who have the original work by Mr. Wiltsie will find this supplement an indispensable companion volume.

PROBATE REPORTS ANNOTATED. Vol. I. Containing cases of general value decided in the courts of the several States on points of probate law. With notes and references. By FRANK S. RICE. Baker, Voorhis & Co., New York, 1897. Law sheep. $5.50 *net.*

This is the first volume of a new series of reports covering the subject of probate law, and is in reality a successor to the "American Probate Reports," so well known to the profession. The plan of this new series is to give in an annual volume the most important and most recent decisions of the courts of the different States upon all matters cognizable in probate and surrogate courts. The publishers have secured an editor in every way capable of making these reports of great value to the practicing lawyer, and for his work, as shown in this first volume, we most heartily commend the series to the careful consideration of our readers.

COMMON-LAW PLEADING: its History and Principles. Including Dicey's rules concerning parties to actions, and Stephen's rules of pleading. By R. ROSS PERRY. Little, Brown & Co., Boston, 1897. Law sheep. $3.50 *net.*

Mr. Perry's experience as a lecturer on common-law pleading in the Georgetown (D. C.) University Law School has eminently fitted him to produce a work upon the subject. His treatise seems to us excellent in every respect, and the science of pleading is made exceedingly clear and intelligible. It is a treatise which will be read with interest and advantage by the practicing lawyer as well as by the law student.

THE LAW OF TAXABLE TRANSFERS, STATE OF NEW YORK. With annotations and forms. Edited by H. NOYES GREENE of the Troy (N.Y.,) Bar. Matthew Bender, Albany, N.Y., 1897. $1.50 *net.*

Mr. Greene has made a compact and excellent digest of the New York law relating to taxable transfers, and it will undoubtedly be appreciated by the lawyers of that State. It will be of great aid and value to all desiring a complete epitome of the law to date.

FAMOUS LEGAL ARGUMENTS. With several cases on Circumstantial Evidence. By MOSES FIELD. E. J. Bosworth & Co., Rochester, N. Y., 1897. Law sheep. $1.00.

Mr. Field, in this little volume, has collected some of the notable arguments made by the most distinguished lawyers in the United States. The list of advocates whose speeches and arguments are quoted includes such men as Webster, Curran, Pinckney, Beach, etc. The book will prove entertaining, not only to the legal profession but to the general reader as well, and the aspiring advocate will find therein many useful ideas and hints.

THE LAW OF SALES OF PERSONAL PROPERTY. By FRANCIS M. BURDICK. Little, Brown & Co., Boston, 1897. Cloth. $2.50 *net.*

In this volume, Professor Burdick furnishes the law student with a most admirable text-book upon the law of sales of personal property. Questions apt to trouble and perplex are discussed with a fullness and clearness rendering a mistake on the part of the student almost impossible. The provisions of the Statute of Frauds bearing upon the sale of goods are treated in connection with the common-law topics to which they relate. This method is novel, avoiding much repetition, and giving economy of space and equal economy of time and perplexity to the student, each topic being presented to him as an entirety instead of in detached and widely separated parts of the book. We unqualifiedly recommend this work to students and to the consideration of instructors in our law schools.

A SELECTION OF CASES ON DOMESTIC RELATIONS and the Law of Persons. By EDWIN H. WOODRUFF. Baker, Voorhis & Co., New York, 1897. Cloth. $4.00.

This selection of cases has evidently been prepared with great care, and almost every point likely to arise in the law of domestic relations, etc., seems to be fully covered. The work has already been adopted as a text-book by Cornell University, and its excellence certainly demands a careful consideration of the work by our other law schools.

AMERICAN ELECTRICAL CASES. Vol. VI, 1895–97. Being a collection of all the important cases (except 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, Electric railway and all other practical uses of Electricity. With annotations. Edited by WILLIAM W. MORRILL. Matthew Bender, Albany, N. Y., 1897. Law sheep.

This volume brings the collection of decisions upon the subject of electricity down to April 1st of the present year, and the series, as a whole to date, fully covers all the law upon the subject and is invaluable to every practitioner. We advise those of our readers who do not possess this work to give it at once a careful examination.

JEWETT'S MANUAL FOR ELECTION OFFICERS AND VOTERS IN THE STATE OF NEW YORK. 5th edition, 1897. By F. G. JEWETT, clerk to the Secretary of State. Matthew Bender, Albany, N. Y., 1897. Paper. $1.50.

This is a valuable compilation for the voters of New York State, containing, as it does, the general election law, town meeting law and provisions relating to school meetings. It also includes the provisions of the penal code, general laws and constitution of the State of New York relating to elections and election officers. A number of valuable annotations, forms, and instructions are added.

A MANUAL OF LEGAL MEDICINE. By JUSTIN HEROLD, A.M., M.D. J. B. Lippincott Co., Philadelphia, 1897. Cloth.

In preparing this work the author has endeavored to lay before medico-legal students the great principles of the science and the leading facts which serve for its foundation. To do this he has condensed into a comparatively small space all the important facts in more elaborate works and added thereto considerable original material. All that is practical and useful seems to have been inserted, and all immaterial matter dispensed with. The result is a work in every way admirably adapted to the students' and practitioners' needs.

ROBINSON ON GAVELKIND: The Common Law of Kent, or the Customs of Gavelkind, with additions relating to Borough-English and similar Customs. Fifth edition. By CHARLES I. ELTON and HERBERT J. H. MACKAY, LL.B. Butterworth & Co., London, England, 1897. Cloth.

The original edition of this work, published in 1741, was esteemed by the lawyers of that time as "a very excellent law treatise comprehending in general everything relating to its subject." To the lawyer of to-day it is valuable as giving the fullest and clearest history of the curious customs prevailing in Kent even before the Norman conquest and known in later times as the customs of gavelkind. The book is of great historical value and the publishers have done the profession a service by bringing out this new edition.

A TREATISE ON MARINE, FIRE, LIFE, ACCIDENT, AND ALL OTHER INSURANCES, including Mutual Benefit Societies; covering, also, General Average, and, so far as applicable, Rights, Remedies, Pleading, Practice and Evidence. By JOSEPH A. JOYCE. Bancroft-Whitney Co., San Francisco, 1897. 4 vols. Law sheep. $24.00.

Almost anyone can make a fairly satisfactory "Digest" of cases, but when it comes to making clear the "why and wherefore" of legal decisions, and presenting satisfactorily the principles upon which the law to which such decisions relate is founded, then a clear, logical and reasoning mind is necessary. That Mr. Joyce possesses such a mind is demonstrated beyond doubt in this treatise on the law of insurances. The work is one of the most important legal publications of the year, and covers fully the whole law upon the subject and its practice before the courts. Eight years have been spent by the author in collecting and arranging the material, and so thoroughly and conscientiously has this been done that, after a rigid test, we can fully endorse Mr. Joyce's statement that "it is believed that no errors exist as to the authorities relied upon." The system of arrangement adopted is admirable, and the index unusually full and satisfactory. The practitioner will find the work of the greatest aid, and we heartily commend it to the profession as worthy their entire confidence. It certainly is one of the ablest text-books which has appeared for many a year.

MASSACHUSETTS YEAR BOOK, and City and Town Register, No. 3, June 1, 1897 – June 1, 1898. Compiled by ALFRED S. ROWE. F. S. Blanchard & Co., Worcester. Map. Cloth. $1.75.

While not coming properly under the head of Law Books, this volume furnishes much of value and interest to the lawyer. Nowhere can so much data pertaining to the commonwealth of Massachusetts be found as in this compilation of Mr. Rowe's. Information upon every conceivable subject relating to State affairs is contained therein. A complete list is given of the cities and towns, their officers, population, valuation, debt, tax rate, election returns; National and State governments; courts, banks, insurance companies, railroads, newspapers, professional directory, etc. In addition to mere data, much interesting historical information is given.

AN OUTLINE OF THE LAW OF LIBEL. Six lectures delivered in Middle Temple Hall during Michaelmas term, 1896. By W. BLAKE OGDEN of the Middle Temple. Macmillan Company, New York, 1897. Cloth. $1.00.

In this compact little volume Mr. Ogden gives an exceedingly clear and succinct exposition of the law of libel. The writer's style is well adapted to interest the laymen as well as the lawyer, and the book will prove a source of entertainment while at the same time imparting much valuable information.

SELECTED CASES ON THE LAW OF SALES OF PERSONAL PROPERTY. Arranged to accompany Burdick's Law of Sales. By FRANCIS M. BURDICK, Dwight Professor of Law in Columbia University School of Law. Little, Brown & Co., Boston, 1897. Cloth. $4.50 *net.*

In compiling this new volume in the very useful set of Case Books accompanying the Students' Series, Professor Burdick follows the arrangement of the topics which makes his text-book on the law of sales of personal property a most desirable book on the subject for the student. His design has been to give the cases needed to make clear the law of sales in a form in which they can be available at a small expense, that all the students of a class may get access to the needed cases at the same time, which is not possible, even in the best libraries, when the cases must be studied in the official reports. Three principal considerations have been borne in mind in the selection of the cases: *First*, to secure at least one case on each question involved in the law of sales upon which the instructor would feel that he ought to give his class information. *Second*, to select cases which present the principles of the subject by way of adjudication of actual controversies before the court, and not merely by way of dictum or argument in laying down the general propositions of law on the subject. *Third*, to choose cases which state what is believed to be the correct or preponderating rule as to any particular question where there is a conflict. The 262 cases are taken from the reported decisions of the Federal courts, from the courts of thirty-four States, and (about one-fourth of them only) from the English courts. Among them will be found very late cases on interesting points, given sometimes in advance of the official publication. The appendix also gives the English Sale of Goods Act and a proposed redraft of Section 17 of the "Statute of Frauds."

NEW LAW-BOOKS RECEIVED.

A TREATISE ON FRAUDULENT CONVEYANCES. By FREDERICK S. WAIT. Baker, Voorhis & Co., New York. Law sheep. $6.00, *net.*

GENERAL DIGEST. Vol. 3, New Series. Lawyer's Coöperative Publishing Co., Rochester, N. Y. Law sheep.

FREE BANKING. By JAMES A. B. DILWORTH. Continental Publishing Co., New York. Cloth. $1.00.

CELEBRATED TRIALS. By HENRY LAUREN CLINTON. Harper & Brothers, New York. Cloth.

The Green Bag.

Vol. IX. No. 12. BOSTON. December, 1897.

SIR THOMAS LITTLETON.

IT is perhaps one of the most curious coincidences in the history of law, if coincidence it were, that Littleton should have set himself to write a treatise dealing with the incidents of feudalism at the very moment when feudalism in England was waging that internecine struggle, the Wars of the Roses, which ended in its practical extinction. If Littleton had not compiled his invaluable work, the history, the law and the methods of feudalism would not have had for us that realism and vigor which they have come to possess under the hands of writers whose work in a great measure has been ancillary to the labors of the great lawyer who accomplished his *magnum opus* in the short interval between the epoch of modern Europe and the period of the middle ages. One of the earliest productions of the printing press in England was the "Tenures" of Littleton, and there could be given no better instance of the irony of fate than that the agent that has, perhaps, more than any other, contributed to the character of modern civilization should have perpetuated as its earliest work the records of the society that it helped to destroy.

Thomas Littleton was born at Frankley House, Frankley, in Worcestershire, in the year 1402, and was the eldest son of Thomas Westcote, of Westcote, near Barnstaple. With the exception of Thomas, the members of the family bore their father's name of Westcote, despite the fact that their mother had contracted as a condition of her marriage that her inheritable issue should bear her name, de Littleton.

"She," says Sir Edward Coke, "being fair, and of a noble spirit, and having large possessions and inheritance from her ancestors, de Littleton, and from her mother, the daughter and heir of Richard de Quartermeins, and other of her ancestors (ready means in time to work her own desire), resolved to continue the honor of her name . . . and therefore prudently, whilst it was in her own power, provided by Westcote's assent before marriage that her issue inheritable should be called by the name of de Littleton."

This hint of the pride of the true feudal days is not without its historical value. The wife under such circumstances brought to her husband not only her love and her wealth, but endowed him also with a local habitation and a name. They lived on her property at Frankley, and her eldest son took her patronymic. Despite these appearances to the contrary, her husband was also of gentle birth. The father of Elizabeth de Littleton was Thomas de Littleton, Lord of the Manor of Frankley, and successively esquire of the body to Richard II, Henry IV and Henry V. Elizabeth, who married Thomas Westcote, was the last of her race, and it was only natural that she should wish the name and ancient arms of her ancestors — argent a chevron between three escalop shells sable — to be borne by her eldest born. This bearer, through the female line, of an ancient feudal name was destined to write the epitaph and raise the monument of feudalism. The learned Camden thus writes of him: "Thomas Littleton, *alias* Westcote, the famous lawyer to whose treatise of Tenures the students of the common law are no less beholden than the civilians to 'Justinian's Institutes.'" Of the early

life of this great judge we know little. We find that he was entered as a member of the Inner Temple. This does not imply that he was originally intended to practice as a lawyer, for we know on the authority of Fortescue and others that at that time "it was the universal practice for the young nobility and gentry to be instructed in the originals and elements of the laws." (Bl. Comm., vol. 1, p. 25.) It seems probable, therefore, that having been sent to the Inner Temple in accordance with the educational custom of the period, he became enamored of the work that he found to his hand, and stayed to practice where he came to learn. This view is considerably supported by the fact that he, in early days, gave a learned reading at his Inn on the statute *De Donis Conditionalibus*, the manuscript of which is still extant. In 1445, we find that he was in practice as a pleader, and that at the same time, possibly owing to family influence, he was occupying positions requiring legal knowledge in his own county, such as the Escheatorship of Worcester. In 1447 he was made acting sheriff of the county under the hereditary sheriff, the Earl of Warwick. He seems also to have been previously the steward of the court of Marshalsea of the king's household. In 1450 he was created recorder of Coventry, and in 1453 he proceeded to the important degree of serjeant-at-law, and on the 13th of May, 1455, he became king's serjeant, and was appointed a justice of assize on the northern circuit. Before the death of Henry VI he obtained the office of steward of the Marshalsea Court. As a man who was, to some considerable extent, in touch with the court, it was impossible that he should have escaped from the social and political troubles of that terrible period. He seems, however, to have conducted his affairs with much astuteness, for we find that he was twice pardoned, and that on the accession of Edward IV, that monarch received him into great favor. In 1463–4 he attended the king's progress through Gloucestershire; on the 27th of April, 1466, he was made justice of the Common Pleas, and rode the Northamptonshire circuit. On the 18th of April, 1475, he was made a Knight of the Bath — "the same king, in the fifteenth year of his reign, with the prince and other nobles and gentlemen of ancient blood, honoured him with the Knighthood of the Bath." This was an honor bestowed, probably, as much in recognition of his gentle birth as of his laborious achievements in the field of law. He married Joan, widow of Sir Philip Chetwynd of Ingestre, in Staffordshire, and daughter and co-heiress of Sir William Burley, "of Broomscroft Castle in the County of Salop," the speaker of the House of Commons. This lady outlived her second husband, and died on the 22d of March, 1504–5, leaving by this marriage three sons ("Sir William, Richard the lawyer, and Thomas") and two daughters. The present noble families of Lyttleton and Hatherton are in direct descent from his marriage. Sir Thomas Littleton died at his own birthplace (at that Frankley which he had inherited from his mother), on the 23d of August, 1481, full of age and honor, having fulfilled his mother's ambition by the revival of her name and family, and the handing of it on to a remote and honorable posterity.

"The body of our author," says Coke, "is honorably interred in the cathedral church of Worcester, under a fair tomb of marble, with his statue or portraiture upon it." This tomb is on the south side of the cathedral, but, unfortunately, the brass, with its portrait of the judge, has disappeared. At his parish of Frankley an image of the great lawyer, wearing the coif and the scarlet robes of his office, formerly existed, but has long since vanished, as has also the window portrait of him in the parish church of Halesowen. The portrait by Cornelius Janssen, in the Inner Temple, is of an au-

thentic character, as the painter was fortunately familiar with the presentations at Frankley and Halesowen. An engraving of the Halesowen portrait is given in the 2d edition (1619) of "Coke's Institutes," part I.

From the author we turn to his work. Coke tells us that it was not published till after the death both of the writer and his son Richard, the latter event taking place in 1518. The reason given is, that it is not cited as an authority earlier than 1534, when Sir Anthony Fitzherbert cites it in his "Natura Brevium," and if it had been published earlier it would have been cited in the various reports and in St. Jermyn's "Doctor and Student." Coke, therefore, thinks it was first printed about 1533. Modern researches into the history of printing have shown that Coke was in error in his attempt to date the first publication of "Tenures." It is clear from existing copies that the book was printed twice in London in the year 1528. Coke himself mentions an edition published "at Roan, in France, by William de Tailier (for that it was written in French) *ad instantiam Richardi Pinson.*" Now this publication was, though undated, from internal evidence very much earlier than 1533. Indeed, it is conjecturally placed as early as 1495, and Pynson published about the same time another edition in London, still extant. There are, however, at least two earlier editions than these. The earliest known edition is the undated one produced by J. Letton and William de Machlinia, which Dr. Middleton, in "His Account of Printing in England," thinks was printed about 1481, or seven years after Caxton introduced the art into England. The colophon of this edition is as follows: "Expliciunt Tenores novelli impresse per nos Johem Letton et Williem de Machlinia in civitate Londonarium juxta exclesiam omnium sanctorum." The writer of the article on Littleton in the "National Dictionary of Biography," thinks there is no data to support this conjecture. There is however, more evidence than might be expected. The period when Letton and Machlinia worked together is approximately known (Circa, 1481); the kind of type used in these early years is well known. "The Chronicle of the Duchy of Normandy," dated 1487, and printed by Letton and Machlinia, gives us a still closer approximation. We may, in fact, date the book as not earlier than 1481 and not later than 1483. The next early edition we get was printed by Machlinia alone when he was "living near Fleet Bridge." The colophon is as follows: "Expliciunt Tenores novelli impressi per me Wilhelmum de Machlinia in opulentissima civitate Londonarium juxta Pontem qui vulgaritar dicitur Flete brigge." It is less rudely printed, and abbreviations are more rare, and modern black letter is used. The vast usefulness of the "Tenures" was at once recognized by the legal profession, and some twenty successive editions were published of the work during the sixteenth century. In more recent times many editions have been produced including, of course, Sir Edward Coke's monumental commentary on the work, published in 1628. It was not, however, until 1841 that Mr. T. E. Tomlins printed an authoritative edition collated from the various manuscripts and printed texts. The earliest manuscript extant (now at Cambridge) seems to have been in circulation as early as 1480. A note on the first page states: "Iste liber emptus fuit in coemeterio Sti Pauli, London, 27th die Julii, anno regis E. 4ti. 2omo. 10s. 6d." In other words, this paper MS. was sold in St. Paul's churchyard on the 27th of July. There is also a vellum MS. of the book at Cambridge.

This treatise on Tenures was written by Littleton for the use of his son Richard, the lawyer (the ancestor of Lord Hatherton). It contains, we are told, "a full and clear account of the several estates and tenures then known to English law, with their pecu-

liar incidents. Probably no legal treatise ever combined so much of the substance with so little of the show of learning, or so happily avoided pedantic formalism without forfeiting precision of statement" (Nat. Dict. Biog.). The book is to some slight extent based upon, or perhaps, to speak more accurately, suggested by a short tract existing in Littleton's time, entitled "Olde Tenures," and another ancient document, "The Customs of Kent," may have been used in the compilation of the treatise. Mr. Tomlins adds these two ancient tracts at the end of his authoritative text of Littleton's work. Coke's "Commentary on Littleton" was published in 1628, and has since then passed through many editions, the most noteworthy being the thirteenth edition by Mr. Hargrave and Mr. Butler. The seventeenth edition was produced, in 1817, by Mr. Butler. Coke's is not the earliest commentary on the work. Mr. Henry Cary, in 1829, published a commentary, the author of which is unknown, but which was certainly produced before that of Sir Edward Coke. — *Law Times.*

THE HISTORIC CASE OF COKE V. BACON.

THERE is an odd similarity between the rivalship of Aaron Burr and Alexander Hamilton and that of Bacon and Coke. Both with regard to American and English history, a legal reader cannot, when conning the life of Burr, separate him in memory from Hamilton; nor in reading about Coke can he differentiate remembrances of him from those of Bacon. Burr was a Coke in chicanery, and Hamilton a Bacon in wisdom, as well as an author. Burr's fall, like that of Coke, was fatal and ignominious. Bacon lives most through his "Novum-Organum," and his essays; and Hamilton's fame rests greatly upon his contribution to the Federal Constitution — the *Novum Organum* of the Republic — as well as his essays collected in the volume entitled "The Federalist."

But let us rest with consideration of the rivalship between Bacon and Coke, and their companion careers; for the closer these are placed in juxtaposition the greater interest attaches to the shortcomings of both as well as to their beneficial achievements. All which the legal reader will discover who shall put Lord Campbell's sketches of Chief-Justice Coke in his one volume, and those of Lord Chancellor Bacon in the companion volume by that diffusive but painstaking author.

As the letters B and C are alphabetical companions, Bacon and Coke were ever *pari passu* in life. They began the world together; the two were rivals; together they fought for distinction, and were even as youths competitors in love. Both were devoured with insatiate lust for wealth and honors. Both gained the objects of their fiery desires; and neither, it may be accurately stated, found happiness in the acquisition. Both lives warningly teach the legal profession how much there may co-exist of intellectual grandeur with the most glaring moral turpitude. And, oh, how both paid homage to virtue by, when in disgrace, seeking refuge in tranquil pursuits which unexpectedly to themselves gave an immortality which they did not seek.

How dramatically meet the brutality of Coke and the baseness of Bacon in the trial and fate of the gallant and unfortunate Essex. There was in public view the cruel arrogance and atrocious bearing toward the Earl from Coke; while behind the scenes Bacon was endeavoring to secure the conviction of that Essex who had used his best efforts towards obtaining for Bacon the very

office of attorney general that Coke obtained. It was partly hatred of Bacon for having sought that office, and partly hatred of Essex for having tried to aid Bacon and to disadvantage Coke, which united to nerve Coke in the prosecution of Essex. While at the same time at court Bacon was furtively, diplomatically aiding the conviction of his benefactor. Were there ever such contretemps of motives in human actions?

We can bring to mind Coke at his chambers in Clifford's Inn burning the midnight oil over legal studies, while Bacon did the same in Gray's Inn. Bacon had taken a degree at the University; Coke quitted it without fully qualifying for one. Bacon had genius plus plod. Coke had great plod minus genius. Coke, stony-hearted and stony-minded, loved neither pleasure nor poetry; but Bacon could combine love of all the Muses with his toil. To Coke, Spenser was practically a myth; but Bacon would linger over that poet's "Daphnaida." One of Coke's biographers has epigrammatically said: "At the commencement of his career he resolutely foreswore friendships not convertible to cash; and he was blessed with none at its close." Bacon sought friendships for their own sake, even if he betrayed them. Bacon could also taste the sweets of vengeance.

In 1594, when the office of attorney general became vacant, both Bacon and Coke contended for it. The former was six years the younger and lost "because," wrote Coke, "a precedent of so raw a youth being promoted to so great a place it was impossible to find." Nevertheless, Coke could have made Bacon solicitor general; who would have accepted the subsidiary post, but Coke refused to give it, and then it was Bacon swore vengeance. Four years later Coke lost his wife, and in a diary that afterwards saw the public light he annotated her virtues much as he would have collected authorities for his reports. But before a third of the traditional year of mourning had expired Coke moved for and obtained a new trial in the court of Hymen by wedding widow Lady Hatton, niece-at-law of Lord Chancellor Hatton. She was twenty-six years Coke's junior; but her youth and beauty were not his beckoners, for these lay in the fact that she had a large fortune, was Bacon's cousin and had been sought by Bacon in marriage. Coke broke the law by a secret marriage, and the gossips said he did so fearing that public attention might direct Bacon to successful accomplishment of suit. The latter had his first revenge of Coke in that Madame Coke (for the husband had not yet been knighted) spurned his company and his dry pursuits, retained her widowed name of Lady Hatton and went to the Continent to live a life of pleasure. Coke on the rights and duties or institutes of marriage was therefore a volume never written.

Both Bacon and Coke became obsequious to her who was (whether ironically or not is a question for debating societies) called "Good Queen Bess," but doubtless Coke best practiced on the Shakespearean line about "thrift following fawning." When James succeeded to the crown Coke deepened obsequiousness and for a time believed in royal prerogative. The king continued him as attorney general, and made him Sir Edward. He who had badgered one favorite of Queen Elizabeth in her reign by a bullying prosecution, now in the reign of her successor was called upon to exhibit fresh arrogance and official brutality in the trial of Sir Walter Raleigh — if the word trial can be applied as understood in modern times. It was presided over by "that reformed highwayman, Judge Popham, who made amends for the delinquencies of his youth by hanging every criminal within his reach." Says another biographer of Coke, referring to his disgraceful bullying of the high-souled prisoner on the occasion: "So long as Coke could find payment for unclean work he betrayed no uneasy desire to wash

his fingers; for it was not until all hope of turning sycophancy to further account fled that Coke took up with patriotism." Perhaps Dr. Sam Johnson was thinking of Coke when he made the often quoted remark that "patriotism was the last refuge of a scoundrel."

The prosecution of Guy Fawkes and his associates afforded fresh opportunity for Attorney General Coke to insult defenseless —and at that time uncounseled—prisoners. How nobly pathetic was that interruption of Coke's insults by conspirator Sir Everard Digby, when he exclaimed, "I may deserve the vilest death, but I petition for some moderation of justice." Coke answered by quoting from the Psalms, "Let his wife be a widow, and his children vagabonds; let his posterity be destroyed and in the next generation let his name be quite put out." But the trial lords did not sympathize with Coke; for when Digby was convicted and pathetically added, "If I may but hear any of your lordships say you forgive me I shall go more cheerfully to the gallows," one of them replied, "The Lord may forgive you as we do."

Coke had now earned and received chief justiceship of the court of common pleas, which rubbed his stubborn pride against the pedantic presumption of James. To support prerogatives of royalty was very well for an attorney general; but when Coke became judge he had those of the bench to support. And when King James, thinking that constitution and law allowed him to personally try causes between Crown and loyal subjects, said rather pettishly to Coke, "By my soul, I have often heard it boasted that your English law"—James being Scotch could put some sarcasm into his tone as he made the reference—"was founded upon reason, wherefore, have I not reason as well as you judges?"

Bacon, now become solicitor general, aimed to gain the attorney generalship; and therefore successfully played the game of aiding to elevate Coke to the chief justiceship of the kingdom and thereby giving to Attorney General Hobart the vacated common pleas-ship and taking the latter's place. Now Coke coveted the chancellorship; as did Bacon. James was minded to give it to Coke; when spake the genius of Bacon thus: "If your Majesty shall take my lord Coke, you will put an overruling nature in an overruling place; and popular men are no sure mounters for your Majesty's saddle."

Just then came into the court of King's Bench a question of royal prerogative in an ecclesiastical matter. Attorney General Bacon advised prohibition; but Coke judicially denied the prerogative. Coke was now in Bacon's trap, and, as history mentions, charges were "trumped up"—the phrase quite appropriate in this connection which procured Coke to be suspended from office. Next came full dismissal; and historic "dejection and tears," Bacon working the wires. Coke was now a Humpty Dumpty; but Bacon had become lord chancellor. Coke was defeated but not dismayed. His wife had given him a daughter and Coke had planned to obtain court influence through her. The Duke of Buckingham was the power behind the throne, and his brother the baronet desired a rich wife. Coke had now added manor to manor in his acquisitions, and owned large realtys in London. Out of these he richly dowered his daughter, who became Lady Villiers, and relieved Buckingham of demands from his brother for moneys. There was a great wedding for Coke's daughter at the royal palace of Hampton "in the presence of king and queen and all the chief nobility of England." But Bacon was not a guest; because foreseeing what the alliance might accomplish for Coke he had endeavored by a counter intrigue to prevent the match. By way, doubtless, of a wedding gift, Buckingham procured Coke's restoration to the Privy Council with a lord treasurership—the gains of which Coke coveted

— in prospective. The Duke's brother kept the dower, but not the bride — for like mother, like daughter — she eloped with Sir John Howard to foreign parts.

Bacon's "Novum Organum" was now awarding fame to its author and feeding Coke's envy and hate. A new Parliament being called, Coke — then three score and ten — successfully stood for a borough; but the lord treasurer vacancy passed him by through Baconish opposition. The Puritans were returned to the Commons largely, and Coke, "rating" against his monarch's party, placed himself in Parliament at the Puritan head. No longer a high churchman, he left Bacon to keep both the king's seal and the king's conscience; while he fed the nation's discontent. When "supply" came up — that still-existing bugbear of every English ministry — Coke moved an amendment against the king's prerogative in monopolies, which carried; and Coke as chairman of the committee personally took the report into the bar of the lords and placed it in Lord Chancellor Bacon's hands. What a picture for a portrait painter as they faced each other! For rumors of bribe-taking by Bacon were already rife. These rumors nourished by Coke took shape in House of Commons charges against Bacon. Vainly the king by special message aimed to defeat them. With his own hand Coke drew impeachment and obtained its control as prosecutor. That case (really of Coke *v.* Bacon) is an historic *cause célèbre*. Bacon feeling that no technicalities of defense (but Bacon's apologists have found many) and that no palliations could obtain while Coke's hands (almost palsied with hatred) held the scales of justice, pleaded guilty. But Bacon's retirement to a scholastic seclusion, that enriched the literature of the ages ensuing his disgrace, did not give Coke the chancellorship; and now Coke's revenge turned against the Crown.

When fatuous James sent his famous message "desiring the Speaker to make known to the Commons that none therein shall henceforth presume to meddle with anything concerning Our Government or deep matters of State," it was Coke who prepared and moved the Protestation that went on the journal book out of which the king's own hand usurpingly tore the rebellious writing before he dissolved Parliament. As we have all read, Coke then was sent to the tower, and in Raleigh's and Essex's old "dungeon keep" could moralize over his former conduct toward them. But Charles, Prince of Wales, was Coke's friend and obtained his release. In a short time the prince came to the throne, and called a new Parliament into which Coke entered from Coventry. A wit of the period might have said, "At length the ex-chief justice has got out of Coventry" — for that place, as now, was then a synonym for social exile. Again, Coke leading the Puritans, bothered the king (forgetting in his patriotism the recent generous intervention of Charles when prince) on a new supply bill. Charles, beaten in his "faithful Commons" dissolved it, but was soon compelled to summon another. This time Coke won two seats, but of course sat for only one — Norfolk. In this Parliament Coke brought forward and carried resolutions that are as memorable as Magna Charta in the annals of English constitutional history; comprising what readers of Hallam know as "the Petition of Right" — the practical preface to the half century later Habeas Corpus. The lords refused it, at first, under the lead of Buckingham, upon whom it was now the gage for Coke to turn. The king had to yield and give assent; as well as to see popular bonfires burning in honor of the measure all down Whitehall Street; and tradition says that the statue of Charles that now confronts Cockspur Street in London was erected over the very site where the largest bonfire blazed. Had Charles' soul been properly illumined then by the light of those popular blazes he

might never have puzzled historians by his remarkable last word on the scaffold to the priest — "Remember."

The Petition of Right bears date with the eighth year of the Plymouth Colony; and it gave the *coup de grace* to Coke's career, for he never resumed his seat in Parliament and died in 1634 aged four-score years and three. While Coke was fighting Charles, Bacon was composing apothegms and died without knowledge of the Petition of Right. Possibly Coke's well-known contempt for science and literature of every kind was heightened by Bacon's eminence therein. The Lord Chancellor had magnanimously — perhaps ostentatiously — presented Coke with a copy of the "Novum Organum," and beneath the autographic presentation Coke had written:—

> "It deserves not to be read in schooles,
> But to be freighted in the Ship of Fooles."

To Coke Ben Jonson was a vagrant, poetry and the drama foolishness; while money making, law and politics constituted the *summa bona* of life. As judge he was beyond all suspicion of chicanery and corruption and at least held that advantage over Bacon. In comparing the two, readers of their careers will undoubtedly agree to Lord Campbell's verdict, "most men would rather have been a Bacon than a Coke." In the firmament of intellect Bacon was a sun, and Coke an inferior planet, the most conspicuous in shining after shadows fell upon the earth.

Among British lawyers the name of Coke is pronounced as *idem sonans* Cooke; and accent on the name of Bacon falls on the last dissyllable to differentiate it from the national breakfast dish. Oddly, too, no English lawyer even refers to "Lord" Coke, but always to "Sir Edward"; yet names Lord Bacon although there never was, technically, such a Peer.

Must not the moral of their lives be estimated by the character of the times in which they together lived?

STYLE IN JUDICIAL OPINIONS.

By Henry C. Merwin.

I.

It might be thought that style has very little to do with the value of a judicial opinion, even when the opinion is written down and reported; and many judges, especially modern judges, seem to act upon this view. The learned magistrate, for example, who composed the paragraph which I am about to quote could hardly be accused of wasting time upon the style of his opinions: —

"The decision of the motion was postponed to the argument upon the merits, and upon that argument counsel for plaintiffs in error, clearly recognizing the necessity they were under of showing that the State court did give effect to the subsequent legislation, in order to show the existence of a Federal question, claimed that it appeared in the record that no judgment could have been given for the defendant in error in the court below without necessarily giving effect to some of the subsequent legislation, and they claimed that an examination of the whole record would show such fact, notwithstanding the statement contained in one of the opinions of the State court already alluded to."

It is a fact, almost an incredible fact, that this long and slovenly paragraph, which no human being could read without distress, emanated from the Supreme Court of the United States. It is not even clear, for in one part of it, somewhere about the middle, the omission of a comma would change the whole meaning of the sentence. It will be observed also that the word "claim" is twice misused in this one paragraph, in the sense of assert. The abuse of this word, which amounts to a literary vulgarity, is not uncommon in recent opinions of the Supreme Court. Thus we find in the same volume such sentences as the following: "It is *claimed* that the rights of the accused were disregarded in the proceedings." "It is *claimed* that a subsequent statute, passed by the State, has impaired the obligations of the contract as *claimed* by the party." "It is *claimed* by the plaintiffs that in any mixed community the reputation of belonging to the dominant race . . . is property." "The plaintiff states three propositions, each of which it *claims* is established by the evidence." "The defendants *claimed* that the whole judgment of the State court was right," etc.

A long fight against this misuse of "claim" has been waged by lovers of the English language, but now that the Supreme Court have gone over to the enemy perhaps the fight will have to be abandoned. I have seen a volume of Connecticut reports, published fifty or sixty years ago, which was once the property of Daniel Webster. The margin contains, as I remember, only one comment written by Mr. Webster, and that is placed against a passage in which the word "claim" is used in the wrong sense. "In the language of the present day," wrote Mr. Webster, "this word 'claim' means almost everything." If the Supreme Court had only stood by the purists, the fight might have been kept up for another fifty or one hundred years. The slovenly passage which I have quoted from a recent Supreme Court opinion might be supposed to be merely the accidental and exceptional lapse of a great man, were it not that other passages as bad and even worse might easily be cited. I add the following specimens: —

"The foreman in this case bore no resemblance in the importance and scope of his authority to that possessed by Murdock in the Woods case."

"In addition to the liability of the master for his neglect to perform these duties, there has

been laid upon him by some courts, a further liability for the negligence of one of his servants in charge of a separate department or branch of business, whereby another of his employees has been injured, even though the neglect was not of that character which the master owed in his capacity as master to the servant who was injured."

The errors and obscurity of these two passages are due to haste and carelessness, but the defects of the sentence which I am about to quote really seem to arise from a lack of education: —

"What it [the Southern Pacific Railroad Company] agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes."

Here we have in one short sentence two faults of taste, — the use of the inelegant phrase "let into," in the sense of permit, and the abbreviated designation of a railroad company, as "the Rock Island," — and one fault, in the last part of the sentence, in the employment of words, for it is impossible to speak of "needing" a use. I will add only one more illustration from the Supreme Court reports: —

"Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make Federal questions of the correct construction of the act, and the bar of the statute of limitation."

It would, I think, be impossible to find such sentences as I have now quoted in any but the recent volumes of Supreme Court reports, and I may add that I have taken them from opinions written, not by the senior, but by the junior occupants of the bench. Such carelessness in the use of language by members of what is confessedly the most important and powerful tribunal in the whole world, is inexcusable. In some degree, — perhaps in but a small degree, — it detracts from the dignity of the Court. To those members of the bar who have visited the Capitol, the words "Supreme Court," call up a picture of nine dignified and, for the most part, venerable men, enthroned in tall armchairs, against a royal background of scarlet hangings, waited upon by obsequious clerks, messengers and pages and, perchance, delivering opinions which may affect the welfare of the country for generations to come. To see the Supreme Court come in and take their seats, and to hear an opinion read by a justice whose voice and manner satisfy the imagination, would give almost any member of the bar, who was new to Washington, an idea of the Court which he had not possessed before. But it is inevitable that most lawyers throughout the length and breadth of the country, should know the Supreme Court only by their published opinions. They know, or imagine, how the members of the Court appear, how they regard themselves and expect others to regard them, only from the printed pages, and if in those pages the justices present a slipshod and slovenly appearance, they detract, so far forth, from their own dignity. When a member of the Court falls into gross errors in the use of English, or writes a long, involved, obscure and evidently hasty sentence, he commits much the same fault as if he should hurry into court dressed in a shooting jacket instead of the customary robe of black. Judges, of all men, are to be not only excused but commended for taking themselves seriously; and this, though not perhaps the chief reason, is at least an important one, why they should have regard to the style of their judicial opinions.

A fine example of judicial dignity may be found in the opinion of Lord Hardwicke in the leading case of William Penn *v.* Lord Baltimore (1 Ves. Sen. 444). Speaking of the importance of the case, Lord Hardwicke said: —

"It being for the determination of the rights and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman senate rather than of a single judge; and my consolation is that if I

should err in my judgment, there is a judicature, equal in dignity to a Roman senate, that will correct it."

In the same volume of the Supreme Court reports, from which I have taken the worst of the specimens just exhibited, there is a passage which might serve as a model of dignity and purity in judicial style. It occurs in the dissenting opinion of Mr. Justice Harlan in that important case where the Court upheld a statute of Louisiana compelling railroad companies to provide separate cars for white and colored passengers, and prohibiting passengers of either race from riding in the cars set apart for the other. Mr. Justice Harlan held that the statute was unconstitutional. He said: —

"The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens, there is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race."

This passage will doubtless be remembered long and quoted often, — but if the same ideas, which are not in themselves new or striking, had been expressed in language devoid of style, no one would think them worthy of particular attention.

Another finished example of dignity and simplicity in style will be found in the closing passage of the dissenting opinion delivered by Mr. Justice Curtis in the Dred Scott case. He said: —

"I have expressed my opinion and the reasons therefor at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment in the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the circuit court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less would have been inconsistent with my views of my duty."

This passage — and indeed everything that Judge Curtis wrote — reflected the singular simplicity and directness of his character. He was essentially a lawyer, and to say that is of course to admit that his character had marked limitations. It would hardly have been possible for Judge Curtis to recognize the validity of a "higher law"; he would have abided by the law of the land, even though that law operated unjustly — at least it is difficult to conceive of his doing otherwise. But in so doing he would have followed his conscience, and he would have followed it with such perfect simplicity and sincerity as not to admit the least trace of bravado, of affectation, of boasting, of vanity, even of self-consciousness. It was well said of him, by Mr. Elias Merwin, at the meeting of the bar held after the death of Judge Curtis: "The wonderful precision and accuracy of his mental operation, I cannot but believe, were due in a large measure to the singular rectitude and force of his character."

Thus far, in giving specimens of bad judicial style, I have quoted only from our most august tribunal. Doubtless, if one were to ransack the opinions of the various State courts, he could find many examples of inelegance and incorrectness. I remember one opinion, rendered by a Western court, in which the learned judge declared: "Courts are not required to hypothecate instruc-

tions upon a mere combination of words or syllables," etc.

But in this quest one need not go far from home. From a recent volume of Massachusetts reports I take the following sentence: —

"But the question is with regard to the rights of a passenger to get off the location of the railroad within which he finds himself by right."

What does the sentence mean? A reference to the context shows that "location" — a hideous word under any circumstances — here signifies premises or track; and what the judge meant to say was that the question related to the lawfulness of the manner in which the passenger attempted to pass from the railroad track to the adjacent land, his presence on the track being lawful.

In a still later volume of Massachusetts reports occurs the following sentence — all in one breath: —

"If these were the only motives for the contract, and if its contents were only what we have stated, we are not prepared to say, either for substantive reason, or because such a transaction may cover others less free from objection, that it is against public policy for one man openly to pay or to promise to pay another in order to induce him to take part in a venture, and to become a director in the management of it."

Of course, the worst fault here, and one which vitiates the whole paragraph, is that the writer begins by stating a proposition limited to the particular case set forth earlier in his opinion, and then, apparently forgetting that he has done so, concludes with a general proposition, applicable to every case. The expression "such a transaction may cover others," is also, of course, inelegant and incorrect; and the use of the word "substantive" in the sense intended by the learned judge, — though, perhaps, good authority may be cited for it, is so technical as hardly to rise above the level of legal slang. It may be doubted also if one can speak of the "management" of a "venture." Here is another specimen taken from a volume of Massachusetts reports published within a few years: —

"In the case at bar, *while* the defendant's *herd* had been exposed to hog cholera, there was evidence that a portion of it only had been affected, and, further, that, even if affected, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals *whose* meat was sold *had* ever, so far as the defendants knew, actually *had* the disease; and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome."

In this passage, "while" is flagrantly misused for "although," "herd" is employed where the proper word is "drove," "had had" is inelegant, and the expression "whose meat was sold" is an almost ludicrous instance of the wrong pronoun. It very nearly implies that the flesh of the hogs could be sold and carried away, leaving them intact and alive. In the same volume there is a sentence which contains no less than five suppositions, through which the mind of the reader has to travel, without the rest and refreshment even of a semicolon, in order to reach the conclusion. It runs as follows: —

"If there had been no consolidation, and the transfer had been direct from the S. and B. Railroad Company to another Massachusetts Corporation, we hardly can suppose that it would have been argued that the purchaser had not the same powers to take land and to complete the road, that the S. and B. Railroad Company would have had, if its time had been extended by similar words before the sale."

This, of course, is intelligible, but it is not easily intelligible, and instead of giving the reader a pleasant sensation, which a well-constructed sentence does, even upon so dry a subject as the law, its effect is to weary and depress his spirits. The same remarks would apply also to the following paragraph taken from the same volume: —

"It cannot be argued seriously that because a

sale made or attempted to be made to a parent through the agency of a minor child is illegal, it therefore becomes a sale to the minor, even if it were true that the illegality would prevent the title passing where there is a delivery, and the sale is fully executed."

This paragraph could of course be "parsed" by one skilled in grammar; it is only obscure; but the following paragraph taken from the same volume, is ungrammatical as well as obscure. The suit was for damages for the killing of a milkman who was struck by a railroad train while crossing the tracks between two and three o'clock in the morning. It was alleged on his behalf that the gate-tender was negligent, and the defendant, in turn, had suggested that the milkman was asleep in his wagon. The Court said:—

"But if the deceased was not guilty of such gross negligence as, by the terms of the statute, would prevent a recovery, then, whether there was some neglect on his part, or on the part of the defendant's servant, or the conduct of both was not more ill-judged than might have been expected in the flurry of approaching danger, the intervention of the later causes would not necessarily prevent the neglect to give warning from 'contributing to the injury.'"

I do not mean to imply that the average opinion — if there can be such a thing — rendered by the Supreme Court of Massachusetts is so bad as the extracts just made would indicate; but those extracts were all taken from two, or possibly from three, volumes of recent reports. In general, it may, I think, fairly be said that modern opinions in this country are inferior in style to those rendered by the earlier judges. Many reasons might be given for this deterioration, as that the modern judges have received an education less classical than that enjoyed by their predecessors; that the multiplication and diffusion of second-rate books and magazines in recent times have lowered the literary standard of the whole community; that the former judges were less burdened with work and therefore could bestow more pains upon their written opinions than it is possible for their successors to bestow. It is perhaps true, also, that judges, at least in this State, now take a more narrow and technical view of the law than was taken in the days of Parker and Shaw; they have widened the gap between law and life, and therefore, also, between law and literature.

How refreshing are the tropes that one finds occasionally in the opinions of by-gone jurists! Here, for example, is a passage from one of the last opinions rendered by Chief-Justice Parker, to whom Lemuel Shaw succeeded. The Judge was deciding the point that doves, while at large, cannot be the subject of larceny. He explained: —

"The reason of this principle is that it is difficult to distinguish them from other fowl of the same species. They often take a flight and mix in large flocks with the doves of other persons, and are free tenants of the air, except when, impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner."

The expression "free tenants of the air" is poetic, and yet it is couched in legal phraseology. After all, a judge, like anybody else, is the better for being human, — for having sympathy with all other animals, including those which are dumb, for having a sense of humor and a sense of beauty. And when these qualities exist in a man, some hint of them will be disclosed even by the style in which he draws up a judicial opinion.

GUILTY.

By John Albert Macy.

GUILTY? If that's the law, judge,
Why then I suppose it's so.
I have broke the rules, that were made for mules
That have to be told to go.

But a man can't stand with a book in his hand,
And read what he's got to do.
When his blood is hot, there's times he's got
To strike, and strike quick, too.

And if he'd said it to me, judge,
I wouldn't have been so mad.
But for such a cur to speak to her!—
Why — my fist was all I had.

And maybe you'd used your tongue, judge,
But I never was quick with my jaw.
So I clenched my fist, and give it a twist,
And I'm guilty, if that's the law.

CHAPTERS IN THE ENGLISH LAW OF LUNACY.

By A. Wood Renton.

IV.

MARRIAGE.

THE English law as to the marriage of lunatics falls naturally under three heads: —

1. The effect of insanity upon the capacity to marry.

2. The effect of supervening insanity upon marriage, and the rights, duties and legal remedies of the contracting parties.

3. The question whether adultery committed by a spouse who is at the time insane is a bar to an action of divorce.

(1) There are some obscure *dicta* in the earliest commentators on the law that the marriage of an insane person could not be invalidated on that account, founded, as Lord Stowell, then Sir William Scott, pointed out in Turner *v.* Meyers (1808, 1 Hagg. Consist. Reps. 414) "on some notion that prevailed in the dark ages of the mysterious nature and the contract of marriage in which its spiritual almost obliterated its civil character." Thus we read in Rolle's Abridgment (357; 50; 7) that "an ideot à nativitate poet consenter en marriage, et ses issues seront legitimates." By the middle of the eighteenth century, however, a more rational rule had clearly been established. It was settled in conformity with the civil law that idiots, being incapable of giving the consent which is the basis of marriage, were *ipso facto* incapable of marrying, and that the marriage of a lunatic was absolutely void unless it had been contracted during a lucid interval. In the reign of George II this doctrine was carried to a rather absurd extent. It was provided that the marriage of lunatics and persons under frenzies (if so found by inquisition or committed to the care of trustees by any Act of Parliament), contracted before they were declared of sound mind by the lord chancellor or the majority of such trustees, should be totally void by the operation of the statute alone and without the necessity of any proceedings for declaration of nullity being taken in the Ecclesiastical Courts. It is stated that this Act was passed to meet the case of Mr. Newport, the natural son of the Earl of Bradford, who had left him a very large fortune, with remainder to another person. It remained on the statute book till 1873, since when the lunatic so found, and the lunatic not so found, by inquisition have been, as regards their capacity to marry, on the same footing. The modern English law may be stated thus: marriage, being the voluntary union for life of one man and one woman to the exclusion of all others (Hyde *v.* Hyde, 1 P. and M. 133. *Re* Bethell, L. R. 38 Ch. D. 394), can be validly entered into by such persons only as are capable at the time of understanding its nature and comprehending its effects as above described.

It may be interesting to refer for a moment to *re* Bethell as illustrating the English legal idea of marriage. Christopher Bethell, whose domicile was English, went to South Africa in 1878, and afterwards resided at Mateking in Bechuanaland. In 1883 he went through a ceremony of marriage with Teepoo, a woman of the Baralong tribe, among whom polygamy is allowed, and lived with her for some time as his wife. He was killed in the colony in 1884, and about ten days after his death Teepoo gave birth to a female child. Bethell, in a document which he wrote and signed in 1883, made some

provision for Teepoo and for her child (if she had one) out of the proceeds of the sale of his property in the colony. He refused, however, to be married to Teepoo in church, on the ground that he was a Baralong. He never mentioned the marriage to any of his friends in England, and there was no evidence that he ever introduced or spoke of Teepoo as his wife; he called her "that girl of mine." Bethell was in receipt of about £600 a year — the rents of estates in England — devised to him for life with remainder to his lawful child or children. Mr. Justice Stirling held that the union of Christopher Bethell and Teepoo was not a marriage in the Christian, but in the Baralong sense, and that it was not a valid marriage according to the law of England. His Lordship said: "I conceive that, having regard to the authorities, I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage and the parties to it may there be designated man and ~~wife~~, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom and be in its essence *the voluntary union for life of one man and one woman to the exclusion of all others*." One of the elements of a true marriage was present in Bethell's case — the agreement to live together as man and wife. The other, "to the exclusion of all others," was abstract; Bethell did not commit polygamy, but under the Baralong law he might have done so if he chose.

Now let us see how the judges have applied this definition of marriage in the law of lunacy. In Harrod *v.* Harrod (1834, 1. K. and F. 4) the question at issue was the validity of the marriage of a woman named Harrod. She was deaf and dumb and extremely dull of intellect, had never been taught to read or write, understood the signs and gestures of those persons only who were constantly living with her, and was unable to tell the value of money. Upon the other hand, the evidence claimed that she did understand the value of money. "She had been residing previously," said Vice-Chancellor Page Wood, "with a married couple, and must have known that they lived together in a manner differently from unmarried persons like herself. She remained up to the time of her own marriage perfectly respectable and chaste; she went through the solemnity in which the hands of herself and her husband were joined. A child was born in due time and not before. That shows that she was aware that she had performed a solemn act, imposing new duties, and she was constant to her husband during the rest of her life — a period of nearly thirty years." His Lordship held therefore that the marriage was valid.

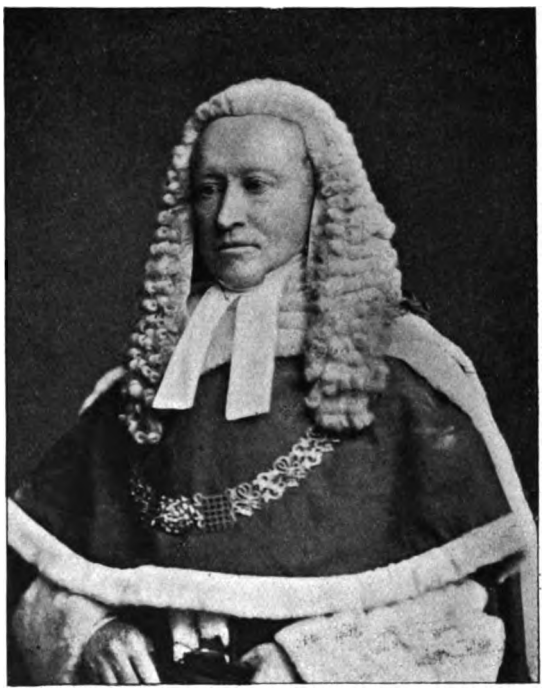
The following cases were decided by the late Sir James (afterwards Lord) Hannen.

In Hunter *v.* Edney (1881, 10 P.D. 93) the parties were married on the 17th of March, 1881. There was clear evidence that the wife, whose mental state was in question in the suit, was in an abnormally excited and troubled condition on the morning of the marriage. She received her future husband coldly, at first refused to go to church and was continually rubbing her hands. After the ceremony she was with difficulty persuaded to change her dress to go away. When the newly married couple reached their apartments in London, she refused to have supper and said that she did not want to get married, and that she was false. She lay down on the bed in her clothes and for three hours refused to undress. The marriage was not consummated. In the morning she asked her husband to cut her throat. A medical man was called in, who pronounced her to be insane, and this view was subsequently confirmed by Dr. Savage of Bethlem Hospital, who reported and gave evidence at the trial that in his opinion the patient was suffering from melancholia, owing in the first instance to hereditary insanity excited

by the idea of marriage. Sir James Hannen granted a decree of nullity.

In Cannon *v.* Smalley, on the other hand, although the wife was shown to have been dull and melancholy before her marriage and was clearly insane ten days after it, the court held that there was no evidence to show that she was incapable.

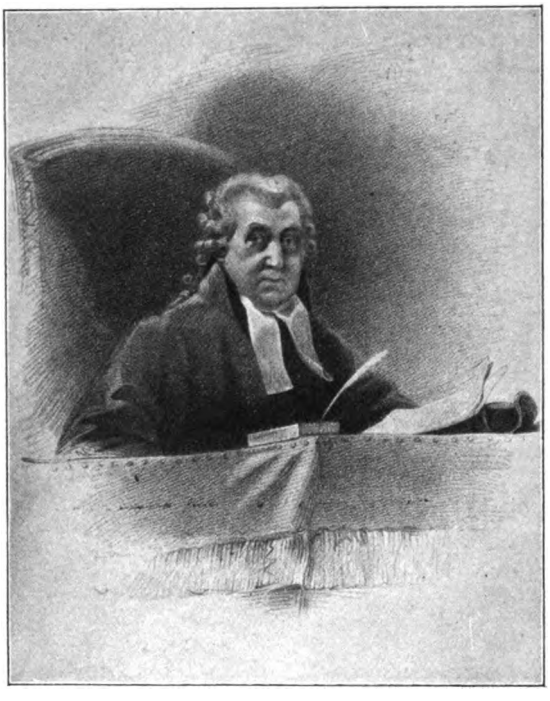
Durham *v.* Durham is a famous case not only intrinsically but because it settled the law on its present basis. This was a petition by the Earl of Durham for a declaration of the nullity of his marriage with the Countess of Durham, *née* Ethel Elizabeth Louisa Milner. The parties were married on the 28th of Oct., 1882; and by the spring of the following year Lady Durham was undoubtedly insane. The question, however, was whether she was insane at the time of the marriage. Sir James Hannen answered this question in the negative. He held that the lady was of less than average intellectual power, that she was shy, and that her affections were set on another gentleman before she became engaged to the petitioner, and these circumstances accounted for the strangeness in her conduct before marriage from which the Earl of Durham asked the court to infer insanity. "I accept," said his Lordship, "for the purposes of this case, the definition which has been substantially agreed upon by counsel, viz., a capacity to understand the nature of the contract of the duties and responsibilities which it creates. . . . It appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and a woman to live together and love one another, as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words 'having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman.' . . . A mere comprehension of the words of the promises exchanged is not sufficient. The minds of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into." It is here that we stand at the present day.



LORD CHIEF JUSTICE COCKBURN.

(2) Insanity is a bar to criminal proceedings, as we have already seen. What is its effect upon divorce? The answer to this question depends on whether divorce proceedings are criminal. This point was raised for the first time in Mordaunt *v.* Mordaunt (L. R. 2 Sc. and Div. App. 374). On April 28, 1869, Sir Charles Mordaunt presented to the divorce court a petition for the dissolution of his marriage with Lady Mordaunt, on the ground of her adultery. Two days afterwards the citation was duly

served on Lady Mordaunt, whose solicitors entered an appearance for her, but on a representation supported by affidavit that she was insane, the court on July 27, 1869, appointed her father, Sir Thomas Moncrieffe to act as guardian *ad litem*. Upon the plea of Lady Mordaunt's alleged insanity, issue was joined and the question was tried by a special jury, who found that Lady Mordaunt was, at the time when her husband's petition was served upon her and had been ever since, in such a state of mental disorder as to be unfit and unable to answer the petition or plead. The question then arose whether this verdict barred her husband's right to a divorce. The House of Lords on the advice of a majority of the judges held that it did not, as divorce proceedings were not criminal according to the law of England. This principle was in 1880 applied to the lunacy of a petitioner also (Baker *v.* Baker, 5 P. D. 142; 6 P. D. 12). It need hardly be said that the supervening insanity of a husband or wife is not ground for divorce.



LORD STOWELL.

(3) Curiously enough, the question whether insanity at the time of committing adultery is a defense to a petition for divorce never came before the courts till 1893. It was then raised in the case of Hanbury *v.* Hanbury, which came before the court of appeal, and in which it was held that the question would practically be determined by the rules in Macnaughton's case.

UNDUE INFLUENCE.

The English law of undue influence touches the law of lunacy so closely that it deserves a place in the present series. Practically it is contained in two groups of cases.

1. The first consists of those in which there has been some unfair and overreaching conduct, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. Lyon *v.* Home (1868 L.R. 6 Eq. 655), which formed the subject of one of the "Old World Trial" series in THE GREEN BAG, is an illustration of this rule. Other analogous cases are Monck *v.* Hilton (L.R. 2 Ex. D. 268), where a spiritualist was convicted as a rogue and a vagabond and sentenced to three months' imprisonment for palmistry and spirit rapping (in his attempted flight from justice the prisoner Monck left behind him his instruments of trade — gloved models of the human hand, elastic tapes and wires, phosphorus and other accessories); and Nottidge *v.* Prince (6 Jur. N. S. 1066); the Bridgewater Agapemone case, which, in the language of Mr. Hume Williams (unsoundness of mind, p. 60), "illustrates how far that hysterical exaltation of mind to which women are so often liable can be utilized by saintly adventurers for their own benefit."

Mr. Prince had been a curate in the

Church of England, but had been deprived of his license by his bishop. He made the acquaintance of four young ladies, the Misses Nottidge, with whose sympathy — and money — he proceeded to found a religious establishment in which he was the central — if not the sole — object of devotion. Indeed, he pretended that his own spirit was dead and that his body was the tabernacle of God, inhabited by the Holy Ghost. Three of his female worshipers he gave in marriage to three male followers of his own. The fourth, Miss Louisa Nottidge, was put in an asylum by her relatives to keep her out of his clutches, but Prince, moved of course by the Holy Spirit, applied to the commissioners in lunacy for her release, and, as her religious delusions were her only overt sign of mental unsoundness, released she was. She returned to Prince and made over to the *Agapemone* a sum of more than £5,000 invested in consols. After her death, her administrator intervened, and in spite of a most skillful and ingenious presentment of his case by Mr. Bacon, Q.C., then the most dexterous of chancery advocates and afterwards, as vice-chancellor, the most witty — and inaccurate — of equity judges, Vice-Chancellor Stuart compelled Prince to disgorge. Another gentleman, of the same character, induced seven credulous girls to believe that they were destined to marry him and comfort him in his ministry. Notwithstanding his confident prophetical utterances to the contrary, the union was in several cases followed by discreditable and compromising results, and, if we recollect aright, the bigamist ultimately suffered imprisonment for his misconduct. Enough has now been said of this class of cases.

LORD CHANCELLOR HATHERLEY.

2. We pass now to the second group. It consists of cases where the relations between the donor and the donee have at, or shortly before, the execution of the gift been such as to raise a presumption that the donee had influence over the donor. Here the court throws upon the donee the burden of proving that he has not abused his position and that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice and was removed from the influence of the donee when the gift to him was made. Thus in Huguenin *v.* Baseley (1807, 14 Ves. Jun. 273) a voluntary settlement by a widow upon a clergyman, who had not only acquired considerable influence over her, but was intrusted by her with the management of her property, was set aside. The *ratio decidendi* here was, and in similar cases has been, that a confidential relation being proved to exist between the donor and donee, the court will presume that it continued up to and at the time of the gift, unless this influence is clearly disproved by the donee. In Allcard *v.* Skinner (1887,

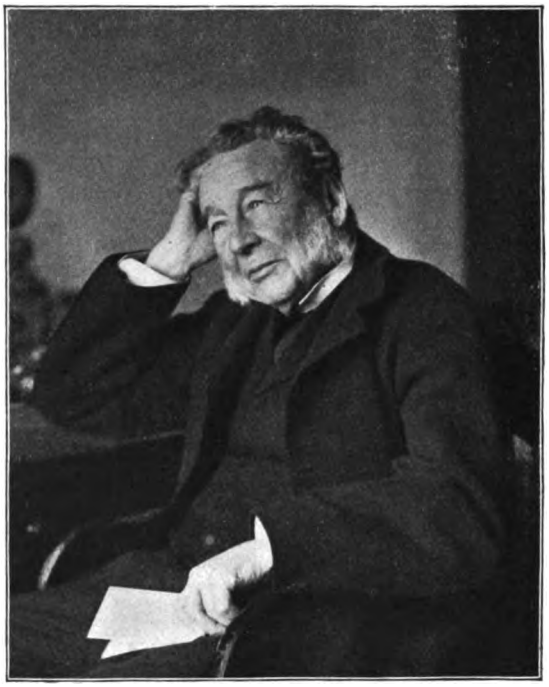
36 Ch. D. App. 185), to which further reference will be made immediately, Lord Justice Lindley qualified this statement of the law as follows: "When a gift is made to a person standing in a confidential relation to the donor, the court will not set the gift aside, if of a small amount, simply on the ground that the donor had no independent advice. In such a case some proof of the exercise of the influence of the donee must be given."

LORD ESHER.

Allcard *v.* Skinner was an exceedingly remarkable case. In June, 1868, Miss M. A. Allcard, a young lady of thirty-five, was desirous of devoting herself to good works, and was introduced by the Rev. D. Nihill, then her spiritual director and confessor, to Miss Skinner, the superior of a Protestant institution known as "The Sisters of the Poor." Mr. Nihill and Miss Skinner were the founders of the sisterhood. Mr. Nihill was from its inception confessor of the sisterhood, and drew up all the rules by which it was governed. Miss Allcard became first a "postulant" of the sisterhood, then a "novice," and ultimately a professed member, in which capacity she bound herself to observe *inter alia* the rules of poverty, chastity and obedience. The rule of poverty began in the following terms: "Behold then the three strong walls that shall keep safe within your hearts the spirit of poverty. They are: 1. The cutting off of possessions; 2. Hardness of life; 3. Love of the poor." It then went on to enjoin the absolute giving up of all individual property, whether it were given up to the relatives or friends of the member, or to the poor, or to the sisterhood itself, and that if it were given up to the sisterhood it should not be required or reclaimed by the members on leaving the sisterhood. All the forms of gift in the schedule to this rule were in favor of the sisterhood. The rule of obedience required the member to obey the voice of the superior as that of God, and under a head "Common Rules" was a provision that no sister should seek advice of any extern without the superior's leave.

In 1870 Miss Allcard became entitled to considerable property, under her father's will, in part of which she had an absolute interest and in part she had an estate for life with power of disposition by will. Within a few days after becoming a member she made a will bequeathing all her property to Miss Skinner, and in 1872 and 1874 handed over and transferred to her several large sums of money and stock. In May, 1879, Miss Allcard left the sisterhood, and immediately revoked her will, but made no demand for the return of her property until 1885, when she commenced an action against Miss Skinner, claiming restitution of it on the ground that it was made over by her while acting under the paramount and undue influence of Miss Skinner and without independent and separate advice. The case was tried before Mr. Justice Kekewich and ultimately reargued in the court of appeal. At the trial Sir

Charles Russell, Q. C., now lord chief justice, Mr. R. B. Finlay, Q. C., and Mr. F. B. Palmer, a leading authority on company law, appeared for the plaintiff, while Sir Edward Clarke, Q. C., then solicitor general, and Mr. Warmington, Q. C. were counsel for the defendant. In the court of appeal Sir Horace, now Lord Davey, was substituted for Sir Charles Russell. The case was argued with great ability on both sides,—Sir Edward Clarke's speech being especially brilliant. Both courts held (although Lord Justice Cotton dissented) that on leaving the sisterhood Miss Allcard would have been entitled to restitution of all property then in Miss Skinner's hands, but that she had barred her claim by *laches* in asserting it.



VICE-CHANCELLOR BACON.

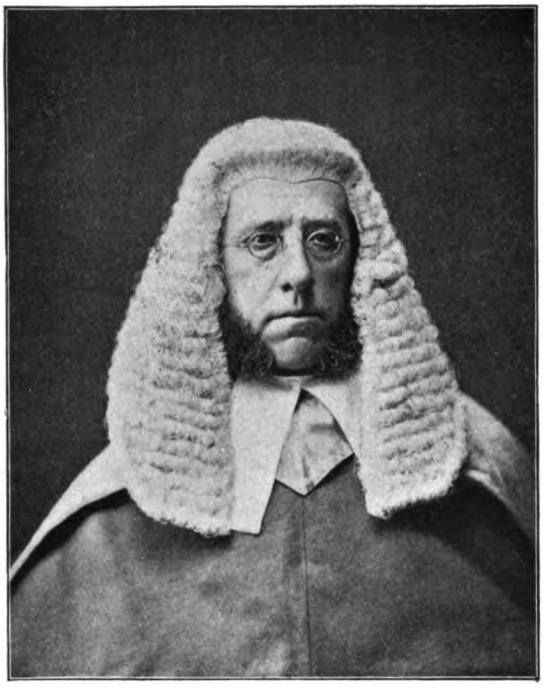
The law of undue influence in regard to gifts *inter vivos* does not apply to testamentary dispositions. In the former case undue influence is presumed from certain relationships, and it is for the donee to rebut the presumption. In the latter, the mere existence of a relationship which renders undue influence possible will not invalidate a testament in favor of the person who is in a position to exercise such influence. It must be shown that he did exercise it. The burden of proof therefore is different. The reason for the difference is plain and satisfactory. In the case of gifts and contracts there is a transaction in which the person benefited at least takes part, and in calling upon him to explain what that part was, the court merely asks him to disclose facts within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in or even knowledge of the act, and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, would be manifestly unfair. In Parfitt *v.* Lawless (1872, 2 P. & D. 469), for instance, a Roman Catholic priest had resided with a testatrix and her husband for many years as chaplain and for part of the time as confessor. He was confessor when the will—under which he became the testatrix's residuary legatee—was made. There was no evidence, however, of undue or improper influence, and accordingly Lord Penzance declined to let the case go to a jury. Parker *v.* Duncan (1890) was a case of a different character. There the will of a female pauper was propounded by the chairman of the Board of Guardians of the Union in which she resided. The property consisted of policies of insurance upon the life of the deceased, and these the testatrix disposed of absolutely to the plaintiff. It was shown that he had himself taken the alleged instructions for the will and got it prepared by his own solicitor whom he refused to allow to see the testatrix. Of the attesting witnesses one was a friend of the plaintiff, the other was a nurse in the workhouse infirmary, in which

the testatrix had died. The will was declared invalid.

A curious case, where a marriage was set aside on the ground of undue influence, will be found in the English Law Reports, 12 Probate Division 21.

INEBRIETY.

The English law of inebriety in relation to crime has had the following history. We start with Coke's doctrine that the drunkard is a *voluntarius dæmon* who "hath no privilege thereby but what hurt or ill so ever he doeth his Drunkenesse doth aggravate it." At the hands of Lord Hermand, a Scotch judge of the old school, which was happily displaced at the beginning of the present century by the school of Jeffrey, Cockburn and Moncrieff, Coke's doctrine received a somewhat curious interpretation. Two young gentlemen who were great friends went together to the theater in Glasgow and thereafter supped at the lodging of one of them. They passed the whole night drinking rum. In the morning they quarrelled: one was fatally stabbed, and the other was in due course tried and convicted of culpable homicide. The majority of the judges were in favor of only a short sentence of imprisonment. But the voice of Hermand was loud for transportation. Himself an ardent drinker, he felt that the reputation of drunkenness was at stake. "We are told," he said, "that there was no malice, and that the prisoner must have been in liquor. In liquor! Why, he was drunk! And yet he murdered the very man who had been drinking with him! They had been carousing the whole night, and yet he stabbed him, after drinking a whole bottle of rum with him! Good God, my Lords; if he will do this when he's drunk what will he do when he's sober?"



MR. JUSTICE DAY.

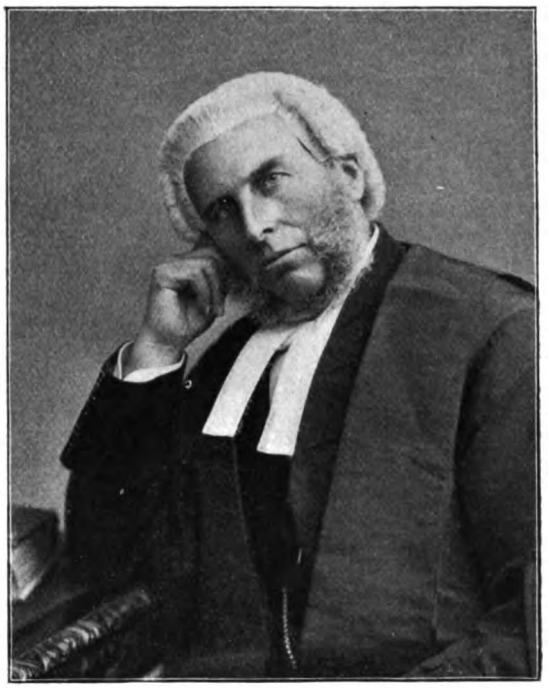
Happily the *voluntarius dæmon* theory, even when fortified by the ingenious reasoning of Lord Hermand, did not take permanent root in the criminal law of this country, and, curiously enough, the first effective blow which it received came from the hand of one of the sternest of Scotch criminal judges—Lord Deas. An Aberdeenshire proprietor, habitually and irreclaimably addicted to drinking, caused the death of his wife by stabbing her with a carving knife, admittedly on very slight provocation. He was tried before Deas. The defense was that at the time of the alleged act the prisoner was insane. There was, in fact, no considerable conflict of evidence, medical or other. The habit of constant drinking to excess, carried on for more than twenty years, had produced, not, indeed, well-marked insanity, but only such an amount of weakness of mind as was apparent to several witnesses, and even to his own lawyer in going over his correspondence, so that he regarded him at times as not quite sane. The facts of the case showed that the homicidal

assault upon his wife took place when he had had liquor but was not obviously drunk, and that it was probably provoked by his displeasure at her having hidden a pint bottle of whiskey and some money on the night in question to prevent him from getting more drink.

Lord Deas said: —

"'There remained the question whether the offense was anything short of murder. It was difficult for the law to recognize it as anything else. On the other hand, however, he could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offense. The chief circumstances for their consideration with this view were, first, the unpremeditated and sudden nature of the attack; second, the prisoner's habitual kindness to his wife, of which there could be no doubt, when drink did not interfere; third, there was only one stab or blow — this, while not, perhaps, like what an insane man would have done, was favorable to the prisoner in other respects; fourth, the prisoner appeared not only to have been peculiar in his mental constitution, but to have had his mind weakened by successive attacks of disease. It seemed highly probable that he had a stroke of the sun in India, and that his subsequent fits were of an epileptic nature. There could be no doubt that he had had repeated attacks of delirium tremens, and if weakness of mind could be an element in any case in the question between murder and culpable homicide, it seemed difficult to exclude that element here. The state of mind of a prisoner might, his lordship thought, be an extenuating circumstance, although not such as to warrant an acquittal on the ground of insanity; and he could not, therefore, exclude it from the consideration of the jury here, along with the whole other circumstances, in making up their minds whether, if responsible to the law at all, the prisoner was to be held guilty of murder or of culpable homicide.'

"The jury found the prisoner guilty of culpable homicide, and he received a sentence of ten years' penal servitude."



MR. JUSTICE KEKEWICH.

This precedent has been followed by English judges in later times. The law may probably be stated thus: —

1. Drunkenness may properly be, and is, taken into account where the question is whether a certain act was done with premeditation, or with sudden heat and impulse, or where the prisoner acted in self-defense or under provocation, and the question is whether the danger apprehended, or the provocation, was sufficient to justify his action.

2. It was at one time laid down that drunkenness is no excuse for crime unless the mental derangement resulting from it is fixed and continuous. But Mr. Justice Day dissented from this view in Reg. *v.* Baines (1886). Counsel for the prosecution submitted that a state of disease brought about by a person's own act, i.e. *delirium tremens*, was no excuse for committing a crime unless the disease so produced was permanent. His Lordship said: "It is immaterial whether the insanity is permanent or temporary," and added, "I have ruled that if a man were in such a state of intoxication that he did

not know the nature of his act or that it was wrongful, he would be excusable."

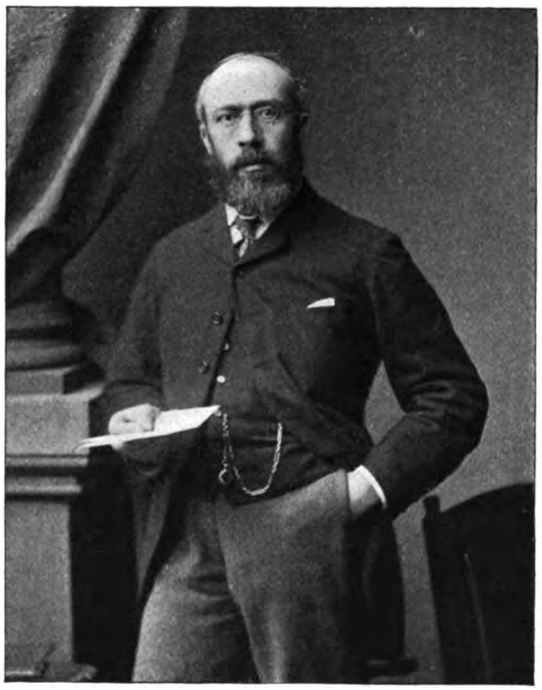
3. Involuntary drunkenness resulting from a temporarily diseased condition or from insane predisposition will exempt from criminal responsibility. On this point the following ruling by Chief Baron Palles may be cited: "If a person from any cause — say long watching, want of sleep, or depravation of blood — is reduced to such a condition that a smaller quantity of stimulant will make him drunk than would produce such a state if he were in health, then neither law nor common sense can hold him responsible for his acts, inasmuch as they are not voluntary but produced by disease." (Reg, *v.* Mary, R. 1887. Kerr's Inebriety, 2d edit. 395.) In Reg. *v.* Mountain (April. 1888), Baron Pollock laid down a similar rule in the case of insane predisposition. Students of "Pollock on Contracts" — and what American lawyer does not belong to the category? — do not need to have the history of English law in regard to the contracts of inebriates placed before them in any detail. It has passed through three stages. The first was governed by the common law rule that no man of full age can be allowed to stultify himself. The drunkard was therefore not allowed to set up his drunkenness as a defense to an action of contract. In the second stage the contracts of inebriates were held either void for incapacity or voidable for fraud, according to circumstances. The modern rule was settled in Molton *v.* Camroux (18 L. J. Ex. 68, 356), and Matthews *v.* Baxter (L. R. 8 Ex. 132). It may be stated thus: A contract entered into by a person apparently sober, and not known either actually or constructively by the other contracting party to be intoxicated. is valid if fair and *bona fide*, and especially if wholly or partly executed so that the parties cannot be restored to their original position, In Matthews *v.* Baxter, A had bought houses and land of B at a public auction. A was at the time, and to the knowledge of B, so drunk as to be incapable of transacting business. It was held by the court of exchequer that A's contract was not void, but voidable only, and that he might ratify it when sober. An interesting rider to this doctrine in regard to the burden of proof has recently been enunciated by the court of appeal, in the case of The Imperial Loan Company *v.* Stone (8 Times L. R., 408). 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 the opinion that the onus lay *upon the plaintiffs* to show that they did not know that the defendant was of unsound mind. This decision was, however, reversed by the court of appeal. "If one went through all the cases," said Lord Esher, with characteristic boldness, "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 afterward alleges that he was insane at the time he entered into the contract — I mean an ordinary contract — and that he did not know what he was doing and proved 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 about." This applies to drunkenness equally with insanity.

The law of England already provides for

the *voluntary* committal of habitual drunkards to licensed retreats, and provision will soon be made for their *compulsory* committal to such institutions.

TESTAMENTARY CAPACITY OF THE INSANE.

The law of England as to the testamentary capacity of the insane falls naturally into three chapters: 1. From the earliest period till 1848 each case was determined upon its own merits. 2. From 1848 to 1870 the *dictum* of Lord Brougham in Waring *v.* Waring (6 Moor. P. C. 341) that any, the least degree of, insanity, vitiated a will, was supreme. 3. Since the judgment of Sir Alexander Cockburn in Banks *v.* Goodfellow (L.R. 5 Q. B. 549), testamentary capacity has once more become a question of fact.



DR. SAVAGE.

(1) Perhaps the earliest definition that we have of testamentary capacity, and not the least satisfactory, was given by the Court of Star Chamber in Combe's case (Moor. 759, 3 Jac. I.), "that sane memory for the making of a will is not at all times when the party can speak *yes* or *no* or has life in him, nor when he can answer anything with sense; but he ought to be of judgment to discern and to be of perfect memory; otherwise the will is void." A curious instance of this kind — sometimes alleged, by the way, to be apocryphal — is the following: In the days of King Henry VIII, a monk came to a gentleman who was dying, to make his will and asked him whether he would give such and such lands to the monastery. The gentleman answered, "Yea." Then the monk, pursuing his advantage, inquired whether he would give such and such estates to such and such pious uses. The testator answered "yea" to them all. Then the heir at law thought it was time to interfere. He asked the dying man if the monk were not a very knave, who answered, "Yea." It is needless to say that at no period in English legal history could a will obtained under such circumstances have been admitted to probate.

In the time of Charles I we find a definition of "judgment to discern" in the law testamentary. "To a disposing memory, it is necessary there be an understanding judgment, *fit to direct an estate*." In the reign of Charles II (see "Nisbet's Doubts," 207) "a will made by a sickly child, newly *pubes*, and without the knowledge of his curators, in the absolute favor of the nurse in whose care he had been, was reduced as inofficious." The next leading case to which we shall refer is Dew *v.* Clark (1826, 3 Add. 79–209, and Add. 123 *et seq.*). The material facts were these: Ely Stott died in 1821 leaving a widow, and a daughter by his first wife. His personal property amounted to about £40,000. By his will, made in 1818, Stott gave to his daughter, to whom he had conceived a violent and irrational hatred, a life interest only in a comparatively small portion of his estate. Sir John Nicholl held that this

unfounded antipathy had prevented the testator from properly appreciating his daughter's claims upon him and that the will must be pronounced against. A strange case of a valid will being made by a lunatic patient in an asylum was Cartwright *v.* Cartwright (1793–95. 1 Phillim 90, 122). On Aug. 14, 1775, the patient was supplied with pen, ink and paper by Dr. Battie, the asylum superintendent, to quiet and gratify her, although he considered her at the time quite incapable of making a will. Her attendants retired but watched her. She was so agitated and furious that they were afraid she would do some mischief to herself. At first she wrote upon several pieces of paper, and got up in a wild manner, tore them and threw them in the fire. Then after walking up and down the room many times, muttering and speaking to herself, she wrote the paper which was the will in question. Probate was granted on the ground that the will was originated and executed by the testatrix herself and that its provisions were wise and orderly. This case has sometimes been quoted in support of the assertion that the instrument itself is the best proof of the testator's capacity or the reverse. In point of fact it lays down no such principle, as Sir William Wynne, who tried the case, took all the circumstances into account in making up his mind upon it.

(2) In 1848 the case of Waring *v.* Waring came before the privy council. The point at issue was the validity of the will of Sarah Gibson, an elderly lady who was penurious, eccentric, irritable and quarrelsome, and who had disinherited her brother under an insane delusion that he had joined the Roman Catholics, towards whom she entertained a strong aversion. There was obviously quite enough in these circumstances to bring the case within the *ratio decidendi* of Dew *v.* Clark. But Lord Brougham, who was nothing if not metaphysical, went out of his way to declare that the mind, being one and indivisible, if unsound upon a single subject could not be really sound upon other subjects, and impliedly held that a person really insane could not make a will. In Smith *v.* Tebbitt, where the testatrix thought that her sister, to whose prejudice the will in dispute was made, was a child of the dead for whom the Deity had reserved the hottest place in hell, Lord Penzance, then Sir J. P. Wilde, still further expanded Lord Brougham's inaccurate theory. "If disease," he said, "be once shown to exist in the mind of the testator, it matters not that it be discoverable only when the mind is addressed to a certain subject to the exclusion of all others, the testator must be pronounced incapable. The same result follows though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the court."

(3) In 1870 Sir Alexander Cockburn brushed away these webs of metaphysical subtlety in his judgment, in the case of Banks *v.* Goodfellow. Compendiously stated the facts were these: A had made his will in favor of B, his niece, who had lived with him for many years and to whom he had always expressed an intention to leave his property. At the time of making the will he was under a delusion that a man named Featherstonehaugh, to whom he had borne a violent hatred and who was actually dead, was still alive. This man had no claim whatever upon A. The jury found in favor of the will, probate was granted and the Court of Queen's Bench refused to set aside the verdict. "It is essential," said Chief-Justice Cockburn, "to the exercise of the powers of making a will that, the testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion

shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made." In the case of Boughton *v.* Knight, Sir James Hannen laid down the law in similar language. "There must be a memory to recall the several persons who may be fitting objects for the testator's bounty and to comprehend their relationship to himself and their claim upon him; a sound mind does not mean a perfectly balanced mind, free from all influence of prejudice, passion or pride: the law does not say that a man is incapacitated from making his will if he proposes to make a disposition of his property moved by capricious, frivolous, or even bad motives. Eccentricities, as they are commonly called, of manner, of habit, of life, of amusements, of dress, and so on, must be disregarded; but there is a limit beyond which one feels that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself."

It may be rather interesting to contrast English with American law on this subject before concluding the present series. Each had a preliminary period in which testamentary capacity was a question of fact. Each has now arrived at the same goal. Testamentary capacity is a question of fact once more. Each has had its metaphysical period in which an external standard was set up for the determination of a testator's power. But whereas the English courts held insanity to be so subtle and all pervading a disease that any, the least degree of it, was fatal to civil capacity, the American courts seem at one time to have leaned to the view that nothing but absolute idiocy or *a-mentia* would destroy it. Take, for instance, the case of Alice Lispenard (26 Wendell, 255). She was mentioned in her father's will as an imbecile: was washed and dressed like a child, even when thirty-five years of age; her head wagged from side to side; she dribbled at the mouth; had sudden fits of anger so that she would strike children; would sit for hours in front of a window and continue in that position even after the shutters were closed; had a vacant stare; drank beer and wine, and was often intoxicated, even in the middle of the day. Senator Verplanck said: "To establish any standard of intellect or information beyond the possession of reason in its lowest degree, as in itself essential to legal capacity, would create endless uncertainty, difficulty or litigation, would shake the security of property, and wrest from the aged and infirm that authority over their earnings and savings which is often their best security against injury or neglect .... the law, therefore, holds that weak minds differ from strong ones only in the extent and power of their faculties; but unless they betray a total loss of understanding or idiocy or delusion, they cannot properly be considered unsound." This was the Waring *v.* Waring of American law with a different inference from the common postulate. American law, too, found its Banks *v.* Goodfellow in the Parish will case (Delafield *v.* Parish, 25 N. Y. 9), which is too familiar to American lawyers to need exposition, even if an English lawyer were competent to expound it.

GOVERNMENT BY INJUNCTION.

By Ben. S. Dean.

A GREAT political party, in its platform of principles, declared, in 1896, that "We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions; and we especially object to government by injunctions as a new and highly dangerous form of oppression by which Federal judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners."

This language, directed against the interference of the Federal courts, supported by the regular army, on the occasion of the great Pullman strike in 1894, gains a new significance from the recent action of Federal courts in the great coal strike, and it is emphasized by the fact that in nearly every State where conventions have been held, this platform has been reaffirmed by the party which first promulgated it, and in many cases with special reference to its new application. It thus becomes, if not a leading issue, one of great collateral importance, and one which is destined to play no inconsiderable part in coming campaigns. It is important, therefore, that the matter be impartially considered at a time when the people are prepared to give it candid consideration, to the end that in the effort to correct abuses, we shall not go to the extreme of creating a greater evil than that which we have been called upon to endure.

There is no doubt that "the arbitrary interference by Federal authorities in local affairs" is a violation of the Constitution of the United States. Not only is no such power granted (and the powers of the Federal Constitution are entirely dependent upon their delegation) but it is expressly provided that the United States shall protect each of the States against invasion; and, on "the application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." If the legislature, or the executive, fails to call upon the Federal government, it can have no authority for interfering in "local affairs," and this brings us to the consideration of what may be fairly understood as belonging to "local affairs." The mere fact that violence is confined to a given locality does not of itself constitute "domestic violence," or "local affairs." It must be a matter of purely local concern to bring it within that definition. It is possible to conceive of a condition of actual public warfare, in which the interests of the entire nation might be involved, and which was yet within a given locality, and within the jurisdiction of a single State. It would then be the duty of the Federal government to interfere, and to extend its strong arm, even though the governor and the legislature refused or neglected to ask for this aid. This was practically the condition existing in Chicago at the time that the Federal authorities took it upon themselves to interfere. The Constitution of the United States gives to Congress the power to "regulate commerce with foreign nations, and among the several States," and, acting under this authority, Congress has enacted what is known as the Interstate Commerce Law, giving a general superintendence of the railroads engaged in interstate commerce to a commission. The strike, which found its focus in the city of Chicago, and which was nominally directed against the Pullman Palace Car Company, assumed such proportions, and embraced so wide a field of activities, that it undertook to, and actually did, interfere with the transit of

interstate commerce, to an extent which brought it within that salutary rule of equity which justifies the interposition of a writ of injunction, when a great and irreparable injury is to be done, for which there is no adequate remedy at law. The injunction issuing out of the Federal court went no further than this; it simply restrained the strikers, through their leaders, from interfering with interstate commerce. It did not prevent them from taking any action which might be permitted by the State, in matters over which the State had authority, but it did forbid them standing along the great national arteries of trade and intercepting the produce of the manufacturers and farmers from States remote from the scene of the trouble to the consumers in other States, and if the exercise of this undoubted right operated to embarrass the progress of a strike which had reached the stage of a riot, which the State authorities showed no disposition to quell, it was but one of the incidents of that power against which right thinking people have no cause to complain. This was not an "arbitrary interference by Federal authorities in local affairs"; it was the legitimate assertion of a power exclusively within the jurisdiction of the Federal government, and the mere fact that it was located in Cook County, in the State of Illinois, in no wise affected its general character.

It should, however, be kept in mind, in considering the question of "government by injunction," as it is presented by the more recent cases, and especially in West Virginia, that the injunction which is looked to for a precedent in dealing with labor difficulties was directed, not to the merits of the strike; not to the interference with the liberty of those engaged in the enterprise, in so far as it related to the right of individuals to assemble, and to take action which they believed to be intended to accomplish their purpose; but purely and simply to the preservation of the rights of the public in the free transit of their goods over the interstate highways, the interruption of which would be attended with great and irremedial damages to people in other States, and who had no interest in the difficulty which it was sought to settle. In other words, the injunction issued at Chicago was confined to its legitimate sphere; to the preservation of the property rights of those who were engaged in interstate commerce, and who had no adequate remedy at law for the injuries which they must have sustained had the striking railroad employees been allowed to interrupt its passage through the city of Chicago en route to its destination.

"An injunction," says Bouvier's Law Dictionary, "is a prohibitory writ, specially prayed for by a bill, in which the plaintiff's title is set forth, restraining a person from committing or doing an act (other than criminal acts), which appear against equity and conscience." Or, to put it in another form, an injunction is a part of the machinery of courts of equity, dealing exclusively with property and civil rights, and is not to be invoked except in cases where there is no adequate remedy at law, or where the damages are of such a nature that they cannot be fully compensated. When, therefore, an injunction is issued for the primary purpose of preventing an individual, or a body of individuals, from committing a crime, it is usurping a power, and under the pretense of punishing for the contempt, is in effect punishing the crime, without allowing the prisoner the benefits of his constitutional right to a trial by jury.

There is no warrant for such injunctions, and especially so when they are directed against the constitutional right of citizens "peaceably to assemble, and to petition the government for a redress of grievances," a clause found in spirit, not alone in the Federal Constitution, but in nearly every State in the Union. "The subject matter of the jurisdiction of equity being the protection of private property and of civil rights," says James L. High in his great "Treatise on the

Law of Injunctions," "courts of equity will not interfere for the punishment or prevention of merely criminal or immoral acts, unconnected with violations of private right. Equity has no jurisdiction to restrain the commission of crimes, or to enforce moral obligations and the performance of moral duties, nor will it interfere to prevent an illegal act merely because it is illegal. And, in the absence of any injury to private rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes or the commission of immoral or illegal acts."

"If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property," says Chancellor Kent in the case of the Attorney-General *v.* Utica Insurance Company (2 Johns. Ch. 371) "it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right, resting in equity, or where the remedy at law was not sufficiently adequate. Nor should the process of injunction be applied, but with the utmost caution. It is the strong arm of the court, and to render its operation benign and useful it must be exercised with great discretion, and when necessity requires it. . . . Thus, in Brown's case, in 2 Vesey, 414," continues the learned chancellor, "a motion was made for an injunction to stay the use of a market, and Lord Hardwicke said it was a most extraordinary attempt, and that the plaintiff had several remedies which he might use. He said it would cause great confusion to bring into contempt, upon the injunction, all persons who might use the market; and that if the court ought to interfere at all, it would be after the title was established at law." Quoting Lord Eldon (Attorney General *v.* Nichol, 16 Vesey, 338) on an information filed to restrain the defendant from obstructing the ancient lights of a hospital, the chancellor says: "I know that the court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private rights; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly for a court of equity to interfere at all, and much less primarily, by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy. The plain state of the case, then, is that an information is here filed by the attorney-general, to redress, and to restrain, by injunction, the usurpation of a franchise, which, if true, amounts to a breach of law, and of public policy. I may venture to say that such a prosecution is without precedent in this court, but it is supported by a thousand precedents in the courts of law. How, then, can I hesitate on the question of jurisdiction? The whole question, upon the merits, is one of law, and not of equity. The charge is too much of the nature of a misdemeanor to belong to this court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this, without the clearest sanction. I shall better consult the stability and utility of the powers of this court by not stretching them beyond the limits prescribed by the precedents."

"The jurisdiction of these courts, thus operating by way of special injunctions," says Mr. Justice Story in his "Equity Jurisprudence" (vol. 2, page 291), "is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence. At the same time it must be admitted that the exercise of it is attended with no small danger, both from its summary nature and its liability to abuse. It ought, therefore, to be guarded with extreme caution, and applied only in very clear cases; otherwise, instead of becoming an instrument to promote the public, as well as private, welfare, it may become a means of extensive, and, perhaps, of irreparable injustice."

In the same line are the remarks of Mr. Justice Baldwin in the case of Bonaparte *v.* Camden and Amboy Railroad Company (I Baldwin's Cir. R. 218) where he says: "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatening, so as to be averted only by the protecting preventive process of injunction."

The right of the people "peaceably to assemble" (a right inherent in all governments in which the sovereignty rests in the people) being conceded, there are but two possible conditions which could justify the courts in resorting to the process of injunction — the one to prevent their becoming a public nuisance by obstructing the highways to the exclusion of other persons, and the other to prevent such a permanent trespass as to constitute a private nuisance within the meaning of the law. So long as they were peaceably assembled they were within the special protection of the Constitution, and they had a perfect and inalienable right to the use of the highways in thus peaceably assembling, or in passing to or from such place of assembly, either singly or in a body as they might elect. The moment they ceased to be peaceable, that moment they passed beyond the jurisdiction of a court of equity, and came within the jurisdiction of the law, where each became answerable for his conduct to a jury of his peers, and not to the arbitrary will of a single judge.

It is necessary to a proper understanding of this question that we briefly consider what constitutes such a trespass, or such a nuisance, as to justify courts of equity in issuing injunctions. It is not enough that a thing shall be a nuisance to some individual, or even to a collection of individuals; it must be such a nuisance as to *permanently impair the value of property*, and by such impairment to inflict an injury upon the owner of such property for which he can have no adequate remedy at law. "When the injury complained of is not, *per se*, a nuisance, but may or may not become so," says Mr. High, "and when it is uncertain, indefinite or contingent, or productive of only possible injury, equity will not interfere."

"The principles upon which this court should proceed in granting or refusing relief by injunction in cases of this kind," says Chancellor Walworth in a quoted case, "are correctly laid down by Lord Brougham in the recent case of the Earl of Ripon *v.* Hobart (Cooper's Rep. Temp. Brougham, 333). If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, where the complainant's right is not doubtful, without waiting for the result of a trial. But where the thing sought to be restrained is not in itself noxious, but only something which may according to circumstances prove to be so, the court will refuse to interfere until the matter has been tried at law by an action." Again the same authority is quoted that "It is always to be borne in mind that the jurisdiction of this court over nuisances by injunction at all, is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of learned judges to use it, even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the plaintiff. . . It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the case of what we have been regarding as eventual or contingent nuisance."

It is evident from these careful statements of learned judges in the decision of impor-

tant questions, that the peaceable assemblage of miners in the vicinity of the coal mines, in the hope of inducing their fellow-laborers to engage in a common cause for the promotion of their own interests, was not such a nuisance as to bring them within the jurisdiction of a court of equity, or to warrant the issuing of its process to restrain them from making use of the public highways in the promotion of their cause.

We come, then, to the question of trespass, and upon this point the courts have been equally clear. They demand not only that a trespass shall be shown, but that it shall be of such a permanent nature, entailing actual irremediable damages, that the defendant may not be able to compensate for the loss. The mere encampment of a peaceable body of miners upon the surface of the ground owned or controlled by a corporation engaged in the mining of coal, while constituting a trespass, is not such a trespass as to justify a court of equity in issuing an injunction to restrain them from this action, because it cannot be shown that it is a direct injury to the property of the company — any resulting damage is contingent, and not within the jurisdiction of the court under any fair construction of its powers, as understood and exercised for centuries.

Therefore, while there can be no doubt as to the right of the court to issue an injunction, and to enforce it with the military power, restraining persons from interfering with the transportation of goods over the interstate highways, the loss or delay of which would result in irreparable damage to people in all parts of the country, or to the corporations engaged in such transportation, this action ought not to be allowed to become a precedent for interference for no other purpose than to prevent the possible commission of crimes. Crime is not within the jurisdiction of equity; it belongs exclusively to the law, and it is the high duty of good citizenship to demand that our courts shall be preserved in all of their old-time integrity, and that they shall not be prostituted to the service of selfish interests in the suppression of honest, if misdirected, efforts to ameliorate the condition of the human race.

A LEGAL RELIC.

By Melvin M. Johnson.

THE seal is perhaps the greatest relic of all our legal treasures of to-day. Its archetype must date with the first formation of society, more ancient than the prophets and the judges, more honorable than the oath and affirmation or any other custom which we practice and revere to-day. It appears concomitant with the first business transactions of mankind. Our first great book of precedents records that Judah, more than thirty-seven centuries ago, constantly carried his signet with him. (Gen. xxxviii, 18.) And it was an ordinary occurrence for Moses to affix his seal to documents. (Deut. xxxii, 34.) And when the whole Israelitish nation desired to bind itself in the most solemn manner, its officers executed a deed, saying, "And because of all this we make a sure covenant and write it; and our princes, Levites, and priests seal unto it." (Neh. ix, 38.)

In re Jeremiah approaches the nearest to modern methods of any recorded ancient transaction. For Jeremiah bought Hanameel's field, and the evidences were subscribed and sealed in the presence of witnesses. (Jeremiah xxxii, 10.) That this was the usual form of conveyancing in his

day Jeremiah attests, for he says (verse 44) that "men shall buy fields for money and subscribe evidences and seal them, and take witnesses."

But Israel has not the exclusive claim to the origin of the seal, for among the remains of Assyria, Babylon, Egypt, and all other eastern nations, seals abound. Little do we think, in the ordinary transactions of our offices, that some thousands of years hence some of them may be examined as historical curiosities. Just so when the heirs of Petepsais sold eight hundred cubits of vacant land near the city of Thebes to Neuchetes, in the reign of Cleopatra, one hundred and six years before Christ. Their sole thought doubtless was of the one talent of brass money, the consideration; but he who will may now examine the deed itself and its authenticating seal. Throughout the East every governor of a village has at this day his own private seal or signet with which he seals and authenticates his writings and decrees.

From the East the use of the seal passed to Greece. Thence to Rome, where it was ordained that the seal be affixed to a thread drawn three times through holes perforated through the parchment. And they were held so sacred that counterfeiting them was punished by the most horrible penalty known to Roman Law. (Justinian, Inst., Lib. 4; Tit. XVIII, §7.)

During the mediæval period, they were considered the main proof of the authenticity of all sorts of documents, both public and private.

But coming to the land from which our law directly takes its rise, it appears that among the Saxons seals were not in general use. For the Saxon, to whom the pen was generally a stranger, smeared his right hand with ink and laid it upon the paper under the words, "Witness my hand." Then he made the sign of the holy cross in black or gold, and a great number of witnesses attested his act. (Sheppard's Touchstone, 121.)

Then came the Norman conqueror, and legislating his own customs upon his vanquished subjects, he decreed the use of the waxen seal in lieu of the manual daub and cross but not being in the least more scholarly than the Saxon, he impressed his signet on the wax and said, "Witness my seal." So the phrase, "Witness my hand and seal," under which thousands now daily write their names, meant something then, though they are but hollow words now, in the use of which we pay unconscious tribute to our noble ancestor who used this form of attestation because it was the very best he could do. And the mark of the illiterate man is the Saxon sign of the holy cross.

All our modern law on this subject issues from the opinion of the greatest legal dogmatist of English writers, Lord Coke, who in his third Institute established for centuries the great common law definition of a seal, viz., "wax with an impression." (3 Inst. 169.)

But why this history? Merely to see for what reason this custom of sealing was introduced and revered so highly that to-day we are governed in many jurisdictions of this country by rules giving it an artificial character. It first began when king, prince, and peasant were alike illiterate. Some means of identifying their execution of documents must be adopted, and in the multifariousness of designs which could be impressed on wax was their salvation; so that a seal came to be regarded as essential to a deed, while signing was not. (Sheppard's Touchstone, 121.)

But great is precedent. And it has prevailed. So when ability to write became common, the courts dared not discard the seal, and being at a loss to ascribe sensible existing reasons therefor, have invented the fiction that the affixing of this attachment gives the document a certain solemnity and tends to excite caution in the illiterate. And since it must stand for something, they have attached to it the doctrine still followed

nearly all over our broad land, that the consideration for a sealed instrument is conclusively to be presumed.

Well did the court in Jones *v.* Logwood (1 Washington Va., 42,) say that "there is neither an act of Parliament nor an adjudged case" to substantiate this position. "It was his (Lord Coke's) opinion, merely founded on the practice of that day, and if it gives a binding rule, we may, by going further back, discover a period of time when the impression was made with the eye tooth. There was some utility in that custom, since the tooth impressed was the man's own, and furnished a test in case of forgery. But both are founded on the usage of the time."

Justice, however, became bound and fettered. Then the harshness of the convention became apparent, and one by one the perquisites of this so-called "solemn" piece of impressed wax have been taken away.

Its conclusiveness has been lost in Equity. Its distinctiveness faded when many were permitted to use the same design, and vanished with the adoption at a later day of the words of Baron Clark, who thought that "twentie men may seal with one seal . . . upon one piece of wax onely." (1 Leonard, Pt. 2, P. 21.) The learned baron was in the minority of the court in 1659, though unknown to him he was supported by Justinian. (Inst., Lib. 11; Tit. x. 5.) He would have added a row of curls to his wig if he knew how the world was to come to his opinion. Later, the necessary impression has become so slight that a Supreme Court in banc seriously declared that, in the case of our little piece of paper with scalloped edges, the act of causing cohesion made "a sufficient impression to comply with the requirements of the law." (33 Mo. 35.)

Lo! the iconoclast has been studying iconography. The seal has seen it and shuddered. Ever and anon it has parted with the variegated and distinctive garments which are its ancient heritage; for from time immemorial it has been the object of the keenest scrutiny and the subject of the most searching criticism, of the profoundest judicial reasoning, and of refinement of distinctions. But the iconoclast has found it and it is doomed.

It is such unhealthy growths upon the body of the law which give irrefutable occasion for the contemptuous remarks of laymen. And when by skillful surgery we remove these excrescences which burden the law but do not benefit it, its devotees will value it more, and the public will value it more, because divested of refinements that impede the righteous administration of justice.

Soon may we have occasion in every state to carve that epitaph which may be found in Mississippi, "Beneath this lies all that remains of Locus Sigilli, a character of ancient date, whose mission was to give peculiar solemnity to documents. Emigrating to this state in its earliest days, he served his day and generation to a good old age and was gathered to his fathers, generally mourned by the members of the legal profession. He has left surviving only one relative, who is now in the keeping of corporations. His last request was that his epitaph should be under seal." (Miss. Anno. Code, Ch. 40, Note. [4079])

LONDON LEGAL LETTER.

London, Nov. 1, 1897.

THE manner of making judges in England must be a matter in which lawyers in America are deeply interested. To begin with, there are, not counting the law lords of the House of Lords, no less than twenty-nine judges of the High Court of Justice. At the head of this large staff is the Lord Chancellor, who has a salary of $50,000 a year. Next comes the Lord Chief Justice with a salary of $40,000, and after him the Master of the Rolls with a salary of $30,000; then there are five judges of the Court of Appeal, who receive $25,000 each. The *puisne* judges are five chancery justices and fourteen Queen's bench justices, and there are two judges of the probate, divorce and admiralty division. All of these judges receive $25,000 each. As all of these appointments, except that of the Lord Chancellor, are for life, and any of the judges may retire after fifteen years' service on a pension of two-thirds of the salary, there are therefore no less than thirty very large plums within the reach of the practicing members of the bar, from whom alone these appointments can be made, for no member of the solicitors' branch of the profession is eligible for promotion to the bench. Besides these large-salaried officials, there is an attorney general who receives a salary and fees, and a solicitor general who is compensated in like manner. Last year the attorney general's combined income from salary and fees amounted to over $65,000, and that of the solicitor general to over $41,000. These law officers must also be barristers, no solicitor being within the range of appointment to these distinguished and lucrative positions.

All of these appointments are part of the patronage of the Lord Chancellor. Theoretically and practically, in the majority of cases, the vacancies on the bench are filled by promotion from the ranks of the leaders of the bar, those who have earned the right to selection by large experience in the trial of cases and general fitness and position. The Lord Chancellor is the only one of the judges who is not appointed for life, he coming in and going out with every change in the politics of the ministry. Naturally he selects for appointment to the bench one of his own party, but it not infrequently happens, to the great credit of the system, that a lawyer of eminence at the bar of the opposite party is promoted over the head of a partisan of the ministry.

Within the past fortnight no less than six appointments have been made to the bench, a greater number than has occurred within the same space of time for many years. First Mr. Justice Cave resigned, and before his resignation took effect he died. To fill the vacancy on the Queen's bench the Lord Chancellor appointed Mr. Bigham, Q. C., who for twenty years has been a leader of the Northern Circuit and more recently of that branch of the High Court to which is assigned the trial of purely commercial cases. This was the beginning of the judicial changes, for Mr. Bigham's appointment was hardly announced before Lord Esher, the Master of the Rolls, who for thirty years has occupied a conspicuous position on the English bench, resigned, closely followed by his friend, Lord Justice Lopes of the Court of Appeal, upon his elevation to the peerage as Lord Ludlow. As the Master of the Rolls is *ex officio* president of the Court of Appeal, two vacancies were thus created. These were filled by the promotions of Mr. Justice Henn Collins from the Queen's bench, and Mr. Justice Vaughan Williams from the Bankruptcy branch of the Queen's Bench Court, two of the ablest of the *puisne* judges. To fill their places two new Queen's bench judges have been selected from the bar — Mr. Darling, Q.C., and Mr. Channell, Q.C. The latter is an able and skillful lawyer, and his appointment has been received with general approbation; but the former owes his new and responsible position to political influence as he has had but little practice, although having been at the bar for nearly thirty years. The fact that only one out of six appointees to judicial positions by the Lord Chancellor is open to the charge of political favor speaks well for the system and to the strong control which is exercised over the ministry by public opinion. Unfortunately there have been other appointments within a comparatively recent date which have been severely criticised, and there are now four judges on the bench whose selection has unquestionably been dictated by political pressure. Still, four out of twenty-nine is a small proportion, and the bench as now constituted is quite up to the average. It is a matter of congratulation that the appointees have no participation in politics and that once appointed they endeavor to live up to the high traditions of the English judiciary.

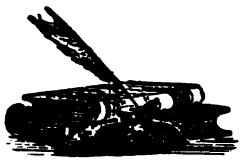
In a recent letter I referred to the recently enacted Employers' Liability Act. The provisions of that law, so far as the scale and conditions of compensation are concerned, are strikingly at variance with recent findings of juries in the United States, particularly in the West. It is provided by the Act that where death results from the injury if the workman leaves anyone wholly dependent upon his earnings the compensation shall be a sum equal to his earnings during the three years next preceding the injury which resulted in his death, but not exceeding in any case £300, or $1500. If the workman does not leave anyone wholly, but only in part, dependent upon his earnings, then the amount payable shall be such sum not exceeding £300 as may be agreed upon or may be determined upon by arbitration. In case he leaves no dependents, the employer shall pay the reasonable expenses of his medical attendance and his burial, not exceeding £10. Where the injury is not fatal, but results in total or partial incapacity for work, the injured man's compensation is a weekly payment during the incapacity not exceeding fifty per cent of his average weekly earnings during the previous twelve months, but such weekly payment is not to exceed one pound. In fixing this amount, regard shall be had to the difference between the amount of the average weekly earnings before the accident and the average amount which the injured man may be able to earn after the accident, and also to any payment other than wages which he may receive from his employer in respect of his injury during the period of his incapacity. To prevent fraud upon the employer, the Act provides that

the injured workman shall, if required, and in order to fix the amount to be paid him, submit himself for examination by a doctor provided and paid by the employer, and if he refuses, his right of compensation shall be suspended until he complies. So, too, he must submit himself for examination from time to time after he comes into receipt of his compensation. This comparatively low rate of compensation is in accordance with the view generally taken of the value of life and of a workman's capacity in this country, and, remarkable as it may seem, although the principle of the bill was bitterly fought over in the House of Commons there was no question raised by the labor representatives or others as to the scale of compensation. A fortnight ago the amount to be awarded in an action for damage for personal injuries where an engine driver was knocked down and run over in the street and so badly injured that one of his legs had to be amputated and the other was seriously hurt, was fixed by a common jury in a London County Court at £150. The new law has not yet gone into effect but it will be observed that this award is but little higher than the scale fixed in the Act.

The opening of the courts after the long vacation was celebrated this year for the first time for many generations by a religious ceremonial and a pageant of more than usual brilliancy. Heretofore the judges, attended by the Queen's Counsel, have simply walked in a straggling procession through the Central Hall of the Royal Courts. On Monday last a service was first held in Westminster Abbey which was largely attended not only by judges and leaders and juniors, but by as many of the outside public, particularly ladies, as could gain admission. The scene was a most impressive as well as brilliant one, color being given to it by the scarlet and ermine of the judges, the full bottomed wigs and court dress of the Queen's Counsel, the rounded wigs and flowing robes of the juniors, and the surplices and academical vestments of the clergy. After the service, which lasted only forty-five minutes and consisted of a shortened form of matins, the procession was made through the hall of the courts, the sides being lined with hundreds of ladies. The judges upon reaching their respective courts sat but for a few moments while the crowd dispersed, many of the latter breaking up into tea parties in the chambers of the junior members of the bar. To these juniors and to the profession generally there was no little zest added to the festivities by the knowledge that the list of causes to be tried at this term is the largest for a number of years past.

STUFF GOWN.

The Lawyer's Easy Chair.



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

BY IRVING BROWNE.

CURRENT TOPICS.

SPECIAL PLEADING. — It is evident that the editor of the "London Law Journal" had a vacation in August. Usually that learned person is too serious and instructive to be quotable in these trifling columns, but in August his *Obiter Dicta* disclosed a lighter hand. For example, the summer editor thus cheerfully discoursed concerning special pleading: —

"An entertaining article might be written on the humors of special pleading. How Littledale, a master of the art, in drawing an indictment for murder which had been committed with a double-barreled pistol, spent many hours in endeavoring to invent some form of words by which to cover the possibility of the fact of the ball having issued from either barrel; how another pleader lost his cause by miscalling *vites arbores;* how an indictment for forgery was quashed because it charged the prisoner as Bartw., when he had signed the damning note as Bartholomew; how Parke (Baron Surrebutter) took a demurrer to the bedside of a sick friend, feeling sure, he said, that the sight of it would restore the invalid, it was so exquisitely drafted. But of all the wire-drawn refinements of that wonderful science, could anything astonish the honest layman more than the case referred to in 'Rolle's Reports'? In this case, an action for words, the pleading was that 'Sir Thomas Holt hath taken a cleaver and stricken his cook upon the head so that one side of the head fell upon one shoulder, and the other side upon the other shoulder,' but it omitted to say that the cook was dead, 'il ne averr que le cook fuit mort,' so it was bad — 'pur ceo fuit adjudge nemy bon' — the cook's death after this splitting of his head being matter of inference only. The case in which the above is cited as an authority is itself a charming illustration of the fastidious nicety of the old pleader. 'Thou art a thief,' the defendant had said to the plaintiff; 'thou hast stolen me a hundred of slatte.' 'Stolen me'! It puzzled the court where was the felony in stealing the defendant? Judgment for the defendant."

All this reminds us of our salad days when we dared write so irreverently of Charles O'Conor and the other devotees of that awful science of special pleading. It must be confessed in candor that in Holt's case there was no necessary inference that the cook was dead, for the cleaver might not have been used for its customary office of cleaving, but might have been employed simply as a bat, knocking the culinary mechanic's head to right and left and not seriously injuring him. So in the case last above mentioned, it is very clear that whatever the speaker's intention, his charge, construed by ordinary grammatical rules, was of stealing for the defendant's benefit. "Rob me the exchequer, Hal," said Sir John. Give the devil his due. As for the Baron's administration of a demurrer to the sick man, it was evidently designed as a healing draught. Demurrers from England do no good nowadays in the case of "the sick man."

DELAYS OF THE LAW. — Some fault has been found with the delays of the law. But delay in some cases would seem to be advantageous in eliciting the truth. It is recorded in recent newspapers that in Kansas, in a suit for damages by a woman against a railroad company, a dozen physicians testified that on account of the injuries sustained by the plaintiff, maternity must be to her a thing unknown. The verdict was for the plaintiff, and the company appealed to the Supreme Court, where, after the lapse of a number of years, the decision of the lower court has just been affirmed. Meanwhile the woman has given birth to three children. We dare say that if the decision had been reversed, the plaintiff would have recovered more damages on the new trial. That is the way it always works. The jury would have awarded more damages to the woman on account of her supposed mortification in being convicted of mistake.

A PROLIX WILL. — In the very agreeable memoir of Chief-Justice Doe, in the June GREEN BAG, is given a copy of his will, from which the writer thinks "not more than three or four words could be omitted." But the Chief Justice was always prolix. He could not help it, and his will is prolix. Turning to page 252 of our June issue, the reader will see how much that document could have been condensed. For "give, devise and bequeath" read "give." For "all the rest and residue of my estate, real and personal" read "the residue of my estate." In the third clause, for "my said wife, Edith H. Doe," read "my wife," for the virtuous chief could not have had more than one, and he had already stated her name. Instead of "and direct that she shall be

exempt from giving a bond as such executrix," read "without bond." In the beginning, "and testament" seems superfluous. There is no wonder that the legislature had to pass an act restraining the chief and his fellows from writing long opinions!

EDUCATION AND GENIUS.— Judge Thompson said, substantially, in an address on Jackson, that correct spelling is not essential to administrative greatness, and cited Cromwell, Washington and Napoleon as proofs. This gives the Chairman an excuse for lugging in some remarks to the same effect made by him in a recent address on education:—

"You may be startled by my proposition that genius does not need education, but I speak of a very few — of one or two or three of a century who really deserve the name of genius, such as Homer, Shakespeare, Peter the Great, Napoleon, Beethoven, Michael Angelo, Abraham Lincoln, all comparatively uneducated men. If Homer had been a profoundly educated man, he might possibly have been as absurd a pedant as those German commentators who insist that he was a syndicate and can tell us exactly what verses have been interpolated since the original poems were first recited. If Shakespeare had been as well educated as his contemporary, Bacon, he would probably have written as bad verses as he. Could a broad education have made a greater soldier or a wiser civil administrator of Napoleon? Would the ability to spell correctly have added anything to the moral stature of Washington?

"What did education ever do for Abraham Lincoln? Who wrote the wisest, most admirably expressed State papers of modern times? Look at the difference between mere talent and heaven-descended genius, as shown at the dedication of the Gettysburg Cemetery, where the best educated and most polished orator of his day and the comparatively uneducated President came in competition. Edward Everett, scholarly and elegant, with all the artifices of a trained declaimer, delivered from memory an oration three hours long. Abraham Lincoln, ungainly, homely, awkward, read through his spectacles, and a little through his nose, in a tone inaudible fifty feet distant, an address fifteen minutes in length. Very few of us have read Everett's oration, and nobody in the future will read it, but those inspired words of Abraham Lincoln, with the soul of the seer and martyr behind them, have been read by every intelligent man, woman and youth in our land, and never by any of us who lived in this time without tears and silent blessing. They are in the pages of school readers; they will be read and admired 2,400 years hence even more than those of Pericles on a similar occasion are now admired, though spoken 2,400 years ago; and they will inspire a noble love of country in our descendants when the very name of Everett shall be forgotten. Now this gift is something which education could not have given and could not have enhanced."

ROOSTER LAW. — Some time ago the Chairman queried whether he had a right to an injunction against early-rising roosters in the immediate vicinity of his domicile. In respect to this, Mr. C. E. Littlefield of Rockland, Me., writes him as follows:—

I had called to my attention recently a case which, although it is not perhaps an illustration of the elasticity of the common law, is an illustration of an application of its well settled principles to a novel state of facts. In connection with your early waking and late rising, during the interval between which you seem to have been seriously oppressed by the unbridled conduct of certain roosters, I thought it would perhaps interest you to know that the court of Maine, in the case referred to, have recently held that the keeping of hens (and roosters included, of course), under circumstances evidently like those to which you refer, constituted a nuisance kept at the annoyance of the plaintiff, for which he was entitled to damages. See the unreported case of Timothy F. Desmond *v.* James H. Smith, Androscoggin County.

In that case, however, only nominal damages were assessed, as the plaintiff expressed his willingness to accept such a result, probably being satisfied with having established his right to maintain the action.

You will therefore observe that you have a remedy at law, and while you might not be able to sustain an injunction until you had established at law the fact of the nuisance, and the roosters had demonstrated an intention to continue indefinitely to your irreparable damage, it is not absolutely necessary for you to take the law into your own hands, because there is yet a "Balm in Gilead" for sufferers like yourself.

CAVE. — In reading the comments of the "London Legal Press" on the recent death of Mr. Justice Cave, the Chairman is led to suspect that there was a bear inside that Cave.

NOTES OF CASES.

UNHEALTHY JAIL.— If a man is compelled to be incarcerated in an unhealthy jail, although it makes no difference as to his health or comfort whether it is owned by a county, a town, or a city, yet it seems he may be better off in his purse if it is a town or a city jail. It has recently been held in North Carolina that a town is liable for injury to the health of a prisoner by confinement in an iron or steel guard-house, with a tin or zinc floor covered with ice, and with broken windows, during a bitter cold, windy night in which he suffers intensely and has his feet badly frostbitten, when the authorities had known

of its condition for months before, and the filthy, wet, and frozen condition of a city prison for several months is presumed to be within the knowledge of the authorities. Shields *v.* Town of Durham, 118 N. C. 450; 36 L. R. A. 293, citing Lewis *v.* City of Raleigh, 77 N. C. 229. There is not much discussion of the matter in either case; the liability seems to be taken for granted under a constitution and statutes requiring jails to be kept clean. In the latter case the prisoner had died on account of the noxious air of the city guardhouse, which was under the market. "He was not a bad man," said the court; "he was not a drunkard, but sometimes drank too much — a weakness so common that it would seem invidious to call it a crime in him. He had drunk too much and instead of letting him go home as he asked to be allowed to do, or of carrying him home as it would have been humane to do, and as he who made him drunk was naturally bound to do, he was carried to a hole like Calcutta's, where he died before morning." This inhumanity cost the city $2,000. A county, however, is not thus liable. White *v.* Sullivan Co. Comm'rs, 129 Ind. 396; Pfefferie *v.* Lyon Co. Comm'rs, 39 Kans. 432; Hite *v.* Whittey Co. Ct., 91 Ky. 168; 11 L. R. A. 122; Manuel *v.* Cumberland Co. Comm'rs, 98 N. C. 9; and see Webster *v.* Hillsdale County, 99 Mich. 259; Lindley *v.* Polk County, 84 Iowa, 308. As to towns and cities there is some conflict of decision, some courts holding that there is no such liability: La Clef *v.* Concordia, 41 Kans. 323; 13 Am. St. Rep., 285; Odell *v.* Schroeder, 58 Ill. 353; Brown *v.* Guyandotte, 34 W. Va. 299; 11 L. R. A. 121; Gullikson *v.* McDonald, 62 Minn. 278; while on the other hand, in Edwards *v.* Pocahontas, 47 Fed. Rep. 268, the court, after alluding to the distinction between counties and municipal corporations proper, held that if a municipality having power to maintain a jail, although not required to do so, undertakes to exercise the power, it will be liable for the negligent exercise of it in keeping the jail in such a filthy and unfit condition that the health of a prisoner is injured thereby. Even the North Carolina court holds if the municipality has furnished a proper place it will not be liable, if without its knowledge it is negligently permitted to become unfit by the attendant: Moffit *v.* Asheville, 103 N. C. 237; 14 Am. St. Rep. 810; Shields *v.* Durham, 116 N. C. 394. That the negligent keeper or authorities are individually liable has been intimated, but never directly decided, while in Williams *v.* Adams, 3 Allen, 171, it was held that a prisoner cannot maintain an action against the keeper of a jail for failure to provide him with suitable and proper food, clothing and warmth, in the absence of express malice on his part. These cases are cited in notes 36 L. R. A. 293.

A SERIOUS JOKE. — In Plate *v.* Durst, 42 W. Va. 63, it appeared that the plaintiff, in 1885, an orphan girl of twelve, went to live with her brother-in-law, and was treated by him as a daughter and rendered him service as such, in his house and store, until 1890, when he told her that when she should have lived with him ten years he would give her $1000, and on another occasion told her that when she married he would give her $1000 and a $500 diamond ring, or diamond earrings. She stayed till 1894, when he dismissed her. But Judge Dent, in answer to the defendant's intimation that what he said was in jest remarked: "Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile." How, pray? — "on the other side of his mouth," perhaps. Defendant's counsel, having complained of the admission into the record of unnecessary verbiage on the part of the plaintiff, was reminded by the court that they had not been guiltless in this regard, and "their attention is respectfully called to the celebrated decision of a beam against a mote with which they are familiar." Now we wonder if the plaintiff can get those diamonds when she marries! In the same volume (State *v.* Cross, p. 261) occurs a curious use of language, the court distinguishing a purely accidental homicide from "a monstrous sedate murder."

MORE PUNCTUATION. — Behold how great a matter a little comma kindled! In Sager *v.* Summers, 49 Neb. 461, it was held that a voluntary assignment for the benefit of creditors, if unwitnessed, is absolutely void. The court said: "In Deere *v.* Losey, 48 Neb. 622, we reached a contrary conclusion, but we were led into that error by the punctuation of section 6 of the assignment act found in the Compiled Statutes. In that section the compiler placed a comma after the word 'acknowledged,' in the fourth line of said section 6. This would justify a reading of that section as follows: 'That an assignment for the benefit of creditors, to entitle it to be recorded, must be executed and acknowledged in the manner in which a conveyance of real estate is or shall be required to be executed and acknowledged'! But on looking at the enrolled act it will be observed that the only comma in the first sentence of said section is after the word 'writing,' which makes the section read, in effect, that a deed of assignment shall be in writing, and shall be executed and acknowledged in the same manner that an ordinary deed of real estate is required to be executed and acknowl-

edged to entitle it, the ordinary deed of real estate, to be recorded. Deere *v.* Losey is therefore overruled." The section correctly set forth is as follows: "Such assignment shall be in writing, and shall be executed and acknowledged in the manner in which a conveyance of real estate is or shall be required to be executed and acknowledged in order to entitle the same to be recorded." The trouble was the interpolation of a comma after the latter "acknowledged," which changed the application of "the same."

GOAT NOT A PERSON. — The Queen's Bench Division has decided that a goat is not a person or mankind. Osborne *v.* Chocqued [1896] 2 Q. B. 109. This was an action of damages by the bite of a dog. The plaintiff failed to show that the dog had ever bitten any person before, but did show that he had bitten a goat. This was held not to be an equivalent.

ROBBERY OF GUEST BY INNKEEPER'S SERVANT. — Judge Dent, in Cunningham *v.* Bucky, p. 675, an action by a drunken guest at an inn for robbery by the innkeeper's servant, quoting from Judge Dixon, in another case, says: "If drunk, the plaintiff might still have claimed the protection of his host, as did Falstaff when he fell asleep behind the arras, and might say with him: 'Shall I not take mine ease in mine inn, but I shall have my pocket picked?'"

THE TOBACCO HABIT. — If any of our readers are afflicted with this habit, they will be entertained by reading the report of Sterling Remedy Co. *v.* Eureka, etc., Manuf. Co., 46 U. S. App. 709. This was a bill in equity, on behalf of the proprietors of a cure for the tobacco habit, called "No-to-bac," to restrain the defendant from selling a similar article called "Baco-curo." It was held that there was no infringement of trade mark nor any unfair competition in trade. The complainant alleged that his trade had fallen off since the defendant started business. The court accounts for this by "judicious advertising, and also by the fact that, unlike the complainant, the defendant insists that during the time of taking the supposed remedy, the patient should not discontinue the use of tobacco," observing: "In this we think the defendant has the decided advantage, because it does not insist upon the exercise of the will, but cures, or professes to cure, in despite of the will. Therein it strikes a 'great popular chord,' in that it enables one to indulge a habit of which he desires to be rid, while partaking of the cure. An easy road to health will always be as popular as an easy road to wealth." So one need not be off with the old love before he gets on with the new. But is "No-to-bac" a valid trade mark anyhow? Is it not merely descriptive?

A TRANSFORMATION. — State *v.* Glenn, 119 N. C. 804, is a funny case. Glenn and the co-defendant, Amis, were indicted for an affray. G. had been walking up and down the street, swearing he could whip a man, and struck A. a blow in the face with his fist, knocking his head against a post, so that the "lick" was heard across the street. A. retorted with a pair of iron plyers. G. then put his hand in his pocket as if to draw a knife, whereupon A. caught and held his arms fast, but G., getting loose, jumped upon a box, announced that he was an officer, and commanded the peace. A. pleaded guilty, and the court gave G. thirty days in jail on a verdict of guilty. Chief-Justice Faircloth, observed: "We are not informed whether the weapons used were deadly weapons or not, but we do observe that the application of the pair of iron plyers, whatever they may be, had an immediate and salutary effect by transforming a six-foot clubber into an officer, who at once began to discharge his duties by commanding the peace . . . If we were permitted to consider the question we think we could approve this verdict. We have no doubt that his honor in pronouncing judgment gave the defendant full credit for his good intentions in trying to preserve the peace." Amis ought to have got off free.

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.

FACETIAE.

LORD ELDON lent two large volumes of precedents to a friend, and could not recollect to whom. In allusion to such borrowers, he observed that, "though backward in accounting, they seemed to be practiced in book-keeping."

THE man stammered painfully. His name was Sissons. Especially difficult to him was the pronunciation of his own name. He had the misfortune to stay out late and uproariously one night (according to the "Illustrated American"), and to account for it before the magistrate at the police court next morning. "What is your name?" asked the court. Sissons began his reply: "Sss—ss—ssss—ss—siss—" "Stop that noise and tell me what is your name," said the judge, impatiently. "Siss—sss—sss—sissss——" "That will do," said his honor, severely; "officer, what is this man charged with?" "I think, your honor, he's charged wid sody-water."

JUDGE JACOB —— was the judge of an eastern Pennsylvania county. He was great on strong charges to the jury, constituting himself the thirteenth man on most of them. Once, during an absence, a judge from another county held court for him and was considerably surprised at the hesitation in the jury about leaving the box, followed by a very long stay out, but some time after court had adjourned, he was told that the jury wanted him. By this time, the courtroom was cleared, and the judge received the jury there, when the foreman, an old "Pennsylvania Dutchman," astonished him by the question, "Vell, Shudge, how is we to decide dis case?" After the judge got his breath, he replied that of course he had nothing to do with that question, that the jury must determine that point for themselves, when the foreman replied, "Vy, Shudge, Shake, he always do dat!"

NOTES.

MASSES said for a dead man's soul are charity, and therefore no legacy duty need be paid on money left for that purpose, according to a recent decision of the Irish court of appeal.

IN a recently published invention for constructing prison doors and window gratings, there is suggested a protection from the safe-burglar. The idea is to make the bars of ordinary steel pipes, all filled with a liquid under pressure and connected by a main pipe with an alarm which would operate by reduction of pressure. Attempted sawing lets the liquid escape and rings the bell.

THE police of San Francisco have recently been enforcing the law prohibiting work on Sunday, especially against Chinese laundrymen. One Sunday, as a large load of these offenders was being carted to jail in the police ambulance, a resident of the Western Addition asked the reason, and was informed by a policeman. "Yep," grunted a disgusted Chinese, who stood near, "man workee Sunday, he go jail —'gainst law workee Sunday. Man no workee, he go jail — vag. Amelica heap hell of countly."

THE London papers have managed to preserve perfect seriousness in their treatment of the suit for libel and trespass recently brought by the owner of Nelson's old ship, the "Foudroyant", against the patent-medicine manufacturer who caused to be painted on the side of the vessel, in huge letters, the statement that "England expects every man to do his duty and take ——'s pills." When the ship was driven ashore at Blackpool, a man whose trade it is to laud this particular remedy considered that he had before him

the chance of a lifetime, so he went before daylight and performed his unholy work. The result was a suit for one thousand pounds. The pill-maker held that his agent acted wholly without authority, but a verdict for fifty pounds was rendered against him, and the "artist" was fined forty shillings. And now the Britishers say that "an attempt to copy American advertising methods" has been properly punished.

CURRENT EVENTS.

THE Prussian railway system has financially proved such a success, paying such a large amount into the German treasury, that the Swiss government proposes to adopt the same system, and buy all the railroads within its territory, paying for them the sum of one hundred and eighty-six millions of dollars.

THE New South Wales government states that it has found such difficulty in placing in England an order for two thousand tons of steel rails of high carbon quality that it has been compelled to order them in America, where the manufacturers readily undertook the contract at the price of twenty-five dollars a ton.

A SOUTH AFRICAN left his property to be equally divided between his two sons. Not being able to agree, they ask President Krueger to decide for them. "You are the eldest?" he demanded of one. "Yes," was the answer. "Then you shall divide the property, and," he continued, turning to the other, "you are the younger, so you shall have first choice."

AN effort has been made by the Venezuelan government to protect its birds. The government has prohibited the use of firearms in hunting herons, and only the egret plume can be gathered. If this rule can be enforced the birds will be preserved, as a man must "get up early" if he expects to run a foot race with a flying heron. The hunter must also take out a license and report the exact quantity of feathers he takes.

THE new Chicago public library, begun five years ago, was opened in October. It has cost nearly two millions, and while the structure is massive and plain, the interior decorations are costly and beautiful. The book capacity of the library is two million volumes, — it now contains a trifle over two hundred and twenty thousand. An annual expenditure of thirty-five thousand dollars is authorized, a larger sum than is expended by any library except the British Museum. Appointments in the library will be made under civil service rules.

DURING the last two years, Victoria, in southeast Australia, has successfully dealt with the labor question by the formation of labor colonies and village settlements for the unemployed. The colonists received government help in raising their first crops. This came in the shape of loans at a low rate of interest and secured by the crops. The village settlements were made near swamp lands, the reclaiming of which provided ample labor and support for all able to work. Thus, while aiding the settlers to support themselves, the government has realized large profits from the enhanced value of the lands. In this way twenty-five hundred families have been provided for and are now permanently settled on these once waste lands.

LITERARY NOTES.

THE Christmas number of HARPER'S MAGAZINE is a very attractive number, and the four pages in color are a new departure for HARPER'S. Among the articles we notice "The Queen's Jubilee," by Richard Harding Davis; "A Bird's Egg," by Ernest Ingersoll, with facsimiles in color of birds' eggs; "Puppets, Ancient and Modern," by Francis J. Zeigler; "Reindeer of the Jotunheim," by Hamblen Sears; "George William Curtis at Concord," by George Willis Cooke; and "The Wooing of Malkatoon," a narrative poem by Lew Wallace. The stories in this number are: "Destiny at Drybone," by Owen Wister; "Marianson, a Mackinac story," by Mary Hartwell Catherwood; "My Fifth in Mammy," by W. L. Sheppard; and "Mr. Willie's Wedding Veil," by Mary Tracy Earle.

MR. GARRETT P. SERVISS, the widely known and popular astronomer, has a most instructive and interesting article in APPLETON'S POPULAR SCIENCE MONTHLY for December, in which he discusses the probability of there being planets similar to our own earth, containing inhabitants, among the so-called fixed stars. The apparatus and methods used in the production of animated photographs, in the cinematograph, biograph, etc., are fully described and pictured by J. Miller Barr. This number also contains "Our Liquor Laws as seen by the Committee of Fifty," by F. A. Fernald, and an illustrated paper on "Pacific Coast Gulls," by H. L. Graham.

THE Christmas number of McCLURE'S MAGAZINE has a special Christmas cover, designed by Charles L. Hinton, and contains pictures by F. S. Church, Charles Dana Gibson, Ernest G. Peixotto, Corwin Knapp Linson, and other of the best-known artists, as well as reproductions of some famous paintings appropriate to the season. Rudyard Kipling, Anthony Hope, Charles A. Dana, Robert Barr, Ella Higginson, Bliss Perry, W. T. Stead, and the distinguished Asian Explorer, Dr. Sven Hedin, are among the contributors to the number.

WHAT SHALL WE READ?

This column is devoted to brief notices of recent publications. We hope to make it a ready-reference column for those of our readers who desire to inform themselves as to the latest and best new books.

(Legal publications are noticed elsewhere.)

A dainty little volume in which the reader is taken on a trip through a most delightful country is entitled *Romance and Reality of the Puritan Coast*.[1] Starting at the historic old town of Medford, the route follows the favorite "North Shore" of the Massachusetts coast as far as Cape Ann. This shore abounds in natural beauties, which are graphically described by the author, and at the same time he has interwoven with the word pictures many historical facts and legends. The illustrations are beautiful, numbering nearly one hundred full-page plates and vignettes from pen and ink drawings by the author. The book is a delight to the eye and mind and eminently suited for a Christmas present.

A capital book for children, in fact for older readers as well, is *Miss Belladonna*,[2] just issued by Messrs. Little, Brown & Co. The contents include eleven stories, brightly and amusingly written, and admirably illustrated. No better book for a Christmas gift to the little ones could be found.

Mrs. Goodwin, whose romances of colonial times are so well known, in her new novel, *Flint*,[3] gives us a story of the present day, the scenes of which are laid in New York and at a New England seashore resort. The work is one of exceeding interest and well sustains the established reputation of the author. There is a peculiar charm about Mrs. Goodwin's writings due to her fresh, unaffected and at the same time cultivated style. We recommend the book to our readers as one which they will find decidedly worth the reading.

No living man has had a wider or more intimate acquaintance with actors than M. Jules Claretie, the general manager of the Comédie Française, and in his "*Brichanteau*,"[1] he portrays an actor enamored of his art, but who for various reasons has not achieved success — but he is a failure without melancholy or envy, an optimist failure. Brichanteau is delightful because he is always treading the boards, and because he believes, in good faith, that his life is a drama in which he plays the principal part. Jules Claretie has grasped all the shades of character of his hero and has rendered them with great delicacy. The book is charmingly written, and will afford the reader thorough enjoyment.

A collection of short stories by Miss White, entitled *A Browning Courtship*,[2] furnishes a very pleasant means for whiling away an idle hour. The title story, was, we believe, the author's first literary attempt, and to our mind is the best of all her writings. The other contents of the volume include several stories which have not before appeared in print.

Boys and girls who read Mr. Harris's "The Story of Aaron" will be delighted to learn that the author has prepared a further treat for them in a story entitled *Aaron in the Wildwoods*.[3] This story gives the further adventures of "Aaron the Son of Ben Ali" while he was a fugitive in the wild woods, and Timobon the black stallion, Grunter the white pig, Gristle the gray pony, Rambler the track dog, etc., again display their friendliness to the poor hunted Arab. The book is beautifully illustrated, and it would be hard to find a more acceptable Christmas gift for children

[1] ROMANCE AND REALITY OF THE PURITAN COAST with many little pictures, authentic or fanciful. By Edmund H. Garrett. Little, Brown & Co., Boston, 1897. Cloth $2.00. Full Crushed Morocco, $4.50.

[2] MISS BELLADONNA. A child of to-day. By Caroline Ticknor. Little, Brown & Co., Boston, 1897. Cloth, $1.50.

[3] FLINT: HIS FAULTS, HIS FRIENDSHIPS AND HIS FORTUNES. By Maud Wilder Goodwin. Little, Brown & Co., Boston, 1897. Cloth, $1.25.

NEW LAW-BOOKS.

A TREATISE ON THE LAW OF BAILMENTS, INCLUDING CARRIERS, INNKEEPERS, AND PLEDGE. By JAMES SCHOULER, LL.D. THIRD EDITION. Little, Brown & Co. Boston, 1897. Law Sheep, $6.00.

This new edition of what has long been considered the standard authority upon the law of Bail-

[1] BRICHANTEAU. Actor. Translated from the French of Jules Claretie. Little, Brown & Co., Boston, 1897. Cloth, $1.50.

[2] A BROWNING COURTSHIP, and other stories. By Eliza Orne White Houghton, Mifflin & Co., Boston and New York, 1897. Cloth, $1.25.

[3] AARON IN THE WILDWOODS. By Joel Chandler Harris. Houghton, Mifflin & Co., Boston and New York, 1897. Cloth, $2.00.

ments brings the law upon the subject fully down to date. The whole volume has been revised by the author and much new matter added, including a chapter upon the law of Carriers under the Interstate Commerce Act. In its present form the work is an exhaustive exposition of the law, and no lawyer's library can be complete without it. We heartily bespeak for it the recognition to which its merits entitle it.

A Treatise on Fraudulent Conveyances and Creditors' Bills. By Frederick S. Wait of the New York Bar. Third Edition, revised and enlarged. Baker, Voorhis & Co., New York, 1897. Law Sheep, $6.00 *net.*

Mr. Wait's treatise is so well known to the legal profession, by whom it has long been regarded as the standard work upon the subject, that we need not enlarge upon its merits. This new edition will be welcomed, as much new and fresh matter has been embodied in the text, and the citation of authorities increased by several thousand cases. To those who are not familiar with the work, if there are any, we commend it as the most exhaustive and valuable treatise upon the subject.

A Treatise on the Law in Relation to Promoters and the Promotion of Corporations. By Arthur M. Alger. Little, Brown & Co. Boston, 1897. Law Sheep, $4.00.

In these days, when the "promoters" of schemes of every imaginable kind are offering the most tempting bait to the ever credulous public, a work setting forth the reciprocal rights and obligations of the promoter and the corporation, and of the shareholder and the promoter, is of great practical importance. Mr. Alger's treatise is therefore very timely, and being the only one on the subject should be welcomed by lawyer and layman as well. It has been prepared with evident care and seems to cover fully all points likely to arise.

General Digest — American and English, Annotated. Refers to all Reports, Official and Unofficial. Vol. III. New Series. Lawyer's Co-Operative Publishing Co., Rochester, N. Y. 1897. Law Sheep.

This last volume of the General Digest is especially noteworthy for the great improvement made in the way of "Annotation." Two features may be particularly noted. *First:* The authorities relied upon by the Court in the case digested, outside its own decisions, are added with the citation of the cases criticised, distinguished, limited or overruled, thus putting before the user the leading cases upon the point. *Second:* To the more important propositions from current decisions is added reference to a line of decisions upon the point involved, showing the cases to similar effect or variant. The publishers promise to make these annotations still more prominent in subsequent volumes. So that the Digest will really be a complete encyclopædia of the law founded upon the current decisions. They should certainly be encouraged in their work by a lively appreciation on the part of the profession of the great merits of this Digest.

The Law of Mortgage and other Securities upon Property. By the late William Fisher of Lincoln's Inn. Fifth Edition. By Arthur Underhill, M.A., LL.D. Butterworth & Co. London, Eng. Cloth, $15.75.

There can be no better evidence of the intrinsic value of a law book than the fact that edition after edition is demanded notwithstanding the bringing out of numerous more modern treatises upon the same subject. Mr. Fisher's book on Mortgages has long been recognized both in England and America as a work of authority, and freely quoted by the courts in England. In the present edition Mr. Underhill has added several new chapters and has made a number of changes which serve to greatly enhance the value of the work.

Celebrated Trials. By Henry Lauren Clinton. Harper & Brothers, New York, 1897. Cloth, $2.50.

Mr. Clinton, for many years the leading criminal lawyer in New York City, gives in this volume sketches of many of the celebrated trials with which he was professionally connected between the years 1857 and 1874. These trials include many of thrilling interest. Among them will be found the trial of Mrs. Cunningham for the murder of Dr. Burdell in 1857; the trial of Dr. E. M. Brown, in 1863, for the murder of Clementina Anderson; the trial of Isaac Van Wart Buckout for the murder of Alfred Rendall in 1869; the trial of William M. Tweed, in 1873, for official misconduct (which resulted in his conviction and imprisonment); the case of John Kelly, the distinguished leader of Tammany Hall, against Mayor Havemeyer for libel (the Mayor died during the argument of the case); and the trial of Richard Croker, the noted politician, for the murder of John McKenna in 1874. It is needless to say that the work is one which cannot fail to interest the reader, be he lawyer or layman.