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The green bag

Sydney Russell Wrightington, Thomas Tileston
Baldwin, Arthur Weightman Spencer

THE

929!

GREEN BAG

An Entertaining Magazine for Lawyers

EDITED BY THOS. TILESTON BALDWIN

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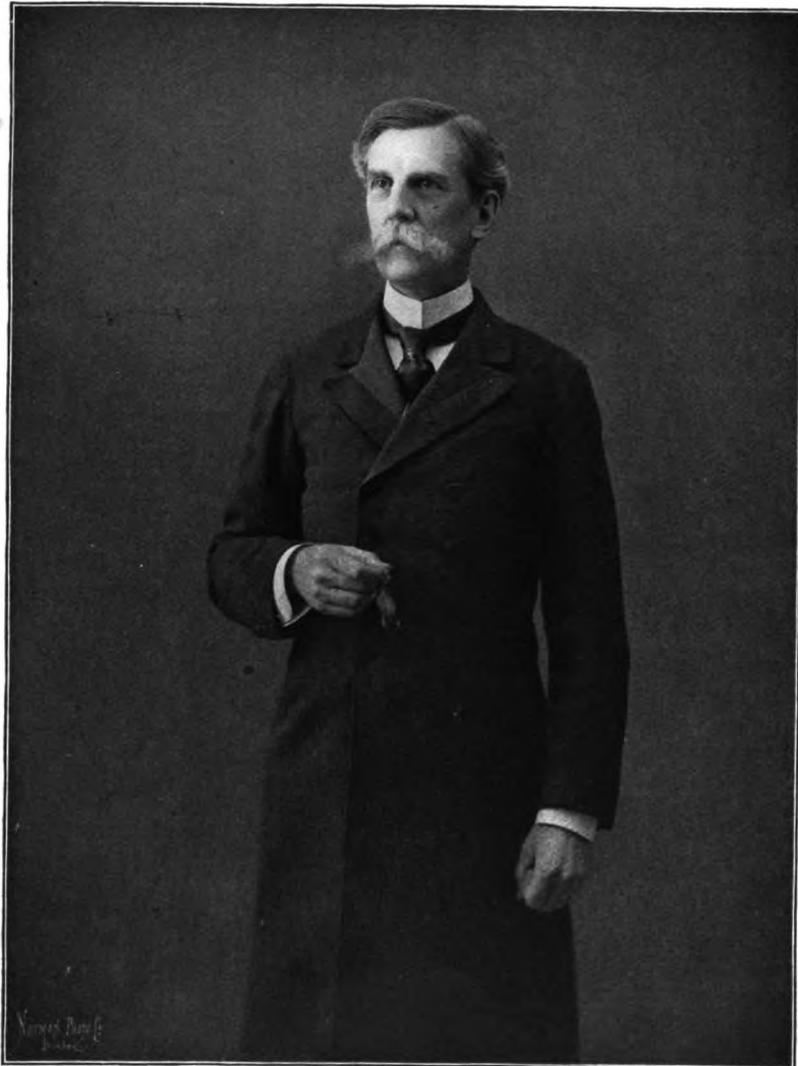
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OLIVER WENDELL HOLMES.

BY EDWARD B. ADAMS.

IT has been said that "the old English lawyer's idea of a satisfactory body of law was a chaos with a full index." But fashions change. When Mr. Holmes came to the Suffolk bar thirty-five years ago, he saw around him the faint beginnings of a revolt against the old notion. With an overmastering love of knowledge and desire to reduce, at least in his own mind and as far as possible, what was to be the business of his life to the principles of a science, he made himself a leader of the forces of attack. He did not consider "the student of the history of legal doctrine bound to have a practical end in view. It is perfectly proper," he has since said, "to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century." He saw the history of civilization woven in the tissues of our jurisprudence, the moral history of the race chronicled in the history of our rules of law. Exact knowledge of the earlier reports was a delight, even when the pleasure was mainly of the sort which the mathematician derived from the theorem of which he proudly said: "The best of it all is that it can never by any possibility be made of the slightest use to anybody for anything." But the value of the historical study of the law is not likely to be underrated in our day. Our danger is lest we forget that "continuity with the past is

only a necessity and not a duty." With moral growth, with changes in the dominant ideals of society, must come development in the rules of law. The law sinks to dry formalism unless it grows.

"The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them, if all that went before were burned." Mr. Holmes believed that the number of our rules of law, when generalized and reduced to a system, was not unmanageably large. They were not a chaos that needed a full index, but the orderly expression of the civilization of the age and country. An attempt to express them in codes, however, would probably be futile, for codes do not proceed, like the common law, by a series of successive approximations, by a continual modification of the form of rules. So believing, Mr. Holmes set himself as practitioner, editor, author, teacher, to find out exactly what the common law was as it had come down to his day, what the reasons for its doctrines were, what was their modern value, and to state the law and its reasons as lucidly as he could. For twenty years now he has been doing what in him lay to help in shaping the law of this Commonwealth into an expression of her most enlightened feeling and her best thought.

Inheriting a name honored and loved by readers of the English tongue everywhere and by all members of the community where

its owner lived and did his daily work, Oliver Wendell Holmes, Jr., was born in Boston, on the eighth of March, 1841. Those who believe that special abilities may be inherited will point to the fact that his mother was the daughter of Charles Jackson, judge of the Supreme Judicial Court from 1813 until ill health compelled his resignation in 1823, and sharer with Mr. Parker, afterward Chief Justice Parker, of the leadership of the bar of his generation.

Holmes went to the school kept when he first attended by Mr. T. R. Sullivan, and afterwards by Mr. E. S. Dixwell, whose daughter he was subsequently to marry. He entered Harvard College in the class of 1861. During the last months of his undergraduate life, the great war broke out, and in April Holmes left college to join the Fourth Battalion of Infantry, Major Thomas G. Stevenson commanding, then stationed at Fort Independence in Boston Harbor. His class had chosen him for their poet, and he was fortunately able to deliver on class day the poem which he wrote in quarters.

Captain Holmes' war record is open to all, and only the barest facts need be stated here. Shortly after class day in 1861 he was commissioned first lieutenant of Company A (afterward transferred to Company D) of the famous Twentieth Massachusetts. In the Fall he was wounded twice at Balls Bluff. In the Spring of the next year he was captain of Company G, and in the Fall he was wounded again at Antietam. In May, 1863, he was wounded still again at Marye's Hill near Fredericksburg. In July he was commissioned lieutenant-colonel of his regiment, but the Twentieth was too much reduced by losses in the field for further service, and he was never mustered in. In the beginning of 1864 he was appointed A. D. C. on the staff of Brigadier-General H. G. Wright, commanding the First Division of the Sixth Corps, afterward Major-General commanding the Sixth Corps, and served with Gen-

eral Wright during Grant's campaign in the Wilderness, returning to Washington when the capital was threatened in July. On the seventeenth of the same month he was mustered out at the end of his term of enlistment. Many of his comrades, his nearest friends, were dead. But he turned eagerly to the life before him. "It was given to us to learn at the outset," he said, in his Memorial Day address at Keene, in 1884, "that life is a profound and passionate thing. While we are permitted to scorn nothing but indifference, and do not pretend to undervalue the worldly rewards of ambition, we have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us. But, above all, we have learned that whether a man accepts from Fortune her spade, and will look downward and dig, or from Aspiration her axe and cord, and will scale the ice, the one and only success which it is his to command is to bring to his work a mighty heart."

In September, Holmes entered the Harvard Law School, taking his degree two years later, in 1866. During part of his time in the school he studied also in the office of Robert M. Morse, Esq. In the Fall of '66 he entered the office of Chandler, Shattuck & Thayer as a student. On March 4, 1867, Mr. Holmes was admitted to practice before the bench, where fifteen years later he was to take his seat.

During the fifteen years that followed, Mr. Holmes practiced his profession in Boston, first in partnership with his brother, and after 1873 as a member of the firm of Shattuck, Holmes and Munroe. These years of practice were crowded also with literary, educational and editorial occupation. In the Winter of 1870-71 he gave a series of lectures on constitutional law at Harvard College, and in 1871-72 he was University lecturer on jurisprudence. In June, 1872, he married Miss Fanny Dixwell, daughter of his old

schoolmaster and a descendant of John Dixwell, the regicide. In 1873 he published in four volumes the twelfth edition of Kent's Commentaries, adding elaborate and valuable notes. From 1870 to 1873 he had editorial charge of the *American Law Review*, then published in Boston. For this review, especially for volumes five, six and seven, which he edited, he wrote many leading articles and innumerable shorter reviews and notes. His longer articles contain the germ of the lectures which he was to deliver in 1880 before the Lowell Institute, and which were in their turn to form the basis of his book on "The Common Law," published in 1881. His articles show the range of his inquiries and the extent of his learning. The principal ones were the following: 1. Codes and the Arrangement of the Law. 2. *Ultra Vires*. 3. Misunderstandings of the Civil Law. 4. Grain Elevators. 5. Arrangements of the Law. Privity. 6. The Theory of Torts. 7. Primitive Notions in Modern Law, two articles. 8. Possession. 9. Common Carriers and the Common Law. 10. Trespass and Negligence. As has been said, Mr. Holmes delivered a course of lectures in 1880 before the Lowell Institute, and in 1881 Little, Brown and Company published the lectures, somewhat amplified, in book form, under the title of *The Common Law*. The *London Spectator* called the book "the most original work of legal speculation which has appeared in English since the publication of Sir Henry Maine's 'Ancient Law,'" and the little volume at once took its place as a legal classic. It has been translated into Italian by Sig. Francesco Lambertenghi.

In 1882 Mr. Holmes was offered and accepted a new professorship in the Harvard Law School, founded by the late Mr. Weld. He held the position for a few months only, resigning to accept an appointment from Governor Long as associate justice of the Supreme Judicial Court of Massachusetts, vice Judge Otis P. Lord, resigned. Judge

Holmes took his seat on December 8, 1882, and has thus served this commonwealth in judicial capacity exactly twenty years. He was the senior associate justice at the time of the late Chief Justice Field's death in 1899, and succeeded by appointment to Chief Justice Field's position. In 1891 Judge Holmes published, for private circulation, a volume of his occasional speeches. "These chance utterances of faith and doubt are printed for a few friends who will care to keep them." In 1900 he added to the collection a few addresses delivered during the last decade. Since taking his seat on the bench Judge Holmes has written several important articles for the *Harvard Law Review*; "Privilege, Malice and Intent," published in April, 1894; "Executors," published in April, 1895; and "The Theory of Legal Interpretation," published in January, 1899. The same *Review* has reprinted two of his most learned and eloquent addresses: "The Path of the Law," delivered at the dedication of the new hall of the Boston University School of Law, in January, 1897, and "Law in Science and Science in Law," delivered at a meeting of the New York State Bar Association, in January, 1899.

Judge Holmes has written something more than twelve hundred opinions since 1882, and a review of his work in this place must necessarily be wholly fragmentary and inadequate. Perhaps the most striking instance of his constructive and co-ordinating ability is to be found in the domain of torts. It is not too much to say that when Mr. Holmes came to the bar there was no general law of torts. Hilliard on Torts, published in Boston in 1859, treated the law in the old manner, enumerating and discussing in successive chapters the time-honored and apparently unrelated heads of his subject, expatiating in their turn upon assault and battery, false imprisonment, libel and slander, malicious prosecution, nuisance, trespass and conversion. "The idea of a book on

Torts, as a distinct subject," says Professor Jaggard, in the preface to his *Hand-book of the Law of Torts*, published in 1895, "was a few years ago a matter of ridicule. . . . The theory of Torts was essentially *terra incognita* until the contributions of Oliver Wendell Holmes, Jr., appeared on the subject." These contributions began soon after Mr. Holmes came to the bar. An article from his pen, entitled "The Theory of Torts" appeared in 1873, in the July number of the *American Law Review*. From time to time other articles explained and amplified the first. In his Lowell Institute lectures, Mr. Holmes developed the general theory of Torts at length, with great wealth of historical illustration. Finally, in *The Common Law* he said: "The theory of torts may be summed up very simply. At the two extremes of the law are rules determined by policy without reference of any kind to morality. Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community. But in the main the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and to some degree, the tests, of morals. But, as the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered, not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril. In general, this question will be determined by considering the degree of danger attending the act or conduct under the known circumstances. If there is danger that harm to another will follow, the act is generally wrong in the sense of the law." With comparatively un-

important exceptions, "the known tendency of the act under the known circumstances to do harm may be accepted as the general test of conduct. The tendency of a given act to cause harm under given circumstances must be determined by experience." And on another page Mr. Holmes said: "The growth of the law is very apt to take place in this way. Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than of articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little farther to the one side or to the other, but which must have been drawn somewhere in the neighborhood of where it falls." Sir Frederick Pollock begins his treatise on "The Law of Torts," published in 1886, with an introductory letter to Mr. Justice Holmes, in the course of which he claims his friend's good will, "because the purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts—that this is a true living branch of the Common Law, not a collection of heterogeneous instances." "You will recognize in my armoury," continues Sir Frederick, "some weapons of your own forging, and if they are ineffective, I must have handled them worse than I am willing, in any reasonable terms of humility, to suppose."

While the two writers on Torts just named and many others, in books and in the schools of law, have industriously developed, illustrated, amplified, the general theory of torts which Mr. Holmes was the first to state articulately, Judge Holmes himself, in the thick of the fight, has again and again brought the general theory to the test of actual decision.

Very likely the good sense of courts would generally have led them to the same result in the particular case, articulate theory or none. But it needs no argument to show that unless the place in the law of torts of the particular state of facts under consideration can be viewed in the light of a general theory, the decision, however sensible, must be more or less uninformative and confusing. The Reports of Massachusetts, beginning with the 134th volume, are full of examples of Judge Holmes' method of dealing with a tort. Two illustrative cases must suffice. In the case of *Hawks v. Locke*, 139 Mass. 208, the plaintiff's swine were infected with a destructive disease by swine which the defendant had introduced into the plaintiff's pen, under what was equivalent to an implied license from the plaintiff. At this time nobody knew, or had reason to think, that the swine were diseased. In an admirable opinion, Judge Holmes holds the defendant not liable, because his conduct did not under the known circumstances tend to the plaintiff's damage. The court might say so much without the aid of a jury. In *Cutter v. Hamlen*, 147 Mass. 471, the defendant leased to the plaintiff for occupancy a house in which there had been diphtheria. The plaintiff and several members of his family contracted the disease, and some of them died. The house had been fumigated to the satisfaction of the Board of Health before the plaintiff's occupation began. The drains were defective, and there was evidence that the defendant knew this fact, and that the plaintiff did not know it. In a very interesting opinion Judge Holmes, speaking for the court, declares that, although the defendant was bound at his peril to know only the teachings of common experience, and was not bound to foresee results which only a specialist would apprehend, nevertheless the fact that there had been diphtheria in the house, coupled with the fact that the drains were defective, might have warranted the jury in finding that there was a

special danger from the drains, and that the landlord ought not to have assumed that this peculiar danger was removed by what the Board of Health had done. Here the question of the defendant's liability might have been decided either way. It lay in that penumbra or debatable land which is the region of the jury.

Judge Holmes and the court over which he ultimately came to preside have had a singularly felicitous opportunity to explain one dimension of the true measure of a tort in a remarkable series of cases dealing with the common law rights of employer and employed. The history of the struggle in the courts of Massachusetts between labor and capital (if a somewhat threadbare phrase may be permitted) is of absorbing interest. Limitation of space forbids the analysis of more than the most recent cases. In *Vegeahn v. Guntner*, 167 Mass. 92, the plaintiff sought to restrain his striking workmen from maintaining a patrol in front of his shop, the purpose of which was to prevent the plaintiff from getting new workmen to fill the strikers' places, and thereby to prevent him from carrying on any business until he adopted a schedule of prices exhibited to him by the strikers. A preliminary decree was entered, granting in substance the prayer of the bill. At the hearing before Judge Holmes, it appeared that the means adopted for preventing the plaintiff from getting workmen were, first, persuasion and social pressure; secondly, threats of personal injury or unlawful harm to persons seeking employment or employed. Judge Holmes made final the preliminary injunction in so far as it prohibited actual or threatened violence, or persuasion to break existing contracts. Declining otherwise to enjoin the employment of persuasion and social pressure, he reported the case to the full court. After elaborate argument, a majority of the court ordered that the injunction should stand as originally issued, without the modifications introduced by

Judge Holmes. Their opinion seems to be mainly attributable to a feeling that, as a matter of fact, a patrol must carry with it a threat of bodily harm. The late Chief Justice and Judge Holmes wrote powerful dissenting opinions. Judge Holmes indicated what he believed to be the proper mode of approaching the question. He agreed that the plaintiff had shown a cause of action when he had proved that the defendants had conspired to injure his business, and had actually injured it, unless the defendants could show some ground of excuse or justification. What constitutes such justification? The principles of free competition justify a man who sets up a second store in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his intent. "The reason, of course," says Judge Holmes, "is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged." Do not the same principles justify one workman in persuading another, not under contract to work, by appeals to the interest of his class, by social pressure, by whatever peaceable argument is likely to prove effective, not to help out the other side in the universal struggle for life? How otherwise can the game be played fairly? The question of what shall amount to a justification is to be decided on considerations of policy and social advantage. "It is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes." Judge Holmes concludes: "It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency.

Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed. . . . Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."

The case of *Vegeahn v. Guntner* has been stated at this length, not because of the admirably explicit confession of Judge Holmes' economic faith just quoted, but because in it Judge Holmes states with so much perspicuity the proper method of attacking these questions, the method of approach which, it is believed, must ultimately prevail everywhere. It did prevail in the later Massachusetts case of *Plant v. Woods*, 176 Mass. 492, decided four years later, in 1900. That case arose out of a contest for supremacy between two labor unions of the same craft. The members of the defendant union conspired to force the members of the plaintiff union to amalgamate with them, and in order to carry out their purpose threatened employers of members of the plaintiff union with strikes and boycotts, unless they asked their employees to enter the defendant union, on implied pain of discharge. The majority of the court thought that strikes and boycotts designed to benefit the strikers not directly, by raising wages or shortening the hours of labor, but merely indirectly by strengthening their union, ought to be enjoined. Judge Holmes again dissented, thinking that strikes were as lawful for the purpose of strengthening the union "as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests" as for the final purpose to which strengthening the union was a means. It is hardly to be expected, perhaps it is hardly desirable, that all the members of the court should think alike on the question of policy and economics involved in this deci-

sion, but it is highly gratifying to find the question approached in the same manner by the spokesman of the majority and by the dissenting judge. "In many cases," says Judge Hammond, speaking for the court, "the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause; and this justification may be found sometimes in the circumstances under which it is done irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined. . . . It is manifest that not much progress is made by such general statements (as that a bad motive cannot make unlawful an act otherwise lawful) whatever may be their meaning." And he addresses himself to the specific question then before the court by asking "under what circumstances, including the motive of the actor, is the act complained of lawful, and to what extent?" "I agree," says Judge Holmes, "that the conduct of the defendants is actionable unless justified."

Massachusetts, the country at large, is by no means done with these questions. They recur with ever increasing frequency and ever increasing gravity. Progress or retrogression depends on a wise solution of them. And the first requisite to a wise solution is a clear comprehension of the issue. It is believed that clear comprehension, or, at all events, clear statement, can be reached only if the question is stated in terms of justification, as Judge Holmes alone states it in *Vegeahn v. Guntner*, and as both opinions state it in *Plant v. Woods*. But, however this may be, our court has adopted Judge Holmes' method of statement, and a comparison of the majority opinions in the two cases cited will show the gain in clearness of expression. The English courts have broken down miserably in an attempt to decide similar questions by what Judge Holmes called in *Vegeahn v. Guntner* "general propositions of law which nobody disputes." The first head-note in the

recent bitterly contested case of *Allen v. Flood*, as reported in (1898) A. C. 1, is: "An act lawful in itself it not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action." As Hammond, J., in writing the opinion of the court in *Plant v. Woods*, keenly says: "If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances," the proposition is not "either logically or legally accurate." Indeed, few lawyers even in England found comfort in the generalities of the House of Lords. Three years later, in *Quinn v. Leathem*, (1901) A. C. 495, *Allen v. Flood* was "explained and its real effect stated." The House of Lords can hardly come nearer to overruling itself. Owing to the circumstance that by the reverential if somewhat inconvenient fiction of English procedure, *Allen v. Flood* and *Quinn v. Leathem*, being judgments of the House of Lords, are both law, the lower courts are now in hopeless confusion, drifting hither and thither without chart or compass.

Of course Judge Holmes goes to Washington with an open mind. The many decisions of our court on constitutional questions in which he has taken part will no longer exert upon him more authority than is due to the force of their reasoning. It is idle to scan them too narrowly in a curious attempt to prophesy his decision on particular questions which may come before him hereafter. Nevertheless, a leopard may as easily change his spots as a mature thinker his whole manner of thinking. It is interesting, therefore, to observe at this time the kind of reception

which Judge Holmes' mind accords to a question of constitutional law. One familiar with his opinions on such subjects must be impressed by a certain largeness of view, an unwillingness to admit restrictions upon the powers of the law-making or administrative departments of the government which are not plainly contained in some specific portion of the constitution from which the government draws its life. It will be remembered that Judge Holmes taught constitutional law at Harvard College in the early days of his practice. The broad spirit in which he deals with constitutional questions is the spirit to which all those who have thought most deeply on the subject come at last. The ideals of the world change, and with them the ends which the world wishes to attain through legislation. One must not accept too readily the argument of a new minority drawn from the silence of the fathers. That the makers of the constitution did not expressly permit does not necessarily mean that they forbade. That possibly growing class of persons who believe, if only half consciously, that because legislators grow incompetent, judges should exercise part of their functions, or at least should be very ready to revise current enactments, have little to hope from Judge Holmes. He states his position clearly in an opinion rendered to the House of Representatives in 1894 (Opinion of the Justices, 160 Mass. 586, 594) on the constitutionality of a proposed general act involving a referendum. Judge Holmes is speaking for himself alone, a majority, consisting of four judges, believing that the whole scheme of legislation was unconstitutional. "In my opinion," he says, "the legislature has the whole law-making power except so far as the words of the Constitution expressly or impliedly withhold it, and I think that in construing the Constitution we should remember that it is a frame of government for men of opposite opinions and for the future, and therefore not hastily import

into it our own views, or unexpressed limitations derived merely from the practice of the past. I ask myself, as the only question, what words express or imply that a power to pass a law subject to rejection by the people is withheld? I find none which do so. . . . I agree that confidence is put in (the legislature) as an agent. But I think that so much confidence is put in it that it is allowed to exercise its discretion by taking the opinion of its principal if it thinks that course to be wise." Of course an opinion on a question of power between the legislature and the people of a state is no help to the decision of the questions of power which arise in Washington, but the quotation seems to reflect certain ingrained habits of thought which are likely to endure wind and weather.

As has been said, Judge Holmes has written some twelve hundred opinions since he came to the bench, as well as the articles and occasional addresses already referred to. Of all the opinions there are probably very few that would not be recognized at once by any reader as proceeding from his pen. In the first place his opinions are almost always short, and they are markedly free from that gentle prolixity which characterizes so many judicial utterances, and gives them the taste of half-baked dough in the mouth of the most patient reader. Judge Holmes' sentences are always virile; each word has been intended to carry some part of the idea. His thought is apt to be expressed elliptically, and sometimes he carries compactness of statement dangerously near to the point of epigram. His opinions are not without suggestions of that shrewd and kindly wit which illumined the writings of his father, restrained, of course, by the decorousness of the occasion. Judge Holmes has a habit of assuming the intelligence of his audience. Often decisions which many careful judges would think worthy of explanation covering at least several pages are reduced to a phrase. A policeman had been discharged because he

would discuss affairs of party in violation of a rule of his department. (*McAuliffe v. Mayor of New Bedford*, 155 Mass. 216). He objected that the rule deprived him of free speech. Judge Holmes stated the entire and sufficient answer thus: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Perhaps judicial traditions demanded the elaboration which followed, but there was nothing more to be said.

This fragmentary sketch has omitted all mention of many decisions of the greatest living importance, and all reference to many others in which Judge Holmes has, with

brilliant scholarship, traced the history of particular rules of law from their sources, bursting inflated explanations. But if one is mentioned many must be named, and the limits proper to an article which can at most state only some of the main events of Judge Holmes' life, and suggest some of the main characteristics of his mind, have already been far exceeded. Chief Justice Holmes succeeds Chief Justice Gray. Our loss is the Nation's gain. The bar of Massachusetts will watch with the keenest interest the part which the late Chief Justice of the Commonwealth is henceforth to play in the greater drama of the Nation's life.

A RUBAIYAT OF THE COURTS.¹

By H. GERALD CHAPIN.

IX.

Each month new clients seek your door, you say;
Ah, but how "panned out" those of yesterday?
Their cases settled, have they settled, too,
Or were you forced to wait awhile for pay?

XVII.

Think, how in musty court rooms pent and drear,
Apparently ventilated once per year,
Jones, Brown, and Smith, JJ., preside,—then as
Commissioners and referees appear.

XIX.

I sometimes wonder if the Court e'er muses,
In re the feelings of the man who loses,
Who now within the tavern's portals safe,
His Honor's rulings and his law abuses.

¹ The legendary friendship between Omar and the Nizam ul Mulk, Wazir to the Sultan Malikshah, is well known to Orientalists. It has remained for an obscure individual like the translator to unearth a tattered ragment of what appears to have been a second Rubaiyat addressed by the illustrious tent maker to his friend, who was somewhat of a lawyer in an Oriental way, *i. e.*, a collector of judicial backsheesh. Likewise to reduce the aforesaid quatrains into the vernacular.

XXV.

Alas for those whose wit is all too slow,
 And cannot apt excuse for 'journment show;
 "Trial when reached," his Honor cries, "or else
 To foot of Calendar the cases go."

XXVII.

Myself when young, did often ponder o'er
 The N. Y. Reps., but this I do no more,
 For they, I ween, hold nothing but the guess,
 Which last tribunals dignify by "law."

XXXVIII.

Our latest case by precedent controlled,
 Adjudged by what adown the aeons rolled,—
 Marconi's patent measured by the law
 Of carriers, dug up from Ventris' mould.

XLVI.

Hope not, O brother, e'er to reach the goal
 When bookish tide will cease to higher roll;
 Treatise, report and text book endless come,
 "*Crescit eundo*" to affright the soul.

LXXII.

To that monstrosity we call the "Code,"
 Sprung from the Dragon's teeth which Field once sowed,
 For aid appeal not. Know you not that right
 By technicality is now o'errode?

L.

A hair, perchance, divides the false and true;
 Aye, and the Court's decision gives no clue
 To what is *obiter* and what is not;
 We all have found it d—d confusing, too.

CI.

And when at last we, too, shall pass away,
 Our wit and argument mere empty clay,—
 "The same old story, he worked hard, lived well,
 Died poor, the common epitaph," they'll say.



THE INCORPORATION OF TRADE UNIONS.¹

BY LOUIS D. BRANDEIS.

LEST what I say on the advisability of incorporating trade unions be misunderstood, it seems wise to state at the outset my views of their value to the community.

They have been largely instrumental in securing reasonable hours of labor and proper conditions of work; in raising materially the scale of wages, and in protecting women and children from industrial oppression.

The trade unions have done this, not for the workingmen alone, but for all of us; since the conditions under which so large a part of our fellow citizens work and live will determine, in great measure, the future of our country for good or for evil.

This improvement in the condition of the workingmen has been almost a net profit to the community. Here and there individuals have been sacrificed to the movement, but the instances have been comparatively few, and the gain to the employé has not been attended by a corresponding loss to the employer. In many instances, the employer's interests have been directly advanced as an incident to improving the conditions of labor; and perhaps in no respect more than in that expressed by a very wise and able railroad president in a neighboring state, who said: "I need the labor union to protect me from my own arbitrariness."

It is true that the struggle to attain these great ends has often been attended by intolerable acts of violence, intimidation and oppression; but the spirit which underlies the labor movement has been essentially noble. The spirit which subordinates the interests

of the individual to that of the class is the spirit of brotherhood—a near approach to altruism; it reaches pure altruism when it involves a sacrifice of present interests for the welfare of others in the distant future.

Modern civilization affords no instance of enlightened self-sacrifice on so large a scale as that presented when great bodies of men calmly and voluntarily give up steady work, at satisfactory wages and under proper conditions, for the sole reason that the employer refuses the recognition of their union, which they believe to be essential to the ultimate good of the workingmen. If you search for the heroes of peace, you will find many of them among those obscure and humble workmen who have braved idleness and poverty in devotion to the principle for which their union stands.

And because the trade unions have accomplished much, and because their fundamental principle is noble, it is our duty, where the unions misconduct themselves, not to attack the unions, not—ostrich like—to refuse to recognize them, but to attack the abuses to which the unions, in common with other human institutions, are subject, and with which they are afflicted; to remember that a bad act is no worse, as it is no better, because it has been done by a labor union and not by a partnership or a business corporation.

If unions are lawless, restrain and punish their lawlessness; if they are arbitrary, repress their arbitrariness; if their demands are unreasonable or unjust, resist them; but do not oppose the unions as such.

Now, the best friends of labor unions must and should admit that their action is frequently hasty and ill-considered, the result of emotion rather than of reason; that their action is frequently arbitrary, the natural re-

¹ An address delivered at a meeting of the Economic Club of Boston, December 4, 1902, and followed by an address on the same subject by Samuel Gompers, president of the American Federation of Labor. This latter address will be printed in the February number THE GREEN BAG.—*The Editor.*

sult of the possession of great power by persons not accustomed to its use; and that the unions frequently ignore laws which seem to hamper them in their efforts, and which they therefore regard as unjust. For these defects, being but human, no complete remedy can be found; but the incorporation of labor unions would in some measure tend to correct them.

The general experience in this country, in respect at least to the great strikes, has been that their success or failure depended mainly upon whether public opinion was with or against the strikers. Nearly every American who is not himself financially interested in a particular controversy sympathizes thoroughly with every struggle of the workingmen to better their own condition, to get a larger share of the fruits of industry. But this sympathy is quickly forfeited if the conduct of the strikers is unreasonable, arbitrary, unjust or lawless. The American people with their common sense, their desire for fair play, and their respect for law, resent such conduct.

The growth and success of labor unions, therefore, as well as their usefulness to the community at large, would be much advanced by any measures which tend to make them more deliberate, less arbitrary, and more patient with the trammels of a civilized community. They need, like the wise railroad president to whom I referred, something to protect them from their own arbitrariness. The employer and the community also require this protection. Incorporation would serve to this end.

When, in the course of a strike, illegal acts are committed, such as acts of violence or of undue oppression, the individual committing the wrong is, of course, legally liable. If the act is a crime, the perpetrator may be arrested and punished; if it is a mere trespass, he may be made to pay damages, if he is financially responsible; and if money damages appear not to be an adequate remedy, an injunction against the wrongful acts may

be granted by a court of equity. If the injunction is disobeyed, the defendant may be imprisoned for contempt.

Now, it seems to be a common belief in this country that while the individual may be thus proceeded against in any of these ways, the labor union, as such, being unincorporated, that is, being a mere voluntary association, cannot be made legally responsible for its acts.

The rules of law established by the courts of this country afford, it is true, no justification for this opinion. A union, although a voluntary unincorporated association, is legally responsible for its acts in much the same way that an individual, a partnership, or a corporation is responsible. If a union, through its constituted agents, commits a wrong or is guilty of violence or of illegal oppression, the union, and not merely the individuals who are the direct instruments of the wrong, can be enjoined or made liable for damages to the same extent that the union could be if it were incorporated; and the funds belonging to the unincorporated union can be reached to satisfy any damages which might be recovered for the wrong done. The Taff Vale Railway case, decided last year in England, in which it was held that the Amalgamated Society of Railway Servants could, as a union, be enjoined and be made liable in damages for wrongs perpetrated in the course of a strike, created consternation among labor unions there, but it laid down no principle of law new to this country.

Numerous instances may be found in our courts where labor unions have been enjoined, and in our own state, more than thirty years ago, an action was maintained against a union for wrongfully extorting from an employer a penalty for having used the product of "scab" labor. But while the rules of legal liability apply fully to the unions, though unincorporated, it is, as a practical matter, more difficult for the plain-

tiff to conduct the litigation, and it is particularly difficult to reach the funds of the union with which to satisfy any judgment that may be recovered. There has consequently arisen, not a legal, but a practical immunity of the unions, as such, for any wrongs committed.

This practical immunity of the unions from legal liability is deemed by many labor leaders a great advantage. To me it appears to be just the reverse. It tends to make officers and members reckless and lawless, and thereby to alienate public sympathy and bring failure upon their efforts. It creates on the part of the employers, also, a bitter antagonism, not so much on account of lawless acts as from a deep-rooted sense of injustice, arising from the feeling that while the employer is subject to law, the union holds a position of legal irresponsibility.

This practical immunity of the labor unions from suit or legal liability is, in my opinion, largely responsible for the existence of the greatest grievances which labor unions consider they have suffered at the hands of the courts, that is, the so-called "government by injunction." It has come about in this way: An act believed to be illegal is committed during a strike. If that act is a crime, a man may be arrested, but in no case can he be convicted of a crime except on proof beyond a reasonable doubt and a verdict of the jury, which is apt to contain some members favorable to the defendant. Many acts, however, may be illegal which are not criminal, and for these the only remedy at law is a civil action for damages; but as the defendant is usually financially irresponsible, such action would afford no remedy.

The courts, therefore, finding acts committed or threatened, for which the guilty parties cannot be punished as for a crime, and cannot be made to pay damages, by way of compensation, have been induced to apply freely, perhaps too freely, the writ of injunction. They have granted, in many instances,

this writ according to the practices of the court of equity upon preliminary application, wholly *ex parte*, and upon affidavits, without any chance of cross-examination. If the courts had been dealing with a responsible union instead of with irresponsible defendants, they would, doubtless in many of the cases, have refused to interfere by injunction and have resolved any doubts for defendants instead of plaintiffs.

In another respect, also, this practical immunity of the unions has been very dearly bought: Nearly every large strike is attended by acts of flagrant lawlessness. The employers, and a large part of the public, charge these acts to the unions. In very many instances, the unions are entirely innocent. Hoodlums, or habitual criminals, have merely availed themselves of a convenient opportunity for breaking the law, in some instances even incited thereto by employers desiring to turn public opinion against the strikers. What an immense gain would come to the unions from a full and fair trial of such charges, if the innocence of the unions were established and perhaps even the guilt of an employer! And such a trial would almost necessarily be had before a jury, upon oral testimony, with full opportunity of cross-examination; whereas now, nearly every important adjudication involving the alleged action of unions is made upon application to a judge sitting alone, and upon written affidavits, without the opportunity of cross-examination.

It has been objected by some of the labor leaders that incorporation of the unions would expose to loss the funds which have been collected as insurance against sickness, accident and enforced idleness; that these funds might be reached to satisfy claims made for wrongs alleged to have been committed by the union. I can conceive of no expenditure of money by a union which could bring so large a return as the payment of compensation for some wrong actually com-

mitted by it. Any such payment would go far in curbing the officers and members of the union from future transgression of the law, and it would, above all, establish the position of the union as a responsible agent in the community, ready to abide by the law. This would be of immense advantage to the union in all its operations.

Again, it has been urged that the incorporation of the union would lead to a multiplication of law suits, which would involve the union in great expense; but the expense of conducting such litigation would be insignificant as compared with the benefits which would result to the union from holding a recognized and responsible position in the community.

Again, it has been urged that the unions would not fear litigation if justice were promptly administered; but that it was the dragging out of litigation which was to be apprehended. I take it that so far as the unions have suffered from the administration

of the law, it has not been from delays but from precipitancy. They have suffered at times in the granting of preliminary injunctions, injunctions which have been more readily granted because of the irresponsible position of the defendants.

Again, it has been urged that the unions might be willing to submit themselves readily to suit if the rules of law, as now administered by the courts, were not unjust to labor. I am inclined to think that there have been rendered in this country many decisions which do unduly restrict the activity of the unions. But the way to correct the evil of an unjust decision is not to evade the law but to amend it. The unions should take the position squarely that they are amenable to law, prepared to take the consequences if they transgress, and thus show that they are in full sympathy with the spirit of our people, whose political system rests upon the proposition that this is a government of law, and not of men.

SOME ABSURDITIES OF THE LAW.

BY WILLIS B. DOWD.

THERE are so many absurdities in the law that the question of selection is one of difficulty only in signalizing those which are most conspicuous.

Lawyers are supposed to be men of practical sense. The law is said to be a science. Since the days of Lord Coke we have been in the habit of thinking that reason and the law go hand in hand. That all these things are myths is perfectly apparent in the following instances of the absurdities to be found in the law and lawyers of to-day.

Take for the first illustration a question in practice. Nobody will deny that direct means should be employed in the accomplishment of a desired purpose. A surgeon intent upon

cutting off a leg does not go about the work by first amputating an arm. If a lawyer in the city of New York, however, wants to appeal from a judgment rendered against his client, he has to pursue a course that is absolutely fatuous and ridiculous. He makes a motion for a new trial on the ground that the verdict is against the law and the evidence, and the motion is denied. He must enter an order denying this motion, and he must appeal from it as well as from the judgment, in order to have the judgment reviewed on the question of the weight of evidence. Hundreds of thousands of pieces of paper have been used in the preparation of such orders. Vast sums of money have been expended in

the printing of the same; incalculable time and energy have been expended in copying, serving and printing these worthless documents, all of which might be abolished and dispensed with by one legislative enactment containing not over one hundred words.

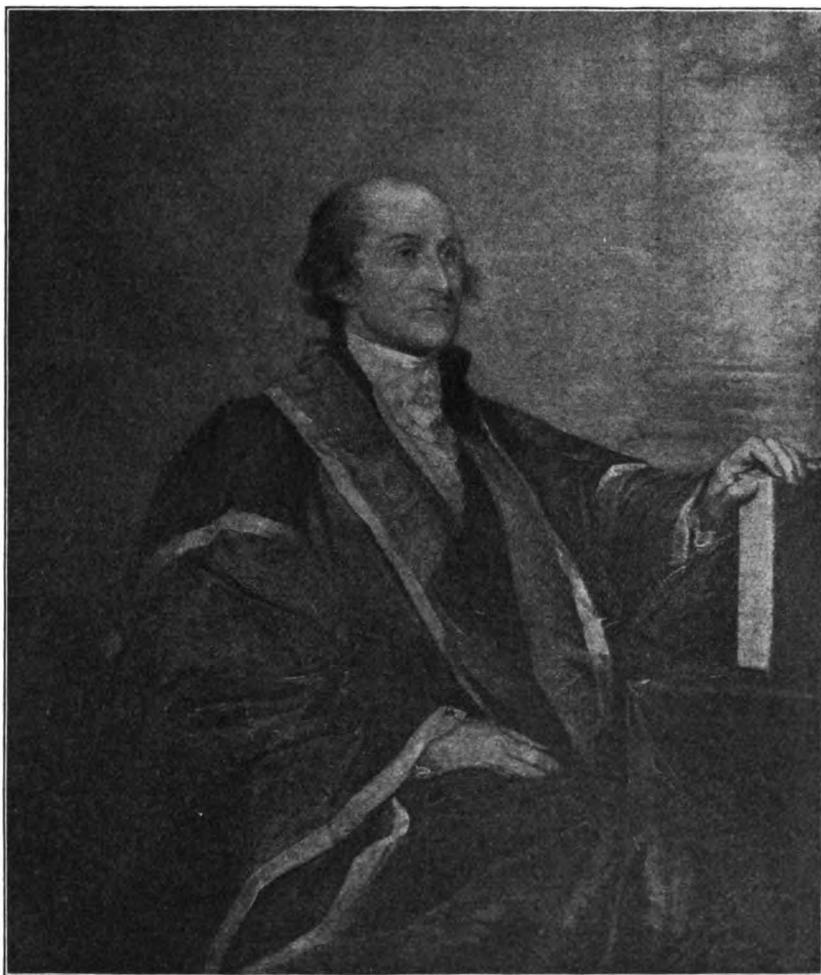
If an act were passed, providing that on appeal from a judgment, whether interlocutory or final, the same should be reviewed both as to the law and the facts, there would be, of course, no necessity for all this foolishness that now goes on to accomplish the same purpose. If ever there was a freakish plan concocted by man for accomplishing a desired purpose, it is found in the New York Code of Civil Procedure, in those sections which require that in order to review an interlocutory judgment overruling a demurrer, a decision must also be filed, and that to overhaul completely a final judgment entered upon the verdict of a jury, a separate order must be entered, denying a motion to set aside the same on the ground above related.

This one instance must suffice for procedure. Let us now look at an absurdity of a much graver nature. Under our statute in New York, usury is the exacting of more than six *per cent.* for the use of money. The theory is that it is not good for the people that one man should charge and another pay a higher rate of interest than six *per cent.* No man may lend one hundred dollars on a promissory note or one thousand dollars on real estate at a higher rate without running the risk of losing principal and interest. In the case of those persons who are necessitous, householders who are in straitened circumstances, the law has provided a means whereby they borrow money at the rate of two and one-half *per cent.* a month, with an additional expense of one dollar and fifty cents a month for examination. Let us say that this measure is just; that the poor may properly be charged thirty *per cent. per annum* for the use of money. Why should a man of moderate means or a rich man be for-

bidden to borrow money at the same rate?

Consider next the question of the liquor law. One of the most transparent frauds ever perpetuated upon a people by a legislature is the "Raines Law" of the state of New York. One sits in a hotel bar and billiard room with a few jolly companions, sipping a few delectable high-balls at the hour of midnight on Saturday. One sees a couple of men-of-all-work lug out a lot of bamboo screens or curtains from some hidden place, and then hang them disconnectedly around the sacred precincts of the bar. One sees the barkeeper through the slats of the aforesaid bamboo screens, and he still mixes drinks, and the patrons still guzzle them until the wee hours of the morning. Nevertheless, the bar is closed, and the dignity of the law is satisfied. Was there ever a humbug equal to this, and is this sort of thing calculated to inspire the people with respect for the laws of the land?

Lastly, the question of gambling. We are told that it is a very bad and a wicked thing for men to play poker, roulette, *rouge et noir* and faro-bank. Policy and pool are especially tabooed. Why do the people prohibit gambling in New York city, and license it at Gravesend? How is it that the legislature holds up its hands in pious horror at the idea of roulette at Canfield's, and makes a special law by which millions of money and thousands of youths are annually lost on the racetracks at Brighton Beach, Morris Park and Saratoga? If pool and policy are wrong in the city of New York, how is the saturnalia of gambling at Saratoga, where bets of fifty thousand dollars on the horse races and losses of eight thousand dollars in a gambling hell are common, is right enough? How do we expect to bring about any reforms in the conduct of our citizens, and make any considerable headway toward the betterment of the human race, so long as we have before our eyes every day such living instances of the folly, hypocrisy and banefulness of our law-makers?



JOHN JAY.

The original painting is by Gilbert Stuart.

A CENTURY OF FEDERAL JUDICATURE.

I.

BY VAN VECHTEN VEEDER.

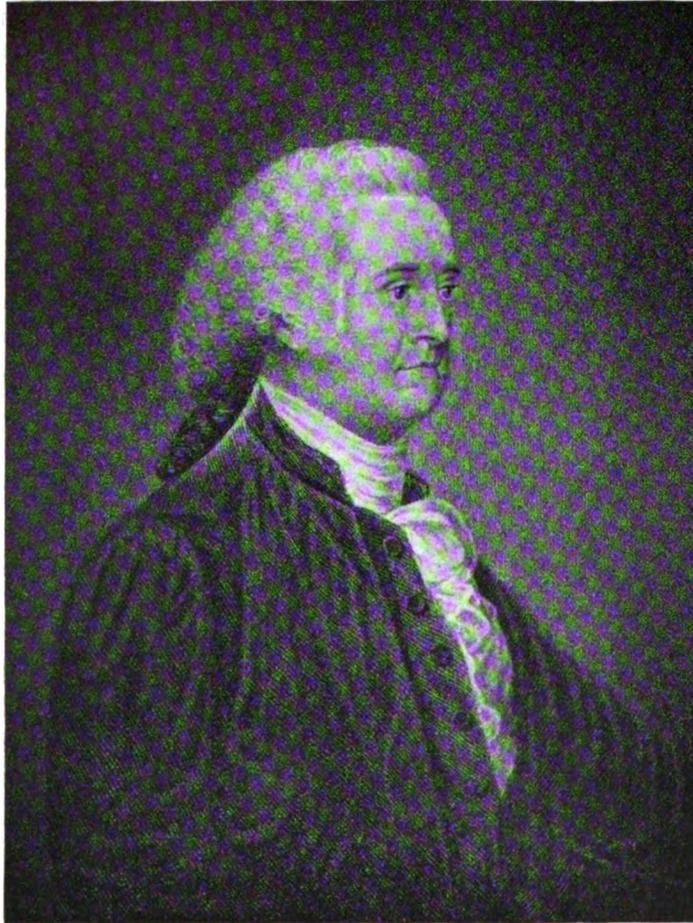
CREATED by an authority superior to legislation, and placed beyond the reach of executive power; entrusted not only with final authority in the administration of public justice, but charged with the limitation of the powers of political governments—the Supreme Court of the United States is without a parallel in history. Whether regard be had, therefore, to the character of the suitors that are brought before it, or to the importance of the subjects over which it has final jurisdiction, it may well be considered the highest court in Christendom. Only lawyers can understand what its members accomplished in making it a dignified and influential court of law; but every citizen should learn what he owes to them for making it the living voice of the Constitution. Established by the fundamental law as one of the coördinate departments of the national government, it remained for Chief Justice Marshall and his successors to vindicate its right not only to preserve the balance between the complex powers of state and nation, but to pass upon the validity of the acts of its co-equal legislative and executive departments. To the justices of the court is due the transformation of the Constitution from a scroll of parchment into a living force; they found it paper, and they made it power. And thus it has happened that the fundamental rights of the people in life, liberty and the pursuit of happiness find their final security in that branch of the government which is furthest of all beyond the public reach. But although the court is made, as far as any institution can be, invulnerable to public attack, public confidence is the very breath of its life. It is the feeblest branch of the government. Congress is strong in its possession of purse and sword, in its power of law making, its popu-

lar character and opportunity of immediate communication with the people. The executive is strong from its position of command, its concentrated power and rapid action, and above all in its power of appointment and removal. The judicial department is inherently weak. Numerically small, and without patronage to dispense, its justices elderly men, necessarily withdrawn from participation in public affairs, and accustomed to meet criticism in the performance of their often unpopular duty with the silence enjoined by usage and decorum, it finds its only refuge and support in the confidence and respect of the people. Thus, while it is the bulwark of the people against their own ill-advised action, it finds its ultimate security in the confidence of those whose passions it restrains. The character and conduct of its justices is therefore of vital interest and importance to every citizen who appreciates his heritage of liberty controlled by law.

A brief reference to the conditions which prevailed during the first decade of the court's history will indicate the uncertainty which characterized its early years. The original bench was composed of lawyers of the highest standing and of wide experience in public affairs. But doubt and uncertainty as to its true position in the government characterized the early years of the court, and its dignity suffered in consequence. Appointments to the bench were often declined, and resignations were frequent. Harrison declined a commission, preferring to be chancellor of Maryland; Rutledge resigned to become chief justice of South Carolina. Statesmen bivouacked in the chief justiceship, as Shirley says, on their way from one position to another. Nor did the judges look upon political service as being incompatible with judi-

cial position. During his first six months' service as chief justice Jay was also Secretary of State in Washington's cabinet, and afterwards did not scruple to undertake a diplomatic mission to England which caused his absence from the bench for more than a year; and he finally resigned his judicial posi-

Chase, who had deserted the bench to canvass Maryland in behalf of the administration, the court was left without a quorum. When Ellsworth finally resigned on account of ill health, Jay declined reappointment, stating that he "left the bench perfectly convinced that under a system so defective it



JOHN RUTLEDGE.

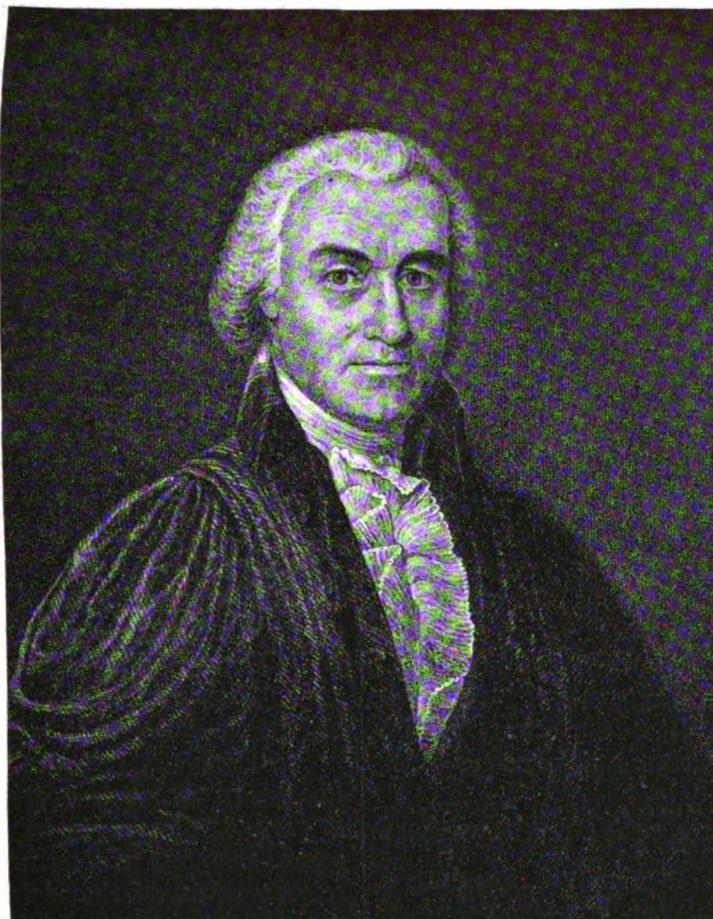
tion because he had been elected governor of New York. Ellsworth retained the chief justiceship while minister to France; and even Marshall, during his first term as chief justice was also Secretary of State. In August, 1800, in consequence of the absence of the chief justice, who was in France, and of

[the court] would not obtain the energy, weight and dignity which were essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."

During the first eleven years the court de-

cided only fifty-five cases. The engrossed minutes of its work cover only a little more than two hundred pages of one of the volumes of its records, and its reported decisions fill only five hundred pages of the second, third and fourth volumes of Dallas' reports. In 1790 there was no business before

early business was concerned with questions of practice, most of which related to enforcing the appearance of defendant states. These efforts finally culminated in the decision in the case of *Chisholm v. State of Georgia*, 2 Dall. 419, in which the court asserted the right to determine the case of a citizen



OLIVER ELLSWORTH.

the court; in 1791 only two matters of practice and a single case, *State of Georgia v. Brailsford*, which was further considered at the following term. The few decisions touching the scope of the court's power and duties were mainly confined to denial rather than to assertion. The major part of the

against a State. This was really the first case finally disposed of; but its effect was promptly nullified by the adoption of the eleventh amendment to the Constitution. *Georgia v. Brailsford*, 3 Dall. 1, was finally determined by a jury. During this period nine cases involving constitutional questions

were decided, only three of which, *Chisholm v. State v. Georgia*, 2 Dall. 419, *Ware v. Hylton*, 3 Dall. 199, and *Calder v. Bull*, 3 Dall. 386, were of general importance.

It is not surprising, therefore, that the law reports contain few specimens of the judicial powers of the ten justices whose service falls entirely or mainly within this period. Jay (1789-95) and Rutledge (1795), although men of distinguished ability and high character, were not profound lawyers. Jay's most conspicuous judicial utterance was his opinion in *Chisholm v. State of Georgia*, 2 Dall. 419, in which he formulated the Federalist view of position of the States under the Constitution. Rutledge's service was confined to his circuit, the Senate having refused to confirm his appointment. Wilson (1789-98),¹ Iredell (1790-99) and Ellsworth (1769-99) were the ablest members of the court during this period. In his dissenting opinion in *Chisholm v. Georgia*, 2 Dall. 419, Iredell expounded the doctrine of state rights with consummate power.² The most conspicuous monument of Ellsworth's ability was the Judiciary Act of 1789.³ Paterson (1793-1806) was a lawyer of much ability, and, with his wide experience in public affairs, made a very acceptable judge.⁴ Blair (1789-95)⁵ and Cushing (1789-1810)⁶ brought to the court their judicial experience in the courts of their respective States. The only record of Johnson's short

¹ See *Chisholm v. Georgia*, 2 Dall. 419; *Ware v. Hylton*, 3 *ib.* 199; *United States v. Henfield*, *Wharton's State Trials*, 49.

² See also *Ware v. Hylton*, 3 Dall. 199; *Calder v. Bull*, *ib.* 386; *Wilson v. Daniels*, 4 Dall. 401; *United States v. Mundell*, 1 *Hughes* 415.

³ His judicial style may be studied in the *Phœbe Ann*, 3 Dall. 319; *Wiscart v. Dauchy*, *ib.* 321; *I. a Vengeance*, *ib.* 297; *Brown v. Barry*, *ib.* 365; *Clark v. Rüssel*, *ib.* 415; *Simms v. Irvine*, *ib.* 425; *Turner v. Bank of North America*, 4 *ib.* 8; *Wilson v. Daniels*, *ib.* 401; and in Kirby's *Connecticut Reports*, *Hobby v. Finch*, 14; *Hart v. Ellsworth* 127; *Adams v. Kellogg*, 175.

⁴ His leading opinions are *Penhallow v. Doane*, 3 Dall. 54; *Van Horne's Lessee v. Dorrance*, 2 *ib.* 304; *Ware v. Hylton*, 3 *ib.* 199; *Calder v. Bull*, *ib.* 386; *United States v. Mitchell*, 2 *ib.* 348.

⁵ See his opinion in *Chisholm v. Georgia*, 2 Dall. 419.

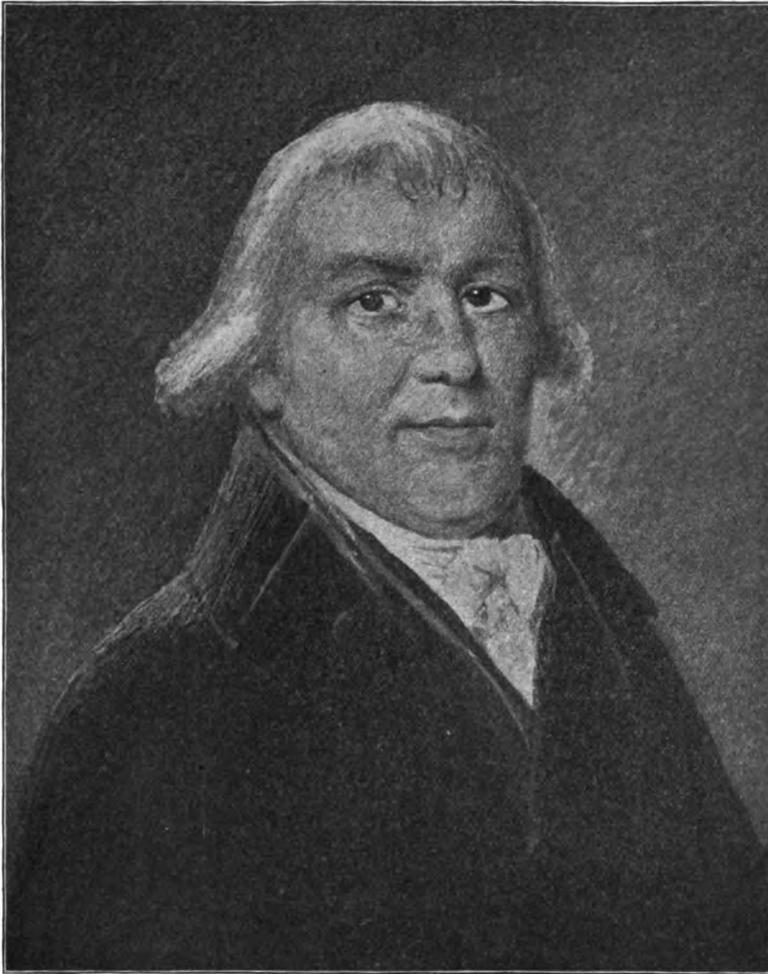
⁶ *McIlvaine v. Cox's Lessee*, 4 *Cranch* 209; *Chisholm v. Georgia*, 2 Dall. 419; *Ware v. Hylton*, 3 *ib.* 199.

service (1791-93) is his brief opinion in *Georgia v. Brailsford*, 3 Dall. 1. Moore (1799-1804), likewise, delivered only one opinion.⁷

On the fourth day of February, 1801, John Marshall took his seat as chief justice of the Supreme Court of the United States. It was the first session of the court at the new seat of the national government, and it marks the real beginnings of our federal jurisprudence. Not only had Marshall's predecessors done little to outline the great work that was to be done, but the circumstances under which he assumed his office were decidedly propitious. The appointment itself was due to a fortuitous combination of events. The resignation of Chief Justice Ellsworth caused a vacancy during the last days of Adams' administration. Upon Jay's refusal to accept the office, it was supposed that Justice Paterson, who was supported by the ultra-Federalists, would be promoted. But the President had been much impressed by Marshall's powerful defence in Congress of the administration's course in delivering up Thomas Nash, *alias* Jonathan Robbins, a British seaman who claimed to be an American citizen, to the British authorities; and this speech probably contributed more than any one thing to make Marshall chief justice.

The bitter conflict between the Federalist and Republican parties had resulted in 1800 in the triumph of Jefferson, and the defeated Federalists resorted to desperate measures to perpetuate their power. One of the last acts of Congress in February, 1801, was the rearrangement of the judicial districts and the establishment of separate circuit courts. This act gave to President Adams the appointment of sixteen new judges, whose commissions he signed and delivered on the eve of his departure from office. The appointment of these "midnight judges" was fiercely assailed in the ensuing Congress; the act creating new circuit courts was repealed, and in order to prevent any interference by the

⁷ *Bas v. Tingy*, 4 Dall. 37.



JAMES IREDELL.

From a painting in the possession of Iredell Meares, Esq., Wilmington, N. C.

Supreme Court, Congress suspended the sessions of the court for nearly fourteen months by abolishing the August term; and the membership of the Supreme Court itself was reduced from six to five judges. No appointment could have been more offensive to the new President, from both a personal and a political standpoint, than that of Marshall. In after life Jefferson described the Federal judiciary as a "subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric"; Marshall was "a crafty judge who sophisticates the law to his mind by the turn of his own reasoning." With a Congress in full sympathy with a hostile executive, the position of the Supreme Court was perilous in the extreme. Had the impeachment of Justice Chase been successful the Supreme Court would, under such circumstances, have been confined to the sphere of a mere court of law. When that impeachment failed, John Randolph had proposed to amend the Constitution so as to make the judges removable on the joint addresses of the Senate and the House of Representatives. The failure of such hostile action now enabled Marshall to fix a construction on the Constitution which forever established the independence and authority of this tribunal. By his indomitable determination, powerful logic and practical statesmanship Marshall not only established a great court of law, but also vindicated its title as one of the coördinate powers of the government.

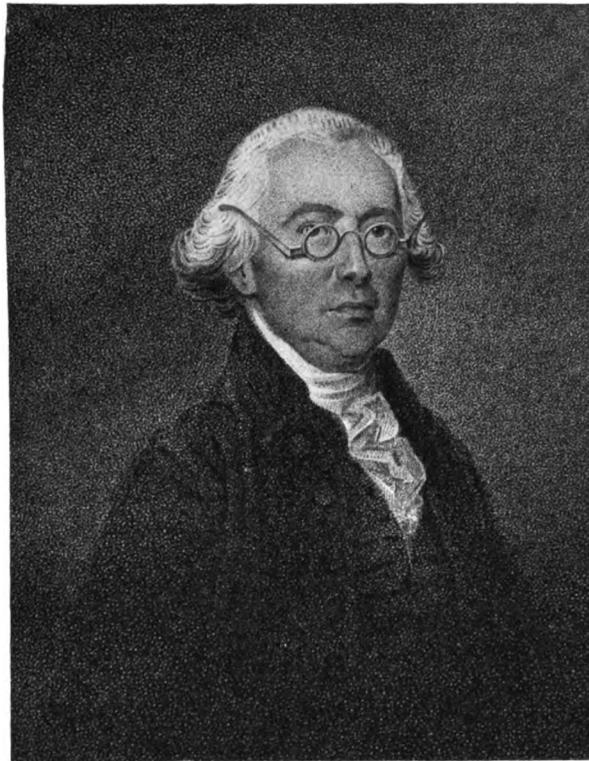
With Marshall, therefore, really began the process, peculiar to our system of government, of the development of constitutional law by means of judicial decisions based upon the provisions of a fundamental written instrument. Not only were the nation, the Constitution and the laws in their infancy; he was met by the problem, absolutely new to political science, whether it was possible to carry into successful operation a plan of government contemplating the contempora-

neous supremacy of two governments, state and federal, distinct and separate in their action, yet commanding with equal authority the obedience of the same people, so that each in its allotted sphere should perform its functions without collision. "To hold the balance true between these jarring poles, to tread the straight and narrow path marked out by law, regardless of political expediency and party politics, on the one hand, and of jealousies of the reigning power on the other; to reason out the governing principle in such manner as to leave the mind free to pursue its own course without perplexity and to commend the conclusions reached to the sober second thought; these," as one of his successors has said, "demanded that breadth of view, that power of generalization, that clearness of expression, that unerring discretion, that simplicity and strength of character, that indomitable fortitude which, combined in Marshall, enabled him to disclose the working lines of that great republic whose foundations the men of the Revolution laid in the principles of liberty and self-government."

The signal success with which he solved the great problem which confronted him, and the invaluable service which he rendered to his country, have been abundantly recognized by succeeding generations. One of our most learned and acute legal scholars, the late Professor Thayer, considered it hardly possible to over-estimate its value. "Sitting in the highest judicial place for more than a generation; familiar from the beginning, with the Federal Constitution, with the purposes of its framers, and with all the objections of its critics; accustomed to meet these objections from the time he had served in the Virginia Convention of 1788; convinced of the purpose and capacity of this instrument to create a strong nation, competent to make itself respected at home and abroad, and able to speak with the voice and strike with the strength of all; assured that this was the

paramount necessity of the country, and that the great source of danger was in the jealousies and adverse interests of the States,—Marshall acted on his convictions. He determined to give full effect to all the affirmative contributions of power that went to make up a great and efficient national government; and fully, also, to enforce the national restraints and prohibitions upon the

functions of the Nation and the States, so plainly, with such fullness, with such simplicity and strength of argument, such a candid allowance for all that was to be said upon the other side, in a tone so removed from controversial bitterness, so natural and fit for a great man addressing the 'serene reason' of mankind, as to commend these things to the minds of his countrymen, and firmly to fix



JAMES WILSON.

States. In both cases he included not only the powers expressed in the Constitution, but those also which should be found, as time unfolded, to be fairly and clearly implied in the objects for which the Federal government was established. In that long judicial life, with which Providence blessed him, and blessed his country, he was able to lay down, in a succession of cases, the fundamental considerations which fix and govern the relative

them in the jurisprudence of the Nation; so that 'when the rain descended and the floods came, and the winds blew and beat upon that house, it fell not, because it was founded upon a rock.' It was Marshall's strong constitutional doctrine, explained in detail, elaborated, powerfully argued, over and over again, with unsurpassable earnestness and force, placed permanently in our judicial records, holding its own during the long emer-

gence of a feebler political theory, and showing itself in all its majesty when war and civil dissention came,—it was largely this that saved the country from succumbing, in the great struggle of forty years ago, and kept our political fabric from going to pieces.”

And Mr. Bryce, the most discriminating English student of our institutions, has expressed the opinion that “no other man did half so much either to develop the Constitution by expounding it, or to secure for the judiciary its rightful place in the Government as the living voice of the Constitution. No one vindicated more strenuously the duty of the court to establish the authority of the fundamental law of the land, no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the court remain its bulwark; the traditions which were formed under him and them have continued in general to guide the action and elevate the sentiments of their successors.”

An examination of the reports of the court reveals the extent to which this great achievement was due to Marshall personally. For the first ten years or more of his service, he alone delivered all the opinions of the court to which any name was attached, except where a case involved an appeal from his own judgment on his circuit, or for any reason he did not sit.¹

This unity and force of judgment continued until 1812, when, in the absence of the chief justice, and upon the accession of Jus-

¹ In the few cases where opinions were given by the other justices, it was the English way, *seriatim*. This was the method in use before Marshall's time. The first printed opinion in the reports is a dissenting opinion. This is due to the fact that the court at the outset adopted the English practice of calling on the judges, beginning with the youngest in commission, to express their individual views. The practice of delivering written opinions, which in the beginning was exceptional, had become the rule before Marshall's accession to the bench.

tice Story and a majority of Republican judges, the present method was inaugurated. In the thirty volumes of reports, from the first Cranch to the ninth Peters, covering Marshall's thirty-four years' tenure of office, one thousand two hundred and fifteen cases are reported. In ninety-four of these cases no opinions were given; fifteen were *per curiam*; of the remaining one thousand one hundred and six cases, Marshall delivered the opinion of the court in five hundred and nineteen. In the domain of constitutional law sixty-two judgments are recorded. The chief justice spoke for the court in thirty-six of these cases, the remainder being apportioned among seven justices, as follows: Story, eleven; William Johnson, six; Washington, five; Paterson, Cushing, Baldwin and Thompson, one each. In twenty-three of the thirty-six opinions by Marshall on constitutional questions there was no dissent. *Marbury v. Madison*, *Sturges v. Crowninshield*, *McCulloch v. State of Maryland*, *Cohens v. State of Virginia* and *Gibbons v. Ogden* were all by a unanimous court. Of the thirteen cases in which there was dissent, eight dissents were by William Johnson, five by Thompson, two each by Washington, Duvall and Baldwin, and one by McLean. None of these dissenting opinions is conspicuously able. In *Dartmouth College v. Woodward*, Duvall dissented but wrote no opinion. In *Osborn v. Bank of the United States* Johnson dissented upon a narrow point of jurisdiction. In *Brown v. State of Maryland*, *Craig v. State of Missouri*, *Cherokee Nation v. State of Georgia*, and *Worcester v. State of Georgia*, the various dissents are but feeble attacks upon Marshall's conclusions. In *Ogden v. Saunders* the chief justice found himself for the first and only time in the minority on a question of constitutional law, and his opinion in that case is accounted one of his ablest efforts.

THE SAN JOSE COLLEGE CASE.

By W. F. NORRIS,

Judge of the Special Court of First Instance for the Island of Negros.

IN the newly acquired possessions of the United States in the Orient, is an educational institution older than Harvard or Yale, older than any school, college or university in any of the States, older than any one of the States. Before the Pilgrims landed at Plymouth Rock, before the settlement of Jamestown, before the Declaration of Independence by more than a century and half, was founded in the city of Manila the ancient college of San José.

The exact origin of the college is not apparent from the somewhat meagre records that remain of its early history. From what can be gleaned of the remaining records, it appears that, as early as the year 1585, those indefatigable workers, the Jesuits, endeavored to procure the establishment of a college in the metropolis of the Philippines, or another college in addition to that of St. Maximo, and another already in existence. For some years no success appears to have attended their efforts; in 1605, however, permission was granted by the Vicar General of the Archbishopric of Manila to the Jesuit Order to found a college in that city for the purpose of bringing up young people and rearing them according to good manners and learning, and of creating such ministers of the Holy Gospel as might be needed in the land and to perform masses in the college. On the same day a similar license was granted to the same applicant by the Governor General of the Philippines, in the name of the King of Spain. An institution of learning was commenced by virtue of the licenses thus granted called the College of the San José, but with no property foundation, apparently, till some years later. The first matriculation, according to the state-

ments of one of the early historians, was in the year 1601.

The great benefactor of the institution and the personage to whom, perhaps, the present school owes its origin as well as its prosperity, was a Spanish official, Rodriguez de Figueroa, Governor of the great island of Mindanao, who, eleven years after the Jesuit Father commenced his labor for the establishment of the school, gave it shape, prosperity and perpetuity, by making his will, by the terms of which at the death of his wife, or at the death of either of his children without heirs in the descending line or before coming of age, their estate was to be devoted to the foundation of a college. A house was to be built near the Society of Jesus in Manila for the purpose of a college and seminary for boys. Shortly after making his will Governor Figueroa was killed in battle. I believe he fell fighting with the hereditary enemies of both Christian Filipino and Spaniard in these islands, the Mohammedan Malays known as Moros. Not long after the death of the Governor, the benefactor accrued to the college through the death of his daughter, Dona Juana, who perished at sea while on a voyage from or to Mexico. The death of the young senorita appears to have afforded a considerable revenue to the college, and to be the source from which was derived its present property valued at some million dollars, Mexican currency, consisting largely of two valuable estates, which have been long in the possession of the institution.

The Crown of Spain had extended its protection to the College, King Philip IV. having made it the subject of the royal bounty to the amount of eight thousand dollars, and

Philip V. honoring it with the title of "*Royal ad honorem*" in case it should have no other patron, and upon the express condition that it should never cause expense to the royal treasury by reason of such title. One hundred and eighty years ago, Spain appears to have been more lavish of high sounding titles than of substantial gifts from the royal treasury. The King, however, was not the only royal benefactor of the College of San José. The same year that Philip IV. gave eight thousand dollars, the Queen of Austria made it a liberal grant of twelve thousand. There appear to have been various benefactions from liberal minded citizens of Manila, who appear to have taken considerable interest in the new school, which was established for the benefit of the sons of well born Spaniards resident in the Philippines. The importance of such an educational institution to Spanish youth, was manifested a hundred and fifty years after the foundation of the college, by the royal decree which stated that his Spanish subjects were leaving the islands owing to the lack of schools in which their children could receive a fitting education.

In the year 1768, the College was deprived of its creators and early protectors, the Jesuit Fathers, who by royal order were banished from Spain and the Spanish colonies. Whatever may have been the acts of the Jesuits which led to their expulsion, their administration of the affairs of the College appears, from what remains of the early records, to have been wise and judicious. The institution while under their care attained to considerable eminence in the Spanish colonial world. What the College of San José is in this year of grace 1902 it owes in a very large measure to the efforts of its first officials and earliest teachers, the Jesuit Order of Manila, from the beginning of the seventeenth century to the middle of the eighteenth, under whose fostering care were enjoyed its days of greatest prosperity.

For three years following the expulsion of the Jesuits, the College was buffeted between Church and State, its property being contended for by the Archbishop of Manila representing Church, and the Governor General of the Philippines representing the Crown. The Governor General claimed the property as confiscated to the government, and seized and converted the buildings of the College into barracks for the Spanish soldiery. The Archbishop protested against such seizure and claimed the property as appertaining to the Church. The Governor complied with the request of the Primate to permit him to control the College till the decision of King should be known, each party having appealed to Madrid against the action of the other. Three years after the sentence of expulsion against the Jesuits had taken effect the appeal was decided by the Crown, the decision being adverse to the claim of the Governor General that the property was forfeited to the Government, and also denying the right of the Archbishop to convert the institution into a seminary for the education of native and Chinese youth, which in the meantime he had done with the assent of the Governor General. It was in this decree that the King stated that his Spanish subjects were leaving the islands for the reason that there were insufficient educational facilities for the instruction of their children, and ordered that the college should remain as intended by its original founders a school for the education of well born Spanish youth. Thus by royal order it was restored to its former status.

For about a hundred and fifty years the college continued under the control of an ecclesiastic of the Metropolitan Cathedral as Rector-Administrator. During this long period it experienced many vicissitudes. Its affairs appear to have been negligently administered, at least a portion of the time. It seems never to have been so ably conducted, nor to have attained so great distinction as

an institution of learning, as when under the management of the Jesuits, though for some years previous to the American occupation of Manila the administration had been intrusted to an energetic and capable official who conducted its business with ability. Its buildings had twice been shaken by earthquake; the ancient institution had, however, withstood the fury of tropical storm, of typhoon and earthshaking, when State and Church, religion, politics and educational institutions were deeply affected, if not radically changed, by the arrival of the Americans in Manila Bay.

Shortly after the occupation of Manila by the United States forces the Archbishop of Manila requested permission of the Military Governor to open the University of St. Tomas, which had been temporarily closed during the troublesome days preceding the arrival of the Americans. This is an ancient seat of learning of Manila, belonging to the religious order of the Dominicans, to which, some years before, the college of San José had been attached as a school of Medicine and Pharmacy. An association of Manila, known as the Philippine Medical Association, protested against the Military Governor granting the request of the Archbishop, for the reason that the College of San José was a secular institution under the former control of the Spanish Crown, which right of control was vested in the United States Government by virtue of the Treaty of Paris. The Association further prayed the Governor that the administration of the college be conferred upon them to be conducted as a school of medicine and pharmacy.

The matter was referred by the Military Governor to the Philippine Commission shortly after it had assumed civil functions in the Islands, the college, in the meantime, having been closed by order of the Military Governor. After due consideration of the issues presented, the case was by the Commission submitted to the Supreme Court

of the Philippine Islands. Judge Taft, in a very able and lucid review of the points at issue, remarked that the questions involved the proper subject of determination by a judicial rather than a legislative body, also intimating that, probably, future congressional action would be taken permitting an appeal in cases of such character from the Supreme Court of the Philippine Islands to that of the United States.

Had the San José College case proceeded to a final determination in the courts, it would have been fitting that the ultimate disposition of the matter should be made by the Supreme Court of the United States. The case, however, having been submitted on agreed statements of facts to the Supreme Court of the Philippines, has been referred, together with other ecclesiastical questions pertaining to the country, to diplomatic rather than judicial determination through action by the Vatican and the Government of the United States.

Considering the importance of the points presented, and the fact that the vexed question of Church and State is involved, the San José College case is probably the most important thus far submitted to the Supreme Court of the Islands. For one hundred and fifty years the school was under the management of the Jesuits, after which, for another hundred and fifty years it was controlled by the Dominicans; and whether the property and foundation of the college have been and are now, owned by the Church and subject to its ultimate control, or whether it was during its long history under the secular and civil control of the Spanish Crown, is the question in controversy. The defendants in the suit insist that the property of the college under the canonical and civil law is in the Church, and they claim ownership, and consequent right of control and administration, in the future as during the past three centuries.

The plaintiffs contend that the Jesuits and

Dominicans were entrusted with the administration of the College as teachers; that at the time of its foundation, the Jesuits were the educators of Church as well as of State; that the administration entrusted to them and, subsequently, to the Dominicans, was subject to the ultimate control and direction

of the Crown; and that the right to appoint an administrator, and to provide for the control of the institution, was in the Government of Spain, which right was vested in the United States Government by virtue of the Treaty of Paris.

LORD MANSFIELD'S UNDECIDED CASE IN THE SUPREME COURT OF THE UNITED STATES.

BY FREDERICK DE COURCY FAUST.

THE Supreme Court of the United States has recently had submitted to it for decision the interesting question of the distribution of personal estates, where the owner and the person whom the law or a will appoints to succeed thereto, both perish in a common disaster, their deaths occurring in unascertainable time relation to each other.

This problem was first presented to the courts of England in the case of the *King v. Hay* (1 Wm. Blacks. 640) in the reign of George III. and so novel were the facts to English jurisprudence that Lord Mansfield, to whom the question was submitted, found the strict rules of the common law totally inadequate for its decision, and accordingly recommended a compromise in the distribution of the estate involved, saying that "there was no legal principle upon which he could decide it."¹ This compromise has since become famous in English law as "Lord Mansfield's Undecided Case," and it left the question in an unsettled condition in England until eighty-seven years later, when by the decision of the House of Lords in *Wing v. Angrave* (8 H. L. Repts.) the question was finally and conclusively set at rest in that jurisdiction.

While the courts of the several states in this country have sought to arrive at a satisfactory determination of the question, and have apparently found in the solution of

¹ *Taylor v. Diplock*, 2 Phillimore 261, note c. Fearn's Posthumous Works, 38.

Wing v. Angrave a welcome settlement of the perplexing and difficult problem, this is the first occasion upon which the Supreme Court has been called upon to review the law of the subject.

The shadow of the tragedy from which the case arose was rendered deeper to some of those present at the hearing, by the fact that a member of the court and one of its officers both suffered the loss of their parents in a similar disaster at sea, while one of the victims of this particular wreck was a classmate of the writer.

Mrs. Sophie Rhodes, with her son Eugene, both being residents of the United States, sailed from Bremen, Germany, on the steamer "Elbe," in response to a cablegram announcing the death of her husband, on the twenty-ninth of January, 1895. At half past five o'clock the following morning, while about due west of The Hague, the ship collided with the ship "Crathie," bound from Rotterdam to Scotland, and within twenty minutes thereafter the "Elbe" went down, and both mother and son, together with many others, perished, there being but twenty-one survivors from the whole list of passengers and ship's company. A last will and testament of Mrs. Rhodes, dated May 10, 1894, was presented and duly admitted to probate in the Supreme Court of the District of Columbia. It contained the following provisions:

By item one she devised to her husband for life one-half of the income of all her property. Item two gave to her son Eugene, subject to the provisions of the above, all her property of whatsoever nature absolutely. Item three provided that "in the event of the death of my son Eugene Rhodes before the decease of either myself or my husband . . . everything I own on earth" was disposed of, first, by giving all her pictures and paintings to the Young Women's Christian Home of the city of Washington, and, second, the rest and residue of her property to a trustee in trust to pay over the rents and profits arising therefrom to her husband during his life, and at his death to turn over the same, with the accumulations thereon, to the said Young Women's Christian Home, absolutely. Item four provided that "In the event of my becoming the survivor of both my husband . . . and my son . . . I then give, devise and bequeath all my property . . . of whatsoever nature, kind and description to the Young Women's Christian Home, to have and to hold the same absolutely and forever for the good of that institution."

The husband having predeceased the testatrix the provisions relative to him were eliminated.

Three sets of claimants filed claims to her estate, in response to a bill of interpleader filed by the administrators with the will annexed, setting out their respective claims:

First: A and B, brother and sister and only next of kin of the testatrix, who alleged that none of the contingencies provided for in the will, *viz.*, that the son survive the mother or that the mother survive the son, had happened; therefore, in contemplation of law, the estate must be disposed of as though the death of each had occurred at the same time, and that the estate of the testatrix accordingly descended to her next of kin, as in case of intestacy.

Second: C, administrator of the deceased son, who claimed either that the son pre-

sumptively survived the mother and that the preponderance of evidence was in favor of such survivorship, or that the burden of proof lay on the other defendants to establish that he did not so survive the mother; and that, if he did survive her, he took her estate by act of law and not by will, because the will gives the same estate as he would have taken in case of intestacy, and that title by law prevails to exclusion of title by act of parties.

Third: D, the Home, who alleged that the will, taken as a whole, showed a plain intention that unless the son should survive the mother, so as to become the beneficiary and enter upon the substantial enjoyment of her estate, the same should pass to it to the exclusion of the next of kin of all other persons.

The only evidence tending to shed any light upon the order of death of the mother and son, and, indeed, the only evidence tending to show their movements after the collision at all, was furnished by the affidavits of two of the twenty-one survivors, a lady, Miss Bocker, the sole woman survivor, and John Vevera, of Cleveland, Ohio. Miss Bocker's statement was to the effect that, just after the collision, she saw Mrs. Rhodes come out of the cabin she occupied with her son, clothed in a blanket over her night dress and that she never saw her again; that subsequently (certainly some minutes later) when Miss Bocker went on deck she saw the son Eugene just in front of her, and that she never saw him afterwards.

John Vevera stated that on the night preceding the disaster he sat at the same table with mother and son and his attention was particularly attracted to them; that after the accident, when every one was on deck, he saw them together, the mother with her arms thrown around the neck of the son in a grip that he thought she would never lose, and the son endeavoring to put a shawl around her to protect her from the cold. When Vevera first came on deck he went to a life-

boat on the right-hand side of the deck and found it filled with women, no man being allowed to enter, and when it had left the vessel's side he saw it capsize. Fighting his way over to the left-hand side of the ship with great difficulty through a crowd of sailors who were keeping every one back, he attempted to reach the other life-boat, and was stopped by a man armed with an ax, but he succeeded in getting by him, after being cut on the wrist, and jumped over the side, and was the last to get into the life-boat, despite the efforts of its occupants to throw him out. The last time he saw Mrs. Rhodes and her son was just prior to his going overboard, and he thought it would have been impossible for them to force their way through the crowd of sailors who kept every one back from the boats; that he was positive that both remained on deck, as his boat was the last one to leave the ship; that after his boat had gone some distance away, the ship went down with a lurch, and all on board were drowned, and that these parties died together; that the scene made an impression on his mind that he could never forget.

Some six weeks later the body of Eugene Rhodes came up in a fishing net off the coast of Holland, but the mother's body was never found. Mrs. Rhodes was about fifty-two years of age at the time of her death, was corpulent of figure and short-winded in breathing; her son was twenty-three, a rather good swimmer, had never been married, was her only child, and died intestate.

Upon the trial, the Court held that there could be no presumption by which it could be determined who was the survivor of two persons lost in a common disaster, and that, in the absence of proof, the rule was that property belonging to either must be disposed of by will or by the laws of descent as if both had died at the same time; that the intention of the will should therefore govern; and accordingly sustained the contention advanced by the Home.

Upon appeal the Court of Appeals of the District of Columbia held with the lower court that no presumption of survivorship could be indulged, whatever may have been the sex, age or physical condition of the persons so dying, but that the law requires evidence as its basis of action. Assuming the order of death of mother and son to be unascertainable from evidence, the Court viewed with equal disfavor the presumption that both deaths occurred simultaneously, stating that such view would be but the substitution of one presumption for another and, if possible, more unreasonable one. The death of the son in the lifetime of the mother was held to be a condition precedent to the taking effect of the bequest to the Home, and the burden of proof was therefore thrown upon it as legatee. The doctrine of intention being the cardinal rule for the construction of wills was approved, but the Court did not think it could be enlarged to the extent of supplying language to cover a contingency which had not only been overlooked, but actually unprovided for, by the testatrix herself. Therefore the claim of the Home must fail.

The burden of proof as between the respective next of kin of testatrix and her son was then considered and a strong contention in favor of the son was found from analogy that prevails in actions of ejectment, for, inasmuch as the law casts descent upon the son, it seemed to place the burden of proof upon the next of kin of the mother to show an extinction of such intervening preferential right of the son's representatives. The Court preferred to base its opinion, however, upon the intention of the will as they viewed it and ruled therefore that such intention raised a *prima facie* right in the next of kin of the son and imposed the burden upon the mother's representatives to displace it. A decree to that effect was accordingly so entered.

Thus it appears that two of the three sets

of claimants submit their theories of the law to the Supreme Court, each confirmed and strengthened by the approval of one of the two lower courts, while the third, with their contention as yet unapproved, share with

the others in a firm conviction that they must succeed in this last hearing. Whatever the result may be it should be cordially greeted as a final settlement of a problem that has puzzled many courts for many years.

THE LAW OF GRAVITATION.

IN spite of the almost universal application of the Law of Gravitation, I cannot call to mind any treatise of a legal nature dealing with its various aspects and collating the scattered cases. This, then, must be the excuse for this brochure.

It has often been said that Chancellor Newton in the case of *Apple v. Earth*, 6 P. D. Q. 77, was the first to take notice of this branch of the law, but I hope to show that this view is erroneous, and that the principles involved are far more ancient and of an infinitely wider scope.

In England itself, the home of the common law, we have only to turn to "Henry VIII." for a carefully annotated report of the Fall of Wolsey. Indeed most of the testimony is given at length.

A careful comparison of the facts of these two cases gives us a grasp on the most salient principles involved:

- I. Anything which falls, stops.
- II. A subsequent rising is impossible *per se*.
- III. Momentum is dangerous.¹

Assuming for the moment the truth of these *dicta*, let us go further back into the mists of antiquity and note the application of them.²

Our facile pen having bridged the gulf of time, behold the Fall of Troy! A careful search through the twenty-four volumes of Judge Homer's "Commentaries on Ilian Law" has revealed but one case in point,—namely *Menelaus v. Paris*, 2 *Ithaca Law Journal* 50. Here we have abundant support for our theories. Without going deeply into

the facts, surely it will not be denied that the fair *divorcee's* fall ceased contemporaneously with that of Troy.³

But enough of this. Let us come to modern times. The Fall of Jerusalem, with its multitudinous legal problems, stands squarely for the proposition that the defendants fell heir to troubles. Need we say more?⁴

Again, to turn to mediaeval history, we find in an interesting old volume that may be known to a few of our legal brethren a somewhat exhaustive account of the Fall of Adam. It is unfortunate that we do not know the libellant's last name, as we are thereby prevented from ascertaining if he was ever a party to a suit before. The case of *Leaves v. Corpus*, 1 Y. B. 2, seems to imply that he was, but the evidence is manifestly merely hearsay.⁵ Be that as it may, the report shows clearly enough that the postulates of the law were clearly recognized before 1643. Nay, I will go further and submit that Lord Sisyphus, Master of the Rolls, in the case of *Tantalus v. Fate*, 653792 *Hades Law Review* 6668, clearly considered Lucifer, Chief Jay, as coming within the bounds of the Law of Gravitation. And so from the Fall of Lucifer to the Fall of 1902 we meet a series of complementary cases which go far towards establishing the fact that Chancellor Newton was merely a clever applicant of well recognized principles, and not an inventor of a new branch of judicature.

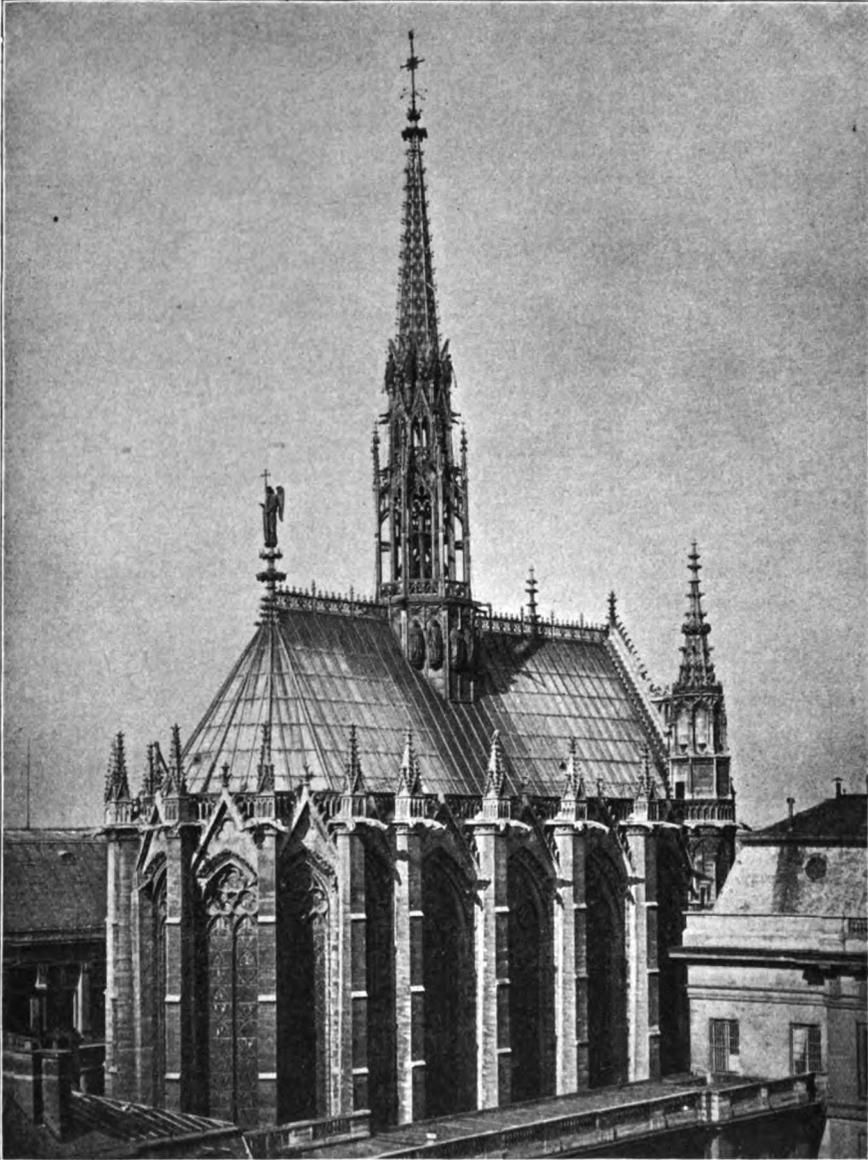
³ Not Troy, N. Y.

⁴ *Odell v. Bird*, 1902, N. Y. Supreme, i.

⁵ *New England Primer*: "In Adams' Fall we sinned all"; which seems to show the adoption of the doctrine into the United States.—Ed.

¹ In accord, *Ping v. Pong*, 13 N. E. Rep., 005.

² The *dicta*, not the mists.



SAINTE-CHAPELLE.

FRENCH LAW AND THE FRENCH JUDICIAL SYSTEM.

BY CHARLES FISK BEACH, JR.

THE law of modern France is the law of imperial Rome, as developed, refined, and modernized by a long line of jurists coming down from the Renaissance. It is, therefore,—and the procedure as well—essentially an evolution in ordinary generation from the law of the Twelve Tables; so that, in very truth, we see absolutely and actually every day at the *Palais de Justice* a renowned body of latter-day lawyers, begowned and befurred, who, in twentieth-century fashion and in the most consummately civilized capital on the earth, are administering justice between man and man through the machinery of a body of law that harks back to the seventh century before our era—a law which for more than twenty-five hundred years has grown and developed and progressed *pari passu* with the slow advancement of the human race in mind and morals and legal conceptions, from the crudeness and rudeness of early republican Rome, to the high civilization and fine intellectuality of republican France. It signifies much for the continuity of our thinking, and brings remote antiquity to our very doors in a startling fashion, and is verily—at least for every thoughtful lawyer—a most stimulating and inspiring consideration as well, that the shades of Numa and of Tribonian, of the lawyers of the republic, of the consulate and of the empire, of imperious Caesar and of imperial Napoleon, and of all the uncounted multitude of the elect jurists of two millenniums, stand ghostly god-fathers to the courts grouped about the *Salle des pas perdus*, on the Island of the Cité, and thus, at least in some sentimental sort dignify the judgments handed down in the ancient palace of St. Louis. It is a little as though Æacus and Radamanthus signed the *arrets*.

Passing in mind from the law to the place, and standing for a moment in the shadow of

Sainte-Chapelle—built with mediaeval yet pious care to receive and enshrine the crown of thorns—the pulses quicken anew upon the reflection that here, on this very spot of earth, courts of law of one sort or another have been holden in an unending series for upwards of two thousand years. No other identifiable seat of justice so venerably ancient has come down to us from the morning of the law. Here—we know it—precisely here, for all these ages, judgments and decrees have been rendered in a substantially continuous and uninterrupted devolution of courts and terms, fixing and adjudging the rights in person and property of that long line of suitors, of accusers and accused, as it has from age to age passed in and filed out before this ancient judgment seat. Only a little imagination and the line of litigants passes by us in a mental review, a great multitude that no man can number, of all nations and kindreds, and people and tongues. Here where we stand was first the Roman prefectorium, destined to be succeeded by the ancient royal palaces, one after the other, from that of Childebert, son of Clovis, to that of the pious Louis, the foundations whereof still remain. Elsewhere in ancient towns courts have shifted from one quarter to another, as in Rome and Marseilles and Athens, with the movement and growth of population; but here the location on the narrow island has secured their fixedness. Fast anchored in a corner and shut in between the Roman road and the rushing waters of the Seine, here the courts are today as in the days of Bethlehem and the wars in Gaul, as they were at the inrush of the northern barbarians, during the Crusades and in the Revolution.

The whole body of law in France at the present time, substantive and adjective, civil

and criminal, is compiled, or comprised, or codified in eight codes, as follows: *Le Code Civil*; *Le Code de Procedure Civile*; *Le Code de Commerce*; *Le Code Penal*; *Le Code d'Instruction Criminelle* (these last two in one volume, which thus includes the whole law and procedure in criminal cases); *Le Code Forestier*; *Le Codes de Justice Militaire*, for the army and navy, respectively. The scope and purpose of each of these codes is generally and perhaps sufficiently disclosed by its title. It ought to be said, however, that no one of them exceeds in size one ordinary volume, and, as indicated above, the two criminal codes make but one volume. This codification is supplemented by the *Lois Usuelles*, a volume of decrees, ordinances, opinions of the Counsel of State, and the Colonial legislation. This completes and modifies the several codes, and records the changes and growth of the law. It is annotated by references to the writings of standard jurists, to the judgments of the Court of Cassation, and to the Ministerial Circulars. All this is so condensed and digested as to be included in a single fair-sized volume. Thus we have the whole body of law in no more than eight portable and compact volumes, including a due and adequate annotations of the codes. There are also, as with us, some series of reports, to which lawyers must refer in preparing for trial and argument. The decisions of the *Cour de Cassation*, which are brief and concise, and some of the decisions of the courts of appeal—but all together only a small number of reportable cases per annum—are published in an annual or biennial volume of reports, carefully annotated, to which reference is also made in the several editions of the Codes. The text of all the Codes is also to be had without annotation in a single volume, which one can put into his greatcoat pocket. Thus the French solve the problem of condensation and compression, and succeed in keeping their law within reasonable limits. The Codes are only

very sparingly amended, and having been drafted at the outset with exceeding skill, stand as monuments to the genius of the French people for law-making.

Obviously, the most important and interesting of these Codes is the *Code Civil* or *Code Napoleon*, which, as its name somewhat suggests, contains the law of obligations, of persons, of personal status and of property. It contains 2281 sections, many of them of only a line or two in length. It is contained in a volume of less than 350 pages, which includes also the Constitutional Statutes, a full annotation of each section, and an index of the whole. Thus within these modest bounds is comprised the whole body of civil substantive law, aside from the law governing commercial transactions, which is dealt with in the *Code de Commerce*.

Some steps were taken during the reign of Louis XIV. looking to a codification of the laws, but little was accomplished; and, as we know, the French owe to the constructive genius of Napoleon the present scheme of codification, which was undertaken during the Consulate at his dictation, and finally completed, one code at a time, shortly after the end of his reign. The Civil Code, which was the first, was enacted and became the law of the land March 21, 1804. It was prepared by a council of jurists, assigned by the First Consul to the work, but he himself took great interest in it, and attended many of the sessions of the Commission, contributing much by his acute suggestions to the form and content of the law. Well did he say of that work: "I shall go down to posterity with the Code in my hand;" and it may well be that, in the fullness of time, when all the rest of his stupendous achievement is almost forgotten, his Code, like that of Justinian may remain and abide. Certainly it is his "*Monumentum aere perennium*." What do the moderns know, or much care, in general, about Justinian except for his Code; and yet,

as emperors go, he was in his day very much of a Napoleon of a smaller cast.

The sources of the codified law of France were: (a) the ancient laws of the realm theretofore in force, consisting of local customs, and written or Roman law: (b) such legislative enactments of the National Assembly,

law constitutes the foundation and ground-works of the structure, the other constituent elements indicated above being merely subordinate or ancillary. Napoleon saw clearly and imperiously insisted that nothing good could come from a blind glorification or magnification of the local and barbarous



INTERIOR OF SAINTE-CHAPELLE.¹

the Legislative Assembly and the Convention, and such of the decrees of the Consuls and of the Directory between June 17, 1789, and March 15, 1803, as were thought by Napoleon and his codifiers to be of permanent value, and (c) such general laws as have been enacted since March 21, 1804. The Roman

customs of the realm, and the codifiers thus wisely subordinated them to the order, method and system of the Roman law. Accordingly they substantially enacted the Roman

¹ *Sainte-Chapelle* was erected in 1245-48, during the reign of St. Louis. The "Mass of the Holy Ghost" is celebrated here annually on the re-opening of the courts after the autumn vacation.

law, with only some unessential concessions to local or provincial law and usage; or, in other words, they wrote the civil law over and above their local and tribal laws, with the result that they secured and now enjoy an orderly, enlightened and essentially scientific system of law and jurisprudence, fit for the governance of an highly civilized and progressive state. There is, indeed, much of sound reason in their boast that it is the most perfect legal machinery ever devised by the wit of man. It is not good only in theory, but it is as nearly perfect in practice as any legal system is ever likely to be that depends upon human agency for its execution. Nowhere on the earth, it may be confidently asserted, is there a more general respect for the law than in France; nowhere is life and human right safer and more secured, or justice more fairly and evenly meted out; nowhere is there a body of lawyers of greater accomplishment and learning; nowhere a bench with higher ideals or a finer purpose to hold the scales of justice even; nowhere better results for the body of the people from the work of the law and the lawyers.

So conspicuous has been the success of the French legal system in practice that, within the century in which it has been in operation, almost the whole civilized world has more or less adopted it; or, to be more exact, the Roman law in substantially the modern French form is now the law of probably more than three-quarters of civilized mankind. It is thus the law not only of France and all of her colonies, but also of Greece, Italy, and all the minor countries of southeastern Europe, of Spain and Portugal, Belgium, Holland, Austria, Hungary, Germany, Norway and Sweden, Denmark, Russia, Mexico, all the countries of Central and South America, of Scotland and the Philippine Islands, the West Indies, Louisiana, and a majority of the more important British colonies, *e. g.*, Quebec, Ceylon and British Guiana, of Egypt, and all the other civilized parts of Africa, and many

of the islands of the seas. As against this formidable list, the English or Common Law prevails only in England and Ireland, and a few English colonies—like Canada (except Quebec) and Australia—and the United States (except Louisiana, the Philippines, Cuba and Porto Rico). The German empire, in spite of its jealousy of anything French, has recently adopted for the empire the Prussian Code, which is a Germanized version of the *Code Napoleon*, and Japan as part and parcel of her scheme of civilization, has enacted a code of law on French lines, following closely even its minor details. No new country like Japan, when called upon to adopt an alien system of law, could hesitate as between the French codification and any other existing system; and even old countries like Germany, in any serious scheme of legal reconstruction and reorganization, are equally remitted to the same selection. In neither case would the common law be a possibility.

The French system of corporation or company law is also well nigh universal. Outside of the United States and England incorporated companies organized under statutes draw closely along French lines, and known by the universal French names, *Societe Anonyme*, *Societe par Actions*, *Societe Commerciale*, are doing the corporate business of the world. When we get away from the immediate influence of the two English speaking countries, this form of incorporation seems to be taken for granted by commercial communities everywhere, very much as we assume inevitable the recurrence of the tides or that young children are apt to catch the measles. But I must tell you, as one of the humors of the subject, that once, in London, a guileless Briton—a lawyer, too, as solicitors go in that country—was possessed of sufficient facial control to keep his countenance and seriously inform me that foreign nations generally preferred English company law to their own!

A study of the civil law and a practical familiarity with its working brings a common-law lawyer,—who has not blindly prejudged the matter, and is in consequence not open to conversion,—finally around to the notion that it was very unfortunate for us in this country that in breaking with England we did not break away from her law, as we did from her monetary system, her social order and her State Church. Our money, our manner of life, our art and our architecture were developed substantially on French lines, and molded after French models. Our law and our weights and measures might well have followed the same course. At the time of our Revolution it would have been entirely possible for our lawyers to have worked out a reform in our jurisprudence along the lines of codification, somewhat as the French did after 1789. True, they were then an old country and had a substratum of Roman law, but on the other hand we were a new country and had no law at all, and could fish in all waters. In those days, even more than now, it was the fashion to worship the common law. Men then in studying law were wont to drop on to their knees and roll their eyes in unctuous reverence for a system of law that was no system at all. That was and is the sheerest fetishism. Then Blackstone was bepraising the common law as “the perfection of reason,” and all that, when the English statute books contained laws making more than two hundred different offences, including poaching and the stealing of a shilling or upwards from the person, punishable with death. That was common law with a vengeance, but when Blackstone sang everybody joined in the chorus, and all were blindly sure that the English common law was the last word in jurisprudence. This we too did, and this system we voluntarily adopted at a time when it exceeded in barbarity and ferocity the code of any other *soi-disant* civilized community on the earth.

Twice in the history of the English people the Roman law was brought to their doors, and twice with a strange fatuity they rejected it. Caesar imposed it upon Britain 51 B. C., and for four hundred years—longer than the common law has obtained with us—it was the law of the island. But when the Romans departed their law disappeared with them. Again at the time of the French conquest in the eleventh century, the Normans took over with them their law as well as their language. The language remained, but again the law, as a *corpus juris*, failed to take root; and, except for its indirect influence on the barbarous laws of the country, it remained for Mansfield and Holt, and the Chancellors,—when advancing civilization in England made it imperative—to import it for a third time, bit by bit and piecemeal, and so to patch out the deficiency of their outworn system of tribal law, which, however industriously tinkered up and revamped, still remains, as compared to the civil law, a thing of shreds and patches. So that, in the end, having adopted it for ourselves, we find it our own, and now beyond much possibility of any radical reform. Our legal development has been the reverse of that of France and the rest of the world. We have proceeded in law making in somewhat Cuvier’s fashion in comparative anatomy, without his excuse for the use of the method. For him that was the only way—no living mastodon was at hand. But we had the living civil law before us, consummate and complete, from which we deliberately turned away, following instead of the doctors of the Roman law, the stupid lead of the dull barons at Runnemedede who “would not change the law of England,” and who then started us on a course which now we cannot easily retrace. The persistence we display in this course is scarcely creditable to lawyers in the twentieth century, and the attempts to prove its wisdom are the veriest *ad captandum*. We have patched up and pieced out the English tribal

customary law, which is dignified by the name of common law, with old odd ends stolen out of the *Corpus Juris Civilis*, and at the end, after infinite labor, we have got a square peg in a round hole—a makeshift, unsystematic system of law, which we get on with very well perhaps, but which we must put up with as Touchstone did with Audrey: "A poor virgin, sir, an ill-favored thing, sir, but mine own."

The course of legal instruction in France, where the curriculum is prescribed in detail by statute, and where the schools of law are held to a strict accountability to the State for the uniformity and efficiency of their work, makes strongly not only for a high standard of professional attainment, but also for orderliness and uniformity in legal methods. All the lawyers must be graduated from the school of law, all must reach preliminarily the same standard for admission, and all must complete the full prescribed three years course of legal instruction. Thus the French safeguard their system of law from any radical innovation, secure an intelligent conservatism in their jurisprudence, and provide the nation with a bench and bar of unrivalled attainment and efficiency, as compared with England, where there is practically no standard, and little systematic training, or with us, where the standard varies from what is very good to what is worse than nothing.

If we studied the civil law more and made ourselves more familiar with its working, there would be less cant with us about the common law, and there would be, in consequence, a constantly increasing tendency to improvement in our law and practice. We should realize that the legal horizon is not bounded by the North Sea and the Irish Channel, and we should be less and less enamored with chasing the phantom of the common law through an endless series of report books, world without end. We should then give fair weight to the criticism of our

system by the continental jurists, who, for example, look upon our rules of evidence as artificial and mediaeval, and regard our rule as to the burden of proof in criminal cases as a serious hindrance to the due administration of the law against crimes. The aptness of the French procedure to the dispatch of the business of the courts would commend itself to our admiration. We should discover that the decisions of the English courts have become of comparatively trifling value to us, and we should contract a habit of looking elsewhere for illumination. With a fuller knowledge of French law and practice we should cease to carp; and crude generalization on the subject from a too slender basis of fact, or from no fact at all, would disappear. To regard things not done our way as necessarily bad is the last measure of provincial folly. Seeing that in no civilized country on earth is justice so cheap and so speedy as in France, we might imitatively reform our own methods; and finding that nowhere else is the law of the family so well worked out and that nowhere else are the rights of women and children so carefully secured, and growing familiar with the smooth working of the system in all its ramifications, it would dawn on us that in nothing is French pre-eminence more notable than in her jurisprudence. Neither in gowns nor in wines, neither in letters nor in art nor in architecture, are they more at the forefront than in this. To this end—devoutly to be wished in the interest of American jurisprudence—we shall do well, (inasmuch as when we seek information about Spain or Italy we do not think it wise to go to Amsterdam or St. Petersburg for instruction) not to depend wholly or even mainly upon English books or English views upon the subject. We must study French institutions through French channels of information. We must see with our own eyes, and read the story of her law in her own tongue.

A LESSON IN ADVOCACY.

BY RICHARD HARRIS, K. C.

THE annals of our Courts of Justice do not contain a more interesting or useful lesson than will be found in the following story.

The great ambition of a young advocate is how to cross-examine, although the first and most important step in that direction is how *not* to. If you know when to be silent it will be a pretty sure indication that you will know what to ask. Keeping silence is not so picturesque a performance as dancing round a witness. It does not appeal to the gallery or the solicitors, who generally like their clients "to have something for their money."

A long time ago, in the East End of London, lived a manufacturer of the name of Waring. He was in a large way of business, had his country house, where his family lived, and his town establishment. He was a man of great parochial eminence and respectability.

Among the many hands he employed was a girl of the name of Harriet Smith. She came from the country, and had not quite lost the bloom of rusticity when the respectable Mr. Waring fell in love with her. Had Harriet known he was married, in all probability she would have rejected his respectable attentions. He induced her to marry him, but it was to be kept secret; her father was not to know of it until such time as suited Mr. Waring's circumstances.

In the course of time there were two children; and then, unfortunately, came a crisis in Mr. Waring's affairs. He was bankrupt. The factory and warehouses were empty, and Harriet was deprived of her weekly allowance.

One day when Waring was in his warehouse wondering probably what would be his next step, old Mr. Smith, the father of Harriet, called to know what had become of his daughter. "That," said Mr. Waring, "is

exactly what I should like to know." She had left him, it seemed, for over a year, and as he understood was last seen in Paris. The old man was puzzled, and informed Waring that he would find her out dead or alive; and so went away. It was a strange thing, said the woman in whose house Mr. Waring had apartments, that she should have gone away and never inquired about her children, especially as she was so fond of them.

She had been gone nearly a year, and in a few days Mr. Waring was to surrender the premises to his landlord. There never was a man who took things more easily than Mr. Waring; leaving his premises did not disturb him in the least, except that he had a couple of rather large parcels which he wanted to get away without anybody seeing him. It might be thought he had been concealing some of his property, if he were to be seen taking them away.

It happened that there had been a youth in his employ of the name of Davis—James Davis—a plain, simple lad enough, and of a kind, obliging disposition. He had always liked his old master, and was himself a favorite. Since the bankruptcy he had been apprenticed to another firm in Whitechapel, and one Saturday night, as he was strolling along towards the Minories to get a little fresh air, suddenly met his old master, who greeted him with his usual cordiality and asked him if he had an hour to spare, and, if so, would he oblige him by helping him to a cab with a couple of parcels which belonged to a commercial traveller and contained valuable samples. James consented willingly, and lighting each a cigar which Mr. Waring produced, they walked along, chatting about old times and old friends. When they got to the warehouse there were the two parcels, tied up in American cloth.

"Here they are," said Mr. Waring, striking a light. "You take one, and I'll take the other; they're pretty heavy, and you must be careful how you handle them, or some of the things might break."

When they got to the curb of the pavement, Mr. Waring said, "Stop here, and I'll fetch a four-wheeler."

While James was waiting a strange curiosity to look into the parcels came over him; so strange that it was irresistible, and accordingly he undid the end of one of them. Imagine the youth's horror when he was confronted with a human head that had been chopped off at the shoulders!

"My hair stood on end," said the witness, "and my hat fell off." But his presence of mind never forsook him. He covered the ghastly "relic of mortality" up and stood like a statue waiting Mr. Waring's return with his cab.

"Jump in, James," said he, after they had put the "samples" on the top of the cab. But James was not in the humor to get into the cab. He preferred running behind. So he ran behind all along Whitechapel Road, over London Bridge, and away down Old Kent Road, shouting to every policeman he saw to stop the cab, but no policeman took any notice of him except to laugh at him for a lunatic. The "Force" does not disturb its serenity of mind for trifles.

By and by the cab drew up in a back street in front of an empty house, which turned out to be in the possession of Mr. Waring's brother; a house built in a part of Old London with labyrinths of arches, vaults, and cellars in the occupation of rats and other vermin.

James came up panting just as his old master had taken his first packet of samples into the house. He had managed somehow or other to get a policeman to listen to him.

The policeman, when Mr. Waring was taking in the second parcel, boldly asked him what he'd got there.

"Nothing for you," said Mr. Waring.

"I don't know about that," replied the policeman; "let's have a look."

Here Mr. Waring lost his presence of mind, and offered the policeman and another member of the Force who had strolled up a hundred pounds not to look at the parcels.

But the Force was not to be tampered with. They pushed Mr. Waring inside the house, and then discovered the ghastly contents of the huge bundles. The policemen's suspicions were now aroused, and they proceeded to the police station, where the divisional surgeon pronounced the remains to be those of a young woman who had been dead for a considerable time and buried in chloride of lime.

Of course this was no proof of murder, and the charge of murder against Waring was not made until a considerable time after—not until the old father had declared time after time that the remains were those of his daughter Harriet.

At length the Treasury became so impressed with the old man's statement that the officials began to think it might be a case of murder after all, especially as there were two bullet-wounds at the back of the woman's head, and her throat had been cut. There was also some proof that she had been buried under the floor of Mr. Waring's warehouse, some hair being found in the grave, and a button or two from the young woman's jacket.

All these things tended to awaken the suspicion of the Treasury officials. Of course there was a suggestion that it was a case of suicide, but the Lord Chief Justice disposed of that later on at the trial by asking how a woman could shoot herself twice in the back of the head, cut her throat, bury herself under the floor, and nail the boards down over her grave.

Notwithstanding it was clear that no charge of murder could be proved without identification, the Treasury boldly made a

dash for the capital charge in the hope that something might turn up. And now, driven to their wits' end, old Mr. Smith was examined by one of the best advocates of the day, and this is what he made of him :

"You have seen the remains?"

"Yes."

"Whose do you believe them to be?"

"My daughter's, to the best of my belief."

"Why do you believe them to be your daughter's?"

"By the height, the color of the hair, and the smallness of the foot and leg."

That was all; and it was nothing.

But there must needs be cross-examination if you are to satisfy your client. So the defendant's advocate asks:

"Is there anything else upon which your belief is founded?"

"No," hesitatingly answers the old man, turning his hat about as if there was some mystery in it.

There is breathless anxiety in the crowded Court, for the witness seemed to be revolving something in his mind that he did not like to bring out.

"Yes," he said, after a dead silence of two or three minutes. "My daughter *had a scar on her leg.*"

There was sensation enough for the drop scene. More cross-examination was necessary now to get rid of the business of the scar, and some re-examination too.

The mark, it appeared, was caused by Har-

riet's having fallen into the fireplace when she was a girl.

"Did you see the mark on the remains?" asked the prisoner's counsel.

"No; I did not examine for it. I hadn't seen it for ten years."

There was much penmanship on the part of the Treasury, and as many interchanges of smiles between the officials, as if the discovery had been due to their sagacity; and they went about saying, "How about the scar? How will he get over the scar? What do you think of the scar?" Strange to say, the defendant's advisers thought it prudent to ask the magistrate to allow the doctors on both sides to examine the remains in order to ascertain whether there was a scar or not; and, stranger still, while giving his consent, the magistrate thought it *was very immaterial.*

It proved to be so material that when it was found on the leg exactly as the old man and a sister had described it, the doctors cut it out and preserved it for production at the trial.

After the discovery, of course the result of the trial was a foregone conclusion.

It will be obvious to the sagacious reader that the blunder indicated was not the only one in the case. On the other side was one of equal gravity and more unpardonable, which needs no pointing out. Justice baffled by want of tact on one side was righted by an accident on the other.—*The Law Journal.*

A LAWYER'S STUDIES IN BIBLICAL LAW.

PRIMOGENITURE.

BY DAVID WERNER AMRAM.

IN the patriarchal Hebrew family the first born was known as the *Bekhor* and enjoyed special rights and privileges. He had a larger share of the family property, succeeded to the patriarchate, and was invested with certain sacerdotal powers. In Rome the

oldest son was the successor and heir, and conducted the religious exercises of the family, and offered sacrifices at the family hearth to the household gods, who were none other than his deified ancestors. Similar family sacrifices were known among the ancient He-

brews. A classical instance is found in the history of David, who begged Jonathan to say to King Saul, his father, "David earnestly asked leave of me that he might run to Bethlehem, his city; for there is a yearly sacrifice there for all the family" (I Samuel, xx, 6); and in the same chapter Jonathan reported the matter to his father, King Saul, in these words: "David earnestly asked leave of me to go to Bethlehem and he said, Let me go, I pray thee, for our family has a sacrifice in the city and my brother commanded me to be there" (I Samuel, xxviii, 29). From the second passage, it appears that David's brother, in all probability his eldest brother, had charge of the ceremonies of the family sacrifice, and issued the summons for all the members of the family to be present. This oldest brother, named Eliab, is found on another occasion exercising his authority, when David had come to the camp of King Saul's army, by chiding him for leaving the flocks which had been left in his care.

It was always the first born of the father, and not the first born of the mother, who enjoyed these privileges and prerogatives. The apparent paradox in this statement disappears when it is remembered that we are considering a polygamous state of society in which each of the wives may have had a first born son. The definite right of the oldest born son of the patriarch to a larger share of the family estate was a later limitation of the patriarchal power. In the early stages of this form of society, the patriarch disposed of the family property at his pleasure, but after the corporate notion of the family had been established whereby it was recognized as an entity apart from the members composing it, the unlimited right of disposing of the family property was restricted. A record of the establishment of such restrictive measures is found in the Book of Deuteronomy as follows: "If a man have two wives, one beloved and another hated, and they have borne him children, both the beloved and the

hated, and if the first born son be hers that was hated, then it shall be when he maketh his sons to inherit that which he hath, that he may not make the son of the beloved first born before the son of the hated which is indeed the first born; but he shall acknowledge the son of the hated for the first born by giving him a double portion of all that he hath; for he is the beginning of his strength; the right of the first born is his." (Deuteronomy xxi, 15-17.)

Although the father's right over the family estate was limited in this respect, it appears that there was no restriction placed upon the exercise of his right to appoint a successor as the head of the family, provided such appointee was of the blood of the family. Such appointment carried with it certain powers and an honorary precedence, although it in no way affected the inheritance, a double portion of which always went to him who was actually first born. In the traditions of the patriarchs in Genesis, the headship of the family is in several instances given to the younger son in preference to the elder. Ishmael, the elder, is set aside in favor of Isaac, the younger son (Genesis xxi, 10); Esau makes way for Jacob (Genesis xxvii, 29); Reuben for Joseph (I Chronicles, v, 2); Manasseh for Ephraim (Genesis xlvi, 17-18). In all these cases it is only the headship of the family that was given to the younger son, except in the case of Isaac. In the latter case, Ishmael, who was the oldest born, was entirely disinherited in favor of Isaac. This case illustrates the ancient right of the patriarch to divide the inheritance as he pleased, which was abolished by the law in Deuteronomy above quoted. There is a suggestion, also, of this right to deprive the first born of his share of the inheritance in the story of Jacob and Esau. It seems that in the course of time the right to appoint the head of the family in succession to the patriarch was likewise limited by custom, and the eldest born was preferred for this position also. It is

reported in the Book of Chronicles that Simri, a younger son, was made chief of the children of Merari by his father; and the chronicler states that this was an exception to the general rule that the chieftainship went to the eldest born.

Among the kings it seems to have been the rule to appoint the successor to the Crown irrespective of any rights of primogeniture. King David gave the Crown to his son Solomon, who so far from being the first born was the fourth son of David's seventh king (I Kings, i, 34-35); Rehoboam made Abijah, the son of his beloved wife, his successor, although he was not the first born (II Chronicles, xi, 18-23). These cases, and more particularly those referring to the old patriarchal times, have suggested to some students the thought that there existed the so-called junior right among the ancient Hebrews, according to which the rights and privileges of the patriarch descended to the youngest son instead of the oldest. It is possible that the earlier cases may have been survivals of such a right and that the law in Deuteronomy was one of the steps by which the junior right was destroyed. The fact that the later examples given in the Bible are taken from the customs of the royal family may be explained by the well-known fact that ancient customs survive among the ruling classes long after they have been discarded by the common people, and the so-called special privileges and prerogatives of the Crown are merely survivals of customs which were anciently common to all the people, and which the conservatism and self-interest of the royal families maintained. Some of the later examples, however, fully indicate that there are exceptions to the general rule which had been established, that the first born was entitled to succeed to the headship of the family or the tribe or the nation.

The right of the first born was established gradually, as the cases in which the patriarch

could exercise his power to appoint another became rare and exceptional, so that the Deuteronomic law which provided that the first born should not be disinherited or rather that his share of the patrimony should not be minimized, was probably a late step in the evolution of this custom. It is only when the exercise of a right has been restricted by any custom and has become the exception rather than the rule that positive legislation steps in to put an end to it entirely, because it seems to be an anomaly, although it is a perfectly legitimate survival of an older historical period. This fact, however, is not generally known to the people who are not aware that the exception to the common practice of their own time is the true law of former times.

There could only be one first born in the patriarchal family, although in the polygamous matriarchal family there may have been as many first born sons as there were wives. In all the genealogical lists given in the Bible it is the first born of the father who is known as the *Bekhor* (Genesis xxv, 13; xxxv, 23; xxxvi, 15; xlvii, 8; Exodus vi, 14; Numbers i, 20; xxvi, 5; I Samuel, xvii, 13; II Samuel iii, 2; I Chronicles iii, 1-9; iv. 4). After the exodus, when Moses took a census of the first born of the males of the children of Israel from a month old and upward, he found that there were 22,273. This fact is used by John David Michaelis, a learned scholar of the last century, in his work, *Mosaisches Recht*, (Volume 2, page 84), for the purpose of proving that the *Bekhor*, whenever referred to in the Bible, means the first born of the father and not of the mother. His argument is ingenious and amusing. He says in substance that the record shows that 600,000 adult males left Egypt. To this must be added at least 300,000 males under the age of twenty years, those constituting the male children not included in the 600,000, and this would give a total number of males of 900,000. Of these

the census showed upwards of 22,000 to be first born sons, or about one first born to every forty-one males. In a polygamous society it may readily be that a man shall have forty-one sons and that the son actually first born shall be known as the *Bekhor*, whereas, if we were to assume that the first born of the mother was meant by the *Bekhor*, we should have to suppose that each woman has forty-one sons and that there were only 22,000 mothers among all those who left Egypt. By this *reductio ad absurdum* Michaelis seeks to prove this case.

Among many primitive people the custom prevailed of offering the first born as a sacrifice to the gods. This custom, like many others, has been subject to a variety of modifications among the different peoples among whom it exists. That the ancient Hebrews of prehistoric times practised the same rite can hardly be doubted, and some of the cases which have already been cited, showing the prevalence of child sacrifice at some periods of ancient Hebrew history, may be referred to again in illustration of this point. In addition thereto, there seems to be evidence of the ancient existence of this practice in the comparatively late law of the sanctification of the first born. The theory of the old law was that the first born, whether of man or beast, belonged to God. The practice was to sacrifice him. The Mosaic law accepted the theory, but modified the practice. The law in Exodus provides as follows: "Thou shalt set apart unto the Lord all that openeth the womb, and every firstling that cometh of a beast which thou hast, the male shall be the Lord's; and every firstling of an ass thou shalt redeem with the lamb, and if thou wilt not redeem it, thou shalt break its neck; and all the first born of man among

thy children shalt thou redeem" (Exodus xiii, 11-13). Thus, instead of offering the oldest born child as a sacrifice to God, he was redeemed, and the redemption money of five shekels was paid to the priests (Numbers xviii). The Hebrew law-giver found the practice of offering the first born as a sacrifice existing among the people. To destroy that practice by legislation was impossible; accordingly, the law-giver adopted it, and with a slight modification made of it a Jewish custom, superseding the primitive brutality of the sacrifice by the custom of redeeming the first born.

Legislation as a rule follows the law of motion along the lines of least resistance. It is rarely indeed that a law is of such a character as to be entirely opposed to the current practice and customs of the people and entirely out of harmony with their current habits of thought. Legislation is merely a modification of existing institutions and laws.

And this is true of all legislation, whether it be civil or ecclesiastical. The law of the early Christian church, which enabled Christianity to spread among the heathen, illustrates this truth. The actual engrafting of the system of morals preached by St. Paul upon a heathen stock was impossible without making concessions. The practical wisdom of the church, therefore, adopted many heathen customs which were deeply and firmly rooted, and by giving them a slightly different signification changed them into Christian customs, and thus furnished itself with powerful instruments for the spread of the Christian faith. In the same manner, the study of the Biblical law will show that many primitive heathen practices were, by the genius of the Hebrew people and its law-givers, converted into Jewish institutions.



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NOTES.

"ARE YOU the defendant?" asked a man in the court room, speaking to an old negro.

"No, 'boss," was the reply. "I ain't done nothing to be called names like that. I'se got a lawyer here who does the defending."

"Then who are you?"

"I'se the gentleman what stole the chickens."

THE late Thomas B. Reed was a great lover of a good story, and no one enjoyed telling one better than he. He was very fond of relating the following one on himself and always seemed to delight in it as much as his hearers.

When he applied for admission to the bar, he was examined as to his qualifications by the judge of the County Court alone. After answering a number of questions in a satisfactory manner, he was asked by the judge whether the Legal Tender Act, which had just been passed by Congress, was, in his opinion, constitutional. Young Reed had never given the matter any consideration, but, being unwilling to display his ignorance, replied confidently that it was.

"Well, I will admit you to the bar," said the judge. "I examined another young man this morning, and asked him the same question. He replied that it was not constitutional. I admitted him, too. I am always glad to admit young gentlemen to the bar who can answer such grave constitutional questions off hand."

"WHY, gentlemen of the jury, this man is not, he cannot be guilty," said the lawyer defending a man charged with grand larceny. "He never did a wrong act in his life. He and I were boys, reared together. I know him as well as he knows himself. He simply couldn't do anything wrong. He and I used to run around together; we used to steal watermelons together; that's his calibre, stealing watermelons; he'd never get up to stealing horses."

And the man was acquitted.

"OFFICER," asked the Police Court judge, "what made you think the prisoner was drunk?"

"Well, your Honor, as he was going along the sidewalk he ran plump into a street lamp-post. He backed away, replaced his hat on his head, and firmly started forward again, but once more ran into the post. Four times he tried to get by the post, but each time his uncertain steps took him plump into the iron pole. After the fourth attempt and failure to past the post he backed off, fell to the pavement, and clutching his head in his hands, murmured, as one lost to all hope:

"'Lost! Lost in an impenetrable forest!'"

"Ten days," said the Court.

IN a certain state, and during a certain scalawag administration, Bill Smith was engaged quite extensively in practising pettifoggery, and was to all intents and purposes a shyster. The greater part of his practice was done before Squire Brown. The squire always called him Sam, and treated him with undisguised contempt.

One day Smith entering Brown's office found the dignitary in his shirt-sleeves, with

feet resting high above his head, on a desk. He was saluted, as usual, with "Good morning, Sam!"

"Judge Smith, if you please, sir," he responded with much unction.

"Well, Judge Smith. What are you judge of, I'd like to know?"

"Judge of the Supreme Court of this State, sir; and I have come to have you qualify me."

And, sure enough, he handed over a commission from the governor, making him a judge of the Supreme Court, to fill a vacancy.

The squire adjusted his glasses, read the document carefully, saw that it was genuine, and then, looking his visitor full in the face, he said:

"Very well, Judge Smith, I can swear you in, but all h—l couldn't qualify you."

MANY stories are told of the droll humor of the late Judge W. H. Mittenry of Iowa. In sentencing a pickpocket to the penitentiary the judge once said:

"Young man, this is a heinous crime, a most heinous crime; I would rather be caught at any other crime in the world than picking pockets, unless it be murder. Why, to tell you how I feel about it; if I had stuck my hand in a man's pocket to pick it and he should cut my hand off at the wrist, leaving the severed hand in his pocket, I'd run as fast as my legs could carry me and never even stop to claim the hand."

A DAY or two ago, at the Old Bailey, counsel, who had been prevented by indisposition from being in court when his client was arraigned, but arrived just when the trial was concluded (luckily, to the satisfaction of the defendant), modestly remarked: "Perhaps I have saved my client from conviction by not defending him." This recalls (says the *Pall Mall Gazette*) the story of a witty barrister, who was asked on returning from circuit how he had got on. "Well," was the reply, "I saved the lives of two or three prisoners." "Then you defended them for murder?" "No," was the rejoinder, "I prosecuted them for it."

A SUIT was won for a Tennessee railroad corporation under rather peculiar circumstances.

A prominent attorney had brought suit for a colored woman for damages caused by killing her husband.

The lawyer for defendant felt a good deal of uneasiness for a time about the case, being convinced that the woman had a good case, and would recover a large verdict against his client.

Finally he secured a bit of information, and having learned, in the course of a long practice at the bar, that a close mouth is capital in the law business, he "lay low."

Although he had many conversations with the plaintiff's attorney about the suit, he never hinted that he knew any other facts than those known to the party of the other part.

After the plaintiff had given her testimony on direct examination and was turned over for cross questions the wily counsel for the defense asked her:

"Hadn't you been married once or twice before you married the man for whose death you have brought this suit?"

"Yes, sir; I done been married twict befoah dat," she replied.

"What became of your first husband?"

"I done got a 'vorce fum 'im."

"Where did you get the divorce?"

"Fum de Circus Coht, suh."

"What became of your second husband?"

"I done got a 'vorce fum him, suh. Dat's whut comed o' him, de no 'count, low down nigger."

"Where did you get that divorce?"

"Squiah Cal Kirk done gien hit to me, suh; dat's whah I got hit, an' ef you doan' bleeve me you c'n des go an' look at de re-cord; dat's what you kin!" she replied with defiant confidence.

"Squiah Cal Kirk" was a colored justice of the peace, noted for not knowing anything about law, as well as for being somewhat of a wag.

The plaintiff's lawyer went out and took something to brace up his shattered nerves.

IN proceedings recently commenced in the Supreme Court of Iowa the constitutionality of the dipsomaniac law, passed by the last legislature, under which more than one hundred persons have been committed to the wards for inebriates at two state insane asylums, is being severely tested. It is set up that if the accused is insane the district court is not the proper tribunal to determine the fact, that being the duty of the county insane commission created by Iowa law. If the accused is a criminal, then he should be tried by a jury of his peers and cannot be sent to confinement by a judge of the court. If the accused is an insane person, the proceeding against him is irregular because the law requires guardians to be appointed for insane persons before suit may be begun against them. The sum and substance of the question might be stated in the query, "Is an inebriate insane, or is he a criminal?"

THE insane patients at the state asylum are indignant at being confined together with the inebriates. They consider themselves far superior. When tobacco was being distributed to the patients, one of the insane, who had been working faithfully, thought he ought to have a larger allowance. Accordingly he asked for a bit more of the weed.

"You use lots of tobacco, don't you?" asked an inebriate who was standing by.

"Yes," came the answer: "I'm getting to be a confirmed inebriate in the use of it."

LORD RUSSELL once asked Mr. Hume: "Mr. Hume, what do you consider to be the object of legislation?"

"The greatest good of the greatest number."

"And what do you consider the greatest number?"

"Number one," was Mr. Hume's reply.

IN the Court of Exchequer there is (says the *Westminster Gazette*) a very remarkable writ. It was filed on the 3rd of October, 1725, by John Everit against Joseph Wil-

liams. The statement of claim is a very lengthy one; it sets forth the fact with much clearness that both men were highway robbers, and that a partnership existed between them for the purposes of carrying on business as highwaymen. The partnership terminated within one year of its inception. Everit sued his partner for £1000, "being for moneys wrongfully appropriated to defendant's private purse." The action was adjudged to be a gross contempt of court, and the plaintiff was ordered to pay all costs, whilst the solicitors who served the writ were fined £50 each; one of the solicitors, a man named Wreathcock, refused to pay the fine, and was sent to prison for six months. Both plaintiff and defendant to this action were subsequently hanged, one at Tyburn and the other at Maidstone.

OF the names given to the various courts within the Temple, some are easily explicable, as, for example, Inner Temple-lane, Middle Temple-lane, Mitre-court-buildings, Fountain-court, Garden-court, and Temple-gardens, and nothing need be said regarding them. Others, again, are derived from public offices at one time situated in the particular block of buildings. Thus we have Crown Office-row, so named because at one time the Crown office was there, although for a long time prior to its removal to the Royal Courts of Justice in 1882 it was at 2, King's Bench-walk. The last-mentioned pile of chambers derived its name from the circumstance that the King's Bench office in former days was at the river end of the walk. Again, other courts have received the names they bear from special features noticeable in connection with them. Thus Fig Tree-court, which has been reputed a favorite *locale* for the scenes in certain kinds of sensational fiction, but regarding which Mr. Flood, in his pleasant little book, *An Hour in the Temple*, declares that all he can allege against the court is that it is not so easy to find an address there as in other parts of the Temple, is so named because at one time a fig tree actually flourished in or near it. In the records of the Inner Temple there occurs an entry, under date

1610, of the purchase of such a tree. Fig trees are still to be seen in the Temple, but the quaint, tortuous old court to which the name of the tree has been given knows them no more. In the same way we have Elm-court. Pump-court is, of course, so named from the pump in the centre. The Cloisters is a self-explanatory name. Brick-court, interesting in an unusual degree from its associations with Blackstone, Goldsmith, and Thackeray, is said to have been so called from the fact that it was one of the earliest erected brick buildings in the Temple, having been built in the earlier years of Elizabeth's reign. The derivation of the name Paper-buildings we have been unable to trace—none of the books, so far as we can find, throws the smallest light on the question.—*The Law Times*.

THE menu of a recent dinner given in Boston to Mr. Justice Holmes was in the following form:

IN THE SUPREME NON-JUDICIAL COURT.

Young's, ss. December Sitting 1902. Equity.

No. 5.

THE BAR ASSOCIATION OF THE COUNTY OF MIDDLESEX

vs.

O. W. HOLMES.

PLAINTIFF'S BRIEF.

BRIEF STATEMENT OF THE CASE.

This case comes here from the Superior Court on Report. The bill alleges an attempt by the defendant to quit his office in total disregard of obligations arising from nearly twenty years of official intercourse, wherein the defendant's courtesy and impartiality, uniformly extended, high character and judicial ability, have inspired among the Bar lasting sentiments of respect, affection and honor. The relief sought is an injunction, and there is also a prayer for general relief.

The defendant answered, denying the several allegations of the bill, and setting up an alleged duty to accept a higher call elsewhere.

The Court, on the issues joined, found all the plaintiff's allegations to be true; and, as to the matter specially insisted upon by the defendant in his answer, found the power which he has to overrule the decisions of the Superior Court to be a more useful and important function than that possessed by any other tribunal.

Accordingly a decree was entered granting a permanent injunction, and, at the request of the parties, the Judge reported the case for determination by this Court.

POINTS (AND AUTHORITIES.)¹

I.

LEADERS OF THE BAR. [The wines.]

II.

CANDIDATES FOR ADMISSION. [The edibles.]

III.

AMENITIES OF THE BAR. [Coffee and cigars.]

Wherefore it is respectfully submitted that the injunction was properly granted—unless it may be adjudged that the plaintiff, subordinating its rights to the broader claims of the country, must give way and allow full scope for application of the rule "Honour to whom Honour is due."

THE BAR ASSOCIATION OF THE COUNTY OF MIDDLESEX.

pro se.

¹The authorities are to be sighted elsewhere. See Bates? Also Holmes, Knowlton, Morton, Lathrop, Barker, Hammond, Loring? Also Mason *et. al.* (too numerous to mention)?

A CURIOUS dispute has engaged the attention of Judge Parry in the Manchester County Court this week, says the *Pall Mall Gazette*. A tree which has been growing for fully forty years by the side of a wall quite recently caused the wall to fall through the spreading of its roots, and an action for damages was raised by the owners of the wall—two lawes—against the owner of the tree. His Honor, however, decided that as the roots of the tree had spread under the wall and into the plaintiffs' land, the tree was joint property, and that if the plaintiffs had chosen they could have pruned the roots, or even cut down the tree. It is certainly a nice legal point, and if the defendant is litigiously inclined it may yet vex, and also amuse, the higher courts.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of contributors, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY. By Emory Washburn, LL.D. Sixth edition. By John Wurts, M. A., LL.B. 3 vols. Boston: Little, Brown and Company. 1902. Law sheep; \$18.

The question is often put, "why do so many new books appear when the old ones are just as good, or indeed better than the new?" And the answer is, as publishers could easily tell if they would, unsatisfying. The craze for the new is the incentive in some cases, but the lawyer not only wants something new, but something accurate as well in order that the work may be used in and out of court. He buys the new work because he either feels or is made to feel that he cannot well do without it; that the most recent authorities are cited and digested in text or notes. He looks up the references and finds them sufficient or insufficient. In the first case, he consults the new book because he finds it useful; in the other case, he goes back to the old because he has found it useful, and supplements it by digests and other aids at his disposal to make it serve his present and practical purpose. In the realm of real property, there is no "recent" work to claim the field and the tried and trusted Washburn appears in a sixth edition, revised and brought down to the year 1902. The advice sometimes administered to others than lawyers applies here with a peculiar force:

"'Tis well to be off with the old love
Before you are on with the new."

A new edition of Washburn was desirable for various reasons. The original treatise was needed when first published in two volumes in 1860-61. It at once took but did not force the market, because it was not only the best but the only book on the subject suited to the needs of the American lawyer. The

four editions brought out in the lifetime of the eminent and venerable author sought to, and did in a way, improve the treatise, and render it more serviceable to the profession, but the revisions to which it was subjected were done in a desultory way. The learned professor corrected a passage here to which his attention had been called; he inserted a passage there which further developed the thought he had in mind, but which for one reason or another he had not clearly expressed. The same process was repeated throughout the entire work, so that the treatise finally left the author's hands in a patched form. Accuracy and added value were obtained at the expense of repetition and not infrequent contradiction, but the symmetry of the book suffered.

In the present edition Professor Wurts has pruned with a discriminating hand these various additions, corrections and interpolations, so that the text now appears as an unbroken and regular whole; where necessary it has been to some extent rearranged throughout in a way to destroy, and "all verbal changes of importance, for the sake either of clearness or of brevity, and all of the editor's original work, by way either of substitution or of addition, are shown by brackets," so that it might be maintained, although the editor does not so claim, that the work appears in this last edition as the learned author would have had it appear had he prepared the treatise for publication as an original work in 1902 instead of in 1860.

Turning now to the book as it appears from the hands of author and editor, the purpose is everywhere evident to make the text and notes truly represent the law in its present state. A cursory examination of the first chapter on the "Nature and Classification of Real Property," shows how completely the editor has mastered, modified and bracketed the text, but it is so skillfully done that the context is not at all broken or jarred. As an example of the care with which the editor annotates and supplements the text by a note, reference may be made to pages 66-68, in which the statutory provisions of the various States are given in briefest form which

regulate the rights of aliens and citizens in the acquisition, holding and disposition of realty. In the same way the notes on pages 161-163 and 263-278 admirably digest the statutory provisions of the States and Territories dealing with the difficult and perplexing subjects of curtesy and dower. In these instances author and editor have coöperated in text and notes; the chapter on "Homestead Rights" is due solely to the editor who placed before the practitioner and student, within the narrow compass of thirty-five pages (pp. 306-341), a satisfactory survey of the subject as it exists in the States and Territories of the Union.

Passing to the second volume, the chapters on mortgages offer an instance of the happy combination of author and editor, while the detailed note on foreclosure on pages 237-245 is the editor's. Attention should be called to the editor's notes to contingent remainders (pp. 554-557); the "Rule in Shelley's Case" (p. 567); and the statute rules against perpetuities and accumulations (pp. 703-706) with which the second volume closes.

The subject-matter of the third volume is simpler in its nature, but it has received the same elaborate care at the hands of the editor. Especial attention should be directed to the notes on "Statute Rules of Descent" (pp. 16-60); the interpolation in the text on pages 140-144; the notes on title by possession and limitation (pp. 148-163); void and voidable deeds (pp. 312-326); and the summary of the principal statutory provisions in the several States and Territories respecting wills of real property (pp. 506-522) which concludes the body of the book.

Enough has been said to show how and wherein Washburn's Treatise has been rejuvenated and sent forth on its career of usefulness. A fundamental defect of the original work and of the present edition should not be passed over. The treatise is practical, and is as dry as it is practical. It was meant for the practitioner, and the successive editions show that it has reached the class for which it was composed. It is not a student's book, and the underlying principles are not treated

historically in the way to point out the origin, development and probable modifications to which they may be subjected. The treatise has the faults and the virtues of a digest, and it could not be revised into a theoretical exposition of the subject for the student's guidance without an omission of much that follows the title-page. It would have to be rewritten upon wholly different lines. And even as a practitioner's hand-book it fails wholly to answer its purpose, for as Mr. Wetmore excellently said in an address before the American Bar Association (1894): "He best argues his cases who considers not how he can match his facts with precedents, as he might match from his hand in a game of dominoes, but how he can best rest the judgment that he seeks upon the right and reason of the law."

But whatever the limitations of the work may be in its original plan and execution, it was, and is in its review form, the best American treatise on the law of real property.

A TREATISE ON THE LAW OF INSURANCE, INCLUDING FIRE, LIFE, ACCIDENT, CASUALTY, TITLE, CREDIT AND GUARANTY INSURANCE IN EVERY FORM. By *Charles B. Elliott*. Indianapolis: The Bowen-Merrill Company. 1902. (lvi + 531 pp.)

In section 41 this book says: "It was thought at first that human life was too sacred to be made the subject of a contract, but this idea passed, leaving the rule that it could be insured under conditions which were supposed to neutralize the temptation of the beneficiary to destroy the life. This safeguard is found in the rule which requires that the beneficiary of the policy must, at least when the insurance is effected, have such an interest in the continuation of the life as to remove the temptation to hasten the event from which he would receive a financial benefit." In section 61, however, the book says: "We therefore find the rule that one who takes an insurance upon his own life and pays the premiums may make the insurance payable to any person he may name in the policy, and that such person need have no interest in the life of the insured. As said in South Caro-

lina: ' . . . But it is also well settled that a person may insure his own life and make the policy payable to whomsoever he chooses, even a beneficiary who has no insurable interest in his life, provided that the transaction is *bona fide* and not a mere cover to evade the law against wager policies.' "

So many apparently impossible tasks turn out to be within the power of peculiarly skilled persons, that it would be injudicious to insist very strongly upon the impossibility of reconciling those two sections. The two quotations have been inserted here in order that the reader may decide for himself whether this book is a safe guide for beginners.

Upon the question whether these quotations give a just impression of the nature of the book, the learned reader will do well to refer to sections 45, 46, 55, 90, 181, 205.

A minor defect is the historical introduction, which reproduces most of the errors of the old books and ignores the amendments required by the later authorities.

This review is based upon the impression that the book is meant for students or for practitioners who are gaining their first information as to insurance. Experts will not be harmed by the points to which attention has been directed; and their only objections to the book will be that it does not add anything to their knowledge and that the title-page is somewhat overloaded. It was hardly necessary to call attention to the six lines of text and the lines of citations on casualty insurance, nor even to emphasize so conspicuously the twelve pages of the chapter on employers' liability, fidelity, credit, and title insurance.

THE LAW OF INSURANCE; FIRE, LIFE, ACCIDENT, GUARANTEE. By *William A. Kerr*. St. Paul: Keefe-Davidson Company. 1902. (xi + 917 pp.)

In section 3 is the definition that: "An insurance contract is an agreement whereby one party, for a consideration, (a) agrees to indemnify another party to a specified amount against loss or damage from speci-

fied causes, or (b) agrees to pay to another a certain sum of money on the happening of a given contingency or event." This certainly sounds as though all wagers and other conditional contracts are instances of insurance. Yet section 13 says that "indemnity and protection against loss are the fundamentals of an insurance contract." This latter statement unquestionably limits and corrects the former; but it indicates the danger of hasty definition, and it requires in turn a more thorough discussion of the nature of life insurance than is found in this work.

In section 4 it is said that: "There are seven different classes of insurance, viz.: (a) fire insurance; (b) life insurance; (c) marine insurance; (d) accident insurance; (e) casualty insurance; (f) guaranty insurance; (g) real estate and title insurance." What has become of tornado insurance, transportation insurance, and the celebrated insurance against twins? Are these—and a long list of other known varieties—to be included in casualty insurance? If so, the seven kinds actually enumerated by the author might well be reduced to one or two. Yet the real fact is that enumeration, like definition, has dangers, and that the enumerator will do well to protect himself with an "etc."

There are still other discouraging failures to make distinctions carefully. Thus on page 283 it is said that: "In all cases there must be a reasonable ground to expect some benefit or advantage to the beneficiary from the continuance of the life insured; otherwise the beneficiary would be directly interested in the early death of the insured. A policy issued to one who is not directly interested in the continuance of the life of the insured has a tendency to create a desire for his death. Such policies are, therefore, independently of any statute upon the subject, condemned as being contrary to public policy. Every person has an insurable interest in his own life and may effect an insurance thereon for the benefit of a relative or friend." Neither text nor annotation indicates that the author distinguishes between applicant and beneficiary or that he is aware of a difference of opinion as to the beneficiary's needing an interest.

Again, on pages 706 and 711, is found confusion as to the distinction between waiver and estoppel.

It is pleasant to be able to say that many parts of the book—for example, the chapter on subrogation—are sound; but nevertheless the volume taken as a whole is a disappointment.

Finally, the space devoted to guaranty insurance—two pages—hardly justifies including that branch on the title-page.

LIFE INSURANCE CONTRACTS IN CANADA. By *Frank Egerton Hodgins*. Toronto: Canada Law Book Co. 1902. (xxii + 276 pp.)

This volume contains the Dominion Insurance Act and the statutes of the several provinces, together with the law as determined by the courts. The law of life insurance has not yet been codified in any one of the provinces—unless, indeed, the elaborate provisions of the Civil Code of Quebec are entitled to be called a codification of this subject. Yet there have been so many statutory changes that this book will be extremely useful to any lawyer who has to pass upon life insurance questions governed by Canadian law.

A TREATISE ON GUARANTY INSURANCE ; INCLUDING THEREIN AS SUBSIDIARY BRANCHES THE LAW OF FIDELITY, COMMERCIAL, AND JUDICIAL INSURANCES. By *T. G. Frost*. Boston: Little, Brown and Company. 1902. (xxxviii + 547 pp.)

Apparently this is the first treatise upon this subject. It is far from being a satisfactory piece of work, and it fails to make convincing its initial and chief contention, that the contracts of surety companies are policies of insurance.

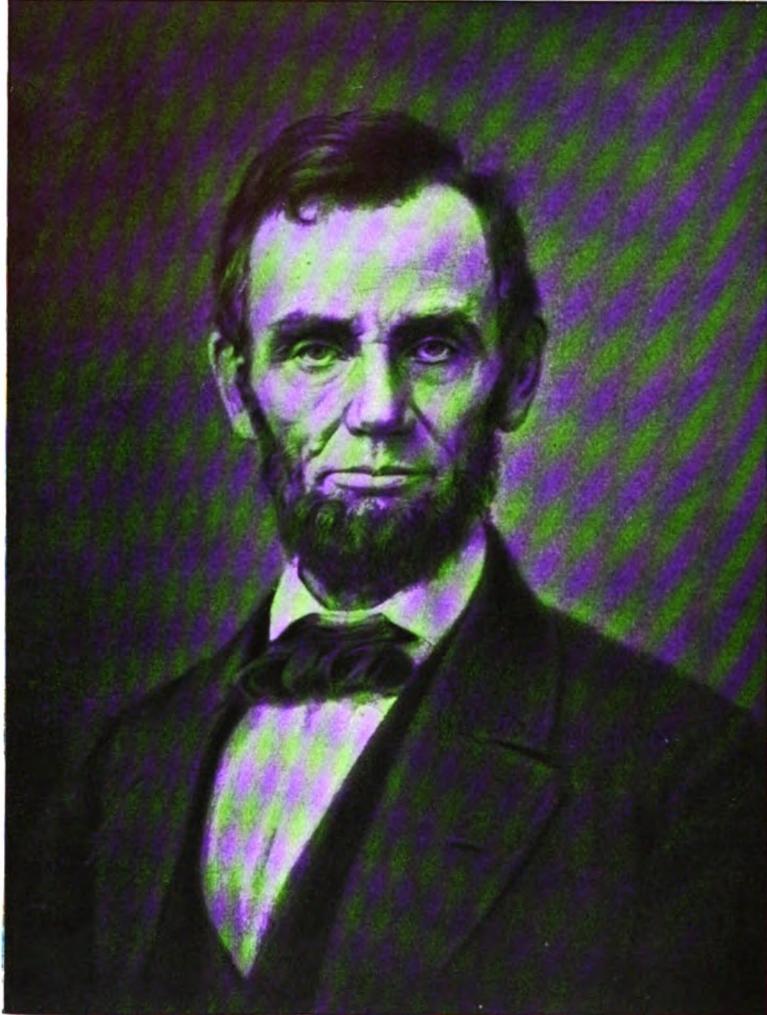
THE AMERICAN STATE REPORTS, Vol. 87. Containing cases of general value and authority, decided in courts of last resort of the several states. Selected, reported, and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1902. Law sheep. (1067 pp.)

The reports from which are taken the cases in the present volume of the American State Reports are the following: 129 Alabama, 135 California, 157 Indiana, 27 Indiana Appeals, 106 Louisiana, 84 Minnesota, 25 Montana, 61 Nebraska, 65 Ohio State, 39 Oregon, 73 Vermont, 25 Washington, 49 West Virginia, 111 Wisconsin, and 9 Wyoming.

The more important monographic notes discuss these subjects: Embezzlement, When a Prisoner may be Released on *Habeas Corpus* after Judgment and Sentence, Proceedings Against Unknown Owners, Abandonment and Forfeiture of Mining Claims, Assignment of Life Insurance Policies, Duty of Mine Owners to Prevent Injury to Their Employés, Docketing Judgments, Power of Municipalities to Regulate, Prohibit, or Discontinue Cemeteries, Right to Acquire Title by Advise, Possession to Lands Devoted to a Public Use, and Fraudulent and Over-issued Corporate Stock.

An interesting case reported in this volume is *Farm Investment Company v. Carpenter*, 9 Wyo. 110, on the right to appropriate water for irrigation purposes, where it is held that "A right to the use of water may be acquired in Wyoming by priority of appropriation for beneficial purposes, in contravention of the common-law rule that every riparian proprietor is entitled to the continued flow of the water of the stream running through or adjacent to his lands."





A. Lincoln

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ABRAHAM LINCOLN.

BY DUANE MOWRY.

A FEW years ago the children of the late William Lloyd Garrison told the story of their distinguished father's life in four large volumes. In doing this, they very naturally, perhaps unavoidably, gave considerable prominence to the slavery question, with which their father was, for so many years, intimately identified. Incidentally, Abraham Lincoln is made to figure somewhat conspicuously on the pages of these volumes. For no history of slavery and of the slave-power in America would be complete which did not take into the reckoning the life and works of the martyred President.

Professor Goldwin Smith, a distinguished scholar, educator and critic, has occasion to consider, in a quite lengthy review, the last two volumes of this series, in an article in one of the English magazines, under the title of "A Moral Crusader." Professor Smith refers to the martyred President in the article in question and undertakes to place some estimate on the man and his place in history. I quote from the article:

"He (Garrison) did not at first give full confidence to Lincoln, nor was he, or any one but a blind partisan, called upon to do so. Lincoln was a Western politician who had risen by the same arts as the rest of his class, and had been nominated not so much for his merits as because he had the Illinois vote. He turned out infinitely better than those who brought him forward had any right to expect. His character proved admirable, and was most useful in giving tone

to the nation during the struggle. But his ability, after all, was chiefly shown in keeping that touch with popular sentiment, the cultivation of which is the supreme study of the politician. The writers of these volumes have to admit that his plans for dealing with the slavery question in the Border States by means of indemnities were mistaken and almost fatuous. Nor can it be said that the war was ably administered while the management was in his hands. The great service which Grant rendered was that of taking the war out of the hands of all the civilians and grasping it as his own. Of finance Lincoln was ignorant, and the story was credible which made him, when told that the funds ran low, ask whether the printing-machine had given out. How he would have dealt with the most difficult problem of all, that of Reconstruction, nobody knows. Lincoln's martyrdom to the great cause, so combined with the pride felt in exalting an American 'railsplitter' above all the statesmanship of the Old World, have, we cannot help thinking, led the Americans to raise Lincoln to an unapproachable pinnacle of glory as a statesman on which, when the final judgment of history is pronounced, he will hardly remain. America may yet produce a greater man."

It is well known that Professor Smith is not a native-born American, although he is not a stranger in our country and is not unfamiliar with our people and our institutions. He has lived in this country for some years; he has been connected with some, or at least,

one, of our great educational institutions, as an instructor; he is, confessedly, a scholar of national and international reputation. But mere scholarship, however profound and cosmopolitan, cannot be urged as excuse or justification for the errors or bias of judgment. Such mistakes, coming from such a source, are rather accentuated and emphasized, and the author of them merits the application of more rigid tests and a severer arraignment, than would otherwise be accorded him.

It is difficult for Americans to fully understand how a scholar and a critic of Professor Smith's acknowledged ability and learning could be responsible for such remarkable utterances as appear in the above quotation. They certainly do not comport with current public opinion; they have the stamp of historical inaccuracy; they ignore certain constitutional powers of the President; they misstate, or, at least, misinterpret, certain statements of the President; they belittle pre-eminent qualities in the Chief Executive of a representative form of government; they fail to fairly comprehend the facts of our political history; they dignify mere rumors and attempt to treat them as historical truth; in fine, the quotation is practically unsupported by the record, and contemporaneous history repudiates the sentiments therein expressed as false, or unjust, or prejudiced. The loyal American heart will give little heed to these sentiments, and impartial history will find no place for their lodgment.

But to return to the consideration of the specific criticisms of Professor Smith. Mr. Lincoln was not nominated for President by the Republican National Convention in 1860 because "he had the Illinois vote." Illinois was not a pivotal State in the national campaign of 1860. Its electoral vote could have gone to any of the other presidential candidates, and still there would have been a sufficient number of electoral votes left to elect Mr. Lincoln.

The Republican party, in national conven-

tion assembled, had declared in its platform against any further extension of slavery "into any or all of the Territories of the United States, as a dangerous political heresy, at variance with the explicit provisions of the Constitution, with contemporaneous exposition, and with legislative and judicial precedent." The platform also maintained "that the Federal Constitution, the rights of the States, and the union of the States must and shall be preserved." With these cardinal principles of the Republican party Mr. Lincoln was in hearty accord, and was known to have taken strong and advanced ground to the advocacy of them, both in public utterance and private statement. His record was clear, pronounced and unmistakable. It was the knowledge of this record which finally determined a majority of the delegates to support Mr. Lincoln in the convention for the Presidency, and not because "he had the Illinois vote." Professor Smith is the first and only person, so far as the writer knows, who has ever suggested Mr. Lincoln's strength in his adopted State as a final reason for his availability as a presidential candidate in 1860.

It is true, as Professor Smith says, that Mr. Lincoln was "a Western politician," if by that is meant that he was born, raised and lived in the West, as it was then known and called. But it is not true that his availability was solely or mainly determined by his shrewdness and skill as a political manipulator. Ante-dating the National Republican Convention of 1860, Mr. Lincoln had gained something more than a local reputation as a lawyer, had served one term in Congress with credit, declining a renomination, and had, in his debates with Stephen A. Douglas on the hustings, aroused the entire country, secured for himself a national reputation as an orator and debater, and demonstrated his fitness and qualifications for the highest office in the gift of the people. It has been truly said that these "speeches of Lincoln, circulated and

read throughout the Union, did more than any other agency to create the public opinion which prepared the way for the overthrow of slavery. The speeches of John Quincy Adams and of Charles Sumner were more learned and scholarly; those of Lovejoy and Wendell Phillips were more vehement and impassioned; Senators Seward, Hale, Trumbull and Chase spoke from a more conspicuous forum; but Lincoln's were more philosophical, while as able and earnest as any, and his manner had a simplicity and directness, a clearness of statement and felicity of illustration, and his language a plainness and Anglo-Saxon strength, better adapted than any other to reach and influence the common people, the mass of the voters." Shall it be said that such a man had "no merits" to commend him to the National Convention of 1860; that it was by "the arts of the politician" that his nomination was made possible? If such an explanation of the reasons for Mr. Lincoln's nomination is accepted, the truths of history will have to be expunged, and the recorded evidence of his contemporaries will have to be disregarded.

Professor Smith assures us that "his ability, after all, was chiefly shown in keeping that touch with popular sentiment, the cultivation of which is the supreme study of the politician." One would be led to infer that Professor Smith regarded "keeping in touch with popular sentiment" as a most reprehensible quality in any person, particularly, in a public servant, which should be never encouraged. But is it unworthy to keep close to popular opinion? Who is the servant of the people supposed to represent? Certainly, not himself solely. But, instead, those who have invested him with power and responsibility. In a Democracy, therefore, the ability to measure the popular feeling correctly indicates something more than negative qualities in those who serve the people, and should always be encouraged.

It is doubtless true that Lincoln's close and just estimate of the public pulse, from time to time, was of invaluable service to him as the nation's ruler. It assisted him in forming opinions. It told him when was the opportune time to publish the Emancipation Proclamation. It guided him in his action with reference to the removal of General McClellan.

Mr. Lincoln was a courageous and a patient man. He bided his time. But when the occasion came for action, he acted, promptly, fearlessly, effectively. It is not true, however, that Lincoln followed in the wake of popular sentiment. He made public sentiment, and was able to lead the people, the great majority of them, at least, to his way of thinking and doing upon public questions of immediate importance. This is well illustrated in his method of getting rid of slavery in our fair land. It was no part of the original purpose of the Republican party to abolish slavery in those States where it was firmly established. And it was Mr. Lincoln's first and highest duty, always, to maintain the Union of the States. With the advance of the terrors of war, it came to Mr. Lincoln, as it did not come to the ultra anti-slavery propagandists, that the time was propitious for publishing the Emancipation Proclamation. He was not called upon to do so by any behests or tenets of his party. But his great heart and conscience had told him that the institution of slavery was wrong, was inherently wrong. And he was able to measure public opinion so accurately, that when the time came for the promulgation of this great document of freedom, he was handsomely, even enthusiastically, sustained by the people. He did not even ask the advice of his Cabinet as to the main proposition. That he had determined without any human assistance.

Yes, Lincoln was able to keep in close touch with public sentiment. But he was never led by it to the prejudice of the com-

mon weal. In a true Democracy, this wonderful ability is always an element of great strength, and its intrinsic value in a public servant cannot be over-estimated. It is easy to see how a mere aristocrat, or one with aristocratic notions or tendencies, discounts such qualities in a public servant. Yet it is a truism, in a representative government, that the most efficient and the most successful public servants are those that hew close to the lines indicated by enlightened public sentiment and opinion.

But it is not true that Lincoln's ability was mainly manifested in the cultivation of the approving smile of the multitude. Nor does it anywhere appear that he sacrificed the interests of his constituents for such recognition. His ability to take the public pulse accurately was intuitive. And he took it, not that he might shape his official policy by it, but in order the better to determine how far, in what direction, and to what extent, the uncertain and fickle masses would sustain *his* policy. Mr. Lincoln's advisors and those holding confidential positions in his administration during the dark days of the Civil War, unhesitatingly declare that he was always a leader and never a blind follower. It is submitted that such characters do not ride to distinction, and influence, and power, on a popular wave of approval.

Mr. Lincoln was essentially a man of peace. It nowhere appears that he was in favor of war. How earnestly he tried to convince the South, in his First Inaugural, of his purpose to allow it to remain in peace with the institution of slavery, is well known. By proposing indemnities for slaves it was his hope and desire to avoid bloodshed. Not only was such a course commendable from a purely humanitarian point of view, but it was also wise and politic, as subsequent events demonstrated. For it contributed to the making of public opinion in favor of the maintenance of the Union by using forcible means to suppress the impending crisis, if peaceable means

proved unavailing. Mr. Lincoln and the political party which placed him in power, were committed to that proposition. The policy of his administration, during the early part thereof, involving, as it did, negotiations and peaceable methods of solving threatening problems of portentous dimensions in the South, was not "mistaken" or "fatuous," but statesmanlike, noble, and wise. It was amply justified by the feverish condition of the public pulse, was in exact accord with the spirit of American thought and American institutions, and was, moreover, thoroughly philanthropic.

It is Professor Smith's conviction that "the war was not ably administered while the management was in Lincoln's hands. The great service which Grant rendered was that of taking the war out of the hands of all civilians and grasping it as his own." Mr. Smith evidently forgets, or, perhaps, he did not know, that the President is made, *by the Constitution*, the Commander-in-Chief of the army and navy. And it matters not whether it is Grant at the front winning victories from the enemy, or McClellan losing battles and prestige. The responsible head is always the same. And it was Lincoln who saw the necessity for a change of leaders in the field, when Grant was placed first in command of the army at the front.

But Mr. Smith's opinions of Mr. Lincoln as a military man are again at fault. General Sherman has said that Mr. Lincoln's military views, as evidenced in his correspondence with his generals, was remarkable for its correctness. General W. F. Smith says that he "has long held to the opinion that at the close of the war Mr. Lincoln was the superior of his generals in his comprehension of the effect of strategic movements and the proper method of following up victories to their legitimate conclusions." Another prominent army officer calls Mr. Lincoln "the ablest strategist of the war." With such opinions from such sources, what wonder is it that

final victory should crown the efforts of such a great military man, although a civilian?

Whether or not Mr. Lincoln ever made the remark attributed to him by Professor Smith about "printing more money" is exceedingly doubtful. Mr. Smith refers to it as a "story," which it likely is, and offers no proof of its genuineness. If it was ever said, it must have been uttered jocosely and not seriously. No one believes that Lincoln, possessed as he was with hard, sound sense, was capable of such an utter want of business judgment or political foresight. The merest schoolboy would not have the audacity to seriously suggest it.

What would have been Lincoln's reconstruction policy no one can certainly know. It is easy enough to indulge in speculations about it now. It is a harmless pastime. The best thought of the period immediately succeeding the Civil War, however, believed that the reconstruction policy which Mr. Lincoln would have inaugurated, had he lived, would have been more efficient, more satisfactory to the South, and, withal, more in keeping with lofty ideals of a democratic government, than the policy pursued by President Johnson. Certain it is that Mr. Johnson's policy of dealing with the South was a mistaken one. The rest is, and must be, unwritten and unknown history.

Possibly, upon some of the intricate details of governmental affairs, Lincoln would not have proved an adept. So far as there have been actual tests made he was generally right. His measure of men for high position in the public service was well nigh intuitive. Not only were his appointments generally wise, but rarely could there have been better selections made. This is evidenced in his appointment of Mr. Seward as Secretary of State; of Mr. Stanton as Secretary of War; of Mr. Chase as Secretary of the Treasury, and later, as Chief Justice of the Supreme Court. The list could be increased almost indefinitely. And it was not mere partisanship

which dictated appointments. There was always uppermost the patriotic impulse, and the clear, discriminating, statesmanlike quality.

Mr. Lincoln has so far been discussed from a negative viewpoint. Some criticisms, which tend to detract from, and to cast a reflection on the great name and fame of the martyred President, have been taken as a text. An attempt has been made to reply to these criticisms. Let us now examine some of the positive qualities which have made the great and growing fame of Abraham Lincoln. For that that fame is both great and growing is no longer an open question. Let us ascertain, if possible, why that fame is increasing, why its universality, whence its greatness.

Abraham Lincoln was a typical American. He was the best product which distinctively and exclusively American conditions and environments were capable of evolving. His intimate acquaintance with poverty in his early life, his close relations with the lower and poorer classes in his young manhood, his inherent love of justice for all ranks and conditions of men, his love of truth, his hatred of wrong, pointed to him as essentially the fittest representative of the people, and especially of the plain people, which this country had ever produced. His education and experiences had prepared him for great, for supremely great effort, in behalf of whatever cause he chose to become identified. This was not alone indicated by his great endurance, physical and mental. It was manifest in a carefully trained mind, trained it is true, under the administration of a noble mother, in early life, supplemented, however, by the behests of a laudable ambition, and an industry which was simply herculean. To this mother he has been known to say, when President, that "all I am or hope to be, I owe." She it was who taught him to read and enjoined upon him never to swear, never to touch liquor, and never to lie, injunctions

which he always obeyed. When it was remembered that this "sainted mother," as he chose to call her, passed into the shades while her son was in his ninth year, one can form some estimate of the great force of character, deep religious feeling and practical common-sense possessed by her. Only such a mother would be able to leave an impress on the young life of her devoted son at such a tender age. What wonder is it, then, that such a life should become great so soon as the occasion came to develop its latent powers? Why marvel that a mere "rail-splitter" and flat boatman of the Mississippi should be the chosen guardian of a great and free people?

Not only was Lincoln the best type of which American soil and atmosphere was capable of producing, but he was, in spite of any and all other considerations, inherently great, great as a man, great as a lawyer, great as a reformer, and great as a statesman. And what is greatness, as applied to the individual? Undoubtedly, it is a relative term, which has various and varying significations, according to the time when, and the place where, and the circumstances to which, it may be applied. But a somewhat general and not too technical definition may be expressed in this wise: Greatness, as applied to men, is that quality of head, and of heart, and of soul, as exemplified in thoughts, in acts, and in deeds, wherein one person towers immensely above the common mass, one whose qualities fit him to be, essentially, a leader of men, and not a blind follower. Greatness, as thus defined, places the name of Lincoln in the first and highest position on the American escutcheon. This estimate will be questioned by the admirers of the "father of his country." There are many who believe that the name of Washington cannot yet give way to that of Lincoln. And while there is no claim made that the illustrious name and fame of Washington has grown any less with

the advancing years, it is insisted that Lincoln and his work have become better understood, the unselfishness of his motives better appreciated, the loftiness of his patriotism and the wisdom of his policy better fixed in the public mind, and the integrity of his purpose and the doggedness of his zeal to do the right as he understood it, more clearly indicated by contemporaries, with the progress of the years. These, and a multitude of parallel considerations, induce us finally to believe, not that the light of the fame of Washington has grown dimmer, but that the fame of Lincoln has grown brighter, has become greater, as the truths of history have become developed and understood, as the clear sunlight of unprejudiced investigation has been let into some dark historical corners.

Some one has said that there are two classes of men whose life-work is the most enduring monument—the great writers, and the men of great achievement. The same authority places Lincoln in both categories. Few of us would have been inclined to place Mr. Lincoln in the lists of the great writers, and it is doubtful if Lincoln would have ever regarded himself as a man of letters. And yet Emerson ranks him with Æsop in his lighter moods. He says: "The weight and penetration of many passages in his speeches, letters and messages, hidden now by the very closeness of their application to the moment, are destined to wide fame. What pregnant definitions, what unerring common-sense, what foresight, and on occasions, what lofty, and more than national, what human tone! His brief speech at Gettysburg will not easily be surpassed by words on any recorded occasion."

These words are found in Lincoln's Second Inaugural: "Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet if God will that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every

drop of blood drawn with the lash shall be paid by another drawn by the sword, as was said three thousand years ago, so still it must be said, that 'the judgments of the Lord are true and righteous altogether.' With malice towards none, with charity for all, with firmness in the right as God gives us to see the right, let us finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle, and for his widow and his orphans, to do all which may achieve and cherish a just and lasting peace among ourselves and all nations."

Of the foregoing it has been asked: "Where, since the days of Christ's Sermon on the Mount, is the speech of emperor, or ruler, or king, which can compare with this Inaugural? Where else, but from the teaching of the Son of God, could he have drawn that Christian charity which pervades the last sentence, in which he so unconsciously describes his own moral nature: *'With malice towards none, with charity for all, with firmness in the right as God gives us to see the right.'* No other state paper in American annals, not even Washington's Farewell Address, has made so deep an impression upon the people as this great document."

Mr. Lincoln's logical mind and clearness of mental and political vision is well illustrated in his message to Congress at its first special session after he became the President, when he discusses the right of a State to secede and the "States' Rights" doctrine generally. In that message he says:

"They [the Southern leaders] invented an ingenious sophism, which, if conceded, was followed by perfectly logical steps through all the incidents to complete destruction of the Union. The sophism itself is that any State of the Union may *consistently* with the National Constitution, and therefore *lawfully* and *peacefully* withdraw from the Union without the consent of the Union or of any other State. The little disguise that the supposed right is to be exercised only for just

cause, themselves to be the sole judge of its justice, is too thin to merit any notice. . . .

"This sophism derives much, perhaps the whole, of its currency from the assumption that there is some omnipotent and sacred supremacy pertaining to a *State*—to each State of our Federal Union. Our States have neither more nor less power than that reserved to them in our Union by the Constitution, no one of them ever having been a State *out* of the Union. The original ones passed into the Union even *before* they cast off their British colonial dependence, and the new ones each came into the Union directly from a condition of dependence, excepting Texas; and even Texas, in its temporary independence, was never designated a State. The new ones only took the designation of States on coming into the Union, while the name was first adopted for the old ones in and by the Declaration of Independence. Therein the 'United Colonies' were declared to be 'free and independent States'; but even then the object plainly was not to declare their independence of *one another* or of the *Union*, but directly the contrary, as their mutual pledge and their action before, at the time, and afterwards abundantly show. The express plighting of faith by each and all of the original thirteen in the Articles of Confederation, two years later, that the Union shall be perpetual is most conclusive. Having never been States, either in substance or in name, *outside* of the Union, whence this magical omnipotence of 'States' Rights,' asserting a claim of power to lawfully destroy the Union itself? Much is said about the 'sovereignty' of the States, but the word even is not in the National Constitution, nor, as it is believed, in any of the State constitutions. What is 'sovereignty' in the political sense of the term? Would it be far wrong to define it 'a political community without a political superior?' Tested by this, no one of our States, except Texas, ever was a sovereignty; and she even gave up the character

on coming into the Union, by which act she acknowledged the Constitution of the United States made in pursuance of the Constitution to be for her the supreme law of the land. The States have their status in the Union, and they have no other legal status."

The foregoing is submitted, not for its matter, but for its manner of treatment of a great political and Constitutional question of that time. His exposition of the subject, is unique and ingenious. It is more. The grasp of the problem is masterful and left little to be said by the friends of the Union. It was then for Congress to act in accordance with the reason which had convened it in special session. That this was done is already a matter of history.

It has already been said that Lincoln was the true type of an American. There seems to be no disposition to question this estimate. It is also conceded that he was great, great as a man of letters, and greater still in the world of achievement. Some definite testimony has been offered to show this greatness. It is also claimed that a fair interpretation of the judgment of contemporaries, a judgment that is never reversed, gives Lincoln the foremost place in the history of his country. Do the facts warrant the making of the claim? Can it withstand the strong sunlight of unprejudiced investigation and comparison? It is true that the name of Washington is close to the hearts of his countrymen. It may be admitted that he towered far above all of the men of his time. He had no competitors. The gratitude of his countrymen rebuked all rivalries and all jealousies. He was made the President by a practically unanimous vote. He was supported in the discharge of his duties by a confidence not confined by the boundaries of the Republic. He was easily the most prominent American of his time. He had been in the public mind for more than a quarter of a century. His loyalty to the cause of the Colonies was above suspicion. Still, he imbibed

the strong aristocratic notions and tendencies of his time. He was in strong contrast to the democratic Jefferson. He was, essentially and naturally, a man for a class rather than for the great mass. He was far from being close to the common people.

How stands the case with Lincoln? When nominated for the Presidency he was not widely known. Many would say he was practically an unknown public man. His public duties up to the time of his nomination had not been numerous or very important. He was not believed to have been personally very popular. The party he represented was not numerically very strong. His success at the polls was due to a division among his opponents. He was not the choice of the majority of the voters of the country.

Of course, both Lincoln and Washington were called to the highest office in the land at a critical period of our national life, the one to preserve, and the other to make it. It may be freely granted that each was great in his time. But there must be, and is, some unflinching test by which it can be determined with reasonable certainty, who was the greater man. To ascertain this it is not necessary to detract from the fame which is securely Washington's. It is necessary, perhaps, to indicate and emphasize the qualities which make Lincoln pre-eminent.

Ralph Waldo Emerson has said: "Lincoln was a plain man of the people. He had a face and manner which disarmed suspicion, which inspired confidence, which confirmed goodwill. He was a man without vices. He had a strong sense of duty which it was very easy for him to obey. He had a vast good nature which made him tolerant and accessible to all. His broad good-humor, running easily into jocular talk, in which he delighted and in which he excelled, was a rich gift of this wise man. It enabled him to keep his secrets, to meet every kind of man, and every rank in

society. His occupying the Chair of State was a triumph of the good sense of mankind and of the public conscience. This middle-class country had got a middle-class President at last. Yes, in manners and sympathies, but not in powers, for his powers were superior. This man grew according to the need; his mind mastered the problem of the day, and as the problem grew so did his comprehension of it. In four years—four years of battle-days—his endurance, his fertility of resources, his magnanimity, were sorely tried and never found wanting. There by his courage, his justice, his even temper, his fertile counsel, his humanity, he stood a heroic figure in the center of a heroic epoch. He is the true history of the American people of his time—the true representative of this continent—the pulse of twenty million people throbbing in his heart, the thoughts of their minds articulated by his tongue.”

George S. Boutwell said: “President Lincoln excelled all his contemporaries, as he also excelled most of the eminent rulers of every time, in the humanity of his nature; in the constant assertion of reason over passion and feeling; in the art of dealing with men; in fortitude, never disturbed by adversity; in capacity for delay when action was fraught with peril; in the power of immediate and resolute decision when delays were dangerous; in comprehensive judgment which forecasts the final and best opinions of nations and of posterity; and in the union of enlarged patriotism, wise philanthropy, and the highest political justice, by which he was enabled to save a nation and to emancipate a race. He is the most commanding figure in the ranks of self-made men which America has yet produced.”

Americans are not hero-worshippers. That charge cannot be justly made against the American character. They are not given to much twaddling sentiment. They are an intensely practical people. They *do* respect, even revere, the memory, in fullest measure,

of a public servant for his unselfish devotion to public duty.

The American people do not regard Abraham Lincoln more or less because he was a “railsplitter,” or because he was ungainly, awkward, and uncouth. Their admiration of him comes from the fact that he was able to discern his great public duty during a critical period of the nation’s existence; that he discharged that public duty faithfully, unselfishly, fully. The work of this great publicist, as it appears in the official records, will be ever held in great esteem and in grateful recollection by his countrymen. His public career is the choice legacy of future generations; his unblemished life and noble character will ever remain the inestimable heritage of all loyal Americans. His name and fame will continue to grow in public esteem for many decades to come.

It is possible that America may produce a greater American. It is certain that no one would wish to say that she shall not. To say, however, that she will do so is mere prophecy. Any one can indulge in that. It has slight significance. It is quite enough for our present purpose to know, that thus far, from the viewpoint of this paper, and as we maintain, in the light of the truths of history and of experience, as a distinctively American product, such a man has not appeared on the scene of action. Nor is it likely that the opportunity for developing such a national character will be offered the American people again. For a man to surpass the martyred President must not only be inherently great, but there must be conditions—opportunities—that will demand the use of those great qualities.

It is maintained, in conclusion, that Professor Smith’s estimate of Abraham Lincoln, as hereinbefore quoted, is inadequate, unappreciative, and unjust. It fails to tell the truth. It is neither fact nor well-authenticated history.

MARTIN VS. HARRINGTON.

73 Vt., 193.

(Holding that the Homestead Act protects the husband, as well as the wife and children; and that the husband's sole deed of the homestead is void, and not rendered effective by the subsequent death of the wife leaving him without children.)

BY HALE K. DARLING.

I.

The strenuous jades of past decades were ducked for their loquacity,
 But nowadays, the statute says they have a man's capacity
 To hold their own, sole and alone, sue and be sued as men can be,
 Trades consummate, own real estate, and act as independently
 As e'er they can; and now a man has hardly an immunity
 That women folk cannot invoke with just as much impunity.

II.

Indeed, so far has man lost *pas*, that now he cannot grant away
 By his sole act, the homestead tract, and, should he try, the jurists say
 The deed employed is null and void, and ne'er becomes of force or weight,
 E'en should the wife depart this life, leaving no children desolate.
 To head of house, as well as spouse, protection must extended be,—
 The court well says that in these days he often *needs it more than she*.

BLOCKADES.

BY LAWRENCE IRWELL.

A TERRITORY is said to be blockaded when access to or egress from its sea-ports is prevented by the naval forces of another State. When a State, for purposes of its own, fiscal or hygienic, declares that certain of its own ports shall be closed against foreign vessels, that decree must be respected by other States to whose notice it is duly brought, provided that those ports are really under the control of the executive of that State. But that is not a blockade; it is a mere closure of ports which any government, in virtue of its inherent sovereignty within the borders of its own territory, is quite entitled to announce. Blockade is essentially a war measure. When the Presi-

dent, in 1861, proclaimed that a forcible blockade of the Southern States would be forthwith instituted, England and France immediately declared their neutrality, and although that meant that they recognized the Confederates as belligerents, not as rebels, their action was unobjectionable, because when the Northern States issued the proclamation, they by implication admitted that they were engaged in war, and not merely in the suppression of a rebellion. In recent times, however, recourse has been had to what has been termed "pacific blockade"; thus the coasts of Greece were blockaded in 1827 by the English, French and Russian squadrons, although all three powers pro-

fessed to be at peace with Turkey (under whose control Greece then was); and from '45 to '48 France and England prevented access to La Plata (Argentina), although no war was declared. To admit such procedure as legitimate, would simply mean that one State might put in force against another measures destructive of the trade of neutral countries, and yet expect those countries to view the whole operation as pacific. In truth "pacific blockade" is a contradiction in terms, and the sole reason why it has not met with the unanimous disapproval of the whole civilized world is that up to now it has been leveled against only the weaker nations. In practice, it is enforced by the same methods as blockade between belligerents.

In 1886 Great Britain adopted a novel form of pacific blockade against Greece. Every ship flying the flag of any nation except Greece, was unmolested. But the liberty allowed to other nations did nothing to mitigate the coercion applied to Greek trading vessels, and had the object of the blockade been merely to divert to British ships the carrying trade of Greece, a measure better fitted to attain that end could scarcely have been devised.

From time immemorial it had been considered a perfectly regular proceeding to declare a port or a territory under blockade, and to affix a penalty for a violation of the declaration, although in point of fact, not a single vessel should be present to enforce its observance. But gradually this tenet met with less toleration; and in 1780, when America and France were combined against England, the three great powers of the North, Russia, Denmark and Sweden, entered into a league known as the "Armed Neutrality," with the object of evading the severe but ancient method of dealing with neutral commerce which England adopted. One of the articles which this confederacy agreed upon was: "A port is blockaded only when evident danger attends the attempts to

run into it"—a principle which boldly denied the right of any power to close by a mere edict a single hostile port. But England persisted in the exercise of a right which had undoubtedly the sanction of custom; and the powers of Europe wrangled through still darker years before an agreement could be reached. On the 21st of November, 1806, Napoleon promulgated the famous Berlin decree, which announced that every port in Great Britain was blockaded, and by an Order in Council issued a year afterwards, the British government declared France and all her possessions subject to the same embargo. Both governments, however, were simply carrying to its logical issue the old doctrine which neither had renounced—that a valid blockade might be constituted by mere notification. It was only in 1856 that, with the express purpose of removing as far as possible the uncertainty which hung over the rules of naval war, the great powers, except the United States, Spain and Mexico, concurred in the Declaration of Paris, which has been described as "a sort of doctrinal annex" to the treaty of that year. Important as has been the operation of all the rules contained in that Declaration, the only one which concerns us here is the fourth: "Blockades in order to be binding must be effective—that is to say, maintained by a force sufficiently real to prevent access to the enemy." This, being practically an adoption of the principle for which the neutrals of 1780 had so strenuously contended, was a triumph for those thinkers who have always maintained that all law must rest upon a basis of fact.

The first fifteen years of the nineteenth century were marked by all that turbulence which had characterized the closing years of that which went before, and there were not wanting in both periods instances of blockades perseveringly prosecuted and gallantly resisted. In the year 1800, Genoa was the only city in Italy held by the French. The

Austrian troops "invested" it by land, and the English warships blocked the passage by sea. The beleaguered Genoese saw the usual incidents of an old-fashioned blockade. From time to time privateers which lay behind the little island of Capraja, northeast of Corsica, would succeed in eluding all the vigilance of the British squadron and would carry in provisions enough to prolong for a while the desperate resistance of the garrison; at other times the blockaders would retaliate by "cutting out a galley" from beneath the very guns of the harbor. One day a gale might drive the jealous sentinels to sea; but on the next they were back at their old stations, there to await with patience until pestilence and famine should bring the city to its door. Sixty years later and in another hemisphere the maritime world was to see how far the new appliances of elaborate science had altered the modes in which blockades were to be enforced and evaded.

On the 27th of April, 1861, President Lincoln issued a proclamation in which the following announcements appeared: "A competent force will be posted so as to prevent the entrance and exit of vessels from the ports" of the Southern States. "If, therefore, with a view to violate such blockade, any vessel shall attempt to leave any of the said ports, she will be duly warned, and if she shall again attempt to enter or leave a blockaded port she will be captured." All Europe was prepared to watch this attempt to block up a coast line of 3500 miles against the intrusion of traders whose appetite for gain would be whetted to the keenest point by artificially raised prices. Already, indeed, the scheme had been ridiculed as a material impossibility by European statesmen, who pointed out the fact that not one of all of the blockades established during the preceding seventy-five years had succeeded in excluding trade even where the coast to be watched was comparatively limited. But as a set-off against the long and broken sketch of coast

which lay open to the operations of the blockade-runners, there were difficulties in their way which were at the outset of the struggle too lightly estimated. Almost the whole extent of the seaboard was protected by a treacherous fringe of low islands, scarcely rising above the surface of the water; the channels between and behind these were winding and intricate; and when these obstacles were passed, there still remained the crucial bar to imperil the entrance to every harbor.

The conditions of the conflict were new, and sagacious men foresaw that under them the risk of neutral powers being entangled in disputes with the belligerents was immensely increased. The agency of steam was employed for the first time to enforce a blockade on a gigantic scale. It was plain that a blockading squadron was no longer liable to be blown off the port it was watching by continued gales; but it was not so easy to say how far this new motive power would alter the chances of the blockade-runners. The naval power of the Northern States was, at the beginning of the war, so small that the blockade when first instituted was little better than one of those "paper blockades" which the voice of the International Law had condemned at Paris seven years before; for many months, indeed, the trade of the Confederacy with Europe was but little affected. It was in view of this that the government was urged to economize the sea forces and close entrance channels by means of sunken hulks. This plan was adopted at Charleston and carried out under the superintendence of an officer whose aim was "to establish a combination of artificial interruptions and irregularities resembling on a small scale those of Hell-gate, that rock which so long impeded the navigation of New York harbor.

In Europe both military critics and chambers of commerce protested against this method of making good a blockade; but the

stone-laden ships sunk at Charleston did no permanent damage to the port, and before the war closed the hulks broke up, the harbor being almost filled with floating timbers. It was quickly felt, however, that only an adequate fleet could render the blockade effective, and in response to the ceaseless activity of the dockyards, the northern warships multiplied with marvelous rapidity. The blockade grew strict. Gradually the pressure of diminished imports began to tell on the resources of the Southern States; iron machinery and drugs became scarce. In Richmond, a yard of ordinary cotton goods which had been sold at 12 1-2 cents brought more than that number of dollars; a pair of French gloves fetched \$150; and the price of salt went up to \$1 per pound. The export trade, too, was being slowly strangled; immense stores of cotton and tobacco lay waiting shipment at every port. A bale of cotton worth \$40 at Charleston would have brought \$200 at New York; and some idea of the price it might have yielded in Europe may be obtained from a consideration of the fact that half a million of English cotton workers were subsisting only upon charity.

But the war sent trade into new channels. Nassau, the capital of New Providence, one of the Bahamas group, became one huge depot for the goods which sought a market in the forbidden ports. Articles of household economy and of field equipment lay piled in heterogeneous masses on her docks, the cotton which had escaped the grasp of the Federals lay in her warehouses for reshipment to Europe; her coal stores overflowed with the mineral which was to feed the blockade-runners lying at anchor in the bay, and the *patois* of every seafaring people in Europe could be daily heard upon the quays. Hardly less numerous and varied were the groups of sailors, merchants, adventurers and spies, who discussed the fortunes of the war at Hamilton, in the Bermudas.

Blockade-running had now become a business speculation. But the great bulk of the trade was in very few hands, for the risks were great, and the capital involved was large. The initial cost of a blockade-runner was heavy, and the officers were highly paid. A pilot well acquainted with the port to be attempted, often demanded \$5000 for his services; and besides all this, it must be remembered that not above one trip out of four was successful. It is computed that in three years there were built or despatched from Scotland alone no less than 110 swift steamers specially designed for the adventurous trade with the Confederate ports. Perhaps the swiftest was the *Lamb*, which attained a speed of about 16 3-4 knots per hour (19 miles.) A careful observer might have guessed the character of the enterprise for which a blockade-runner was designed by a scrutiny of her build. Two taper masts, and a couple of short smoke-stacks were all that appeared above the deck; her object was to glide in the darkness past her watchers, and the tall spars of a heavily-rigged ship would have been too conspicuous a mark for eager eyes. Her hull was painted white, for experience was then believed to show that on dark nights or in thick weather that color most easily escaped detection. Although she had considerable stowage-room, her draught was light, and she was propelled by side wheels, in order that she might turn readily in narrow or shallow waters. To aid the war-vessels in capturing and destroying light cruisers such as this, the government built twenty-three small gunboats. They, too, drew but little water, and rarely exceeded 500 tons burden. For armament they carried one eleven-inch pivot gun and three howitzers, two of twenty-four pounds, and one of twenty pounds, well-chosen weapons for the work they had to do. Their weak point was their rate of speed, which did not amount to more than nine or ten knots an hour.

There was so much in blockade-running

that was attractive to the adventurous that we need not be surprised to learn that some British naval officers engaged in the work, forgetful of the neutral position to which their country's policy bound them. The remonstrances which were made to the British government upon that subject, however, and the Gazette order which they elicited, probably prevented those who had an official status from taking their capture so phlegmatically as the youth who took his passage out in a blockade-runner with the intention of enjoying a tour through the Southern States, and who, when the vessel was captured, wrote home, saying that he would now explore the Northern States, "which would do quite as well."

Blockade-running soon became almost as much an art as a trade, the most ingenious expedients being resorted to on both sides. A system of signalling by means of blue lights and rockets was in many cases established between the forts and the friends of the confederates outside the harbor. One steamer actually ran into Wilmington while Fort Fisher was being bombarded, and prevented pursuit by boldly sailing close past the powder ship, which shortly afterwards blew up. Occasionally a furious cannonade was begun from some adjacent fort, so as to draw off the blockading squadron and leave the entrance free, if only for a few moments. The blockaders had their tricks, too. Sometimes heavy smoke was seen rising as from a ship on fire; but when the blockade-runner went to render assistance, she found out too late that the supposed burning vessel was a Federal cruiser, which had resorted to this device in order to bring the swifter craft within range of her guns. One dark, rainy night the *Petrel* ran out of Charleston, and shortly afterwards fell in with what appeared to be a large merchant vessel. Hoping to crown a successful run with the capture of a valuable prize, she gave chase and fired a shot to bring the stranger to. The reply was a single

broadside, so well directed that there was not any need for another. The supposed merchantman was the frigate *St. Lawrence*. A favorite ruse of the privateer Jeff Davis was to hoist the French flag of distress, and when a ship bore down in response to this appeal, she would under pretense of handing in a letter, send aboard a well-armed boat's crew.

But of all the remarkable incidents of this remarkable blockade, there was none more noteworthy than the voyage of the British ship *Emily St. Pierre*. The story rivals the inventions of a sea-romancer. The vessel left Calcutta with orders to make the coast of South Carolina and see if the blockade of Charleston was still in force. Now, although this was a proceeding not in any way illegal, she was nevertheless captured by a Federal war-ship; a prize crew of two officers and thirteen men were put aboard; and her own crew, with the exception of the master and cook and the steward, were taken off her. Thus manned, she was being steered for a southern port, when her deposed captain persuaded his cook and steward to assist him in making one effort to regain possession of the ship. They caught the mate asleep in his berth, and gagged him; the prize master they found on deck, and treated him similarly; three seamen who had the watch on deck were asked to go down into the scuttle, a store-room near the helm, for a coil of rigging. The captain gave them his order as if he had accepted the inevitable, and was aiding the captors to navigate the ship. As soon as the three leaped down, the hatch was closed, and they were prisoners. The remainder of the crew, who were in the fore-castle, were shut down and liberated one by one; but those who would give no promise to their new master were confined besides the unfortunates in the scuttle. Three, indeed, consented, but only one was a sailor; and with this crew of five, a vessel of 884 tons was taken to Liverpool through thirty days of bad weather.

A TRIAL IN FICTION.

BY ARTHUR F. GOTTHOLD.

THE varied temperaments of the learned courts in this country have always prevented trial work from stagnating into anything so dull as certainty. But on reading such a book as "Hand and Ring," by Anna Katherine Green, we are forced to admit that fiction is stranger than truth.

The story is one of those "this-cross-marks-the-spot-where-the-body-was-found" tales, in which the jury labors manfully in an obviously impossible attempt to convict the hero of murder. A district attorney will go on for volume after volume wasting the county's money in prosecuting the hero, when any jury of intelligent circulating libraryites would acquit him before they got to "The Untangling of the Web." And he never learns any better.

But to resume. In this particular mesh the counsel for the defence is in love with the prosecution's star witness, who is in love with the hero. He, in turn, is very properly in love with the p. s. w.; but he thinks she did the dastardly deed, while she thinks *he* did. The counsel for the defence knows neither did it, because he killed the old woman himself. This, needless to state, is unknown to the young detective, who ——— But there, you had better read it yourself.

Anyway, the noble young hero is up for trial, and then things are doing. For instance, the district attorney asks an obviously improper question, to which the defence promptly objects. We were deeply interested in this, supposing the objection was for the benefit of the prisoner. But it seems that it was for the protection of the witness. "Gentlemen," said she [the witness], 'there was no need of all this talk.'" And

thereupon she proceeded to answer the question ruled out by the Court.

The learned author's interpretation of the value of a ruling is certainly novel, but it is submitted that when a judge is in a state of coma, the trial should be adjourned until restoratives can be found.

A little later the same witness having been asked an improper question, which was withdrawn, and also a proper one, calmly says she prefers to answer the first one, and proceeds to do so. And still the Court never turned a hair.

Nor is this witness the only nervy person in the caste. The district attorney at times does surprisingly well. For example, the prosecution in cross-examining indulges in some rather irrelevant questions. The defence objects on the ground that there is no evidence to bear out the line of inference suggested.

"What testimony I have to produce will come in at its proper time," retorted Mr. Ferris. "Meanwhile, I think I have a right to put this or any other kind of similar question to the witness." The judge acquiescing with a nod, Mr. Orcutt (counsel for the defence) sat down." And well he might; but he should have prefaced it by going 'way back.

It is these little incidents that cheer us on the way to "The Clearing of the Clouds."

As we close we say with the poet:

"O, Mistress Green, we do beseech you—
So runs the public's humble prayer—
When you another book prepare,
Please get some lawyer man to teach you."

But it's a good story, just the same.

A CASE OF CONSTRUCTIVE ASSAULT.

BY GEORGE O. BLUME.

THE Court of Petty Sessions was open for business. The county magistrate, having taken his seat on the bench, cast a kindly glance at the motley crowd that had assembled in the court-room, and with an air of great importance asked the court officer what cases were on the calendar for the day.

"Nothing of any importance, your Honor, only a case of constructive assault."

"What kind of a case is that?" whispered his Worship to the clerk, not wishing to betray his ignorance.

"It's an indirect assault, an assault inferred," replied the clerk.

"Ah," whispered his Honor, "give me an illustration. Hould, I think I have it. I suppose it's something like shaking your fist at a lad wid the intention you'd like to be hammerin' the head iv him?"

"Yes," rejoined the clerk, smiling, "that would be a constructive assault."

"I'm glad I've larnt this sort of crime," said his Honor, "bekase I may have a few men and women up under it. Mr. Clerk," he added, with an air of grave importance, "call the case iv Duffy *v.* McCarthy."

"Take the book, officer, and tell us what you know about this constructive assault."

The constable, being sworn, said: "Your Honor, the defendant in this case is a woman by the name of Peggy McCarthy, and my charge agin' her is that she wilfully left a metal pot in my path, so that I might fall over it and hurt myself."

"Who is this Peggy McCarthy?" sternly inquired the Court.

"She's a widow, your Honor, an' she lives on a small farm a few miles over in the country."

"Well," said the Court, "you say she left a metal pot on your road for you to fall over

it. It doesn't matter whether you fell over it or no from it bein' a constructive assault."

"But," insisted the constable, "I did fall over it, and scraped and bruised my shins and ankle."

"Thin a regular assault is now added to the constructive assault," rejoined the Court.

"Your Honor knows the law better than I do, and that's my charge," responded Officer Duffy.

"He has produced no evidence in support of his case," whispered the clerk in an undertone. "He merely makes an assertion without proving it."

"Hould your tongue, Mr. Clerk, and don't be raisin' objections of this kind. Iv all things a magistrate should avoid is thryin' to upset a policeman."

"Hev you anything to say in your defence?" said his Honor to the defendant.

"Well, your Honor," says Peggy McCarthy, "I am as much guilty in that crime as yer Lordship sitting up on the binch."

"Don't say that, Peggy McCarthy, bekase you are charged with a crime, and magistrates are not charged with any crime, and it's insulting to the Court."

"I beg pardon, your Honor, I meant no offence."

"Your ignorance is excoosable this time."

"Well, your Honor, I live about a mile or so from this, and after I got through bilin' the pigs' dinner, I puts the pot outside my doore, to air it. It was right alongside my cabin, and fully twelve feet from the road."

"That's not so, your Honor," interjected Officer Duffy.

"Do you deny that my cabin is twelve feet off the road, Constable Duffy?" asked Peggy McCarthy.

"The Court rules that it doesn't matter a

hair where your cabin is. It's where your pot was, is the charge, and I rule that cabin evidence irrelevant," replied his Honor.

"Your Honor, I know where my pot was. Agin' my doore. Which the policeman can't deny, as he stumbled over it, and he fell agin' my doore."

"Did you fall, officer, against the door, when you stumbled over the pot?" queried the Court.

"Yis, your Honor."

"But you might have kept stumbling for four or five steps after you tripped over the pot," suggested the Court.

"No, your Honor, I did not," answered the policeman.

"He's a very stupid officer," whispered the Court to the clerk, "an' I thryin' to help him out of his difficulty."

"There it is now, your Honor," rejoined Peggy. "He admits that he didn't stumble any feet to reach the wall in my place. Don't it prove complete that my cabin is on the very side of the path, if when he stumbled, he fell agin' my doore?"

"There seems to be no doubt of that," whispered the clerk. "We must discharge her unless we prove she hasn't given the right location to her cabin."

"I'm afraid," said the Court, "the officer has put his foot in the pot now, after stumbling over it."

"I say, officer, is this woman, Peggy McCarthy, giving the right location to her cabin?" inquired the Court.

"I don't think she is," replied Officer Duffy.

"But you ought to know."

"This is a matter of fact, not opinion that the officer is swearing to," said the clerk.

"Your Honor," says Peggy, "I would like to have the Court see my cabin."

"The Court has no time to view any one's cabin, especially in such a trifling case. Evidence in the case is now closed, and I think I'll take a hand myself and get to the truth of the matter. Peggy McCarthy," said his Honor, "would you be sorry if the policeman hurt himself?"

"I would be sorry to see anyone hurt himself," said Peggy.

"You have no great love for Officer Duffy, have you?"

"I can't say that I have," replied Peggy.

"Peggy McCarthy, listen to the sentence of the Court. The Court finds that you, upon trial, showed that you did not love your neighbor as yourself in conformity with the Tin Commandments and the Sarmon on the Mount, and that you showed no apparant contrition for the injury which you have inflicted on Officer Duffy. The Court finds you guilty of constructive assault and moral delinquency, and you are sentenced to pay a fine of five shillings, or in default thereof, one week in jail."

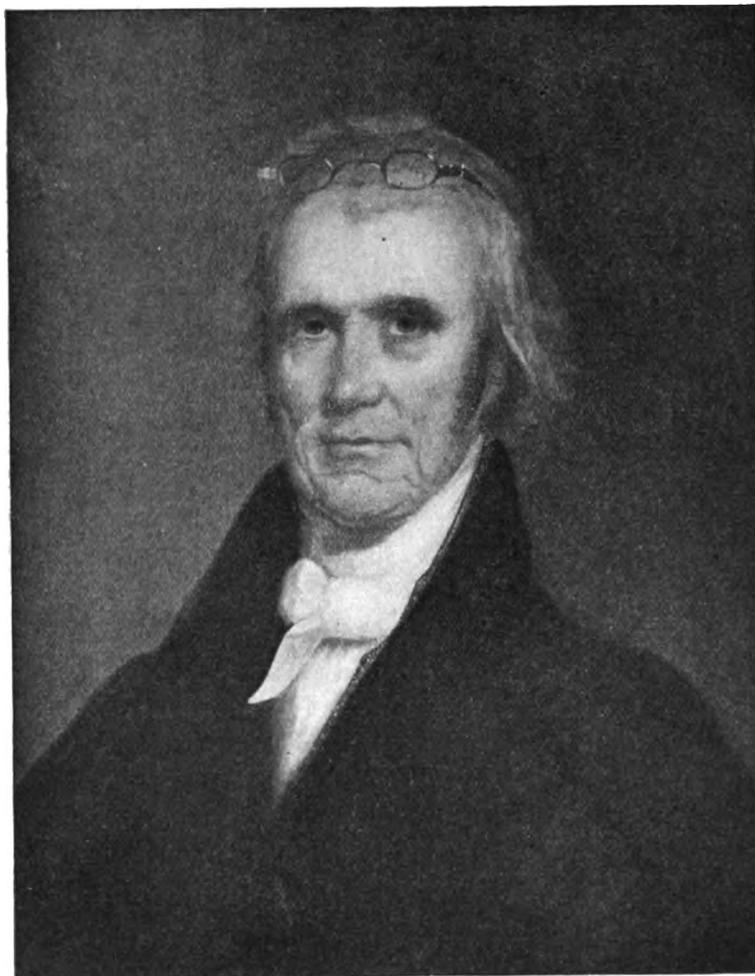
"But I have no money," ejaculated Peggy.

"The Court will take a recess of tin minutes so that you can consult your friends."

Here the hat was passed around, and the necessary amount was raised. Peggy pays her fine. The Court wishes to admonish all blackguards and evil-minded people that this tribunal is run on a strictly business basis.

"Mr. Clerk, call the next case."





JOHN MARSHALL.

A CENTURY OF FEDERAL JUDICATURE.

II.

BY VAN VECHTEN VEEDER.

NO consideration of Marshall's genius would be complete without reference to the merits of his style and his methods of exposition. He possessed to a most remarkable degree the power of clear statement and pure reasoning. His conscious apprehension of every step in the process of reasoning by which he reached a conclusion was combined with the ability to express the whole process in clear and convincing terms to others. Sparing in the extreme of ornament and external illustration, his reasoning is, for the most part, simple logical deduction, unaided by analogies and unsupported by precedent or authority. Indeed, in his chosen sphere there were no precedents. In his opinions in *Cohens v. State of Virginia*, *Sturges v. Crowninshield*, *McCulloch v. State of Maryland* and *Dartmouth College v. Woodward*, not a single case is cited. His mental characteristics have been well described by a great judge whose association with him for nearly a quarter of a century gave abundant opportunity to study the temper of his mind. "It was a matter of surprise," says Judge Story, "to see how easily he grasped the leading principles of a case, and cleared it of all its accidental encumbrances; how readily he evolved the true point of the controversy even when it was manifest that he had never before caught even a glimpse of the learning on which it depended. He seized, as it were by intuition, the very spirit of judicial doctrines, though cased up in the armor of centuries; and he discussed authorities as if the very minds of the judges themselves stood disembodied before him. Perhaps no judge ever excelled him in the capacity to hold a legal proposition before the eyes of others in such various forms and colors. It seemed a

pleasure to him to cast the darkest shade of objection over it that he might show how it could be dissipated by a single glance of light. He would by the most subtle analysis resolve every argument into its ultimate principles, and then with a marvellous facility apply them to the decision of the cause. His powers of analysis were indeed marvellous. He separated the accidental from the essential circumstances with a subtlety and exactness which surprised those most who were accustomed to its exercise. No error in reasoning escaped his detection. He followed it through all its doublings until it became palpable and stripped of all its disguises. But what seemed peculiarly his own was the power with which he seized upon a principle or argument apparently presented in the most elementary form, and showed it to be a mere corollary from some more general truth which lay at immeasurable distances beyond it. If his mind had been less practical he would have been the most consummate of metaphysicians and the most skilful of sophists. But his love of dialectics was constantly controlled by his superior love of truth."

After this statement of Marshall's transcendent abilities it will conduce to an accurate perspective to consider his limitations. It is to be observed, in the first place, that his preëminence is confined within the scope of constitutional law. Possibly this statement should be qualified by one reservation; some of his opinions on questions of international law are at least equal to the masterpieces of Stowell and Lushington. This subject was, indeed, peculiarly suited to his mind. Of the one hundred and ninety-five cases on international law or international relations decid-

ed by the court in his time he delivered the opinion of the court in eighty cases, many of which have exercised wide influence in the development of this branch of jurisprudence. His opinion in the case of *The Exchange v. McFaddon*, 7 Cranch 116, "is and always will be," as Lord Justice Brett said in the Court of Appeal, "the first case upon the question of the exemption of ships of war to be carefully considered." His opinion in what Phillimore terms the "great case" of *The Venus*, 8 Cranch 253, has been deemed a salutary moderation of the rigor of Lord Stowell's doctrines with respect to prize. Other well-known cases on questions of international law, in which his conclusions have been accepted as authoritative are *United States v. Palmer*, 3 Wheaton 610; *The Gran Para*, 7 *ib.* 471; *Johnson v. McIntosh*, 8 *ib.* 543; *The Antelope*, 10 *ib.* 66; *Foster v. Neilson*, 2 Peters 253; *Soulard v. United States*, 4 *ib.* 511. In this subject, his opinion carried only a little less weight than in the consideration of questions of constitutional law, since he found himself in the minority in only five cases. But his conclusions in the case of the *Nereide*, 9 Cranch 389, have been severely criticised as carrying the etiquette of international law to extreme limits. Compare, also, *Church v. Hubbard*, 2 Cranch 187, with *Rose v. Himley*, 4 *ib.* 241, and the limitation of the latter case in *Hudson v. Guestier*, 6 *ib.* 281; and *Brown v. United States*, 8 Cranch 110, with his later opinion in *United States v. Percheman*, 7 Peters 51.

With respect to the more familiar titles of the law it would be idle to claim for him the highest rank. In extent and accuracy of learning he was easily surpassed by his colleague Story, and by many other jurists since his time. A familiar illustration of his limitations in this respect is his decision on the recondite subject of charitable trusts in *Philadelphia Baptist Association v. Hart*, 4 Wheaton 1, which Horace Binney demonstrated in the argument of the subsequent

case of *Vidal v. Girard's Executors*, 2 Howard 127, to have been founded upon a misconception of the early authorities.

Even in the domain of constitutional law, his judgment was not infallible, and his opinions occasionally leave something to be desired. Soon after taking his seat as chief justice there came before the court the case of *Marbury v. Madison*, involving one of those very *ante-mortem* appointments which had prompted the hostile legislation and shown the judges the insecurity of their position in the government. The facts of this now memorable case are well known. President Adams had nominated Marbury for the office of justice of the peace, the nomination had been confirmed, and a commission had been signed and sealed; but it had not been delivered when Jefferson came into office, and was supposed to be withheld by Madison, Marshall's successor as Secretary of State. Marbury therefore applied to the court for a writ of *mandamus* against the Secretary of State to compel the delivery of the commission. Undismayed by the hostility of his adversaries, Marshall resolved to force the fighting. The court decided, in an opinion delivered by him, that it had no jurisdiction to grant the writ because the Constitution allowed it no such power; and although an act of Congress had undertaken to confer this jurisdiction on the court, Congress had no power to do so, and therefore the act was void, and would be disregarded by the court. There is a popular impression that this opinion, as far as it related to the constitutional question, was *obiter*. But this is not true; it was strictly within the issue. More than three-fourths of the opinion is really *obiter*, but all this *dictum* relates to the demonstration that the commission was improperly withheld and that *mandamus* would lie if the court had jurisdiction. Since, however, the court had no jurisdiction, this lecture to the executive was a mere matter of personal opinion.

In this, then, the sixth case decided since

he took his seat, Marshall, for the first and only time during his long service, adjudged an act of a coördinate department of the Federal government null and void. His method of reaching this momentous conclusion deserves careful consideration. "The powers of the Legislature," he says, "are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. . . . The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it. If the former part of the alternative is true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. . . . If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? . . . This would be to overthrow in fact what was established in theory. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . If a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law—the court must determine which of these conflicting rules govern the case. This is of the very essence of judicial duty."

This summary disposition of the issue, however admirable in itself, hardly met the requirements of the occasion. So far as it applied to the entirely different question of state legislation inconsistent with the Federal Constitution and laws, it is conclusive. The Constitution expressly provides that the laws and treaties of the United States shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Yet, in his subsequent consideration of the relation between the Federal government and the States, and of the specific restraints upon the States, he developed the subject with an elaboration and completeness which constitute his chief title to fame. The grave step of disregarding an act of the Federal Congress was a far more novel and difficult problem, deserving the exercise of the highest powers of his mind. But his conclusion that the Supreme Court is the arbiter of the validity of the acts of a coördinate department of the general government, however firmly established now, was really an assumption, not a demonstration. The real question at issue was, as Professor Thayer says, not whether the act was constitutional, but whether its constitutionality could properly be brought in question before a given tribunal. Chief Justice Gibson, of Pennsylvania, who discussed this question in 1825, in *Eakin v. Raub*, 12 *Sergeant & Rawle*, 330, with an ability and acuteness commensurate to its importance, reached the conclusion that the power to set aside legislative enactments of a coördinate department of government exists only when it is expressly conferred, and it is to be observed that this power is not expressly given by the Federal Constitution. It was not overlooked by the founders, for it was both asserted and denied in the discussions of the Constitutional Convention of 1789; it must have been deliberately left open for subsequent determination. To Marshall the nation is undoubtedly indebted for its wise and momentous solu-

tion; but it could be wished that he had seen fit to demonstrate its wisdom in a more comprehensive manner.

The motive or misconception which led Marshall to overstep the bounds of formal judicial procedure in *Marbury v. Madison* again appeared in 1807 when, at the trial of Aaron Burr, he issued a *subpœna duces tecum* to President Jefferson. See also *Livingston v. Jefferson*, Fed. Cas., No. 8411. Many years later, in *Worcester v. State of Georgia*, 6 Peters 515, he again found himself in conflict with the executive department of the government, and powerless to enforce his decree.

Marshall's reasoning in *Marbury v. Madison* was mainly that of Alexander Hamilton in the *Federalist*. In his great opinion in *McCulloch v. Maryland*, 4 Wheaton 316, probably, all things considered, the finest specimen of his powers, he drew largely from the same source. The doctrine of implied powers had been formulated and expounded by Hamilton in his opinion on the constitutionality of his proposed national bank in a manner which, as the chief justice acknowledged during the argument of *McCulloch v. Maryland*, left nothing to be added.

In the constructive work of vitalizing a written instrument of government and placing the Federal authority upon broad and secure foundations, it was perhaps inevitable that Marshall should occasionally err in the direction of magnifying the scope and reach of Federal powers, and should tend to interpret too narrowly the restraints upon the states. Some of his applications of the contract clause of the Constitution, notably *Fletcher v. Peck*, 6 Cranch 87, *Dartmouth College v. Woodward*, 4 Wheaton 518, and *State of New Jersey v. Wilson*, 7 Cranch 1, have since been severely criticised; and their effect has been largely overcome by the intervention of the police power. His conclusion in *Craig v. State of Missouri*, 4 Peters 410, was afterwards overruled; and neither Mar-

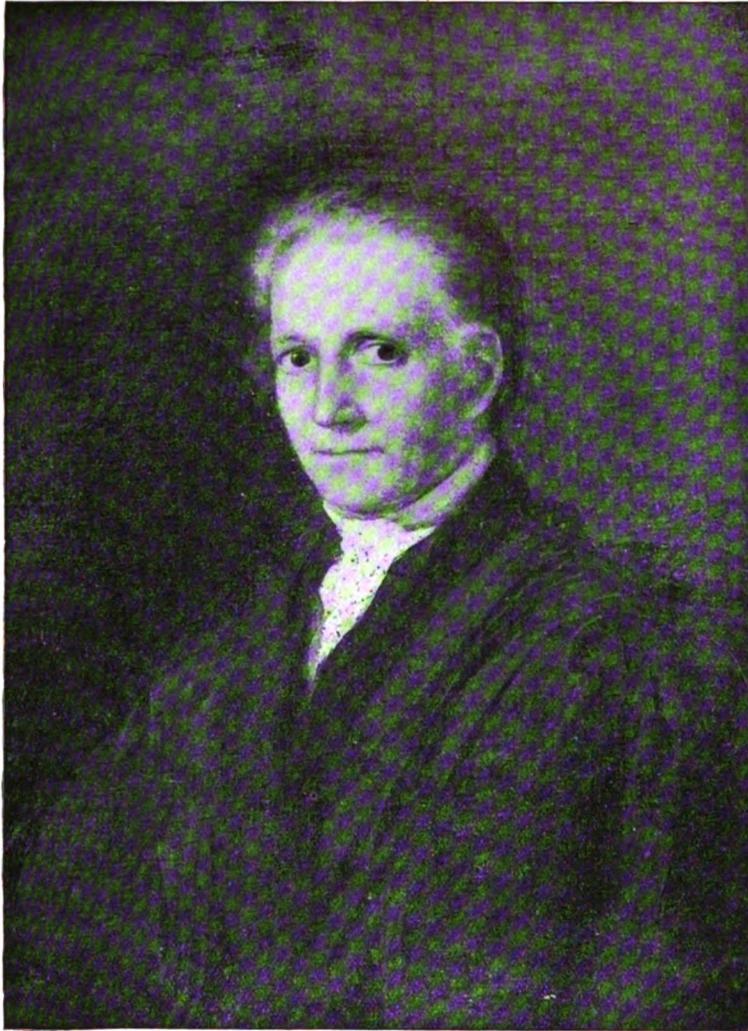
shall's efforts nor those of the succeeding generations of judges have succeeded in satisfactorily coördinating the functions of the Federal and State governments in the regulation of interstate commerce.¹

Fifteen associate justices served for various periods during Marshall's time. Of the five associate justices at the time of his appointment—Cushing, Paterson, Chase, Washington and Moore—Washington alone survived after 1811. Meanwhile, Wm. Johnson, Livingston and Todd had succeeded to vacancies, and all served long terms. Story and Duvall, who were appointed in 1811, served throughout the remainder of this period. In the next decade came Trimble, Thompson and McLean. Baldwin was ap-

¹ The following selections from Marshall's work suffice to illustrate the foregoing characterization:—*Talbot v. Seaman*, 1 Cranch (first opinion); *Wilson v. Mason*, 1 *ib.* 45; *Marbury v. Madison*, 1 *ib.* 137; *U. S. v. Fisher*, 2 *ib.* 358; *Church v. Hubbard*, 2 *ib.* 187; *Hepburn v. Ellyey*, 2 *ib.* 445; *Ex parte Bollman*, 4 *ib.* 75; *Alexander v. Baltimore Ins. Co.*, 4 *ib.* 370; *Fitzsimmons v. Newport Ins. Co.*, 4 *ib.* 185; *Rose v. Himley*, 4 *ib.* 241; *U. S. v. Burr*, 4 *ib.* Appendix; *Bank of U. S. v. Deveaux*, 5 *ib.* 61; *U. S. v. Peters*, 5 *ib.* 115; *Fletcher v. Peck*, 6 *ib.* 87; *Durousseau v. U. S.*, 6 *ib.* 307; *Russell v. Clark*, 7 *ib.* 116; *New Jersey v. Wilson*, 7 *ib.* 164; *The Venus*, 8 *ib.* 253; *Clark's Exrs. v. Van Riemdsdyk*, 9 *ib.* 153; *The Commercen*, *Wheaton* 382; *Coolidge v. Payson*, 2 *Wheaton* 66; *Olivera v. Union Ins. Co.*, 3 *ib.* 185; *U. S. v. Bevans*, 3 *ib.* 336; *U. S. v. Palmer*, 3 *ib.* 610; *Phil. Baptist Asso. v. Hart*, 4 *ib.* 1; *Sturges v. Crownshield*, 4 *ib.* 122; *Bank of Columbia v. Oakley*, 4 *ib.* 235; *McCulloch v. Maryland*, 4 *ib.* 316; *Dartmouth College v. Woodward*, 4 *ib.* 518; *Houston v. Moore*, 5 *ib.* 1; *Loughborough v. Blake*, 5 *ib.* 317; *U. S. v. Wilterbridge*, 5 *ib.* 76; *Owings v. Speed*, 5 *ib.* 420; *Farmers and Mechanics Bk. v. Smith*, 6 *ib.* 131; *Anderson v. Dunn*, 6 *ib.* 204; *Cohens v. Virginia*, 6 *ib.* 264; *Hunt v. Ronsmanier*, 8 *ib.* 174; *Gibbons v. Ogden*, 9 *ib.* 1; *Johnson v. McIntosh*, 8 *ib.* 543; *Osborn v. Bank of U. S.*, 9 *ib.* 738; *U. S. Planters Bk. of Georgia*, 9 *ib.* 904; *Wayman v. Southard*, 10 *ib.* 1; *The Antelope*, 10 *ib.* 66; *Ogden v. Saunders* (diss.) 12 *ib.* 332; *Maison v. Haile*, 12 *ib.* 370; *Martin v. Mott*, 12 *ib.* 19; *Postmaster General v. Early*, 12 *ib.* 136; *Brown v. Maryland*, 12 *ib.* 419; *Governor of Georgia v. Madrozo*, 1 Peters 110; *American Ins. Co. v. Canter*, 1 *ib.* 511; *Wilson v. Blackbird Creek Co.*, 2 *ib.* 245; *Columbian Ins. Co. v. Lawrence*, 2 *ib.* 25; *Foster v. Neilson*, 2 *ib.* 253; *Satterlee v. Mathewson*, 2 *ib.* 380; *Weston v. Charleston*, 2 *ib.* 449; *Craig v. Missouri*, 4 *ib.* 410; *Providence Bank v. Billings*, 4 *ib.* 514; *Cherokee Nation v. Georgia*, 5 *ib.* 1; *Worcester v. Georgia*, 6 *ib.* 515; *Barron v. Baltimore*, 7 *ib.* 243; *Byrne v. Missouri*, 8 *ib.* 40; *U. S. v. Clarke*, 8 *ib.* 436; *Scott v. Loyd*, 9 *ib.* 418; *Wormley v. Wormley*, 1 Marshall 330; *Hopkirk v. Page*, 2 *ib.* 20; *Brig Wilson v. U. S.* *ib.* 423; *U. S. v. Maurice*, 2 *ib.* 96.

pointed in 1830, and Wayne was serving his first term when Marshall died. Marshall's principal associates in length of service were, therefore, Washington, Johnson, Livingston, Todd, Story, Duvall and Thompson.

and throughout his long service he contributed in no small measure to their supremacy. He was one of the first justices to publish reports of his decisions in his circuit, and this collection probably illustrates better than the



BUSHROD WASHINGTON.

Among the earlier associates, Washington (1798-1829) was easily chief. Although a man of active intellect, and tenacious of his individual opinions, he was thoroughly in accord with the constitutional views of his chief,

Supreme Court reports the quality, variety and extent of his learning.

Johnson (1804-34), on the other hand, was, until the accession of Baldwin, the principal critic of the constitutional doctrines of the

majority of the court. His opinions vary greatly in quality. His dissenting opinion in *Fletcher v. Peck*, 6 Cranch 87, contains the germ of dissatisfaction with Marshall's view of the scope of the contract clause of the constitution which subsequently became widespread. See also his dissent in *ex parte Bollman*, 4 Cranch 75, *Livingston v. Moore*, 7 Peters 469; *Patapsco Insurance Company v. Coulter*, 3 *ib.* 213; *Ogden v. Saunders*, 12 Wheaton 213; *Munro v. Almeida*, 10 *ib.* 473; *The St. Jago de Cuba*, 9 *ib.* 417.

Chase (1796-1811) made no material contributions to federal jurisprudence. His patriotism was militant, but his judicial demeanor was rough and overbearing. He is chiefly remembered as the only justice of the court against whom impeachment proceedings have been brought. To this extent, indeed, his title to remembrance is likely to be secure, for the failure of the proceedings against him bears the same momentous significance with respect to the independence of the judiciary that the impeachment proceedings against President Johnson bear to the independence of the executive. Livingston (1806-23) and Todd (1807-26) were modest specialists; the former was a lawyer of undoubted learning in maritime and commercial law, while Todd's specialty was land laws.

Dryden's Lines on Finch,—

"Our laws that did a boundless ocean seem,
Were coasted all and fathom'd all by him,"

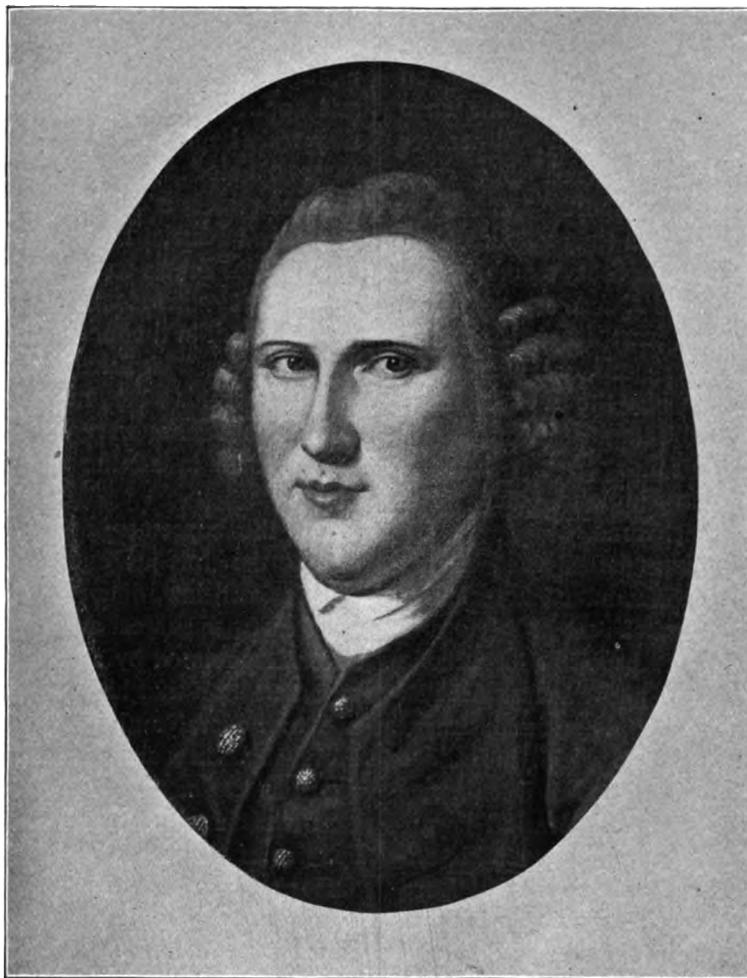
may well be applied to Joseph Story (1811-45). Appointed to the bench, like his English prototype Buller, at the remarkably early age of thirty-two, he devoted his great powers to the law during a period of thirty-four years with a singleness of purpose and such marvellous industry that one despairs of seeing his like again. The mere catalogue of his labors oppresses the senses. In the Supreme Court of the United States he was, next to Marshall, the most active participant in labors

which are recorded in thirty-five volumes of reports. The record of his service in his circuit fills thirteen volumes. During the same period he wrote thirteen treatises on large and widely diverse topics of the law, assisted in the preparation of a digest of the decisions of the Supreme Court, wrote a large volume of exhaustive legal reviews, and for the last sixteen years of his life acted as professor of law at Harvard. This immense productivity indicates certain necessary characteristics—untiring industry, regularly and systematically applied; a memory and power of reasoning developed by healthy discipline, and ready apprehension, together with remarkable fluency in expression. It also implies some limitations, which are perhaps most conspicuous in his legal treatises. Story was not a genius—unless it be that genius which has been described as the capacity for taking infinite pains. His work was not, like Marshall's, the outcome of the suggestive inferences of his own mind. It was mainly the result of his knowledge of the thoughts of others, arranged, systematized, applied and extended. His distinguishing characteristic is, therefore, not strength, but learning, fullness and variety. Considered from an historical point of view his legal treatises are very superior productions, but as practical text books they do not rank so high. The extent of the writer's learning inevitably led to diffuseness and historical disquisition rather than terse statement of principle. And the speed with which these works were prepared is disclosed by their frequent lack of point and precision. Of all his treatises it is safe to predict that his *Constitutional Law and Conflict of Laws* alone will hold a permanent place in judicial literature.

His judicial services were upon a higher plane. His opinions, particularly in the Supreme Court, are admirable specimens of learning, logic and perspicuous method. It is too much to say, as his biographer does, that "for clearness of texture and compact

logic they are equal to the best judgments of Marshall; for luminousness and method they stand beside those of Mansfield; in elegance of style they yield the palm only to the prize cases of Lord Stowell; but in fullness of

be taken as a typical specimen, the fullness of illustration and wealth and variety of learning became almost oppressive. However instructive as historical disquisitions, as judicial opinions they are too diffuse. His con-



SAMUEL CHASE.

From a painting by C. W. Peale, in Independence Hall, Philadelphia.

illustration and wealth and variety of learning they stand alone." His opinion in the *Girard will* case, for instance, leaves little to be desired, from whatever point of view it may be surveyed. In many of his circuit court cases, of which *De Lovio v. Boit*, may

curing opinion in *Dartmouth College v. Woodward* affords a good opportunity to compare his judicial style and method with Marshall's.

But if there were some among his contemporaries who were not inferior to him, if

others were even superior in grasp of legal principles, in accuracy of perception, in logical power, and in simplicity and clearness of expression, none equalled him in extent and variety of learning; and it is hardly possible to overestimate the historical value of his services to the law in general and to federal jurisprudence in particular. His legal treatises gathered and arranged the learning on important branches of the law at a time when legal literature was in its infancy. Wherever English law was administered they commanded authority and respect. Lord Chief Justice Denman paid him the compliment of saying in a case in which Story's opinion differed from that of the Queen's Bench that the former would "at least neutralize the effect of the English decisions, and induce any of their courts to consider the question as an open one;" and Lord Campbell, in the House of Lords, pronounced Story greater than any law writer of whom England could boast since the days of Blackstone.

In his judicial labors he covered all the great branches of the law, from the technical and recondite learning of real property and special pleading to the broad and equitable principles of chancery and admiralty. The weight of his individual opinion is illustrated by the profound influence which his rather hasty generalization in *Wood v. Dummer*, 3 Story, has exercised on corporation law.

In the domain of admiralty law his historical position is second only to that of Lord Stowell. Before Story's time the principles of admiralty were imperfectly understood in this country; its jurisdiction was ill-defined, and its practice literally without form. The relative rights and duties of ship owners, ship masters and seamen awaited exposition and adjustment. Then, the non-intercourse and embargo acts and the war of 1812 created a new class of cases in shipping, salvage and insurance. The law of prize, too, was almost unknown here before that time. To Story fell the heav-

iest share of this difficult work in consequence of the extensive commerce of his circuit. The proximity of New England to the British dominions, the conquest of part of our territory by the enemy, and the practice of trading under licenses and of making colusive captures, gave rise to a multitude of questions, his solution of which forms a luminous commentary on the origin, history and application of this branch of law. He may truly be said to have created the law of patents. Prior to his time the courts had contributed almost nothing to this subject. But Jefferson's restrictive policy had forced the commercial States to engage in manufacturing, thereby increasing the value of every improvement in the mechanical arts and leading to increased vigilance in securing patents. The bulk of this work, too, came upon Story; more patent cases were decided in the First Circuit than in all the other circuits combined.

On the supreme bench he was second only to the chief justice in constitutional and international law, delivering eleven opinions in the former subject and thirty-seven in the latter. Appointed by a Republican president in expectation that he would stem the rising tide of Federal authority, he proved to be Marshall's ablest supporter and Taney's most vigorous critic. He looked with apprehension and alarm upon the constitutional tendencies of the court after Marshall's death, and is said to have contemplated retirement. Again and again he enforced his minority views with references to his veneration for the great Chief Justice. But Story was a man of independent convictions, and upon more than one occasion successfully controverted Marshall's conclusions. Reference has already been made to the Girard will case; and his powerful dissenting opinion in the case of the *Nereid* was substantially accepted by the court after the Civil War.

With all his learning and intense pre-occupation Story was a man of most admir-



JOSEPH STORY.

able personal character. Those who differed from him most in matters of opinion were readiest in expressing their admiration for the gentleness, simplicity and unselfishness of his disposition. His fame is secure, for, as Webster said in his noble eulogy, he devoted his great powers to justice, the greatest interest of man on earth. "Whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name and fame and character with that which is and must be as durable as the frame of human society."

An attempt has been made in the following selection from Justice Story's work to give

¹ Some of his best known opinions may be found in the *Venus*, 8 Cranch 253; *Craig v. Leslie*, 3 Wheaton 363; *Houston v. Moore*, 5 *ib.* 1; *Green v. Biddle*, 8 *ib.* 1; *Ogden v. Saunders*, 12 *ib.* 213; *Satterlee v. Mathewson*, 2 Peters 380; *Odlin v. Insurance Company*, 2 Washington 312; *Ross v. The Active*, *ib.* 222; *United States v. Jones*, 3 *ib.* 209; *Harrison v. Rowan*, 3 *ib.* 580; *Golden v. Prince*, 3 *ib.* 314; *Zane v. The President*, 4 *ib.* 453; *Corfield v. Coryell*, 4 *ib.* 380; *General Bright's Case*, Federal Cases. No. 14589; *Crawford v. The Wm. Penn.* Peters' Circuit Court Reports 106, and *The Seneca*, 3 Wallace, Junior, 395.

In the United States Supreme Court: *Vidal v. Gerard's Executors*, 2 Howard 127; *Martin v. Hunter's Lessee*, 1 Wheaton 304; *Swift v. Tyson*, 16 Peters 1; *The Nereide*, 9 Cranch 388; *The Santissima Trinidad*, 7 Wheaton 283; *The Marianna Flora*, 11 Wheaton 1; *Dartmouth College v. Woodward*, 4 *ib.* 518; *Charles River Bridge v. Warren Bridge*, 11 Peters 420; *Prigg v. Pennsylvania*, 16 *ib.* 539; *Bank of United States v. Dandridge*, 12 Wheaton 64; *Briscoe v. Bank of Kentucky*, 11 Peters 257; *Mayor of New York v. Miln*, 11 *ib.* 102; *Groves v. Slaughter*, 15 Peters 449; *The License Cases*, 5 Howard 504; *The Passenger Cases*, 7 *ib.* 283; *United States v. Smith*, 5 Wheaton 153; *Conard v. Atlantic Insurance Co.*, 1 Peters 386; *Inglis v. Trustees, Sailors' Snug Harbor*, 3 *ib.* 99; *Green v. Litler*, 8 Cranch 229; *United States v. The Amistad*, 15 Peters 518; *Carrington v. Merchants Insurance Co.*, 8 Peters 495; *Waters v. Merchants Insurance Co.*, 11 *ib.* 213; *McLanahan v. Universal Insurance Co.*, 1 Peters 170; *Van Ness v. Packard*, 2 *ib.* 137; *Bradley v. Maryland Insurance Co.*, 12 *ib.* 378; *The Virgin*, 8 *ib.* 538; *Columbian Insurance Co. v. Ashby*, 13 *ib.* 331; *Martin v. Mott*, 12 Wheaton 19; *United States v. Coombs*, 12 Peters 72; *Green v. Biddle*, 8 Wheaton 1; *Houston v. Moore*, 5 *ib.* 1; *Bank of United States v. Bank of Georgia*, 10 *ib.* 333; *Parsons v. Bedford*, 3 Peters 433.

In the United States Circuit Court: Maritime law: *De Lovio v. Boit*, 2 Gallison 470; *Le Jeune Eugenie*, 2 Mason 409; *The Julia*, 1 Gallison 594; *The Schooner Rapid*, *ib.* 295; *The Brig Joseph*, *ib.* 545; *The Ship Ann Green*, *ib.* 274; *The Marianna Flora*, 3 Mason 116; *The Schooner Tilton*, 5 *ib.* 465; *Harden v.*

in the note below some idea of his vast contributions to the law.¹

Of Marshall's remaining associates, Thompson (1823-44) was most efficient. His work may be studied in *Wheaton v. Peters*, 8 Peters 591; *Kendall v. United States*, 12 *ib.* 524; *Groves v. Slaughter*, 15 *ib.* 449; *Ogden v. Saunders*, 12 Wheaton 213; *Gen. Interest Insurance Co. v. Ruggles*, *ib.* 408; *Clayton v. Stone*, 2 Paine 392. Duvall (1811-36) came to the bench at an advanced age, and his work was merely respectable. Trimble's short service (1826-28) offered little opportunity for distinction. McLean, Baldwin and Wayne will be considered in connection with Chief Justice Taney.

Gordon, 2 *ib.* 541; *Chamberlain v. Chandler*, 3 *ib.* 242; *United States v. Grush*, 5 *ib.* 290; *The Schooner Volunteer*, 1 Sumner 551; *The Ship Henry Ewbank*, *ib.* 400; *The Ship Nathaniel Hooker*, 3 *ib.* 542; *The Jerusalem*, 2 Gallison 190; *The Chusan*, 2 Story 455; *The Tilton*, 5 Mason 465.

Patent and Copyright law: *Wyeth v. Stone*, 1 Story 273; *Brooks v. Bryan*, 2 *ib.* 525; *Washburn v. Gould*, 3 *ib.* 122; *Folsom v. Marsh*, 2 *ib.* 100; *Emerson v. Davies*, 3 *ib.* 768; *Gray v. Russell*, 1 *ib.* 11; *Barrett v. Hall*, 1 Mason 447; *Stearns v. Barrett*, *ib.* 153; *Earl v. Sawyer*, 4 *ib.* 1; *Ames v. Howard*, 1 Sumner 482.

Equity: *Harvey v. Richards*, 1 Mason 381; *Hough v. Richardson*, 3 Story 660; *Flagg v. Mann*, 2 Sumner 487; *Doggett v. Emerson*, 3 Story 700; *Jenkins v. Eldredge*, *ib.* 183; *Weagie v. Williams*, *ib.* 612; *Wood v. Dummer*, 3 Mason 308; *Dexter v. Arnold*, 5 Mason 303; 3 Sumner 152; *Tobey v. County of Bristol*, 3 Story 800; *Bright v. Boyd*, 1 *ib.* 478.

Commercial and Mercantile law: *Peele v. Merchants Insurance Co.*, 3 Mason 27; *Pape v. Nickerson*, 3 Story 465; *Peters v. Warren Insurance Co.*, 3 Sumner 389; *Bullard v. Bell*, 1 Mason 143; *Cremer v. Higginson*, *ib.* 323; *The Ship Fortitude*, 3 Sumner 228; *Andrews v. Essex Insurance Co.*, 3 Mason 6; *Clark v. Protection Insurance Co.*, 1 Story 109; *Jordan v. Warren Insurance Co.*, *ib.* 342; *Potter v. Ocean Insurance Co.*, 3 Sumner 27; *Humphreys v. Union Insurance Co.*, 3 Mason 429; *King v. Shepherd*, 3 Story 349.

Real Property: *Gardner v. Gardner*, 3 Mason 178; *Parkman v. Bowdoin*, 1 Sumner 359; *Sisson v. Seabury*, *ib.* 235; *Durant v. Ritchie*, 4 Mason 45; *Lippett v. Hopkins*, 1 Gallison 454; *Arnold v. Buffum*, 2 Mason 208.

Criminal and Miscellaneous: *United States v. Moulton*, 5 Mason 537; *United States v. Grush*, *ib.* 290; *United States v. Battiste*, 2 Sumner 240; *United States v. Bainbridge*, 1 Mason 71; *United States v. Wilder*, 3 Sumner 308; *United States v. Bevans*, Fed. Cas., No. 14589; *United States v. Travers*, *ib.* No. 16537; *Webb v. Portland Manufacturing Co.*, 3 Sumner, 189; *Gilbert v. United States*, 2 *ib.* 19; *Tyler v. Wilkinson*, 4 Mason 397; *In re Richardson*, 2 Story, 571; *Folsom v. Marsh*, *ib.* 100; *Reed v. Canfield*, 1 Sumner 195; *Picquet v. Swan*, 5 Mason 35.

THE LAWYER'S PATRON SAINT.

ANOTHER VERSION.

BY A. V. D. WATTERSON.

LAWYERS really have a patron saint even if few of them are aware of the fact; but that is not strange, for some lawyers are not expected to know everything, even if others actually do. It is doubtful whether they all care whether they have a patron saint or not; but, from some of the expressions I have heard, and from stories told, I am led to believe that the former clients of some of them have felt quite differently about this little matter, and have actually greatly regretted that lawyers have not several patron saints, and that *their* lawyers in particular had not invoked the benign aid of these good men on several occasions of grave importance to the aforesaid clients. However, I am satisfied that these lawyers, like the relatives of the bore mentioned by our old classic friend, Horace, in his celebrated Ninth Satire, are "all buried"; but if any one of my readers may prefer to doubt this statement, he may, if he wishes, say on his own account what Horace adds, "*nunc ego resto.*"

It is evident that lawyers were once very good, pious individuals, for it is related that in the grand old ages of faith they were extremely anxious for a patron saint, feeling very keenly the apparent imputation implied in the failure to have one ascribed to them, while all other professions and crafts were worthily represented in the Heavenly Courts. Hence they made many efforts to procure the object of their desire; but each time they were informed that they must have patience and await the appearance of some suitable, estimable gentleman, who could be duly canonized, as there were then no saints on the calendar who were not already overworked. Besides, it was contended that investigation had demonstrated that it would

never do to give any one charge of the lawyers who had anything else to do, not, of course, because of any radical defect in the morality of the profession, but simply because lawyers are such active and inventive individuals that they necessarily require great care and attention, and sometimes, mean people say, just a little watching. In fact, it was even suggested by the Sacred Congregation, to whom the matter had been referred, that they felt that they ought to wait until a *lawyer* could be found who could be sufficiently amiable and virtuous to stand the saintly test. Such a suggestion, however, seemed to savor so much of "funny business," and appeared to be so unlikely, and, even if possible, so remote, that the lawyers sent a deputation to Rome to petition the Pope in person to do the best he could for them out of the material on hand. The Pope, as was highly proper in dealing with the representatives of a profession so illustrious, received them in state and listened very patiently and attentively to their petition.

It is many years since the renowned Pontiff, Gregory the Great, after mature consideration, issued his famous decree in this well-known case, which bore the caption, "*In re petition of the legal fraternity of the world for the appointment of a patron saint,*" but it is still remembered with keen appreciation by legal readers of trusty history.

This decree, which I have translated from the original in the Vatican Archives, is as follows:

"And now, to wit, May 27, 1080, this matter came on to be heard, and after hearing the statements and arguments of counsel, thereupon, upon due consideration thereof, it is ordered, adjudged and decreed as fol-

lows, *viz.*: that the lawyers here present shall blindfold one of their number, and that the one so blindfolded shall be turned loose in Saint Peter's" (the old Basilica) "among the statues of Saints and others, and that the individual whose statue said lawyer shall grasp and clasp in his embrace shall thenceforth until further order be the patron saint of the legal profession.

"Given at Rome the day and year above written, being the seventh year of our pontificate.

Hildebrand, *Pontifex Maximus.*"

This decree being considered by the learned gentlemen assembled, the perfection of pontifical solicitude and judicial sagacity, not only was no appeal taken, or even thought of, but on the contrary all were eager for its immediate fulfillment. Accordingly a batch of lawyers, who considered themselves easily the leaders of the profession, selected a fresh and fearless young judge, whom they estimated to be well qualified for this class of work, and after securely blindfolding him they started him out to perform this most delicate mission.

Like most of his kind he did not cut a very wide swath, but with marked intrepidity and celerity he clasped a figure and cried out, "This shall be our patron saint!"

Imagine the disgust of his legal brethren, when, as they crowded around to learn the coveted patron's name, they discovered this poor, deluded judge clasping in tight embrace—the Devil. It was Lucifer in the group of the Archangel Michael in the act of driving the rebel angels out of heaven. It is recorded that by reason of this unfortunate mishap many swear words of prodigious proportions and ominous portent were indulged in by certain legal lights, and that the profession was totally dissatisfied with the reflection cast upon it by the aforesaid Lucifer. Nevertheless, the Devil remained our patron saint for more than 300 years, when, after repeated efforts, Saint Ives, a law-

yer himself, was solemnly canonized and made our steady, regular patron saint, which high office he fills with great dignity to this day.

While I am fully aware that a superb stock of acerbity and crankiness may be developed before a lawyer reaches the age of fifty, yet I am of the belief that these exotics grow more luxuriantly during the twenty years following fifty, and the fact that Ives died at fifty in my opinion accounts for the aforesaid Ives being a saint. However, I will not press this point; I merely offer it as a suggestion.

Speaking of saints reminds me that very few people know that America is a saint's name. Saint Emeric was the son of Saint Stephen, King of Hungary, and, when naming the baby, Italians changed the name from Emeric into Amerigo. Every one knows the rest.

Saint Ives' feast day is celebrated on May twenty-second of each year. I cannot add with any degree of exactitude the number of lawyers who celebrate, but it is reported that the number is about one in every three hundred of the population.

Saint Ives was born near Treguier in Brittany, France, in 1253, and, after a studious and eventful career, was appointed ecclesiastical judge of Rennes. In this capacity he protected the orphans and widows, defended the poor and oppressed, and administered justice to all with a promptitude and tenderness which gained him the good will of even those who lost their causes. Wouldn't it be lovely if we had some of that brand of judges in our day and generation?

It is said that "he never pronounced sentence without shedding many tears, always having before his eyes the tribunal of the Sovereign Judge, where he himself was one day to appear and to stand silent at the bar."

But in my judgment Ives' long suit was developed before he went on the bench. He was surnamed the advocate and lawyer of

the poor, and it is related that "he never took a fee, but pleaded all causes without any gratuity."

Like the good King Pepin of France, he always wore a hair shirt next his person to prevent himself from feeling too comfortable. I once heard it said that a saint is a man who has performed the ordinary things of life in an extraordinarily good manner. Ives, according to his chronicler, certainly attained at least this standard, but for much more weighty reasons he was canonized by Pope Clement VI. in 1347. His admission to the bar of "the land which is fairer than day" might be considered by some at this period a piece of sharp practice. Some of our enemies tell this story about the event:

Like most of those who have gone to glory, Saint Ives died, the date of his death being May nineteenth, 1303, just as he had rounded out the half century. With a degree of promptitude, said to be foreign to the profession, he immediately presented himself at the golden gates. Finding the portals deserted, he hammered on the gates and demanded admission. Saint Peter, hearing the noise, and fearing that it might be some great personage who would consider him remiss in his attention to his duty, hurried to his post, looked at the visitor, and asked him the customary questions covering his name, age, residence and former occupation.

"I am Ives," he replied, from Bretagne, and I am a lawyer; let me in."

Saint Peter hesitated, and then ejaculated:

"A lawyer, you say." "Yes," he replied, "open the gates." Saint Peter, still more agitated by this strange reply and authoritative demand, completely lost his nerve and without further ado admitted the strange applicant.

When inside, Saint Ives, turning to Saint Peter, said: "What is your name? What business were you formerly engaged in? What is your present occupation?"

Saint Peter, still more flustered by this unexpected examination, answered: "I am Peter, and I used to be in the ship business. I am now porter of heaven, carry the keys, and hold my appointment from the Lord Himself." "Humph!" said Ives, "I wonder if you are. I have my doubts about it. Let me look at your commission."

Saint Peter, completely dumbfounded by having his authority questioned, left abruptly, and hastening to his Master, said: "I have just admitted within the gates a personage named Ives, who says he is a lawyer, and who, as soon as he gained entrance within the Court, questioned my authority as porter of heaven, and asked to see my commission. What shall I do?"

He was answered thus: "Now! Peter! That is the first lawyer who has ever been admitted into heaven, and let him be the last; for if these fellows get in here, their arguments and disputations will soon create such dissension and turmoil in the Celestial Court, as will completely destroy the peace which surpasseth all their understanding."

THE ONLY TWENTY DOLLAR FELONY BOND.

By J. C. TERRELL.

NO one served the people of Texas with greater honor to the State and himself, as Supreme Judge and Governor, than did the old Alcalde, O. M. Roberts. To some extent he possessed the genius of the great

Napoleon in selecting his lieutenants. Among them was John D. Templeton, his Attorney-General, a young man of unusual dignity, with a fine legal mind.

It was my good fortune, in 1869, to meet

young Templeton in his first case. It was in an examining court in Tarrant County, Texas; James Grimley, justice. The old practice of "taking" cattle was fast playing out. Defendant owned no cattle but had collected and sold several small herds; was arrested in possession of some forty head, to which he could show no bill of sale. It was a hot spring day. The examination was held in a grove, was largely attended, and nearly every man had his shotgun. It looked squally for the defendant, who paid me all his money, except a twenty dollar gold piece, and gave me a written promise for a set of house logs.

The State proved adverse ownership as to only one animal, a crumpled horn work steer, worth ten dollars, and the defendant was held to answer for the theft of that animal,—a felony charge. The question was

as to the amount of bail. I contended with simulated gravity that the court should fix the bond at double the amount of the value of that steer; read from the Federal and State Constitutions as to "excessive bail," and from the Statute laws on amounts of bonds in attachment and sequestration cases—double the value in litigation. Uncle Jimmy declared that he once had an attachment case before him and that he would hear evidence as to the value of the steer. All hands adjourned to the yard, where "Aunt Jane" had prepared a good dinner of jerked beef, bread and buttermilk. Court resumed business and fixed the amount of the bond at twenty dollars. The house logs were delivered, and made me a smoke house. The defendant was finally acquitted.

FOOT NOTES ON AMERICAN CITIZENSHIP.

By WILLIAM L. SCRUGGS.

I.

WHEN and under what circumstances may a citizen of the United States be deemed to have expatriated himself? When and under what circumstances may a naturalized citizen of the United States be deemed to have absolved himself from all obligations or penalties incurred under a former allegiance?

These questions are constantly coming up for discussion, but with the exception of a few special Treaties, and one or two general principles bearing upon the subject, we have nothing to guide us to a satisfactory solution of them. Curiously enough, we have no law providing for the expatriation of American citizens. Our so-called "Expatriation Act" of July 27, 1868, merely affirms the abstract

"right of expatriation." It does not go beyond this and say what acts or formalities are necessary to a conversion of this "right" into a fact. It does not say how expatriation may be effected, or what shall be the evidence of its accomplishment. And although the old feudal doctrine of indelible allegiance has been generally abandoned, there still remain many diverse theories of expatriation, some of which are conflicting. There are also as many as four general systems of naturalization, besides various exceptional methods in different countries, some of which are likewise conflicting.

But our so-called "Expatriation Act" is something more than a superfluous declaration of an abstract "right"—a right inherent in every free American citizen. It goes be-

yond this and declares it to be the inherent right of "all peoples"—of the human race at large. It declares, moreover, that naturalized citizens of the United States, "while in foreign countries" are entitled to and shall receive from this Government the same measure of protection that is accorded by it to native-born citizens under like conditions!

In the first place, it is needless to point out that Congress has no authority to speak for "all peoples"; its authority is limited to the people of the United States. It is equally superfluous to point out that Congress cannot alter or abrogate the law of nations; and that foreign governments are not bound by any declaration it may make further than they may agree thereto by treaty, or further than the declaration itself may be, in reality, in accordance with the law of nations.

In the next place, whilst a naturalized citizen, so long as he remains *in* the United States, is entitled to and should receive the same measure of protection that is accorded to native-born citizens, it is manifest that the rule cannot be extended to him in foreign countries, and more particularly in the country of his former allegiance. If he visits that country, the protection to be accorded him therein becomes complicated with certain questions of natural rights which no civilized government can afford to disregard. His change of allegiance is not retroactive. It does not exempt him from obligations or penalties incurred *before* emigration. These remain. Nor is it in the power of our Government to absolve him from them. So long as he remains within our domain and jurisdiction, we may refuse to give him up or not at discretion. But the moment he voluntarily passes beyond our borders and enters the country of his former allegiance, that discretion ends. He must then take the consequences of his own act. This is a principle too fundamental, too well established by international usage, and too specifically recognized in all our modern

Treaties on the subject, to be a matter of dispute.

II.

The nationality of married women has been, and is still, another source of international controversy. In every country except where the old English common law prevails, the nationality of the wife merges into that of her husband. She loses her own nationality and gains his. Even in England this is now the law, the old common law rule having been superseded by provisions in the naturalization act of 1870. But in the United States, where there is no statute defining the status of American women married to aliens, the old common law rule still prevails. An alien woman married to an American citizen acquires her husband's nationality and loses her own; whereas, an American woman married to an alien, acquires her husband's nationality and retains her own. She thus contracts a double allegiance—an obligation abhorrent to reason and anomalous in modern international law. Yet our law is powerless to relieve her of possible embarrassment in consequence of it.

If, therefore, it be desirable to appear consistent before the eyes of the world, and to place ourselves in harmony with modern international usage with respect to this important matter, some legislation is necessary. And the shortest and simplest, though perhaps not in all cases the most equitable, method of accomplishing that end would be by a statute making the nationality of the wife to follow that of her husband, and to change as he changes his. Of course, such a law would not be without objections; it would doubtless work hardships in exceptional cases, as do most general laws. But if it would cause American heiresses to be a little more cautious about entering into matrimonial relations with foreign adventurers and titled paupers and profligates, that would, in itself, overbalance objections, and be a very strong argument in its favor.

THE TRIAL OF GILLES GARNIER.

By JOSEPH M. SULLIVAN.

CLOSELY allied to the charge of witchcraft was that of lycanthropy, a prejudice derived from Pythagorean sorcery. Lycanthropy was the supposed act of turning one's self or another person into a wolf. Defined by medical men, it was a species of erratic melancholy, in which the person afflicted imagines himself a wolf, and imitates the actions of that animal. The following case will illustrate the nature of this stupendous transformation. Cases of this sort were common in southern France, a district where wolves abound. And the learned men of that day reasoned that if the devil could enter into swine, he could as easily enter into wolves.

The case of Gilles Garnier furnishes an example of pure ignorance, superstition, and cruelty unparalleled in the history of jurisprudence. Garnier was sentenced to death upon his own confession, wrung from him while he was suffering from the tortures of the rack. The sentence of the court condemning him to be burned alive at the stake, and his ashes to be scattered to the winds, was carried out to the very letter.

The detailed facts of the prosecution are as follows: At Dôle, in 1573, a *loup-garou*, or *wehr-wolf* (man-wolf), was accused of devastating the country and devouring little children. The indictment was read by Henry Camus, doctor of laws and counsellor to the king, to the effect that the accused, Gilles

Garnier, had killed a girl twelve years of age, having torn her to pieces, partly with his teeth, and partly with his wolf's paws; that having dragged the body into the forest, he then devoured the larger portion, reserving the remainder for his wife; also that by reason of injuries inflicted in a similar way upon another young girl, the *loup-garou* had occasioned her death; also that he had devoured a boy of thirteen, tearing him limb by limb; that he displayed the same unnatural propensities even in his own proper shape.

Fifty persons were found to bear witness; and he was put to the rack, which elicited an unreserved confession. He was then brought back into court, when Dr. Camus, in the name of the Parliament of Dôle, pronounced the following sentence: "Seeing that Gilles Garnier has, by the testimony of credible witnesses and by his own spontaneous confession, been proved guilty of the abominable crimes of lycanthropy and witchcraft, this court condemns him, the said Gilles, to be this day taken in a cart from this spot to the place of execution, accompanied by the executioner, where he, by the said executioner, shall be tied to a stake and burned alive, and that his ashes be scattered to the winds. The court further condemns him, the said Gilles, to the costs of the prosecution. Given at Dôle, this 18th day of January, 1573."



INTERNATIONAL ARBITRATION.

IN a paper read recently before the Scots Law Society, at Edinburgh, and printed in the current number of *The Juridical Review*, Sir Robert T. Reid discusses the question how far legal methods can be extended for the adjudication of controversies between nations. "Unqualified submission by antecedent treaty of all disputes that may arise," he says, "is practically unknown among nations. . . . So to engage States by previous treaties that their disputes shall fall automatically under a ready-made jurisdiction . . . is for the present a chimerical hope." For this he gives the following reasons:

International law, by which such disputes must be determined, is a very incomplete code, and also a very uncertain code. In some points it is clear enough, and universally accepted; but there is a vast field in which nations are not agreed upon principles, and even less agreed upon the application of them. For example, what is contraband of war? Hall says, "The policy of nations . . . has been governed by no principle. The wish to keep open their own or a foreign market has usually been a motive quite as powerful as the hope of embarrassing an enemy, and it has led to a thoroughly confused practice. Usage does not conform to principle, and at the same time no sufficient rule can be extracted from it" (*International Law*, 3rd Ed. p. 660). Or again, what are the duties of neutrals in case of war? In the Treaty of Washington certain rules touching part of the duties of neutrals were laid down, and the two contracting States, Great Britain and the United States of America, agreed to do their utmost to secure the general acceptance of these rules. They have proved, however, under criticism to be defective, and are certainly not likely to be universally accepted. Indeed, they are acknowledged to be most imperfect. They require a neutral

power to use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a belligerent. Now obviously no neutral can lawfully allow its territory to be made the basis of a warlike expedition, but the language of the Rule, if strictly construed, might forbid the sale of ships, even though not armed. They also require that no neutral port shall be used for the purpose of the renewal or augmentation of military supplies or arms. If that is to be taken literally, British traders would not be allowed to send from this country in time of war, to either belligerent, rifles or ammunition, or food supplies, or clothing intended for an army in the field. In other words, the national trade of this country would be crippled. Commentators on the Geneva Tribunal, which adjudicated on this question, have endeavored to lay down certain broad principles. That effort has failed still more signally. Few authorities on International Law would be prepared to accept the Geneva doctrines. Even more perplexing are maxims enunciated by writers or adopted by statesmen in official despatches upon the vexed subject of boundaries, as to how they are to be ascertained, and what should be the character and period of occupation, from which sovereignty in this or that territory may be inferred. In short, if nations are unwilling to bind themselves beforehand that they will arbitrate upon future differences, they are equally unwilling to accept beforehand a fixed rule of International Law. Your difficulty is not merely to establish your Court by consent. It is far from easy to establish the principles by which that Court shall be guided, and the explanation is not hard to seek. Rules of International Law which suit one class of State, for

example, a Maritime State, will not be equally convenient, perhaps will be injurious, to the interests of another State.

Unfortunately, that is not all. There exists an uneasy suspicion that International Tribunals do not approach the questions before them with the same complete impartiality that obtains in our own Courts of Justice. This feeling is partly due to the fact that the universal confidence in the administration of justice at home which we feel here does not obtain in all foreign countries. I recollect once discussing this subject with one of the greatest judges outside the British dominions. He told me that if a quarrel arose between his country and mine, so persuaded was he of the purity of British justice, that he would be prepared to submit that difference to three British judges. But it is not so everywhere. And inasmuch as the final decision in any International Tribunal rests with a foreigner, the bias of patriotism, the prepossession in favor of the interests of his own country may, even unconsciously, sway his mind. Governments are very sensitive upon such points, and naturally so. Every arbitration is watched most closely, and the cause of peace is immensely injured by any miscarriage or supposed miscarriage of justice. It cannot be said that the *Alabama* Award, for example, was an encouraging precedent. The damages awarded against Great Britain were so excessive that the United States Government were unable to find claimants for the whole sum. Nothing can be more ruinous to the prospect of International Arbitration than the slightest suspicion of prejudice among the arbitrators; and unhappily there has been a great deal of such suspicion.

These then are the difficulties which we shall do well to recognize. We have to deal with voluntary litigants, with uncertain rules to guide us, in an atmosphere charged with suspicion and with national pride.

Beyond all this there is a great limitation

to be borne in mind, a limitation so great that it leads fainter spirits almost to despair. There are many subjects of quarrel, and those the most explosive, which, from the nature of them, we cannot hope at present to see composed by arbitration. They arise not from differences on law or on fact, but from conflicts of national policy. Let me use a few illustrations drawn from foreign countries or from history so far ancient that it provokes no controversy today. I strictly avoid any illustration that may cause controversy. In the Crimean War, the origin of dispute nominally concerned the Holy Places in Palestine. Really the question which resulted in war was the old antagonism between the interests of Russia and the interests of Turkey. The nominal question might well have been settled by arbitration had there been good-will and a desire for settlement. The real question was beyond any such solution.

Or take the American Civil War. There was the long and bitter dispute about slavery, which became associated with a conflict between State authority and Federal authority. In the end it came to the point whether the United States was to be one power in future or not. Perhaps the slavery question might have been determined peacefully on the footing of purchase. It is difficult to suppose that the Constitutional question could have been settled by any peaceful adjudication.

Again, the Franco-German War arose from the pretensions of a Hohenzollern Prince to advancement in a foreign country, but in the background there was a sense of rivalry between France and Germany, and an irritation on both sides rooted in old history and unappeased by the lapse of many years. In 1886 fears were entertained lest that war might be renewed. The danger arose partly, at least, from a belief in Germany that France was arming for revenge. Happily, war was averted; but not by arbitration. All efforts of that kind would have

been unavailing. In all these cases International Tribunals can offer no help, as the world is now; even mediation is difficult. Our aspirations, therefore, must be confined to a restricted class of disputes.

What then is the area of this restricted field? This was much discussed at The Hague Conference. You cannot attain an exhaustive analysis. You cannot draw the line with any precision, or classify disputes so as to distinguish between those in which arbitration is unattainable and those where you may expect it to be accepted. It depends in every case upon many considerations, including the relative power of nations, the temper of the moment, and the extent of the interests involved. One proviso, however, we may take with us; where vital interest or national honor is concerned the hope of arbitration is slender. That limitation is of course itself vague. In short, instead of trying to define, it is better to illustrate; beginning with the least important subjects upon which nations are apt to differ.

Arbitration is generally attainable when disputes arise concerning private property, or arrangements to which many nations are parties that deal with mere matters of business. Literary and artistic copyright; patents or trade marks; postal, telegraphic, railway, or steamship conventions, are instances of this kind.

The same may be said of what concerns the navigation of great rivers or inter-oceanic canals, though it is conceivable that such questions may prove in the future, as they have proved in the past, vital to the interests of one particular nation.

Another sphere ought certainly to fall within the area of arbitration; that of private International law. The conflict which arises by reason of the diversity of the laws in one country from the laws of another country has been the subject of learned volumes. Moreover, it often happens that the Courts of two nations exercise a jurisdiction over the same

individuals in respect of the same dispute. Under the same law, for example, I recall a case in which a Spanish Court decided upon the question as to which was to blame for a collision on the high seas, a British ship or a Spanish ship. The decision, which went against the British ship, was undoubtedly very difficult to justify, and the English Courts did not take the same view. Very serious consequences followed to the aggrieved British subject. The same kind of mischief arises where a marriage is held valid in one country and invalid in another.

Now, I fully admit that it would be impossible to apply arbitration in all cases of difference relating to private international law. It is practicable where the Courts of different nations purport to apply similar laws, such as those relating to bills of exchange, or the carrying out of contracts, or navigation at sea, in which the law of all States is substantially the same. There it would be easy to arrange that where the Courts of various countries differ the ultimate decision should rest with an International Tribunal, but it is another matter when the several Courts have not been applying the same rule.

All this, however, does not carry us very far on the road to arbitration, as an alternative to war. These are small matters in which national interests are not involved.

Let me come to more important cases, where damages are claimed against a State itself for illicit acts, or for negligence in observing international duties. Many such are constantly arising, and many have already been arbitrated. They may be, and often are, trivial cases. For example, not long ago an Australian ship on the point of starting upon a whaling expedition was seized upon in adequate grounds by the Government of a Dutch colony. Arbitration was demanded, and the Dutch Government agreed to it. An award of damages was made, and duly satisfied. Or again, under the Behring Sea Convention, claims arise from time to time when

United States ships or Canadian ships are seized by British or American cruisers. Instances of the same sort will occur to everyone, such as violation of neutrality in time of war; unlawful arrest; injury to residents in a foreign country; refusal to give succor in port to vessels putting in under quarantine; infringement of fishery rights. Though many of these cases are unimportant, some are important in the highest degree, such as the case of the *Alabama*; such also as the dispute between Great Britain and France, relating to what is called the French Shore in Newfoundland. The latter is a very old dispute, resting upon ancient treaties, and in part upon modern usage. It has caused friction between France and this country quite disproportionate to the value of any French interests at stake, and it is a very serious embarrassment for the Colony of Newfoundland, yet there is nothing in this question which might not be, with perfect propriety, referred to International arbitration. I hope this method of solution may yet be applied, and I do not believe our Government has ever been indisposed to take that step. In all disputes of this character I am very sanguine that the principle of arbitration will be adopted.

I come now to the interpretation of treaties. Much friction and not a few wars might have been averted if States had been content to submit to arbitration differences arising as to the meaning of treaties they had themselves made. Strange as it may seem, the wise men who compile these great international instruments have often been afflicted by the same incapacity to express themselves clearly on paper, that, when displayed by humbler persons, has occasioned so much litigation in our own law Courts. Indeed, it is worse; for often statesmen of all nationalities find it convenient to use ambiguous language in order to mask a difficulty which they are not able or willing to compose. Spain used regularly to practise this artifice.

Students of history will remember her ingenuity in this evil practice. It is noteworthy that at The Hague Conference the class of subject upon which the delegates most hopefully recommended arbitration was precisely this of the interpretation of treaties. It will be a substantial advance if that recommendation is acted upon.

Let me now refer to the last class of disputes that have been dealt with between nations by arbitral methods. Nothing in past time has been more fruitful of war than disputes as to territorial dominion. There is nothing upon which a nation is more stiff and exacting than the extent of its sovereign rights. If in this, the most delicate, the most difficult of all points, nations are willing to accept of a judicial solution, we may cherish the highest hopes. Now, happily there have been several cases in which this solution has been accepted by great States, and I am glad to think that our own country has given the finest examples. Great Britain arbitrated with Portugal in regard to Delagoa. Great Britain also arbitrated with Venezuela in regard to the true frontier of British Guiana. These two cases represent the high-water mark of International arbitration. The Delagoa case was of great importance. It related to a territory of much value to this country. It involved of course the question of sovereign rights. Unfortunately, it was decided in favor of Portugal. I have not examined the evidence, and I do not presume to express any final opinion, still I have heard that our case was not adequately prepared. It was undoubtedly a great disappointment to us. Notwithstanding that discouragement, some years afterwards the British Government consented to arbitrate with Venezuela. There also a question of sovereign rights was involved over a great territory, some parts of which promise to be most valuable. No greater homage was ever paid to public law than by the submission of this controversy to the judgment of an International Court.

Allow me to point out the full bearing of this precedent. It is not generally known how far it goes. There had been several previous offers by Great Britain to arbitrate certain parts of this controversy, but the hindrance was at one time a refusal by Venezuela; at other times the claim by that country was so wide and so unreasonable that it was difficult to entertain it. At length, and in my opinion most wisely, Lord Salisbury consented to submit to arbitration the sovereignty, not of any restricted area such as had been before proposed by Great Britain, but of the full demands of both countries however far they should extend. The Venezuelan claim did extend over territory which proved on investigation to have been for 250 years in the occupation of the British and their predecessors in title. For instance, if the Venezuelan claim had been admitted one fortified British post which had been held by a small garrison certainly ever since the year 1689, and had successfully sustained a siege 190 years ago, would have found itself within the Venezuelan territory together with a great tract which it protected. Lord Salisbury, confident in the irresistible justice of his case, consented to arbitrate upon the whole dispute, and a favorable award was obtained by the unanimous decision of the Tribunal. I believe that in days to come few passages in history will reflect greater honor upon our country than the record of our example in furthering the cause of arbitration. We have treated more cases in this way than

any other country except the United States, and if you regard not the number but the weight of the issues upon which we have been willing to arbitrate, neither the United States nor any other country in the world can be compared with us in readiness to accept a judicial determination in controversies of really great importance.

In truth much progress has been already made. Most of the cases adjudicated upon by International tribunals have been, it is true, comparatively trifling. But remember that trifling cases if unsettled are apt to produce serious irritation, and to create bad feeling between nations which may result in disastrous consequences. There is a further consideration. If a habit of arbitrating comes to prevail among leading States, even though the instances may at first be trifling, the tendency will be gradually to create a predisposition in the minds of men in all countries to look to this as a natural solution. From small cases they will come to larger, until at length the example of Great Britain in the instances I have last mentioned, will be more readily followed. Let States once forbear from taking the law into their own hands and prefer the decision of a Court, and then in the language of Shakespeare:

“ That shall lend a kind of easiness
To the next abstinence ; the next more easy ;
For use almost can change the stamp of nature
And master thus the devil, or throw him out
With wondrous potency.”

I know not to what highest step civilization may thus attain.



LONDON LEGAL LETTER.

JANUARY, 1903.

WITHIN the past two or three weeks three trials of more than ordinary interest have attracted wide attention. One of them was a criminal trial, in which a lady of commanding social position, the wife of a county magistrate of large wealth and lengthy lineage, having two country seats, was prosecuted upon the information of the Society for the Prevention of Cruelty to Children for having cruelly treated one of her children, a little girl seven years of age. The details of the accusation were of such a nature as to arouse the prejudices of the whole country against the unworthy mother. For the two or three days the trial lasted the newspapers gave verbatim reports of the proceedings, and as the London morning papers find their way by evening into the remotest corners of England, an intense excitement was produced. The accused, Mrs. Penruddocke, was defended by Mr. Edward Clarke and other leading counsel, but their efforts in her behalf were unavailing, and the jury returned a verdict of guilty. This accorded with the views of the great majority of those who had read the evidence as it appeared from day to day, and there was, therefore, no little exasperation when the judge sentenced the convicted woman to pay a fine of fifty pounds, instead of giving her a term of imprisonment, as it was open for him to do, the penalty involving a maximum of two years with hard labor. At once the cry was raised that there was one law for the rich and another for the poor, an imputation to which additional force was given when it became known that an arm chair had been provided for the accused in the prisoner's dock, and that she had been given the freedom of one of the waiting rooms in the court and accorded other privileges.

Nearly all of the newspapers for days afterwards published columns of letters to the editors either condemning or affirming the sentence, while the episode of the arm chair was alluded to in music hall ditties and has furnished comic business for the Christmas pantomines. That the judge who imposed the sentence, who is one of the most courageous, as well as sagacious, on the bench, realized the gravity of the offence cannot for a moment be questioned. He also realized that to a lady in Mrs. Penruddocke's position the mere fact of the accusation of a crime of so unnatural a character, and the appearance in the prisoner's dock, and being daily the subject of comment by the public generally, constituted a greater punishment than imprisonment for any term, however long, would be to a person of humbler environment. The defence claimed that Mrs. Penruddocke was affectionately attached to her child, and that while, in fact, she did treat the little one in the manner charged it was only by way of discipline to correct certain habits which could not otherwise be eradicated. The severity of the punishment may be realized from the fact that the Penruddockes have not only lost their position in the places where they were of commanding influence, but are naturally ostracised from society and will not be able for years to come to reside in England.

Another of the temporary *causes célèbres* was a divorce case in which Mr. Charles Hartopp sought the annulment of his marriage with his wife on account of her infidelity, and Lord Cowley was named as a correspondent. Lady Hartopp was a Miss Wilson, and her family is probably as well known among ultra-society people as that of any in England. The position of the parties

and the unsavoriness of the details of the sordid story of their domestic infelicities caused the court to be crowded every day, while hundreds of people, long before the doors were opened, struggled for admittance. The trial lasted for nearly two weeks, and every night crowds gathered in the streets, no matter what the weather, to see the parties and the notable witnesses come out and drive away in their carriages. From a professional point of view that which struck the observer most forcibly was the shocking revelation of indecency which the washing of so much dirty linen in public occasioned. Those who were present in the court were ladies mostly, and ladies of social position. They were there, not only willingly but eagerly, and therefore deserve no pity if they were obliged to hear details of incidents which no man willingly speaks of in the presence of ladies. But the papers were obliged to publish the text of the addresses of counsel and the evidence of witnesses, and columns filled with this nauseous matter were daily read by hundreds of thousands of women and young children. American divorces are a by-word in England, but contrasted with trials of the Hartopp sort the procedure in America is vastly superior to that in England. In one country the evidence, for the most part, heard by a referee on privacy, while on the other it is given in the fullest glare of publicity with display head lines and double-leaded type. Sir Charles Hartopp failed to prove his wife's adultery, and Lady Hartopp likewise failed on her counter-charges against her husband. In England the husband must prove adultery, but the wife must go one step further—prove adultery and cruelty, or adultery and desertion, in order to get a divorce. As both parties in this case made the necessary charges, but failed in the necessary evidence, it is difficult to conjecture upon what basis a *modus vivendi* can be established for the future in the Hartopp household. It is conceivable that the American method of

simplifying the grounds for divorce is better for the health of the community than the forcing of husband and wife who have mutually charged each other with the gravest offences against the marital tie, but have failed to support their charges, to go on living together, or pretending to do so.

In the third of the cases referred to, known as the "Taff Vale case," the Taff Vale Railway Company brought an action for damages against the Trade Union, to which their employés, who had gone out on a strike belonged, for damages resulting from the strike. The aid of the Chancery Courts was invoked during the strike for an injunction to restrain the Union and its officers and servants from interfering with the management and operations of the railway. The defence was that the act complained of was not the act of the Union, but of individuals, its members, and that the Union was not responsible for what they did. The court of first instance granted the relief prayed for, and this decree was approved of by the Appeal Court, and also by the House of Lords. The company then began its action on the common law side for damages. It was an interesting struggle between employer and employés, and it lasted for nearly three weeks, at the end of which the special jury found for the plaintiffs and the question of damages was referred. There will probably be an appeal by the Trade Union, as the result is of vital importance, not only to this particular union, but to all trade unions. If the verdict stands and the damages claimed are awarded to the railway company the treasury of the Trade Union will be bankrupt. A large number of counsel were employed upon both sides, and it is a subject matter of congratulation that although there were constant opportunities to appeal to prejudice and to import politics into the proceedings, not one of the counsel, several of whom are not without political ambition, yielded to the temptation. The opening

statements on both sides, the cross-examination of witnesses, and the summing up of counsel, were as devoid of prejudice and of appeals to the public, as if the action was a suit on a promissory note. That the danger was recognized and that counsel had the courage to avoid it was acknowledged by Mr. Justice Wills, whose comment, in summing up to the jury, as to this feature of the case is worthy of the attention of lawyers all over the world. He said that he owed a debt of the sincerest gratitude to the gentlemen of the Bar, and, of course, especially to the leaders, for the admirable manner in which the case had been conducted. It teemed with combustible elements. They had walked along paths bestrewn with gunpowder and dynamite, and yet not a spark had been let fall. With every temptation to indulge in topics of prejudice and passion, no one on either side had ever been betrayed into any such indulgence. The difference in the strain upon himself between a case so conducted and what it would have been if such rigorous self-restraint had not been practised was incalculable, and he should be very sorry to part with the case without adding this expression of personal gratitude to the expression of his opinion that this trial had been conducted by the learned counsel engaged in a manner worthy of the highest and best traditions of the profession to which he and they alike had the honor to belong. He added that something in this result might well be due to the influence of a part of our legal machinery of which the advantages were very often but imperfectly recognized—the circuit system. No fewer than four of the leading counsel were members of the same circuit, and on circuit men got to know one another down to the ground, they never failed to do justice to one another's good points, and personal friendships grew up which engendered kindly feelings which no stress of advocacy ever obliterated, the indirect effect of which in smoothing the rugged path of litigation it was difficult to over-

estimate. In another passage the judge alluded to the completeness of the discovery of documents, *etc.*, on the part of the executive committee, and said that absolutely nothing had been withheld, no matter how compromising it might be, and this in spite of every temptation to make the discovery less adequate. In the whole course of his experience he had never seen in a case of this magnitude such carefulness, as well as honesty, in the important matter of discovery, and it reflected the highest credit on all concerned.

Everything is relative, and lawyers in America would be amused by the complaints that are being made of the arrears of work in the Appeal Court and the consequent delay in arriving at a final determination of cases.

The most that can be said against this court is that it is now hearing and deciding appeals which were entered on its dockets "nearly a year ago!" In the second division of the court cases which were appealed in March last were being heard in December. Allowing for a vacation that lasts nearly three months, this means a delay of six months. And this is only for final appeals. All interlocutory matters are heard in from four weeks to two months. Contrasted with delays in most of the States and in the United States Supreme Court, the procedure here might almost be called precipitate haste. It is even better in the King's Bench division, where the interval between the serving of the original writ of *mandamus* and trial by jury does not exceed on the average three months. And even this despatch has been thrown into the shade by the performances on the chancery side, where in four or five of the courts, cases are heard and finally determined within six weeks of the time they are brought. In fact, it is not now necessary in many cases, to ask for interlocutory relief, for the action itself is disposed of in the time otherwise necessarily occupied in the intermediate application. The old jibe at the delays of chancery has now lost its point.

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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.

We regret that we are unable to print in this number the address by Mr. Samuel Gompers on Incorporation of Trade Unions. The address was not delivered from manuscript, and as yet Mr. Gompers has not been able to obtain and to send to THE GREEN BAG the stenographic report.

NOTES

"You must have had a hard time bringing them over to manslaughter," said the shyster who had bribed one of the jurors in a murder case to prevent a jury from bringing in a verdict of murder in the first degree. "But here's your money."

"Hard time," replied the juror: "well, I should say so; eleven of them wanted to acquit him, but I got them around to manslaughter finally."

IN a Southern judicial circuit, a number of years ago, there was a learned and able judge on the bench who loved an occasional dram; and there was practising in his court an attorney who was fond of a very frequent toddy. On one occasion when a case was being tried before this judge, the toddy-drinking lawyer, whom we will call Kink, remarked to the Court:

"If your Honor pleases, I am not quite well, and would like for you to rest the case a few minutes while I go and get a dose of quinine."

The machinery of justice was stopped, and the attorney hurried from the court-room to

a nearby saloon, where the judge felt sure he was going. Upon his return, the case was resumed, and in the course of an hour or two the lawyer asked that he be permitted to go and take another dose of quinine. When the third demand was made that the wheels of justice be stopped, the judge, with a merry twinkle in his eyes, said:

"All, right, Kink. The Court also feels the need of a little quinine just now, so we will adjourn for ten minutes, which is a sufficient length of time for one to take a dose of that kind of medicine."

THE late Judge D. M. Key, postmaster general under the Hayes administration, presided over Federal courts in Tennessee something like twenty years. He nearly always wore a smile, and was noted for leniency toward the moonshiners.

He sentenced an East Tennessee mountaineer to imprisonment in jail for a year. The old fellow arose, looked at him in astonishment, and said:

"You look like a right clever old feller, jedge; now jes' lissen a minnit, an' let me splain this thing to ye."

But when second or third offences were established, the judge felt compelled to be more severe. A man at Tullahoma was shown to have been operating an underground distillery for a long time. And he had "been up before." The judge fined him a thousand dollars, and sentenced him to imprisonment in the penitentiary at Columbus, Ohio. The prisoner's lawyers determined to move for a new trial.

"Tain't no use, gentlemen," he told them; "I'm guilty, and they'll prove it on me every time. But you jest let me make a little talk to the jedge."

The lawyers reluctantly consented.

"Wy, jedge," said he, "I'm a pore man. I've got a big fambly at hum, includin' a wife an' four girl children. They needs my help. They'se jest erblige ter hev hit, or they'll suffer. I ain't no criminal, jedge; w'y, I was in your regiment in ther rebel army, an' you never heerd o' me committin' any crime. It's jes' 'bout crop time now, an' I'm needed at hum more'n any other season o' ther year. I couldn't raise that thousan' dollars ef'n my life depended on it, jedge; an' as fer goin' ter the 'tentiary, w'y, that's *simply out'n ther question.*"

The judge's eyes did not comport themselves quite judicially as the man sat down. His voice was not so stern as it should have been when he asked the prisoner:

"Can you secure a fine of two hundred and fifty dollars?"

"I reckon I possible mought."

"Mr. Clerk," said the judge, "enter an order reducing that fine to one hundred dollars, and setting aside the sentence of imprisonment."

JUDGE C. A. BISHOP, who was recently elected to the Iowa Supreme Court, was for years on the county bench. When presiding over the criminal court he achieved a reputation for sternness almost as severe as that of the Hanging Judge of Hermiston created by Robert Louis Stevenson. There is still a legend in the county jail regarding a peculiarity of the judge. It is a fad of his to wear a red carnation in his buttonhole. On the days when the red flower adorned his coat lapel the prisoners believed that he inflicted heavier sentences than he did on other occasions.

"Has he got it on to-day?" was invariably the first question asked the jailer when he went to take a man up for sentence.

"Got what on?" was the invariable reply.

"It—the blood-red hoodoo"; and to this day Judge Bishop's name is always associated with the "blood-red hoodoo."

In a western state, whose laws provide for a jury of six in suits before justices of the

peace, a German was elected to that high and honorable office. The old gentleman was naturally smart, and, being prosperous, was something of an oracle in the neighborhood; but law was a thing he knew as little about as the most of his predecessors and successors of the J. P. genus.

When his first case came on he listened with reasonable attention to the evidence, but with wrapt interest to the arguments of counsel for both plaintiff and defendant.

When the arguments were closed he appeared very ill at ease, and not until reminded that it was his duty to charge the jury did he offer any suggestion touching the case in hand. But he came up to the situation that confronted him like a man and a judge.

"Gentlemens of der tschury," he said, "as dis ist mein first oxberience in tschargin' a tschury, I hartly knows vat do say do you. But as eet ist mein tuty to tscharge you somedings I vill do der pest vat I knows how.

"Eff you peleeves all vat der lawyer for der blaintiff haf said, den I tscharge you dot eet is your tuty to find your ferdict for de blaintiff, und assess hees tamages as you dink rigdht, not do oxzeet five huntret tollars und der cosdts, vich you must nod vorged.

"But eef, on der odder hant, you peleeves all vat der tefendant's lawyer haf saidt, den eet ees your tuty to fint for der tefendant. In dot case you vill tschust do id, und say nodings apoud it, oxcepting der costs, vich you moost nod vorged.

"But, tschendlemens, if on der odder hant, you are ligke me apout dis maddter, unt dondt peleeve a tamt vort vat eider one off dem haf saidt, den I doan' know vot in der hell you are goin' ter to."

At the funeral of a lawyer of state reputation, who lived and practised in a town not far from Philadelphia, and who was known among his friends thereabouts as an unbeliever, an eminent gentleman reached the house after the minister began his address. Not knowing how far the service had progressed, he accosted a well-known Quaker who was noted for his great sense of humor, and, leaning over his shoulder, asked in a

whisper: "What part of the service have they reached?"

To which the Quaker, without a smile, replied: "Just opened for the defence."—*Exchange*.

WE are indebted to an esteemed English contributor, "J. M.," for the following interesting note on the "jury of matrons":

When Mr. Justice Jelf took his seat on the bench at the assizes a few weeks ago, the jury-box was occupied by twelve ladies. His lordship explained that they had been put to the trouble of attending through a mistake. It had been suggested that the prisoner, who was sentenced to death for the murder of a lady at Bootle, was in a certain condition, in consequence of which the sentence would have been respited. In this case it had been found that the matter had been mentioned by mistake. The girl did not allege that she was in that condition, and the doctor said there was no foundation whatever for suggesting it. In these circumstances he would not detain the matrons, and expressed regret that they had been troubled to attend.

It is still the law in England, where a prisoner pleads pregnancy, or where the courts are disposed to think such a state of things highly probable, that the prisoner is tried by twelve matrons. The procedure is of high antiquity. It is stated by Blackstone to have prevailed as early as memorials of English laws will reach. When the plea is raised the clerk of the court has to empanel forthwith, *de circumstantibus*, from the bystanders in court, a jury of twelve matrons, or discreet women (2 Hale P. C. 412.) The course usually followed is exemplified in Wycherley's case, when Baron Gurney ordered all the doors to "be closed and no one to leave the court," and by this means secured the lady sightseers. There are cases, Christiana Edmond's case to wit, where there have been some extraordinary scenes witnessed in court, at the clerk's endeavor to empanel a jury "forthwith."

The following is the form of oath administered to the forewoman of the grand jury:

"You as forematron of this jury shall swear

that you will search and try the prisoner at the bar whether she be with quick child, and return a true verdict according to your skill and understanding. So help you God."

In Tidy's *Legal Medicine*, 1883, part II., it reads: "There is perhaps no subject on which women display greater ignorance than on questions connected with pregnancy." It certainly seems strange that this law should still remain in force in England, as it is not so in other countries. But as the jury are entitled to medical aid there is not much chance of their giving a wrong verdict. Where the law is changed, as some day it no doubt will be, it may be found wise to adopt the practice of the French courts.

Probably the most distinguished jury of matrons was the jury called in the time of James I., 1613, in the case of the Earl of Essex, where the court decreed "that six midwives of the best note, and ten noble matrons out of which they themselves would choose two, and four matrons, should inspect the countess." Some of the names mentioned in connection with this enquiry were Lady Mary Tirwhit, wife of Sir Philip, baronet; Lady Alice Carew, wife of Sir Mathews; Lady Dalison, wife of Sir Roger, and Lady Anne Walker, widow. This jury returned a verdict favorable to the countess, and, to corroborate all this, the countess produced seven women of her consanguinity, *viz.* Katherine, Countess of Suffolk; Frances, Countess of Kildare; Elizabeth, Lady Walden; Elizabeth, Lady Knevel; Lady Katherine Thynne, Mrs. Katherine Fiennes and Mrs. Dorothy Neal.

This case is reported in Cobbet's *Complete Collection of State Trials*. The details are not fit for publication.

FRENCH archæologists have recently, at Susa, in Persia, the text, transcribed on a diorite column, of the oldest law code of which we have knowledge. This is the code of Hammurabi, king of Babylon, about 2300 B. C. The code has been translated by a French Assyriologist, and from a summary of these enactments *The Literary Digest* gives the following interesting items:

Legal cases were tried before a court of

judges, at the head of whom was a president. The facts in the case were learned through witnesses and written documents. The care taken in this regard is evident from the following example: "If anybody has bought, or received as a deposit, silver, or gold, or a male slave, or a female slave, or a steer, or a sheep, or an ass, or anything else from a free man or a slave without witnesses or written documents, he is to be treated as a thief and shall be killed."

In some cases there was even an appeal to divine judgment. The accused was compelled to go down into a stream of water, and "if the river seized him" he was guilty; but "if he remained in good health," he was innocent. In this way those charged with witchcraft and women accused of infidelity, but not caught in the act, were tried.

The punishments inflicted were severe. Death was the penalty for witchcraft or for false oath in capital cases, or for robbing a temple or royal possessions. Any person who permitted a slave to escape, or harbored an escaped slave, was punished by death, as was an official who failed to attend to his duties himself but intrusted these to a substitute. The death penalty was inflicted either by fire, or drowning, or impaling. The first method was applied in the case of those who during a fire had stolen goods. Drinking-places were seemingly as much in discredit at that age as they are now. We learn that such places were generally kept by women, and that they were headquarters for dangerous political agitations. The code declares that if the landlady failed to report dangerous inmates to the authorities, she was to die. A priestess was not allowed to enter such a drinking-place under penalty of death. Death by drowning was applied in the case of an adulteress, "unless the husband grants his wife her life, and the king does the same to his servant." Crimes of a less serious character were sometimes followed by loss of some member of the body, it being the rule to cut off that member which had been guilty of the offence. In this way an adopted daughter or adopted son who said to his foster-father and mother that they were not

his parents should lose his or her tongue.

In general the Old Testament principle of an "eye for an eye and a tooth for a tooth" is consistently carried out in this Babylonian code. Among other things it says: "If a man knock out the eye of a freeman, his own eye shall be forfeited. If he break one of the members of a man, his own member shall be removed." But this rule applied only in the case of freemen. If the suffering party were a slave, a payment of money could make good the wrong; the same was true of a freedman. On the other hand, if an inferior struck a superior, he was punished with fifty lashes, and if he was a slave his ear was cut off. The *lex talionis* was carried so far that if a surgeon was unsuccessful in performing an operation, he was not entitled to any pay. If the patient died under the hand of the surgeon, the latter lost his hands, in case the patient was a free man. If a slave died under his hand, he must buy another. In case a builder made a failure of a structure he was also punished with death. Whether imprisonment was one method of punishing wrongdoers does not appear, but evidently if at all applied it was of comparatively small importance. Money fines were, however, very common, and were proportionate to the wrong done. He who falsely claimed that another was indebted to him must pay one-third of a *mina*. Freeman fighting were fined one *mina*. Theft of an animal was punishable by a fine of thirty times its value.

Hammurabi was much concerned for the safety of his highways. A robber who attacked a person on the public road was killed, or if he could not be found, then the community in which the crime had taken place was fined a *mina*, in case the life of a human being had been lost. In addition to these forms of punishment, transgressing officials could be removed from office or banished from the city or the state. Some of the paragraphs throw strange light on the state of sexual morals in that period.

Among other things, the priestesses and hierodule system, so imperfectly known from classical writers, are here for the first time seen in their proper light.

LITERARY NOTES.

A NEW biography of Longfellow¹ may have seemed unnecessary. The life published sixteen years ago by his brother, Rev. Samuel Longfellow,—himself a poet and a man of letters,—left little to be desired. At the hands of Col. Higginson, however, the life and work of the great American writer assume new interest.

Biographers are like teachers, being born not made, and Col. Higginson was equipped in every way for the task he undertook. The only difficulty seems to have been his evident assumption that people in general know as much about Longfellow as the residents of Cambridge know.

There is too much of Cambridge in the picture, possibly, and too much is made of the Harvard professorship, and of Longfellow's connection with the college. On the other hand, there is too little of the poet's actual life. The death of his second wife, for example, is barely touched upon; it being assumed that every one knows the tragedy of her death by fire, which many do not.

One whole chapter,—that on Westminster Abbey,—is curiously misplaced. It is introduced with a somewhat over-full account of the unveiling of the bust in the Poet's Corner, before a hint is given that Longfellow's life is even drawing to a close. Had it come after, and not before, the chapter entitled "Longfellow as a Man," there would have been an easier and more natural sequence in the narrative.

The life as a whole, however, is eminently satisfactory. It is well to have the fact of Longfellow's wonderful popularity brought out as clearly as it is. He is known and read in England and on the continent of Europe as no other American author is or ever has been. Col. Higginson sums the whole matter up most admirably and justly when he says: "He will never be read for the profoundest stirring, or for the unlocking of the deepest mysteries; he will always be read for invigoration, for comfort, for content."

¹ HENRY WADSWORTH LONGFELLOW. By *Thomas Wentworth Higginson*. With portrait. Boston: Houghton, Mifflin and Co. 1902. \$1.10 net. (vi + 336 pp.)

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of contributors, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

THE NEGOTIABLE INSTRUMENTS LAW, With Annotations. By *John J. Crawford*. Second Edition. New York: Baker, Voorhis and Company. 1902. (xxxiv+173 pp.)

The appearance of this new edition of the now familiar work, annotating the recent codification of the law as to commercial paper, directs the profession's attention to the cordial rapidity with which the codification has been accepted and also to the history of the codification of this part of the law.

As the law of commercial paper is of Continental origin and has much the same doctrines throughout the world, it is necessary to notice the steps taken in the Civil Law countries. The French law as to this subject was codified in 1673; and this codification was adopted in a revised form by the *Code de Commerce* of 1818. Spain followed in 1830, Portugal in 1833, Germany in 1849, and Italy in 1865.

The earliest legislative codification of Anglo-American substantive law appears to be the Georgia Code, which was adopted Dec. 19, 1860, to take effect Jan. 1, 1862; but this codification gave to negotiable instruments little more than a page. The Civil Code drafted by David Dudley Field and his associates, and reported in 1862, assigned twenty-six pages to this subject; and this Civil Code, with some amendments, was adopted by Dakota in 1866, and by California in 1872.

The recent codification of the law of negotiable instruments, however, is to be traced not to these early Continental and American enterprises, but to the codification of the English law for India. With the Indian codifications, though not with the codification of this subject, is associated as early as 1834 the name of Macaulay. In 1867 a draft codification of the law of commercial pa-

per for India was prepared by the Indian Law Commission, then composed of Lord Justice James, Lord Justice Lush, and others. In 1879 the bill was re-drawn by Mr. Phillips of Calcutta; and after consultation with bankers and merchants it was amended slightly and in 1881 was adopted. The purpose of this Indian Negotiable Instruments Act, 1881, was, it seems, merely to codify the English law. Chalmers' *Indian Negotiable Instruments Act*, introduction, *passim*.

Meanwhile, in 1878, M. D. Chalmers, Esq., published a *Digest of the Law of Bills of Exchange*, giving the law in the form of a draft code, in brief sections with illustrations, after the plan of Sir J. F. Stephen's *Digest of the Law of Evidence*. In 1881 the author was employed by the Institute of Bankers and the Associated Chambers of Commerce to prepare a bill. The resultant draft was examined by a committee of the Institute of Bankers, and was then introduced into Parliament by the President of the Institute, Sir John Lubbock. The bill was referred to a committee, of which some of the members were Sir Farrer Herschell, Q. C., as chairman, Sir John Lubbock, Mr. Asher, Q. C., Mr. Cohen, Q. C., and Mr. T. C. Baring. Some amendments were made, including a few as to Scotch law, drawn by J. Dove Wilson, Esq., of Aberdeen. The bill was reported by Sir Farrer Herschell, and was adopted by the House of Commons. In the House of Lords it was referred to a committee that included, among others, Lord Bramwell as chairman, Lord Selborne, and Lord Fitzgerald. After amendments, particularly some suggested by Lord Bramwell, the bill was adopted by the House of Lords, and as amended it was then adopted by the House of Commons. Such is the history of the Bills of Exchange Act, 1882. It has been the subject of remarkably little litigation. The secret of the rapid adoption of the codification and also of the satisfaction given by it is to be found in the codifier's attempt to reproduce existing law without amendment. Chalmers' *Bills of Exchange*, fifth ed., introduction, *passim*.

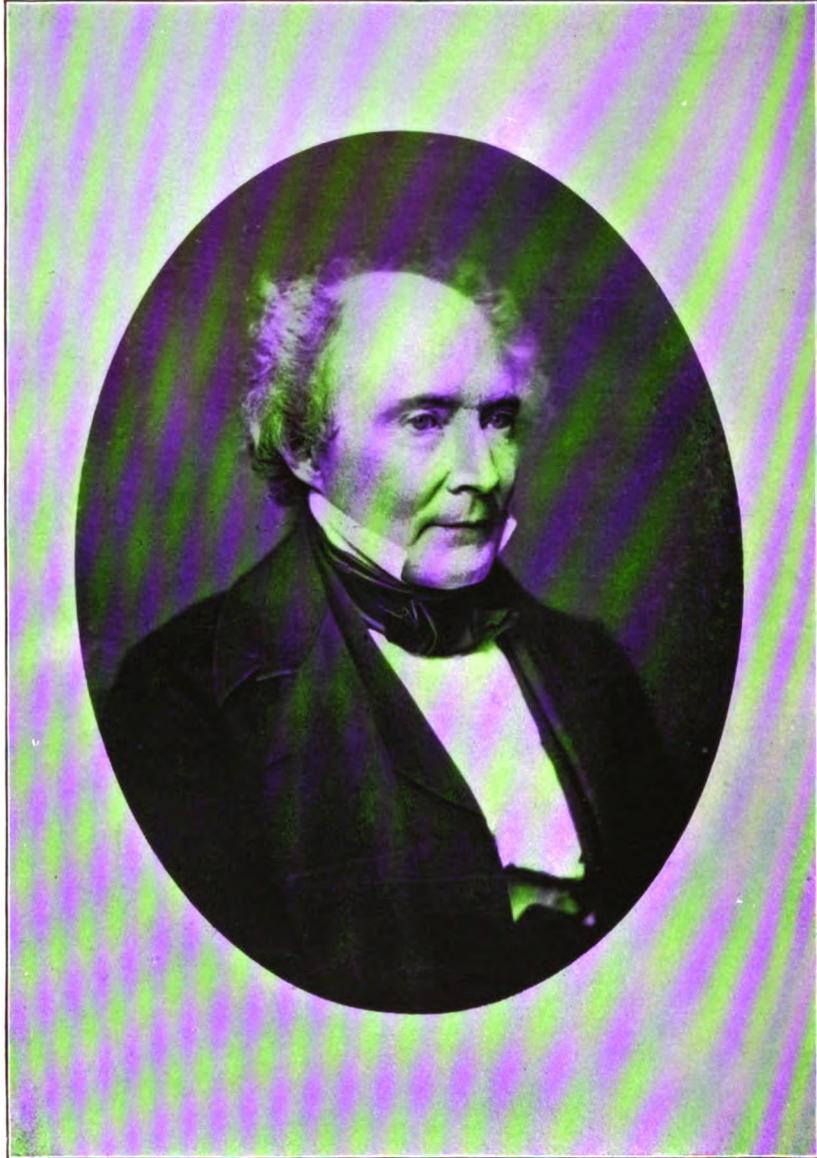
The American history of the codification

now known as the Negotiable Instruments Law, begins in 1895, when the Commissioners on Uniformity of Laws, sitting in Detroit at the time of the meeting of the American Bar Association, instructed a committee to cause a bill to be drawn. A sub-committee, of which Hon. Lyman D. Brewster of Connecticut was chairman, employed John J. Crawford, Esq., of New York, to make the draft. The result was submitted to lawyers for criticism, and, after slight amendment, was adopted by the Commissioners in 1896. The codification is based upon the English Act, but differs from it in arrangement and frequently in expression. The American codifier encountered the special difficulty that the law was not identical in all the States. Yet this difficulty was so successfully met, that the act has already been adopted in nineteen jurisdictions, including among others, Massachusetts, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, and the District of Columbia. This record as to rapidity of adoption is quite as extraordinary as the record of the English Act; and the results as to litigation have been similarly good—two or three cases in England and half a dozen in the United States.

The book under review is by the gentleman who drew the act—the first act that has codified any important division of the substantive law for any large part of the United States. The book is not a treatise. It is a reprint of the act, with brief and clear annotations—embodying many of the comments appended to the author's draft when submitted to the Commissioners on Uniformity of Laws. The practitioner will find it an extremely useful tool.

SHEPARD'S CITATIONS OF ALL CASES IN THE UNITED STATES SUPREME COURT REPORTS WHICH HAVE HAD A SUBSEQUENT CITATION. Third Edition. New York: The Frank Shepard Company. 1902.

Shepard's *Citations* is more than a time saver for the brief-maker; it is indispensable in following up thoroughly any legal question which has been passed upon by the Federal Supreme Court.



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ROBERT J. WALKER.

BY GEORGE J. LEFTWICH.

IN 1824 there came to Natchez, then the largest and wealthiest town in Mississippi, Judge Jonathan Hoge Walker, and Duncan S. Walker, the father and brother respectively of the subject of this sketch. A large and rich colony of Pennsylvanians was already established there. Robert J. Walker, with his mother and sister, Charlotte Corday Walker, followed in 1826. Judge Jonathan Hoge Walker was a grandson of William Walker, who emigrated from England to Pennsylvania in 1710. Robert J. was born at Northumberland in that State in 1801. Judge Walker was appointed Judge of the United States District Court of Pennsylvania by President Monroe and removed from Northumberland to Pittsburg, whence, his health failing, he went with his son, Duncan S., to Natchez. Robert J. was educated under his father's direction till he entered the University of Pennsylvania, where he graduated with highest honors in 1819 and was selected as salutatorian of his class. He was an excellent scholar, a master of Greek and Latin. He spoke and wrote French and was given to writing verses in his early days. A medical career was marked out for him, but he did not practise medicine. His aptitudes were all favorable to the law, and he was admitted to the Pittsburg bar in 1821, when twenty years of age. He was a member of the State Democratic Committee of Pennsylvania at twenty-one, chairman of the same committee at twenty-two, and claimed to have first named Jackson for the Presidency at

twenty-three years of age. He married Mary Blechenden Bache, a great-granddaughter of Benjamin Franklin, and a granddaughter of A. J. Dallas, Secretary of the Treasury under Monroe.

His brother, Duncan S. Walker, had become the partner at Natchez of Edward Turner, a lawyer of distinction, who had been elevated to the bench and had left a vacancy in the firm which Robert J. was invited to fill in 1826. He immediately entered upon a large and lucrative practice, as the Reports of the High Court of Errors and Appeals themselves disclose. He was master of both the common and civil law; in fact, at that time and place a knowledge of both systems was essential, as the Natchez country had been for a great while Spanish territory, Natchez itself being the capital of the province.

The State had been admitted to the Union in 1817, and the High Court of Errors and Appeals was established in 1818, but no official reports had been issued until 1828, when Robert J. Walker was elected official reporter, his name doubtless suggested by Judge Turner, then a member of that court. The records of the court had been poorly preserved, but the work was well done according to reportorial standards as then established. He issued but a single volume of reports which covered the proceedings of the court from its establishment in 1818 till 1832, a period of fourteen years. The reports of cases are often exceedingly brief, giving but

a memorandum of the court's opinion. The principles decided, however, are accurately stated in the syllabi. These reports are distinguished by one marked peculiarity. Mr. Walker frequently appends notes to the opinions, and he does not hesitate to assail and criticise the views of the judges when he deems their opinions wrong. These scanty reports of Mr. Walker when a young lawyer would hardly challenge the attention of the historian but for the great distinction afterward achieved by him as a senator and statesman. The volume would not come up to the reportorial standard of to-day in its arrangement for complete and easy reference.

It must not be left out of view that the South was crowded at that time with brilliant and aspiring young lawyers from almost every part of the Union, of many of whom the world at large knows nothing, but numbers of whom, like Prentiss, Sharkey, Foote, Poindexter, McNutt, Holt and others, became famous. The wealth and fertility of the country, its accessibility by water navigation, the exciting episodes and romantic atmosphere made it attractive to the daring in all walks of life.

The term of George Poindexter, a senator from Mississippi, had expired March 4th, 1835. Poindexter was a Virginian by birth and has been characterized by Claiborne, the historian, as the ablest man who ever lived in the State. He had been a judge on the bench, he had codified her laws and was an autocrat in politics. He had killed his antagonist in a duel. He was a great orator, and held a prominent place in the national senate. But in the parlance of that day "he had gone over to Biddle and the bank." He was a candidate for re-election, and the problem at home among his enemies was who could defeat him? Natchez in that day was the political, social and financial headquarters of the State. To Judge George Adams, a prominent lawyer and United States District judge, and William M. Gwin, Jackson's pro-

tege, and afterwards United States senator from California, was ascribed the political parentage of R. J. Walker, then but thirty-four years of age and but nine years a resident of the State. These astute politicians concluded that Walker was the only man in the State, unknown as he was in any extended way, who possessed the ability to cope with Poindexter in debate. Walker in comparison with the great senator in some sense provoked laughter. It was charged that Poindexter had come back to the State with his purse full of Biddle's gold as the price of his apostacy. At any rate, true to his instincts and character he was as defiant as a Roman gladiator. Walker was exceedingly diminutive and stooping in person, weighing ninety, to one hundred pounds. His voice was wheezy and vibrated from high to low in rapid succession. But he was brilliant in diction and poured forth a train of original ideas. He was invincible in argument, pugnacious and resentful. He could write or dictate a speech and without again referring to it get up on the stump and repeat it word for word. He had come to Mississippi without a cent, but now stood in a brief period of nine years at the head of the bar among a host of brilliant competitors from all parts of the Union, reputedly a wealthy man. A colony of rich Pennsylvanians had patronized him. He was not widely known, but confident, brilliant, learned. He was seconded by Henry S. Foote, who resolutely stood by him when too severely pressed by Poindexter who had become somewhat disabled by ill health. The race was very close, but Walker won. He at once took a high stand in the Senate, where he soon became chairman of the committee on public lands.

In his canvass preceding his election to a second term in the Senate, Sergeant S. Prentiss, the brilliant lawyer and orator, was his adversary. When Prentiss, seven years his junior, first came to Mississippi, Walker had

opened his library to him; now they were contesting for a great office before the people, but like the great Poindexter, he too went down before the "little magician," as he was sometimes called.

Senator Walker's career as a statesman was not only a brilliant one in many ways, but he was one of the greatest constructive statesmen of his time. His connection with the public lands by virtue of his chairmanship of that committee no doubt suggested to him the first Homestead Bill which he successfully brought forward in 1836. The Pre-emption Act, originated by him in 1841, became a law in 1844. These provisions for the disposal of the public lands have been far-reaching in importance in the settlement of the West and South. They encourage the establishment of homes and the opening up of the country by actual and permanent settlers.

A quotation from a speech of Senator Walker's made in 1836 while chairman of the committee on public lands may both illustrate his character and at the same time give a pleasant aroma of by-gone days. The question before the Senate was whether the government should continue the receipt of bank notes for public lands, as recommended by the committee. Senator Benton had assailed vigorously the committee's action. Here are excerpts from his reply:

"Sir, being deeply solicitous to preserve unbroken the ranks of the Democratic party in this body, participating with the people in grateful recollection of the distinguished service rendered by the senator from Missouri to the Democracy of the Union, he would pass by many of the remarks made by the senator on this subject."

"Mr. Benton here arose from his chair and demanded with much warmth that Mr. Walker should not pass by one of them. Mr. Walker asked what one? Mr. Benton replied in an angry tone, Not one, sir. Then Mr. Walker said he would examine them all,

and in a spirit of perfect freedom; that he would endeavor to return blow for blow, and that, if the senator from Missouri desired, as it appeared that he did, an angry controversy with him, in all its consequences, in and out of this house, he could be gratified." Later on in the same speech he said:

"Yes, even then he would have passed lightly over the ashes of the theories of the honorable senator, for, if he desired to make assaults on any, it would be upon the living, and not upon the dead; but that senator, in the opening of his address, had rejected the olive branch, which, upon the urgent solicitation of mutual friends, against his own judgment, he had extended to the honorable senator. The senator from Missouri had thus, in substance, declared his 'voice was still for war.' Be it so; but he hoped the Senate would recollect that he was not the aggressor; and that, whilst he trusted he never would wantonly assail the feelings or reputation of any senator, he thanked God that he was not so abject or degraded as to submit, with impunity, to unprovoked attacks or unfounded accusations from any quarter. Could he thus submit, he would be unfit to represent the noble, generous, and gallant people, whose rights and interests it was his pride and glory to endeavor to protect, whose honor and character were dearer to him than life itself, and should never be tarnished by any act of his, as one of their humble representatives upon this floor."

Nothing could better illustrate the pugnacity of Mr. Walker than this speech when it is remembered that he was young in both years and experience and insignificant in appearance, and that his antagonist was the great and pompous senator from Missouri.

The recognition of the independence of Texas by Congress and her admission into the sisterhood of States were favorite measures of the Mississippi senator. A few months after he entered the Senate he called attention to the struggle of Texas. Later

he recommended the use of any surplus money in the treasury to acquire Texas. In 1844 he had been named for the vice-presidency by the people of Mississippi, and was called on by the people of Carroll county, Kentucky, to express his views on the admission of Texas into the Union. In reply he wrote his famous "Texas letter," which in a degree formed the basis of the policy on which Texas was later admitted. He was a slave holder and defended slavery in the Senate, but he advocated the gradual abolition of slavery as a condition of admitting Texas into the Union. It was his theory to make Texas a free State and use her as a safety valve to relieve the South of the negro and the slavery question. He argued that climatic and other favorable conditions would attract the negro and he would pass into Texas, thence into Mexico, where his color would be no bar to his education and prosperity. The ambassadors from Texas solicited his bust to adorn the capitol of the State.

In the great war waged by Andrew Jackson against the Bank of the United States, Walker stood with the President and ably advocated the Independent Treasury Bill, which was but a corollary of the overthrow of the bank. That bill, in short, was for the keeping of government monies by the government's own officers, a system which still prevails. It was charged and believed by many that Mr. Walker inspired the veto by President Tyler of the bill rechartering the bank. Certain it is that Walker had the ear of Mr. Tyler, though many things were charged to his prolific brain which he did not do.

At the Democratic convention that nominated Polk, Walker was instrumental in getting the two-thirds rule adopted and for his successful service in getting Polk nominated General. He wanted the treasury portfolio, and elected he was slated for Attorney and brought such influence to bear that the

pre-arranged slate was broken, and he was named for that place and became one of the greatest and most efficient financiers the government has ever known. His career as Secretary of the Treasury marks an epoch in the management and direction of the nation's revenues. In that administration Walker and Secretary of State Marcy were constant antagonists, and they overshadowed the President and the remainder of the cabinet. Walker's able and elaborate treasury reports so won the attention of the English government that they were ordered printed at the public expense for the instruction of English political economists. His low tariff views were doubtless never unattractive to British statesmen. In preparing these great reports it is said he often worked literally all night surrounded by clerks and helpers, eating a scanty meal in his office and refusing to go home.

He was the author of the Tariff Bill of 1846, so often praised, which became the model system of tariff for revenue. He was also the originator of the warehousing system which was adopted the same year and which greatly enlarged and facilitated trade with other nations. When he made his great report on the warehousing system as recommended by him on Feb. 22, 1847, ten thousand copies in addition to the usual numbers were ordered to be printed.

When Franklin Pierce was elected President he offered Mr. Walker the Chinese mission with the title of "Commissioner," and in response to a request by the cabinet he prepared a statement as to the needs and policy of this government in that part of the globe. That paper found its way into the hands of the British government, where it was pronounced the most statesmanlike document ever penned on the Chinese question. Private reasons prevented his departure for China.

Mr. Walker aspired to be Buchanan's Secretary of State, and the Senate petitioned the

bachelor President to give him the first place at his counsel table, but Buchanan made him governor of Kansas, and thereby dug his political grave. When speaking of his appointment *Harper's Weekly* of that date said: "Mr. Walker may, in fact, be regarded as the foster father of Texas; may he be equally fortunate with Kansas."

As governor of Kansas he prepared and read his inaugural at Lecompton. He stated that the President and cabinet concurred with him in his opinion that the actual and *bona fide* residents of Kansas by a fair and regular vote unaffected by fraud and violence should be allowed to form a constitution. Among other things he thought the climate of Kansas unfavorable to slavery. McLean, a pro-slavery leader, cried out, "and do you come to rule over us, you, a miserable pigmy like you. You came here with your ears erect, and you will leave with your tail between your legs, Walker; we have unmade governors before, and I tell you we can unmake governors again. Has Buchanan sent you to Lecompton to defy us? Are these your instructions? Look out and let your master at Washington look out, too. Remember." "A hell of a governor he is," shouted another.

Governor Walker and Secretary Stanton threw out the returns of election of certain towns, and one of the candidates defeated thereby attempted to get his credentials by force. Other outrages disturbed and excited the governor. As recounted by State Historian Spring, he armed himself with a pepper box pistol and began a tour of abjuration. "Let us go and see the Bengal tiger," said he to Stanton. He visited the drinking saloons and political dens and hiding places of Lecompton, and poured forth upon the heads of the cowering offenders such a tirade of cursing, abuse, and denunciation as was never heard there before. Whether the adventure produced ridicule or fear is not known. His presidential aspira-

tions were killed to the roots. Both sides of that awful controversy spewed him out of their mouths. He pleased no one. No governor who attempted to do right could please many in that frightful day.

During the early part of the civil war, when the finances of the Federal government were in great straits, two points were sought to be gained in Europe; the credit of the United States was to be strengthened, and the financial resources of the Confederate States were to be discredited and European loans by the latter prevented. Walker was the best known of all American statesmen in Europe. Secretary Seward suggested his name as financial agent, and thither he was sent. He did his work well. He went about with great retinues at his heels. There he spent, as is believed, a large part of his fortune. He was so embittered toward the Republican party that he would accept no salary, only his expenses. He negotiated a loan for the Federal government of \$250,000,000 and prevented the Confederate States from making a loan at all. No more effectual work was done to save the Union. At one stroke he both fed the Union and starved the Confederate armies.

It might not be uninteresting to note that at this time he was engaged in a literary venture, being one of the owners and the editors of the *Continental Monthly* of New York. He published the magazine as the mouth-piece of the political and financial views of himself and others. Disowned by his own party and refusing to join the Republicans he sought vindication in the public prints. This magazine was edited during the eighteen months Mr. Walker was in Europe by his sister, Mrs. Cook, though it was not known that a woman was at the helm at the time.

Mr. Walker with his many other accomplishments was a great lawyer. During his whole life, when diverted for a time, as he so often was by public office, he at once re-

turned to the practice of his profession when free to do so. Its atmosphere suited him. The fecundity of his intellect never showed to better effect than when practising at the bar. His resourcefulness, his nimbleness of mind, his great stores of general knowledge, his energy, his pugnacity, altogether made him a great advocate. His selection by President Polk as Attorney General is adequate proof, if any were needed, of his established reputation. He was profound, both in the knowledge of the law as a science, and in its application to the solution of disputes among men. His practice before the Supreme Court of the United States was always considerable. On one occasion he took exception to the argument of Attorney General Jerry S. Black before that court when the case of the "New Almaden Quicksilver Mine Case" was up, and challenged him. Nothing came of it, but it is said that he acquired an interest in that mine as a fee

which he sold for \$500,000. He was always a great speculator.

He died in Washington in 1869, somewhat broken in fortune. His country's internal strife had thoroughly wrecked his political fortunes. A leading Democrat with somewhat despotic power for many years, he abandoned his own party and was abandoned by it. He supported Mr. Lincoln at the time of his re-election for his country's good as he saw it, but he never espoused nor endorsed the leading tenets of the Republican party, and disowned allegiance to it. Amidst the warring elements of partizan strife he was a stranger in a strange land, and so he died. His memory has never been cherished as his works deserve. The children of the State which so honored him, and which he so honored, barely know his name. His fame will be fairer when all trace of war memories is gone, and when his deeds are viewed in the dry light of history.

THE LAW STUDENT'S DREAM.

By C. H. D.

Audita Querela, a gay Spanish maiden,
To young Scire Facias quite lost her heart;
Said she: 'Tho' you're poor, you may *habeas corpus*,
I am yours in fee simple till death doth us part."

But her uncle, gruff Venire Facias de Novo,
To love's ardent pleading made haste to demur;
He said 'twas a case of mis joinder of parties,
That none but a noble could ever have her.

Qua re ejecit the youth from the freehold,
Vi et armis he kicked him the length of the hall;
He did not have time to replevy his top coat,
Nor could he *respondcat ouster* at all.

But true love can never be barred or non-suited.
He met her *per nocte* at de Novo's place;
As demandants her lips did not traverse his kisses,
As tenant he held her in loving embrace.

At last he said softly: "Audita, darling,
I fear in repleader we may find no hope,
It is up to your Scire that *excat regno*,—
Add *similiter*, loved one, and let us elope."

To this the fair maid pleaded naught in abatement,
Though her blushes gave color to cheeks, rosy red;
She filed no demurrer nor asked an imparlance,
But alleged a disclaimer and thus to him said:

"Though Uncle de Novo may damn with *mandamus*,
And ask *quo warranto* you take me away,
Absque hoc he is right to demand my appearance
I deliver you *seisin* for ever and eye."

Said he: "To my arms, Audita, Beloved One,
No writ of *distringas* shall keep us apart;
No other shall ever bring writ of ejectment
To oust you, my dear, from the close of my heart."

He urged her to flee, but the maiden *nil dicit*,
Her soul was possessed by divers alarms,
Until, fearing the uncle would come and bring *trover*,
Assumpsit the maid down the stairs in his arms.

From that *venue* the twain departed *instanter*
To pay for a license the requisite toll,
And when daylight on darkness enforced a continuance
Audita had ceased to be a *feme sole*.

In a neat little *messuage* they live, and are happy,
From the world all secluded, its cares and its sins,
Their joinder of issue has proved most successful,—
They are tenants in common of beautiful twins.

The one is named Profert (his pa will display him,
Most amiable youngster that man ever had),
And you can hear Oyer without even craving,—
He always is bawling, his temper is bad.

MORAL.

The moral of this is to know well your pleading,
You must prove your *scien ter*, certain and sure;
If you do, the *exam* will descend on you *molliter*,
If not you must suffer the *peine forte et dure*.

THE COURT OF EQUITY—A THEORY OF ITS JURISDICTION.

BY COLIN P. CAMPBELL.

OF the three departments of government—legislative, executive and judicial—it is our purpose to deal with only the last. This may be roughly defined as that function in government which adjudges concerning the acts of those within the territory of the State or within the scope of its sovereignty, and declares the rights and wrongs of those within its authority. The judiciary might be defined as the power to adjudge violations of law and fix the result to the violator: but this definition would mislead, and I purposely abstain from it for this reason. There is no court or judicial body, and there never was, that did not do more and the scope of the action of which was not broader than merely to adjudge violations of legislative declarations. True, the definition under criticism implies more, but its first impression is as narrow as the thought with which it has been credited. Courts everywhere and all the time are to a greater or a lesser degree recognizing other rules, the ancient common law, the more modern contributions to it, and more than these, even the dictates of natural reason and justice.

The early, as well as the more modern, history of this department shows the truth of the discrimination, and the verity of the proposition that the purpose of the court is not altogether to deal with violations of legislative ordinances, but covers the broader field occupied by that code, the precepts of which lie at the basis of human association, are said to exist in the very nature of things, and which, for lack of a better name, we call rules of morality, justice or common honesty.

The judicial power of the sovereign is exhibited in ancient times among the Egyptians, the Assyrians and the Jews. Very

early we find the Egyptian king sending a case of conspiracy to the judges to be tried¹; likewise, in 1014 B. C. King Solomon exhibited the judicial power in adjudging the parentage and right to a child brought him claimed by two women.² A curious decision of a Chaldean judge shows, in a remarkable degree, how closely these early peoples clung to natural equity in their adjudications, indeed more than this, even to the extent of requiring generosity beyond fairness in business matters. The judgment was rendered in the reign of Hammurabi, who lived from about 1546 to 1520 B. C., and concerned four slaves, two male and two female, claimed by the suitors respectively. The judge divided the slaves, giving each suitor one male and each one female slave. The theory of the adjudication is expressed in these words: "Brother to brother should be loving, brother from brother should not turn, should not quarrel over the whole. A brother to a brother should be generous, the whole he should not have."³

Two facts are evident from the history of these ancient peoples. One, that judicial power centred in the sovereign who either exercised it in person or delegated it to judges and magistrates.⁴ Another, that the main rules for decision were those dictated by wisdom, righteousness and justice.⁵ These statements are not intended to be understood as indicating that there were no general laws or customs prevalent among the peoples spoken of; on the contrary there were very

¹ Records of the Past, first series, vol. VIII, p. 57.

² Bible, I Kings iii, 16-28.

³ Records of the Past, first series, vol. V, p. 109-110.

⁴ I Samuel viii, 56; II Chronicles xix, 55; Exodus xviii, 25.

⁵ Bible, Deut. i, 16, 17; xvi, 19, 20.

many of these, and they were strictly observed; and several of them, it is believed, were capable of execution without the intervention of the ordinary tribunals, as various Jewish laws.¹

The same simplicity is observable among the early European nations. The fewness of general laws and the adherence to foundational principles of justice and morality; even down to Saxon times,² these precepts were observed as foundational.

So also among the Germanic tribes,³ and among the early inhabitants of England,⁴ the king or chief was the judge in controversies between his subjects. In this task he had assistants among the Germans,⁵ and at the time of Bracton in England⁶ the king might—and did—have assistants. In Britain the king was conceded to the fountain of justice and honor.⁷

From these delegations of authority in England, and from the king's custom of calling councillors to his assistance in judicial matters, arose the system of courts which is in the main followed to-day among English speaking peoples. The history of the common law courts, so called, it is not our purpose, nor is it essential, to enter.

The king still retained a measure of judicial power even after the portion had been delegated to the common law courts, and he still exercised jurisdiction in special cases, either to temper the rigor of the law or to extend it in order that complete justice might be done.

The monarchical authority to dispense with the law, to pardon, and to compel the doing of justice and right in particular cases,

¹ Bible, Leviticus xx, xxiv, 17; II Samuel xiv, 4-17; John viii, 3-11.

² Campbell's Lives of the Chancellors, vol. I, p. 32 (Note); Sullivan's Lectures, I.

³ Tacitus, De Mor Ger., ch. 7, 12, 14.

⁴ History of Institutions, Maine, p. 35.

⁵ Sullivan's Lectures, IV.

⁶ Bracton, De Legibus, etc., II, ch. 9, 107 b; ch. 10, fol. 108, V; ch. 15, fol. 412, 1, 2, 3.

⁷ *Id.*

is a prerogative of very ancient origin. It does not need the citation of historical facts to show its existence among the Western Asiatic absolute monarchies, and in the code of Edgar (959-975) there was a provision that the mitigation of the law, if too heavy, might be sought from the king. Still more extensively was this prerogative recognized by the Burgundians with whom the king had authority to solve ambiguities in the law and to interfere when a case arose requiring a remedy, but as to which the written law was silent. His duty was to apply equitable rules in the decision of such cases. Mr. Spence observes, after reciting this paragraph, that the prerogative in each nation is of imperial origin. This is undoubtedly the secondary source, but the ultimate fact is, that this prerogative has been exercised by kings in all ages and is associated with sovereignty itself.⁸

In England the Select Council, originally of small consequence among the Saxons, was continued by the Normans as a court of justice. Its chief business officer was the chancellor, who kept its records and issued its writs. Causes both of a civil and a criminal nature were heard by it, and if there appeared to be adequate relief in the ordinary tribunals, the cause was sent to the one of these in which it appropriately belonged, but if the resources of these were inadequate to the situation the answer was, the king will consider, or, a remedy will be provided.⁹ The decisions of the council, like those of the subsequent court of chancery, were based upon principles of equity and general law, or were *per aequo et bono*.¹⁰

The office of chancellor is one of high antiquity. In early Roman imperial history he kept the latticed doors or *cancelli* leading to the imperial presence chamber. The

⁸ Spence, Eq. Jur. I, * 77.

⁹ Spence, Eq. Jur. I, * 328-330; Reeves' Hist. Eng. Law (Finlason), III, 155, 156.

¹⁰ Reeves' Hist. Eng. Law (Finlason), I, 283.

chancellor, however, gradually absorbed more administrative power and in the Roman Empire became a scribe and secretary, subsequently came to receive the petitions addressed to the throne, and issued the imperial writs or mandates.¹ In France, as early as 850 A. D., the chancellor was the head of the judiciary presiding at the king's council and in the sovereign courts.² There has been a chancellor in England since very early times. The exact date when the first chancellor was appointed is conjectural, different authors assigning different dates;³ however, he exercised but little judicial power until the later Plantagenets and the Tudors,⁴ and did not obtain the first rank until Richard I.⁵ From this time on he gradually absorbed the remnant of the sovereign's judicial power, including that of the Select Council, the early parliament and the so-called prerogative of grace, which was the king's authority to interfere specially in causes of particular hardship; and in 1348, in the reign of Edward III., the king, by special ordinance, directed that all matters which were of grace be heard by the chancellor and the lord keeper of the Privy Seal.⁶ The importance of the chancery increased still more after this, by the introduction of the writ of *subpœna*, and the activity in case of trust.

The history of the chancery office has been examined, the source from which its judicial power came has been noted. We have seen the importance, through all time, of the judicial function in government, its connection with the royal personage, the intimacy of its relation with the basic principles of natural justice, equity, honesty, generosity and good conscience; the transference of this judicial power in England first

¹ Spence, Eq. Jur. I, * 78.

² Woodeson's Lectures, vol. I, Lect. VI; Spence, Eq. Jur. I, * 79.

³ Campbell's Lives of the Chancellors, vol. I, pp. 3, 29.

⁴ Spence Eq. Jur. I, * 78.

⁵ Spence, Eq. Jur. I, * 117.

⁶ Spence, Eq. Jur. I, * 337; Campbell's Lives of the Chancellors, I, 206 (Note); Story, Eq. I, 48.

to the common law courts and finally the grant of the prerogative of grace to the chancellor.

It is also important to the inquiry to examine the history of the English common law. All nations have been more or less governed by custom and usage. This is true even to-day and even though the custom or usage is not enforced by governmental authority. Usage is largely responsible for the English common law. Its foundation is, the notions of right, justice and honesty, and the conditions, general ideas and necessities of the early inhabitants of England. Avowedly and actually the common law is constructed on the broadest principles of justice, equity and sound reason. So long as it was in its formative state, it was in the truest sense *lex non scripta*; readily susceptible to alteration in consonance with its fundamental principles, it then kept pace with the moral and intellectual development of the English people. However, about the thirteenth century the common law began to crystallize. Respect for decisions, the recognition of the rule *stare decisis*, the compilation of reports of cases and the composition of treatises is responsible for this decrease in elasticity.

When the common law had ceased to be a living, growing system, the continuation of British development left it behind. Within a generation a supplemental system was demanded. The parliament recognized the lack and endeavored to meet the situation, in the statute of 13th Edward I., called of Westminster, the second making provision for like writs in similar cases,⁷ but failed. From the necessities of this condition of affairs came the court of chancery. This situation enormously increased the number of cases calling for the exercise of the prerogative of grace, and so magnified the equitable jurisdiction of the English chancellor.

⁷ Spence, Eq. Jur. I, * 239, 322; Pollock and Maitland, Hist. Eng. Law before Edward I., vol. I, p. 175.

The purpose, then, of the conference of the prerogative of grace upon the chancellor was to preserve the usefulness of English institutions and English law. By the application of the same principles and notions that formed the common law, the dictates of equity and conscience, he sought to keep Anglo-Saxon jurisprudence abreast of the growth of the Anglo-Saxon conscience, morals, notions of right and justice and institutions.

Where, then, is the line of demarcation between the chancery as a court of equity, and the parliament as a legislative body, if the chancellor may meet new situations with new forms of relief? Where does the judicial function end? Where does the legislative power begin? That this question presents grave difficulty is true, but there is one way to simplify it. That method concedes what is the fact, although practically ignored by our courts in very many cases at the present time, namely: that there are rules which actually govern society to-day, the principles of common honesty, equity and good conscience, without the exact lines of legislative or judicial declaration. The object in view, when the equitable jurisdiction of the chancellor was established was to provide a tribunal where the hardship of particular cases might be relieved; the purpose was not to provide general rules of law. This, then, is the province of the court of equity, to relieve in special cases not covered by the general rules of law, but which the principles of equity, honesty and good conscience demand should have a remedy. That is, to recognize and enforce principles which actually govern society in general, whether embodied in the so-called rules of law or not.

On the other hand, the task of the legislature is to frame general rules of police, of administration and of government; dealing with such common cases as are conveniently dealt with by broad rules. Not attempting

specialization but contenting itself with the enunciation of principles.

The argument for this equitable jurisdiction is first historical. The facts upon which it is based have been dwelt upon. The existence of judicial power in the king, the exercise of a portion of it as the prerogative of grace relieving in particular cases, and the delegation of this prerogative to the chancellor, have all been narrated.

The logic of the situation demands a step more. By the American statutes, equity or chancery powers are conferred on certain courts. These provisions must have intended the powers of the English chancellor in equity; no other construction is admissible; however, it may be contended that the power of the English chancellor was narrowed by later chancellors, but I ask by what right was this done? By what authority did Eldon, or Nottingham, or Hardwicke limit the power conferred by the royal grant? And if their jurisdiction was equal to limiting the class of cases of which equity may take cognizance, what prevents the extension of these limits by subsequent chancellors?

The second argument I base upon the necessities of government, and of this the first part is historical, for in all states some governmental power has existed to take cognizance of exactly such cases as were originally taken cognizance of in the equity court. It may be taken as axiomatic that no set of prohibitive or declaratory words which the ingenuity of legislatures or courts can devise will do justice in all cases or will provide for all situations. Hence, both the statutes and the opinions must some time fall short in future cases of that which the peculiar demand of the occasion requires. When this shall happen some power in government must stand in the breach and supply that which prevents the general rules meeting the immediate necessity, or the State falls short of the purpose of its creation. This power has been resident either in the king or some

officer constituted by him since time far beyond memory, and is an element in government essential in all states. Had the basic principle of the delegation to the chancellor been recognized, the too frequent expression of regret at the hardship of cases, and the inability to relieve would not exist; the railing of the masses at the lack of justice and at the number of cases remediless in the courts would be largely prevented; and our President would not be required to seek congressmen with sufficient backbone to legislate against monopolies.

There would be no danger here; men would be equally as cognizant of the law as now, for there is underlying the opinions, the views or the ideas of mankind a common conscience, common principles of right, of justice, and of equity. These are the practical rules of human conduct in the major portion of society's daily transactions. Why should the transgression of these principles, the violation of these rules so universally recognized, be without redress merely from the absence of a legislative or a judicial declaration? If this notion of *stare decisis* had not been prevailed against in the fifteenth century, frauds, breaches of trust, and the violation of contracts in which the award of money damages is not relief would be as remediless in our courts as are the numberless wrongs of which our courts refuse cognizance to-day, and *ubi jus ibi remedium* would be as impotent in Anglo-Saxon jurisprudence as the twentieth century construction actually makes it.

As to the chancery authority to dispense with positive law, the favorable argument is not so strong, and to say the least such authority should be sparingly exercised. This might be considered as part of the general power to do equity and yet no violation would be done the logic of American institutions or the notions of popular government; for even then the courts' authority would barely approach the absoluteness of the par-

doning power recognized by all as resident in the executive; but it may well be laid down that when one department has spoken the other governmental offices should be silent, unless the case is one calling for the application of fundamental principles.

Upon this basis and under this theory of the power of courts of equity, precedents would be considered advisory to be applied judiciously under a prudent view of the rule *stare decisis*, and the decisions of three centuries past, whether suited to the present moral or intellectual stature of the race or not, would not be applied to the mutation of this development. Then the jurisprudence of the Anglo-Saxon would keep pace with the development of his science with the progress of his institutions, the enlargement of his horizon, the extension of his education, and with the broadening of his views of morals of right and of equity.

Do these thoughts violate the settled theories by which the maxim "every right has a remedy" is construed? They can do no greater violence to the views of the American jurist or practitioner, be he ever so bound by precedent, than was done the narrow conceptions of the rule *stare decisis* entertained by his English brethren, when the trust was first recognized or the defence of fraud was first entertained.

Traced directly from these models, and with these examples before us, how can it be concluded otherwise than that jurisdiction of the chancellor is equal to righting any wrong irremediable at law, that was the prerogative of the ancient king and the modern Cadi. Why should civilized nations suffer wrongs to go unredressed more than savages? Are our courts inferior to those of our ancestors, or the jurisprudence of the twentieth century beneath that of the tenth, that we should deny redress for want of precedent, or prostitute the purposes of government at the behest of formalism?

Regarding, then, the example of history,

the lesson of principle, and the doctrine of necessity, it cannot be affirmed that the jurisdiction of the Court of Equity is narrower

than the measure of human affairs or the redress of all wrongs which human ingenuity is virile enough to devise.

POLITENESS ON THE BENCH.

BY JOHN DEMORGAN.

FRENCH judges sometimes carry their politeness to the extreme, making its display really amusing to the American or Englishman who happens to be in Court.

Quite recently a *Mdlle. Sombreuil* was tried at the Correctional Tribunal in Paris for having for the sixth time returned to France in defiance of a decree of expulsion which affected her. The lady was possessed of decided spirit, and after she had violently protested against her arrest, breaking a parasol over the head of the *gendarme*, and exhausted a comprehensive vocabulary of abuse against everybody—from the chiefs of the government down to the *huissiers* of the Court—who had anything to do with it, she avowed her fixed intent not to be tried that day at all.

The judge politely suggested Friday "if entirely convenient to *Mademoiselle*."

"Friday!" the fair exile almost shrieked, "Friday! Certainly not. Friday is my unlucky day."

The judge's face showed his sympathy and he expressed the very great regret he felt at the "melancholy coincidence," he really did not "wish to place *Mademoiselle* in so very uncomfortable a position as being tried on an unlucky day; would Tuesday do?" No, Tuesday wouldn't do. *Mdlle. Sombreuil* declared that Tuesday was the *fête* day of her revered aunt, and it was unnatural and insupportable that such an interesting event

should be associated with criminal proceedings in a court of law.

The judge again expressed his regret and agreed that it would never do for the trial to take place on a *fête* day of her aunt, so he asked if Wednesday would be convenient. After considerable discussion the accused agreed to attend and be tried on Wednesday, whereupon the judge thanked her for complying and assured her of his great appreciation of her graciousness.

Mr. D'Eyncourt, a police magistrate in London, a few years since wrote to an accused whose case had been adjourned, asking him to name a day when it would be convenient for him to attend for trial, and in another case where points of law had led to a postponement of sentence, he asked the accused, out on bail, if it would be acceptable to him to be sentenced on a certain day.

Mr. Justice Vaughan Williams used to have a big bouquet of roses at his side, and in the afternoon would daintily sip a cup of tea while listening to the evidence. His face would beam with sympathy when any point was made in favor of the accused, and it was often said that he thought more of the "prisoner at the bar" than of honest witnesses who appeared for the prosecution. On one occasion he began sentencing a prisoner by saying that he was really grieved at having to fulfill so unpleasant a duty, but hoped the prisoner would forgive him.

EDUCATION FOR THE ENGLISH BAR IN THE INNS OF COURT.

BY JOHN PHILIP HILL.

FROM the top of a bus, wedged in the press of traffic on the Strand, with the gray walls of the Courts of Justice towering above, London seems a mass of bricks and stone. Everything and everybody pushes. Even the houses crowd, and one sees churches apparently forced from some narrow lane into the middle of the street. The air is full of smoke and the noise of the crowd. The rush of a great city is all about, and one thinks of the quiet of the fields as an impossible dream. Yet here, in the very core of the most crowded of cities, in this desert of jumbled houses and lanes, are three fair patches of green.

Between the Strand and the Thames embankment, facing the river, are the beautiful gardens of the Temple. Between the Strand and High Holborn the fields of Lincoln's Inn are broad and fair. Just off High Holborn the very elms that Bacon, the Lord Chancellor, planted in the days of Elizabeth, still border the long walks of Gray's Inn. In all London there cannot be found three more inviting spots. Here one may see rare old carvings, and paintings, and curious bits of architecture, and about the quaint halls and churches and chambers of these ancient closes, cluster rich associations of men who made English history, and moulded English law.

In the gardens of the Temple, as Shakespeare tells us in *Henry IV.*, were plucked the roses that gathered the adherents of York and Lancaster in deadly conflict. In Lincoln's Inn fields, Lord William Russell, the "patriot," was executed for alleged complicity in the Rye House plot. Goldsmith and Fielding and Johnson lived in these precincts, and in the Temple, once the abode of the proud knights that warred for the Holy Sepulchre, have feasted Queen Elizabeth and

the great men of England. The Inns abound with literary and historic associations, but for the lawyer their chief interest is due to their having been the nurseries of the common law of England. For the student of the law the great fact is that here Blackstone and Mansfield and Erskine delved into the mysteries of the Year Books; that, as Thackeray says in *Pendennis*, "yonder Eldon lived—up this side Coke mused upon Lyttleton; here Chitty toiled,—here Barnwell and Alderson joined their famous labors,—here Byles composed his great work upon Bills, and Smith compiled his immortal leading cases."

In an article in *13 Harvard Law Review*, Dicey, the distinguished English scholar, says that the student at the Harvard Law School is "to be compared with a student of an Inn of Court, who is eating his terms and beginning to read in Chambers." For one not acquainted with the English system of legal education this comparison must prove somewhat puzzling. He wonders why the English student eats his terms, and in what sort of an Inn he does it, and how thereby he fattens in legal lore. In this paper I shall endeavor to answer some of these queries. First, I shall give a short account of the history, housing and constitution of the Inns of Court. I shall then sketch briefly the course of a student in an Inn of Court in the days of Coke, and thereafter attempt to show the place the Inns hold in the scheme of education for the English Bar at the present time.

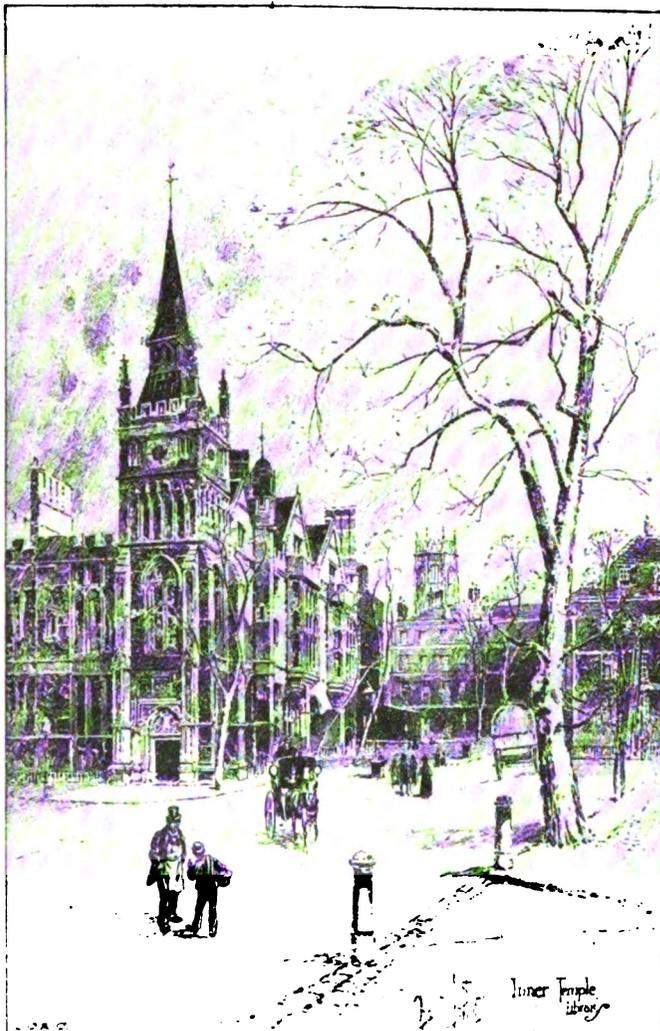
The late Justice Maule, in response to a question as to the essentials for success at the bar, is reported to have replied: "There are but three things necessary,—the first is high animal spirits; the second is high animal spirits, and the third is high animal spirits. If, in addition, a young man will take the trouble to read a little law, I do not think it

will materially impede his professional progress.”

In the time of Elizabeth this certainly would not have expressed the feeling of the leaders of the bar, for at that time the system

since 1852 there has been a great increase in interest, and a concerted effort for improvement.

The Inns of Court are today the same as those that Lord Coke, in the preface to his



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of education was most thorough and perfectly developed. Toward the latter part of the 17th century legal training began to be neglected. At present the system is poor as compared with what it formerly was, but

reports, called the “four famous and renowned Colleges or Houses of Court”—the Inner Temple, Gray’s Inn, Lincoln’s Inn, and the Middle Temple.

“These Inns are not corporations in the

¹ The illustrations in this article are from those by Herbert Railton, in *The Inns of Court and Chancery*, by W. J. Loftie. For other illustrations of the Inns of Court see THE GREEN BAG, Vol. IV, No. 8, August, 1892; Vol. VI, Nos. 9 and 10, September and October, 1894; Vol. XIV, No. 10, October, 1902.

legal and popular sense of the term. They are mere voluntary societies, self-constituted, self-governed, and possessing by prescription the right of investing their members with the privilege of audience in the courts of the Kingdom." (*New Guide to the Bar*, by A. M. and LL. B., p. 67) "The original institution of the Inns of Court," says Lord Mansfield in *Hart's Case* (1 Doug. 353) "nowhere precisely appears." The Magna Charta contains a clause by which the Common Pleas were fixed at Westminster instead of following the King's Court, and to this clause the coming of the professors of law to London, and the rise of the Inns of Court are attributed. Before the time of King John the judges and lawyers had been for the most part in holy orders. In the same year the Magna Charta was granted, the Church, by the fourth Council of Lateran (1216), forbade its clergy from practising in secular courts, but it was not till the end of the reign of Henry III. that ecclesiastics ceased to practise. The place of the clergy was filled by "introducing laymen into the different companies or fellowships of learning connected with the law." In this manner the societies of the Inns of Court are supposed to have originated. (G. Pitt-Lewis, K. C., *History of the Temple*). Though composed thereafter of laymen, they kept in some relation with the Church, and retained many ecclesiastical customs. We find most of the societies housed on what were once church lands.

The order of the Knights Templars was dissolved by the Crown in 1313, and the Temple lands came into the hands of the Knights of St. John, who, in 1346, leased them to "certain lawyers." Both the Societies of the Inner and the Middle Temple, so called because of the situation of the former just within the precincts of the old city, claim to be the original society. It is possible that both existed in 1346, for at the time of the lease by the Knights of St. John there is evidence that another society of lawyers were

occupying part of the Temple. The Temple property, having passed to the Crown at the dissolution of the religious houses by Henry VIII. (1541), was, in 1609, declared the property of the corporations of the Inner and the Middle Temple. The origin of the societies of Lincoln's Inn and Gray's Inn was much the same, and subject to the same conjecture. They, like the societies of the Temple, took their present form in the time of Edward III.

The first connected description of the Inns of Court is given by Sir John Fortesque, Chancellor of Henry VI. (1422-1461), who spoke of them in his Panegyric of the Laws of England. At that time the four great Inns were fed by ten lesser Inns called the Inns of Chancery. It is said they were so called because in early times the clerks resided therein, whose duty it was to copy the writs in the Chancery. These Inns of Chancery played an important part in the preparatory training of the students, but were at last entirely absorbed by the greater Inns, and at present have no independent existence.

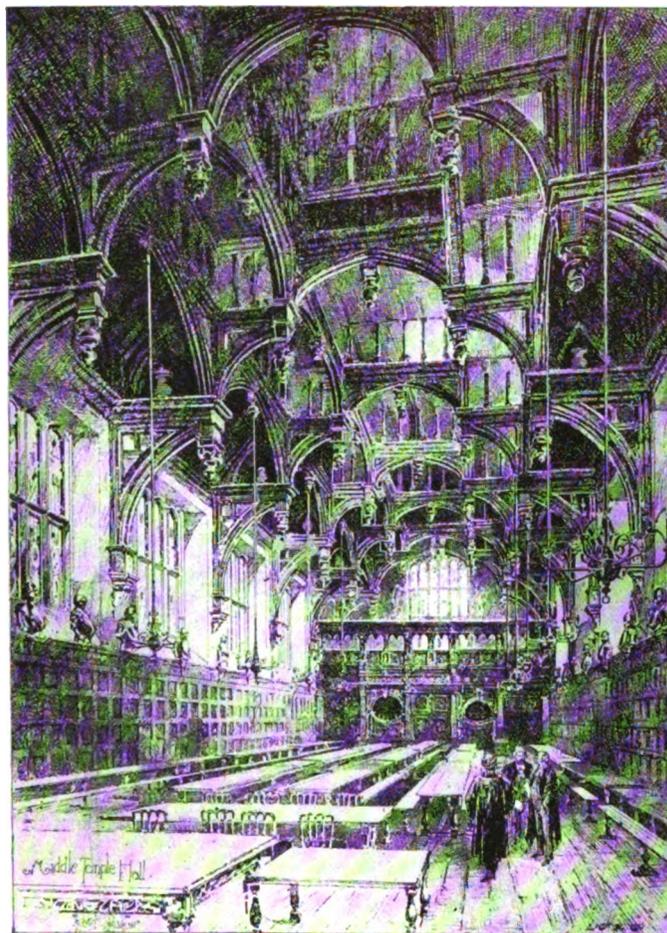
Fortesque has little to say of the studies pursued at the Inns, save of the attendance on pleadings in the nearby King's Court. He remarks that the expenses of the Inns were great, and the members were mostly gentlemen of means, who kept remarkably good order, their fear of expulsion from their Inn and separation from the fellowship of their own society being greater "than the fear of other criminals for prison and chains."

At this time the Inns of Court numbered about two hundred each, and the lesser Inns a hundred each. Fortesque records that the education was very general, and extended to singing and dancing, and to the Scriptures, and adds that the students lived in great content.

In the reign of Elizabeth, when Coke wrote of them, the Inns of Court attained their greatest renown. Their material welfare equalled their repute for learning. The Hall

of Gray's Inn was built in 1560, and that of the Middle Temple shortly thereafter. The latter was, and remains still, the finest of the Halls. Its Gothic roofing of dark oak, the quaintly-carved screen, the high windows of decorated glass, the heraldic emblems on the panelled walls, made a harmonious setting for

ways been in the hands of a board of the eminent older members of the bar, styled the Masters of the Bench, or simply the Benchers. They had, and still have, entire control of the studies and the discipline of the House, and meet in solemn parliament to admit or call members of their Inns to the



INTERIOR OF MIDDLE TEMPLE HALL.

the learned body of the Society. In the precincts of the Inns, free of the jurisdiction of the city, the students and barristers lived in the old chambers, discussed cases in the gardens, and, solemnly robed, dined together in the ancient halls.

The government of the Inns has al-

Bar. In the exercise of this power they are practically supreme, for though now there may be an appeal from their decision to the judges of the King's Bench Division, no appeal has ever been upheld. They may also disbar members for any cause. The Benchers are elected by the Societies, and their

number has never been strictly limited. At present there are sixty-two Benchers of the Middle Temple, among whom is the King, who was elected a member while he was yet Prince of Wales. The other Inns have, some more, and some less, benchers.

According to a recent legal writer, (*New Guide to the Bar*, p. 69), the benefits of Bencherhood at present consist chiefly of the following points: "To dine on a dias off su-

is elected Chairman or Treasurer, and as head of the Society maintains somewhat autocratic sway. The government and constitution of the Inns has always been practically the same.

The details of instruction in Coke's time varied in each of the four Inns of Court and their dependent Inns of Chancery, but the essential features were the same. The year was divided, as at present, into four terms,



GRAY'S INN HALL.

perior and more numerous courses of viands and vintages; to enjoy these dinners and lunches practically free of expense; to have the run of a luxurious set of club rooms called the Parliament Chambers; to take part in legislation for the Society, and to have the highest places in the synagogue and elsewhere." In the days of Coke these privileges were not enjoyed without some arduous duties.

Every year the succeeding Senior Bencher

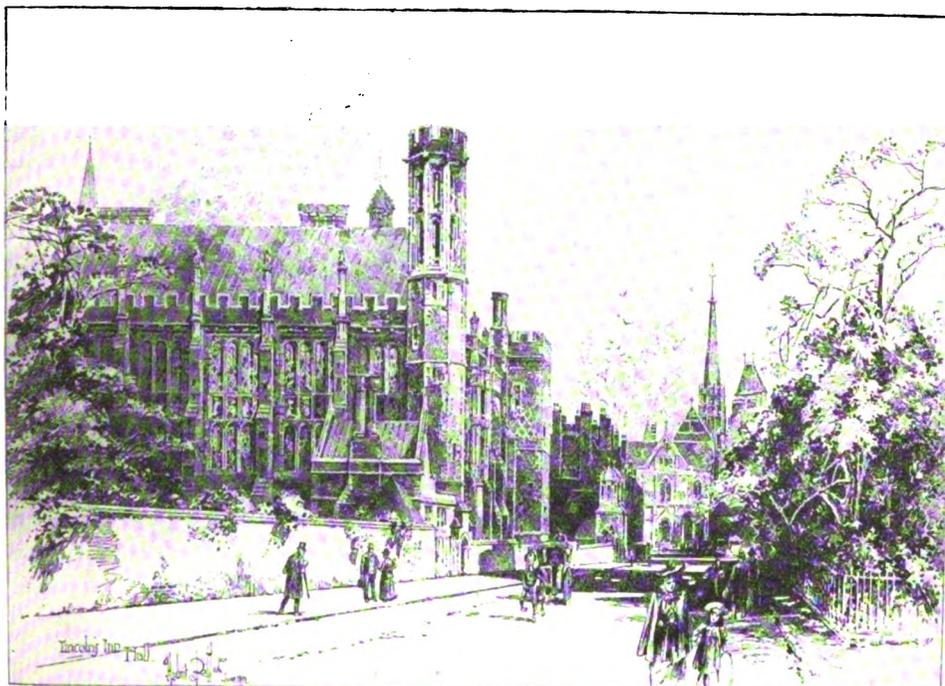
varying from one to three months in duration. They were called Hilary, Easter, Trinity and Michaelmas. Between these terms came the vacations, and in both of them the work of the students was carried on. In term time the studies seem to have been of a more formal nature, for in the vacations the Benchers were absent and the Inns were directed by the older barristers.

Very little appears of regular lectures, apart from the exercises of the Readers, who

lectured to the Societies annually. The students learned their law from their private reading, and participation in the moot cases. The most important factor in their training came from these moots, of which there were many kinds. The Inns of Court were great legal societies rather than schools in the modern sense. The youngest students, the new-fledged barristers, and the older members of the profession, the Benchers, all participated,

library of Gray's Inn, and moots held in the chambers of the barristers. In the last case they were designated "bolts," and took the form of question-putting more than formal argument. A kind of case system seems to have flourished. The two most important kinds of moots were those held in the Inns of Chancery, and those of the Inns of Court.

The former considered simple questions, and were participated in by the students of



LINCOLN'S INN HALL.

though with due regard to seniority, in the conduct of the moots, and together disputed legal points. A distinct legal atmosphere at all times permeated the Inns. Questions emanating from the Bench tables passed through all the Hall, and were discussed by the barristers and students over their ale, and then were returned to the Benchers for decision.

There were moots held in the ancient Chapel of the Temple, moots held in the

the Inns of Chancery, who were as yet trained only in the rudiments of the law. These moots were in charge of the utter barristers of the Inns of Court, and were modelled after those held in the Societies to which the barristers belonged.

Mooting in the Inns of Court was one of the most important of the duties of the members, even after they had received their call to the bar. In the Middle Temple during term time all the utter barristers had to per-

form several assignments of moots, each consisting of three or four moots or exercises.

These moots were performed at the various Inns at different times. Some came in the afternoons, but the favorite time was in the evening at meal time in the presence of the whole house. Often long cases, begun in the library, were completed in the Hall. In these cases all grades of the Inn took part. The two barristers who were assigned to the case prepared the pleadings, which were orally recited by two of the students. These cases were usually made up by the barristers, and contained two questions, which, after the barristers had argued, were reargued by some of the Benchers. The members of the Inns who had not received their call to the bar took part in these moots only in the pleadings, but were trained in the lesser moots of the Inns of Court and Chancery. The moots were conducted with ceremony, and there were forfeits provided for any neglect by the parties.

Next in importance for the actual training derived by the students, but held to be the great events of the year, were the readings, which, with the moots formed the principal modes of instruction. There were readers in the Inns of Chancery as well as in the Inns of Court. In the former they were chosen from lists prepared by the Benchers of the Inns of Court from the barristers of about eight years' standing. These readers had charge of the exercises of the Inns of Chancery, and proceeded on much the same plan as the Readers in the greater Inns.

In each of the Inns of Court two Readers were chosen yearly by the Benchers from among the oldest of the barristers. In the Middle Temple the four oldest barristers were called the cupboard men, and were of quite long standing at the bar. After the Readers were elected they attended at the next feast day of All Saints, and with great ceremony met the judges and sergeants, and feasted them in the Hall of the Inn. The

Readers were expected to take a leading part in the conduct of the moots, but the readings themselves, which came once for each of the Readers in the year, were their chief duty.

The readings were attended with much form and solemnity. The Reader usually selected as his topic some statute, and proceeded, during three weeks, to point out its meaning and to draw learned analogies. His theses were supplemented and supported by carefully selected authorities, and each day, after the reading, these cases were duly argued by certain of the barristers who were nominated by the Reader as assistants. Lord Bacon, when a Reader of Gray's Inn, delivered a weighty discourse on the Statute of Uses, and Lord Coke read on a subject of equal possibilities. Blackstone was a Reader at the Middle Temple, as were others well known as judges and advocates.

The office of Reader was one of great dignity and attended by burdensome expenses. During the time of his service he practically kept open house at his Inn, feasting the nobles and judges and great men of the realm. It was a rule of the Benchers at one time that no Reader could use less than fifteen bucks at his feasts, and generally this number was greatly exceeded, and augmented by red doe. There were savory pasties of game, and other equally toothsome viands, and vast quantities of ale and wine were consumed. The Revels incident to the readings were carried out with great merriment and elaboration, the whole society zealously joining in the treading of measures and the drinking of copious bumpers of a mixed wine called hypocras.

During one of the Revels a play of Shakespeare's was produced in the Hall of the Middle Temple, and masques were frequently performed by members of the Societies. In the genial times of King Charles II. the Revels became quite riotous and scandalized the soberer element. One old writer, after a min-

ute account of the doings of the Benchers, relates that the 100th Psalm having been sung, the seniors retired to the library, while the younger members of the Society dispersed themselves right joyfully in the Hall. Fancy a lecture in Bills and Notes on the

important requisite for success at the bar.

After the three weeks of the reading were over the Reader left for the vacation, and was escorted on the way in state by all the younger members of the Society, who gave him a great supper at parting. The Reader



INTERIOR OF LINCOLN'S INN HALL.

Negotiable Instruments Act followed by a Law School smoker, or a moot court meeting followed by numerous bottles, and you have the two sides of the old life of the Inns of Court. Men are much the same in all ages, and versatility has always been an

was then made a Master of the Bench, and exempted from moots. Readers of the Middle Temple were entitled to place their coats of arms on the panels of the Hall of their Inn, and by special grant of the sovereign were entitled to bear arms if possessing none.

The Readers possessed the right of call to the bar, concurrently with the Benchers, before the latter assumed that power exclusively.

In addition to these readings and moots the students carried on independent study, and thus grew into knowledge of the law. The old system tended to accustom them to the handling of cases, and thus had some of the merits of the method used in the Harvard Law School and other schools where the case system is used, with the additional training got from the oral arguments. The presence of the judges and sergeants, and the participation of the great men of the bar in the exercises of the Inns doubtless had some influence on the even development of the law. In course of time, however, interest decreased, and the training the Inns afforded in the last part of the 17th and the 18th centuries was poor.

While there was frequent intercourse between the members of the four Inns, it was mostly of a social nature. We hear of Lincoln's Inn as the "ancient ally and friend of the Middle Temple," and in 1422 the Steward of the former charged himself with the receipt of a cup certain members of his Inn had won in a drinking bout with members of the Middle Temple. But in the old days the four Inns were but loosely allied in their official capacities, and there was no one governing body that could be called a university in the sense in which the term is used at Oxford or Cambridge.

Of late years the renewed interest in legal education has caused the Inns of Court to associate. In 1852 the four Inns adopted consolidated regulations, and established a regular board of examiners, under the direction of a Council of Legal Education, composed of five Benchers from each Inn. This Council stands to the Inns in somewhat the relation of the University at Oxford or Cambridge to the colleges, and like the university dominates the policy of the Inns. The Regulations of the Council concern the admission

of students, their education and examination, the mode of keeping terms, calling to the bar, and the taking out of certificates to practise under the bar.

Unless a student has passed a public examination for a university, for a commission in the army, for the Indian Civil Service or their equivalent he must pass an examination in the English language, the Latin language, and English history given by the Board of Examiners. No attorney-at-law or clerk is eligible while being a clerk. The student, after passing the examination, and having his character certified by two barristers, becomes a member of one of the Inns of Court at the discretion of the Benchers, who can refuse admission to any one.

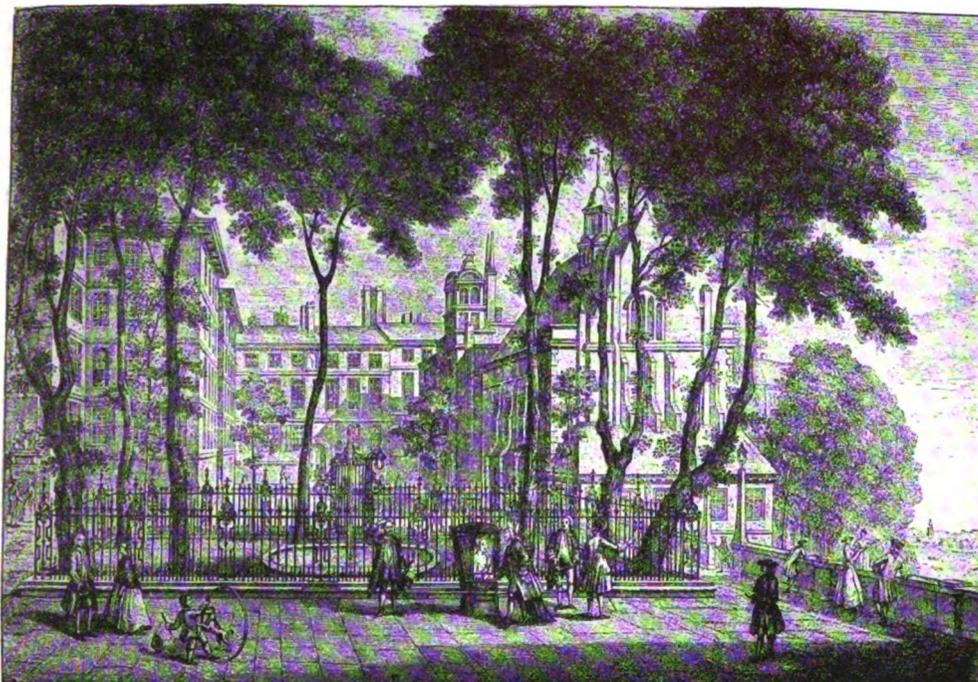
The modern methods of legal education lack the essential features of the old system. Formerly the Masters of the Inns participated in the exercises and required the work to be performed under their supervision. The relation of the members of the Societies was more intimate, and mutually stimulating. To-day the old position of Reader is honorary, and the moots have fallen into disuse. The present training of the Inns consists of inviting rather than requiring work. There are lectures by eminent men on Constitutional Law, Procedure, Equity, Civil Law, *etc.*, and the lecturers are called Readers. Their assistants are ready to quiz and suggest, but attendance on these lectures is not required. The chief concern of the Inns is that the student keep his terms properly, and pass the final examination given by the Board of Examiners. If these requirements are fulfilled the student is eligible for a call to the bar. He may gain the knowledge needed for the examinations in any way he pleases, and the Universities are giving excellent law lectures.

In order to keep or "eat his terms" it is only necessary that for six days during the term (at present three weeks for this purpose) the student dine in the Hall of his Inn. In

order to have this count he must be present at grace before dinner, and remain till the concluding grace has been said. If he be a University man he need be present at only three dinners in a term, and many men keep terms while attending the university. It would seem that aside from these meals the candidate for a call need never go near his Inn, and that absolutely no part of his train-

The examinations are of two grades,—the “pass” and the “honor” examinations, and cover jurisprudence, civil and international and English law. Passing the honor examinations entitles the student to seniority in the Inns of Court.

It usually takes three years before a student is called to the bar, and after the call he is supposed to read for at least two years



THE FOUNTAIN IN THE TEMPLE.

From an engraving, 1710.

ing need be obtained under its direction. The purpose of keeping terms is to give the student a chance to be seen by the members of the Inn before his name comes before the Benchers for a call.

In order to qualify for a call the applicant must be twenty-one years of age, have kept twelve terms, have passed the public examination, and have had his name “screened” or posted in his Inn for fourteen days in the term previous to his call.

more in chambers, beside attending court, before he goes into practice for himself. This reading in chambers is usually divided as follows,—six months with a conveyancer, six months with a special pleader, six months with a chancery barrister, and six months more with a barrister whose practice is in that subject which the student has selected as his specialty.

The old system, careful, thorough and eminently practical, has entirely passed away.

The Inns to-day, aside from their exclusive right of call to the bar, and the lectures they offer, do little in the way of legal training. They afford agreeable places for their members to dine, and historic chambers for their quarters. They are pleasant social centers, resembling somewhat the Bar Association in New York. There are tennis courts in the closes, flower shows in the gardens, and good music in the Temple Church. There is even a Rifle Corps of the Inns of Court, that George III., on hearing it was composed entirely of lawyers, named the "Devil's Own," but I fancy the legal atmosphere of the times of Lord Coke does not hover so thick over the old Chambers and Halls. With the moots have passed away the formal legal discussions that occupied the dinner hour. The English barrister of to-day may get the rudiments of his law from the lectures of his university or he may read or tutor in private if he chooses. He has not the benefit of the old exercises where the juniors and the ancients of the bar contended before him for their and his instruction. A descendant of one of the most famous of English judges, who recently visited Cambridge, is reported

to have said that there was little regular schooling to-day in the law in England. Dicey's article in the *Harvard Law Review* seems to show the same opinion. There is, however, an increasing interest in the matter, and since the Report of the Parliamentary Commission in 1854, many plans have been suggested to make the training of the Inns of Court more effective. It seems likely that in the near future there will be a more exacting and definite mode of study carried out under the auspices of the Council of Legal Education. In the constitution of a more thorough scheme of legal education there is much in the old system worthy of imitation.

The Inns of Court have been for centuries identified with the growth of the common law. Once they were esteemed the most renowned legal university in the world. It is to be hoped that they will resume their old standing; that the old spirit of eager, careful, interested study will once more pervade the ancient Halls and Chambers of what rare Ben Jonson called "the noblest nurseries of humanity and liberty, the Inns of Court."



THE WIT AND HUMOR OF VAGABONDS.

By JOSEPH M. SULLIVAN.

“THERE is no independence like that of impecuniosity.” As the ancient writer gracefully expresses it,—*cantabit vacuus coram latrone viator*,—the empty traveler will sing in the presence of the thief, so the vagabond stroller will laugh at the display of authority by mere judges and magistrates, and when cornered will use his ever-ready wit to extricate himself from whatever trap the officers of the law may set for him. The ingenuity and learning of the vagabond are well known. He can hold ready conversation with prince and pauper, philosopher and fool, and the brilliancy of his conversation never seems to dim, notwithstanding his hardships and dissipation. He can detect a soft spot or sympathetic straw in the composition of a judge quicker than the most astute lawyers.

I give herewith a few specimens of vagabond wit and humor for the entertainment of the reader:

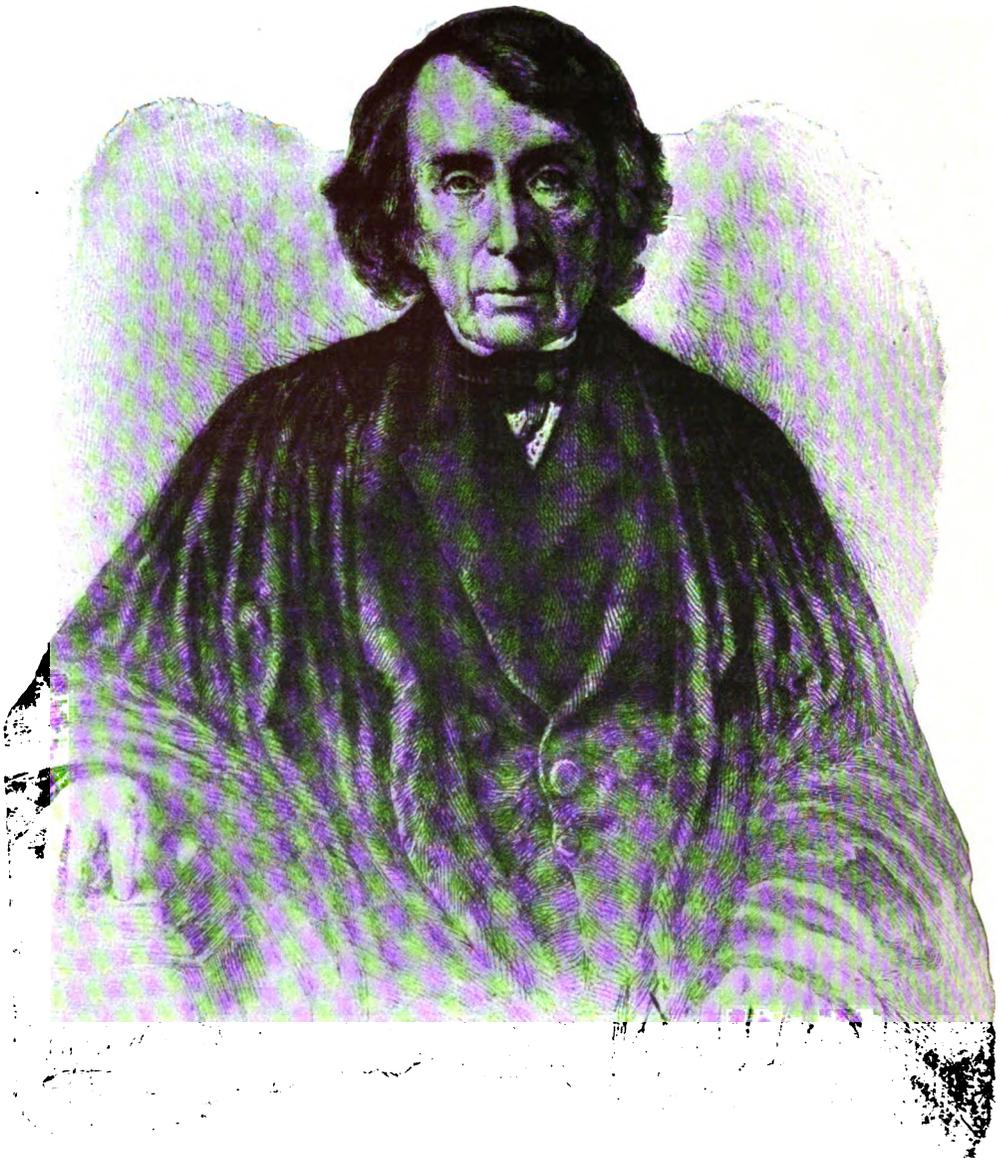
“What is your nativity?” asked the magistrate. “I ain’t got any, yir honor,” said the bleary-eyed vagrant; “the police took everything I had.”

Judge H——, who had been rather fast in his youth, took occasion one day after the jury had retired to ask a scamp what had become of all their former playmates. The rogue replied: “All hanged, my lord, ’cept you and me.”

When Brennan was confined in jail in Ireland on a charge of burglary, a banker, whose notes were not held in very high esteem in the community, paid him a visit, and sarcastically remarked that he was pleased to find him “at home.” Brennan quickly re-

plied: “My bankrupt caller, when everyone in the country refused your notes, I ‘took’ them.”

An itinerant player, possessed of more wit than money, was a short time ago driven by that hard master, hunger, to commit the crime of poaching in the neighborhood of Birmingham, and was, unluckily, detected in the act, and carried forthwith before a bench of magistrates, where the offense was fully proved. The knight of the buskin, however, being called on for his defence, astonished the learned justices by adapting Brutus’s speech to the Romans on the death of Cæsar, to his case, in the following manner: “Britons, hungry men and epicures! Hear me for my cause, and be silent that you may hear; believe me for mine honor, and have respect to mine honor, that you may believe; censure me in your wisdom, and awake your senses that you may the better judge. If there be any in this assembly, any dear friend of this hare, to him I say that a player’s love for hare is no less than his. If, then, that friend demand why a player rose against a hare, this is my answer:—Not that I loved hare less, but that I loved eating more. Had you rather this hare were living, and I had died starving, than that this hare were dead, that I might live, a jolly fellow? As this hare was pretty, I weep for him; as he was nimble, I rejoice at it; as he was plump, I honor him; but as he was eatable, I slew him.” Here the gravity of the court was obliged to give way; prosecutors, spectators, and all burst into laughter at the ready wit displayed by the “poor actor,” and the information was withdrawn.



A. B. Toney

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A CENTURY OF FEDERAL JUDICATURE.

III.

BY VAN VECHTEN VEEDER.

THE career of Chief Justice Taney (1836-64) is a striking illustration of the severity of public sentiment. For nearly a generation this great lawyer served in the highest judicial station, if not with complete satisfaction in all sections of the country, at least with recognized judicial integrity and ability. But in his old age (with the most laudable motive, it may now well be believed) he overstepped the bounds of formal judicial procedure in one conspicuous instance, and from that time, although he had merely pronounced the views of a court composed of several members, he was overborne by reproach and calumny. I say calumny because the worst charges made against him in connection with the Dred Scott case were without foundation. There was no bargain between him and the administration concerning the court's decision. Nor did he express the personal opinion that the negro had "no rights which the white man is bound to respect." This statement was made in connection with his declaration that the court had no concern with the justice or injustice of the law, but must interpret the Constitution as it was framed, and was part of an historical narrative describing the views supposed to have prevailed at the time of the adoption of the Constitution. Taney had long before expressed his own views of slavery: "It was imposed upon us by another nation while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet while it continues it is a blot on our national character; and every lover of freedom confidently hopes that it will be eventually, though it must be gradually, wiped away." Chief Justice Taney seems to have persuaded himself, or allowed

himself to be persuaded by his associate, Justice Wayne, that he could quiet the gathering storm by throwing the weight of the court's opinion in the balance. But the righteous sentiment of a people with the governing power in their own hands was no longer to be stayed out of respect for the political compromises of their ancestors. In fact, this decision contributed in no small measure to precipitate the crisis. The pain and humiliation which the chief justice must have suffered in his final years are no small atonement for any offense. For the civil strife which ensued he had no heart; but, though he remained true to his oath, he was, nevertheless, an object of suspicion. He was reaping the whirlwind. "Since the first organization of this court," said Attorney General Bates, addressing the court at the opening of the December term, 1861, "no term has yet been held under circumstances so gloomy and sorrowful. I look up to that honored bench and behold vacant seats. Even this august tribunal, the coequal partner in the government of a great nation, the revered dispenser of our country's justice, shares with us in feeling the common sorrows and suffers in the common calamity. . . . Your lawful jurisdiction is practically restrained; your just power is diminished, and into a large portion of our country your writ does not run, and your beneficent authority to administer justice according to law is successfully denied and resisted." The stern necessities of war subjected him to many humiliations, which he bore with the utmost dignity. When, in 1863, Congress passed the act withholding three *per cent.* of the salary of government officers, he wrote a letter to the Secretary of the Treasury, point-

ing out the unconstitutionality of the law so far as it affected the judiciary. "Having been honored with the highest judicial station under the Constitution," he said in conclusion, "I feel it to be more especially my duty to uphold and maintain the constitutional rights of that department of the government, and not by any act or word of mine have it to be supposed that I acquiesce in a measure that displaces it from the independent position assigned to it by the statesmen who founded the Constitution. And in order to guard against any such inference I present to you this respectful, but firm and decided, remonstrance against the authority you have exercised under this act of Congress; and request you to place this protest upon the public files of your office as evidence that I have done everything in my power to preserve and maintain the judicial department in the position and rank in the government which the Constitution has assigned to it."

In the Merryman case his mandate was wholly ignored. After martial law had been proclaimed in Maryland, the chief justice, upon the application of John Merryman, who had been arrested by order of General Cadwalader, ordered the release of the prisoner on the ground that the President had no authority to suspend the writ of *habeas corpus*; and this being refused, he issued an attachment against the officer. But the marshal was unable to serve the writ. Taney concluded his calm and dignified review of the case in these words: "I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and di-

rect the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation, to take care that the laws be faithfully executed, to determine what measure he will take to cause the civil process of the United States to be respected and enforced."

The last days of his private and domestic life were without cheer or comfort. His private fortune had been lost in worthless securities. Those who had been dearest to him in his domestic life had long since passed away. Friends were few to ease the lonely hours of infirmity and illness. And when at last his indomitable will succumbed to the weight of years, the tumult of war drowned the feeble voice of regret. Later times have done justice to his memory, and there is no longer any doubt of the integrity of his character, his mental force, and his valuable service to Federal jurisprudence.

As a lawyer, Taney was little, if at all, inferior to Marshall. To a mind of singular grasp and readiness of apprehension, he added, as became a distinguished special pleader, a remarkable capacity for subtle discrimination. "His power of subtle analysis," said such a competent judge as Benjamin R. Curtis, "exceeded that of any man I ever knew; a power not without its dangers to a judge as well as to a lawyer; but in this case it was balanced and checked by excellent common sense and by great experience in practical business." His vigorous intellect had been thoroughly trained and developed by a life of studious habits, and, if without brilliancy, he was logical, scholarly and sound.

Frail and emaciated in physique and without an imposing presence, afflicted with a species of morbid self-consciousness which he was never able to overcome, he was, nevertheless, a man of great dignity. As a presiding officer he endeared himself to the bar by his gentleness and courtesy. It is

said that he would not allow even a court officer to read a newspaper during the sittings of the court. His apparent indifference to public opinion was probably one of the causes of his unpopularity with the general public. He never noticed newspaper attacks, believing that "the daily press, from the nature of things can never be the 'field of fame' for judges."

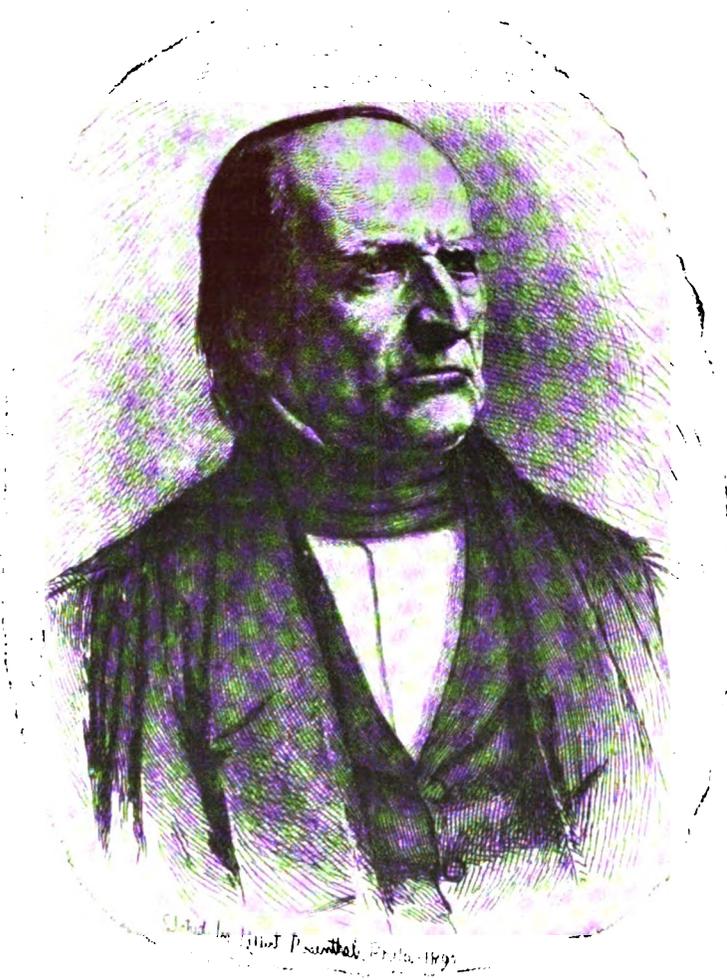
Although he was not able to dominate the court as Marshall had done, his associates were unanimous in their testimony to the force and influence of his great qualities of mind and character in the consultation room. The reports during his twenty-eight years' service, from the last six volumes of Peters to Black, contain only about three hundred opinions by him. His delicate health prevented him from writing many elaborate opinions; and it is said also that he was kindly disposed to give his associates an opportunity to distinguish themselves in formulating the conclusions of the court. Taney differed from the majority of his colleagues in less than thirty cases, and seldom without the concurrence of one or more justices. He formulated his dissenting views in only seven cases, three of which were admiralty cases, turning upon questions of fact. His dissenting opinions in the Wheeling Bridge case, *Taylor v. Carryl*, *State of Massachusetts v. State of Rhode Island* are among his most elaborate efforts. Only one of his judgments on circuit was reversed on appeal (*Haney v. Baltimore Steam Packet Co.*, 23 How. 287.) His opinions are written in a style which Chief Justice Chase paid the high compliment of studying as a professed model. Probably his opinions in the *Genesee Chief*, *Luther v. Borden* and *Ableman v. Booth* are the best specimens of his style and method.

In considering the value of his labors as a contribution to Federal jurisprudence, it must be conceded that they were especially useful in reforming and perfecting the rules of practice. The practice of the court had be-

come loose and uncertain during the latter part of Marshall's service, and the increasing business of the court demanded its reduction to form and system. This was a subject congenial to Taney's mind, and a large proportion of his opinions deal with it. Some of his opinions on the larger aspects of this subject, such as *Kendall v. United States and State of Rhode Island v. State of Massachusetts*, repay careful examination.

In general tendency in the construction of Federal powers the court under Taney and the reconstructed bench undoubtedly showed wide divergence from the views of Marshall and his associates. The broad and liberal interpretation of Federal powers which had so long prevailed were now checked. Taney's theory of government differed radically from that of his predecessor, and it was not to be expected that he would divest himself of his fundamental convictions in the exercise of judicial functions. This general tendency was accompanied by a decided lack of uniformity of opinion, and it would seem that the practice of seriatim opinions was resumed because of this lack of cohesion. It was not until the latter part of Taney's service that the general concurrence of opinion by the chief justice and Justices Nelson and Campbell exercised something like a dominant influence. But it is questionable whether the extent of counteracting influence of Taney and his associates has not been overestimated by popular opinion. We can now see the value of their critical attitude. Their work served, as Mr. Carson says in his scholarly history of the court, to check excesses, to limit extravagances of doctrine, to awaken and develop new powers, to moderate tendencies, to introduce contrasts and elements which could be used in after years.

After Marshall's death, three important cases of constitutional law upon which there had been a difference of opinion came up for re-argument—*Mayor of New York v. Miln*, *Briscoe v. Bank of Kentucky*, and *Charles*



John Adams

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River Bridge *v.* Warren Bridge. The case of Mayor of New York *v.* Miln, together with the subsequent cases known as the License and the Passenger Cases, involved a review of doctrine of Gibbons *v.* Ogden and Brown *v.* Maryland, with respect to regulation of commerce. In the first-named case it was decided that a New York statute requiring masters of vessels to make reports of passengers on arriving was a police regulation which did not interfere with the powers of Congress with respect to the regulation of foreign commerce. In the License Cases it was held that a State might regulate or prohibit the retail sale of wines or spirits that Congress had authorized to be imported, each justice having, however, his own method of reaching that conclusion. In the Passenger Cases the judgment of the court was that a State might impose a head tax on immigrants, the power of Congress to regulate commerce not being exclusive. *Briscoe v. Bank of Kentucky* involved the correctness of the decision with respect to the emission of bills of credit in *Craig v. Missouri*, and Marshall's reasoning in that case was distinctly repudiated. *Charles River Bridge v. Warren Bridge* called in question the construction of the contract clause of the Constitution as applied in *Dartmouth College v. Woodward* and *Fletcher v. Peck*, and it was specifically held that the States were free to authorize bridges, railroads and other similar improvements without regard to implied contracts in former grants and monopolies. In *Mayor of New York v. Miln*, *Briscoe v. Bank of Kentucky* and *Charles River Bridge v. Warren Bridge*, Justice Story dissented with the energy of despair. But the dire prophesies of Kent and Webster which these judgments evoked have not been realized. The commerce clause has continued to be a subject upon which a wide difference of opinion exists, and not until our own day has Taney's judgment in the New Hampshire License Case been distinctly

overruled. The doctrine of *Briscoe v. Bank of Kentucky* has ever since been maintained; and the decision in *Charles River Bridge v. Warren Bridge* was the beginning of a movement to circumvent Marshall's doctrine which has continued to this day. By the logical application of Marshall's doctrine the State, as Judge Hare says, "was stripped of prerogatives that are commonly regarded as inseparable from sovereignty, and might have stood, like Lear, destitute before her offspring, had not the police power been dexterously declared paramount and used as a means of rescinding improvident grants."

The court's refusal in *Luther v. Borden*, to interfere with the political issues arising out of "Dorr's Rebellion" is amply justified by Chief Justice Taney's lucid exposition. "The high power has been conferred upon this court of passing judgments upon the acts of the State sovereignties and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction; and while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums." It would have been well if Taney had always been guided by this sentiment.

For the rest, Federal authority was sustained and conserved in such cases as *Prigg v. Pennsylvania* (in which the chief justice for the first time pronounced a State law unconstitutional), *Pennsylvania v. Wheeling Bridge Company*, *Rhode Island v. Massachusetts*, *Ableman v. Booth* and the Prize Cases; while *Swift v. Tyson*, *Waring v. Clark* and the Genesee Chief are landmarks in the development of Federal jurisdiction. In his

bold and vigorous opinion in the latter case he made a memorable contribution to Federal jurisprudence by extending the Federal admiralty jurisdiction over the great lakes and their connecting waters. "These lakes," he said, "are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made, and every reason which existed for the grant of admiralty jurisdiction to the General Government on the Atlantic Seas applies with equal force to the lakes. . . The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and in this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide. Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, or anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between different States and nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

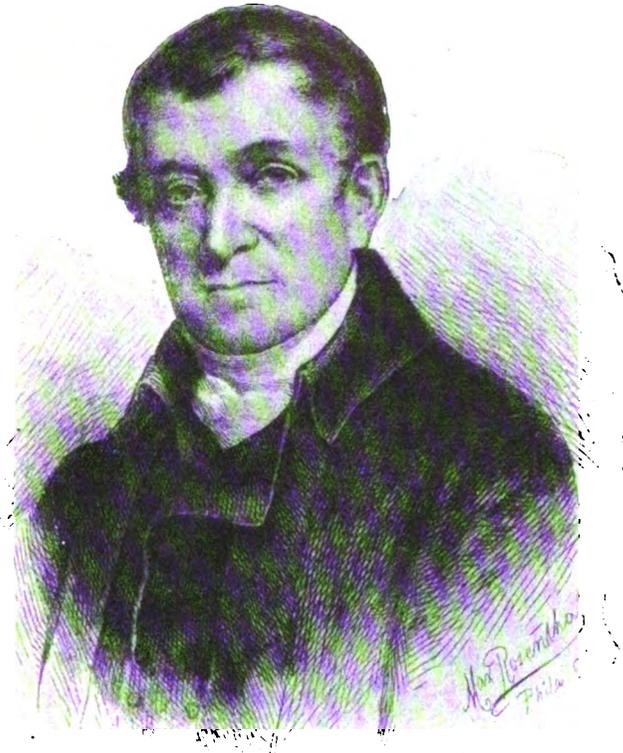
It remains to consider the Dred Scott case. Even at this late day, a statement of the issues involved and of the court's procedure may serve a useful purpose. Dred Scott, a negro of African descent, brought an action in the United States Circuit Court for the District of Missouri to establish his freedom. In order to give the necessary jurisdiction he described himself as a citizen of the State of Missouri, and the defendant, the adminis-

trator of his reputed master, as a citizen of the State of New York. The defendant interposed a plea to the jurisdiction, alleging that the plaintiff was not a citizen of Missouri, because he was a negro of African descent whose ancestors had been brought to this country and sold as slaves. To this plea there was a general demurrer, which was sustained. The defendant then pleaded in bar of the action that the plaintiff was the property of the defendant. The case was tried upon an agreed statement of facts, from which it appeared that in 1834 Scott was a negro slave belonging to Dr. Emerson, a surgeon in the United States Army. In that year Dr. Emerson took the plaintiff to a military post at Rock Island, in the State of Illinois, and held him there as a slave until 1836. Scott was then removed to Fort Snelling, north of the State of Missouri, and held there until 1838, when he was taken to Missouri, where he was afterwards sold to the defendant as a slave. It also appeared that Scott had theretofore brought suit for his freedom in the Missouri courts, and that the Supreme Court of that State had decided adversely to him.

At the trial there was a verdict and judgment for the defendant, whereupon the plaintiff brought the case to the United States Supreme Court on a writ of error. Upon the record thus made there were, therefore, two main questions: upon the plea to the jurisdiction, whether Scott could be a "citizen"; upon the plea to the merits, his personal status as affected by his residence in a free Territory, and his return to Missouri, which involved the consideration of the constitutional power of Congress to prohibit slavery in a part of the Louisiana Territory. If, therefore, the court should decide that he was a citizen, notwithstanding his African descent, then the case would necessarily be examined upon the merits; but if it decided that he could not be a citizen, then, according to recognized procedure, the case should have

been dismissed for want of jurisdiction without any expression of opinion upon the merits. After the first argument of the case the majority of the court came to the conclusion that it was unnecessary to decide the question of citizenship, but that the case should be decided upon the

Scott's original condition so as to prevent that condition from re-attaching after his return to Missouri, and that this determination of the Supreme Court of Missouri was binding upon the Federal courts. In this way any expression of opinion upon the constitutional power of Congress to prohibit slavery



Henry Baldwin

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merits; and in an opinion prepared by Justice Nelson it was accordingly declared that the judgment of the lower court should be affirmed on the ground that the highest court in Missouri had declared that a residence in the free State of Illinois had not changed

in the Territories was astutely avoided. But a motion for re-argument was made and granted before this conclusion was announced, and Justice Nelson's opinion was set aside. After this second argument Justice Wayne seems to have persuaded himself

that it was practicable to quiet the rising storm of slavery agitation by throwing the weight of the court's influence in favor of the contention that Congress had no power to prohibit the introduction of slavery in the Territories; and he was able, apparently, to convince a majority of his colleagues of the expediency of such a course of action.

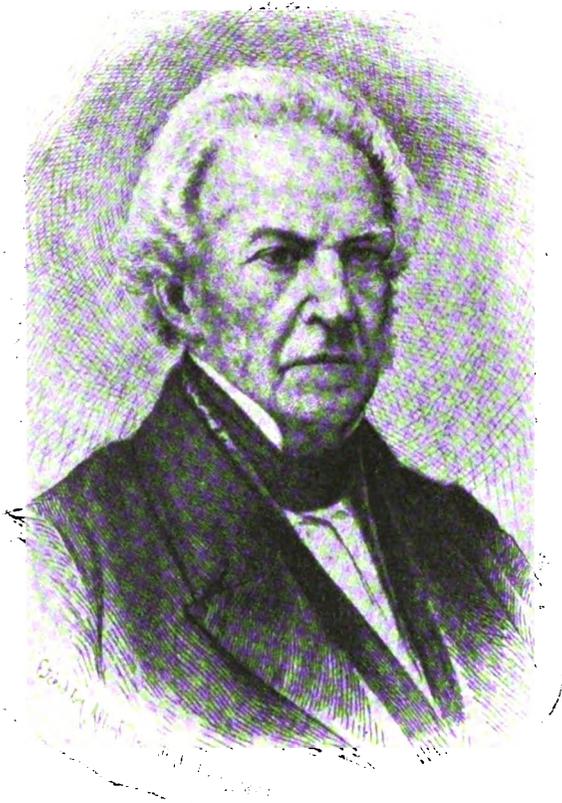
In an elaborate opinion, characterized by great ingenuity and learning, Chief Justice Taney held that a free negro of African descent, whose ancestors were brought to this country and sold as slaves, is not a citizen within the meaning of the Constitution, and that the judgment of the court below was, therefore, erroneous, as it had no jurisdiction of the controversy between the parties; that Scott remained a slave, and that the Missouri Compromise Act of 1820 was unconstitutional and void. Six of the nine judges concurred in holding that the plaintiff was a slave and that the judgment should be affirmed. Justice Wayne concurred absolutely, and Justices Daniel and Campbell generally, with the views of the chief justice. Although Justice Nelson doubted whether the accuracy of the judgment upon the demurrer to the plea in abatement was not admitted by the defendant's plea in bar, he concurred in the view that the Circuit Court was without jurisdiction for the reason that the plaintiff was a slave. Justice Grier concurred in Justice Nelson's opinion, and also agreed with the chief justice that the Missouri Compromise was void. Justice Catron thought the judgment upon the plea in abatement was not open to examination, but concurred generally with the chief justice upon the other points. All these judges must, therefore, share in the responsibility for this judgment. Justices McLean and Curtis dissented. The former held that the judgment given of the Circuit Court on the plea in abatement was a finality, and dissented *in toto* from the opinion of the court. Justice Curtis' dissenting opinion is a luminous,

learned and masterly consideration of the whole controversy. He effectually exposed the irregularity of the action of the majority of the court in deciding, under a plea to the jurisdiction, that the lower court had no jurisdiction to hear and determine the cause, and then proceeding to decide a question of constitutional law which could arise only on a plea in bar to the merits of the action. "I do not consider it to be within the scope of the judicial power of the majority of the court," he said, "to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the jurisdiction, and I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it. The judgment of this court is that the case is to be dismissed for want of jurisdiction because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached."¹

¹ Chief Justice Taney's ablest opinions are *Genesee Chief*, 12 Howard 443; *Charles River Bridge v. Warren Bridge*, 11 Peters 420; *Ableman v. Booth*, 21 Howard 506; *Luther v. Borden*, 9 *ib.* 1; *Kendall v. United States*, 12 Peters 524; *Ex parte Merryman*, Taney 246; *The Passenger Cases*, 7 Howard 283; *The License Cases*, 5 *ib.* 504; *Prigg v. Pennsylvania*, 16 Peters 539; *Pennsylvania v. Wheeling Bridge Co.*; *Dred Scott v. Sanford*, 19 Howard 393; *Rhode Island v. Massachusetts*, 12 Peters 657; *Bank of Augusta v. Erle*, 13 *ib.* 519; *Groves v. Slaughter*, 15 *ib.* 449; *Taylor v. Carryl*, 20 Howard 583; *Waring v. Clark*, 5 *ib.* 441; *Kentucky v. Ohio*, *Neil Moore & Co. v. Ohio*, 3 Howard 720; *Martin v. Waddell*, 16 Peters 307; *Maryland v. Baltimore & Ohio R. R. Co.*, 3 Howard 534; *United States v. Rogers*, 4 *ib.* 567; *United States v. King*, 3 *ib.* 773; *O'Reilly v. Morse*, 15 *ib.* 62; *Kentucky v. Dennison*, 24 *ib.* 66; *Perrine v. Canal Co.*, 9 *ib.* 172; *Branson v. Kinzie*, 1 Howard 311; *Kennett v. Chambers*, 14 *ib.* 38; *Ohio Life Insurance Co. v. Devalt*, 16 *ib.* 416; *Holmes v. Jennison*, 14 Peters; *Gittings v. Crawford*, Taney 1; *United States v. Amy*, Federal Cases, No. 14445; *Cushing v. Owners of Ship John Fraser*, 21 Howard 185; *United States v. Guillem*, 11 *ib.* 47; *Ohio Life Insurance Co. v. Debolt*, 16 *ib.* 416; *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black 286; *Bank of United States v. United States*, 2 Howard 711 & Appendix; *The St. Lawrence*, 1 Black 522.

Nineteen associate justices served with Chief Justice Taney during his twenty-eight years' presidency. Of his associates at the time he took his seat—Story, Thompson, McLean, Baldwin, Wayne and Barbour—all save McLean and Wayne, had dropped out

son and Grier alone survived, and Catron died in the following year. During the last two years of Taney's tenure four new judges were appointed, but they, like his successor, belong to another era. Taney's principal associates in point of service were, therefore,



James M. Wayne

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before 1850. Meanwhile, Catron, McKinley, Daniel, Nelson, Grier and Woodbury had succeeded to vacancies; and in the next decade came Curtis, Campbell and Clifford. At Taney's death, in 1864, Wayne, Catron, Nel-

McLean, Wayne, Catron, Daniel, Nelson and Grier.

Among Taney's earlier associates McLean, Baldwin, Wayne and Catron were most generally efficient. Justice McLean

(1829-61) was a lawyer of great force and ability, and the reports of his time bear ample testimony to his varied powers. After Story's death, he was the principal critic of the constitutional views of the chief justice. Although his celebrated dissent in the Dred Scott Case, 19 Howard 393, was overshadowed by the wonderful effort of his colleague, Justice Curtis, his clearness of thought and vigor of expression may be studied to advantage in *Prigg v. State of Pennsylvania*, 16 Peters 539, probably his ablest effort, as well as in the cases given in the note below.¹

On the other hand, Justice Baldwin (1830-44), who was also a man of extraordinary mental force, was in general accord with the constitutional views of his chief, and supported him with vigor and ability. He formulated his constitutional theory in 1837 in a treatise on the Origin and Nature of the Constitution and Government of the United States. His opinion in *McGill v. Brown, Brightly* (Penn.) 346, indicates his learning; his intellectual characteristics are illustrated by his opinions in *State of Rhode Island v. State of Massachusetts*, 12 Peters 657, and in the cases in the note below.² His dignified and impressive submission of the law to a jury in *United States v. Wilson*, Baldwin 99, could not be improved: "We have thus

¹ *Mayor of New Orleans v. United States*, 10 Peters 662; *Briscoe v. Bank of Kentucky*, 11 *ib.* 257; *Graves v. Slaughter*, 15 *ib.* 449; *The Wheeling Bridge Case*, 9 Howard 647; 13 *ib.* 518; 18 *ib.* 421; *Green v. Neal's Lessee*, 6 Peters 291; *Hazard v. New England Marine Insurance Company*, 8 Peters 557; *Wheaton v. Peters*, 8 *ib.* 591; *The License Cases*, 5 Howard 504; *The Passenger Cases*, 7 *ib.* 283; *The Magnolia*, 20 *ib.* 296; *Fox v. State of Ohio*, 5 *ib.* 410; *State Bank of Ohio v. Knoop*, 16 *ib.* 369; *Jackson v. James*, 20 *ib.* 296; *Spooner v. McConnell*, 1 McLean 337; *Bartlett v. Crittenden*, 5 *ib.* 32; and the *Neutrality Cases* in 2 McLean 1 and 5 *ib.* 306.

² *Craig v. Missouri*, 4 Peters 410; *Graves v. Slaughter*, 15 *ib.* 449; *Mayor of New York v. Miln*, 11 *ib.* 102; *Briscoe v. Bank of Kentucky*, *ib.* 257; *Charles River Bridge v. Warren Bridge*, *ib.* 420; *Harrison v. Nixon*, 9 *ib.* 505; *Poole v. Fleeger*, 11 Peters 185; *McCracken v. Hayward*, 2 Howard 608; *United States v. Holmes*, 1 Wallace, Junior 1; *United States v. Wilson*, Baldwin 78; *Baker v. Biddle*, *ib.* 394; *Tilghman v. Tilghman's Executors*, *ib.* 464.

stated to you the law of this case under the solemn duties and obligations imposed upon us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges of the law and the fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and if you should feel it your duty to differ from us you must find your verdict accordingly. At the same time, it is our duty to say that it is in perfect accordance with the spirit of our legal institutions that courts should decide questions of law and juries of fact; the nature of the tribunals naturally leads to this division of duties, and it is better, for the sake of public justice, that it should be so; when the law is settled by a court there is more certainty than when done by a jury, it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject—by taking the law as given by the court you incur no moral responsibility; in making a rule of your own there may be some danger of mistake."

Although Justices Wayne (1835-67) and Catron (1837-65) were quite generally efficient in the performance of the varied duties of the court, their chief distinction was attained as specialists. Wayne was especially influential in the domain of admiralty law, although some of his opinions on constitutional law and on public land titles have been highly respected.³ Justice Catron was an

³ Justice Wayne's leading cases are *Waring v. Clark*, 5 Howard 441; *Cutler v. Rae*, 7 Howard 729; *Prigg v. State of Pennsylvania*, 16 Peters 539; *The Passenger Cases*, 7 Howard 283; *United States v. King*, 7 *ib.* 883; *Story v. Livingston*, 13 Peters 359; *Raymond v. Tyson*, 17 Howard 53; *Perrin v. Casey*, 24 *ib.* 465; *Ex parte Wells*, 18 *ib.* 307; *Warner v. Martin*, 11 *ib.* 209; *Dodge v. Woolsey*, 18 *ib.* 331; *Barber v. Barber*, 24 *ib.* 582, and his charge on the slave trade, *Federal Cases*, No. 8269, a.

expert in the law relating to public land titles. His style may be observed in *State Bank of Ohio v. Knoop*, 16 Howard 369; the License Cases, 5 *ib.* 504; the Passenger Cases, 7 *ib.* 283, and *Dred Scott v. Sanford*, 19 *ib.* 393.

dall v. United States, 12 Peters 524, and *Mayor of New York v. Miln*, 11 *ib.* 102. During a much longer service McKinley made little impression; he is less known than any of the modern justices. See, however, his strong dissenting opinion in *Lane v.*



J. Catron.

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Justices Barbour (1836-41), McKinley (1837-52) and Daniel (1841-60) made no conspicuous contribution to Federal jurisprudence. Barbour served only five years, but gave good promise of usefulness. See Ken-

Mick, 3 Howard 464. Daniel is remembered as the dissenting judge. His eccentric views of constitutional construction have, however, unduly limited the public estimate of his capacity. His ability, particularly in admiralty,

was unquestioned. His powerful argument in the case of the *Genesee Chief*, 12 Howard 443, admits of no disparagement.¹

¹ See also *Waring v. Clark*, 5 Howard 441; *The Magnolia*, 20 *ib.* 296; *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 *ib.* 344; *Marshall v. Baltimore and Ohio R. R. Co.*, 16 *ib.* 314; *White v. Nicholls*,

3 *ib.* 266; *The License Cases*, 5 *ib.* 514; *B. and S. R. R. Co. v. Nesbit*, 10 *ib.* 395; *Fox v. State of Ohio*, 5 *ib.* 410; *Withers v. Buckley*, 20 *ib.* 84, and *West River Bridge Company v. Dix*, 6 *ib.* 507.

Correction:—In the February number, on page 80, the first paragraph of the note purporting to give Mr. Justice Story's leading opinions refers to Mr. Justice Washington's opinions, and should have been printed on page 75.

A TWENTIETH CENTURY TRIAL FOR HIGH TREASON.

By LUCIUS F. CRANE,

Of the Middle Temple, Barrister-at-Law.

A TRIAL for high treason is a circumstance of such unusual occurrence in England that that of Colonel Arthur Lynch, which has lately been concluded, caused no small degree of excitement. The fact, too, that Lynch was indicted mainly under a statute as old as 1351 [25 Edward III. St. 5, c 2,] and that the trial took place "at bar" lent additional interest to the case.

It will be remembered by students of the ancient-day law that under 25 Edward III. seven distinct offences were mentioned, each of which constituted the crime of high treason, but only the following offence is of importance in the present case, *viz.*: "or if a man do levy war against our Lord, the King, in his realm, or be adherent to the King's enemies in his realm, giving to them aid or comfort in his realm, or elsewhere, and thereof be proveably attainted of open deed by the people of their condition." By 35 Hen. VIII. c 2, the law of England is made to extend to High Treason committed out of the realm of England by any subject of His Majesty.

Arthur Lynch, the defendant in the latest action under the statute, is an English subject, born apparently in Australia. He is a man of about forty years of age, who has been chiefly occupied in journalism and literary work, much of which has been done in

Paris. The most curious point of all, however, is that he is the member of Parliament elect for Galway in Ireland.

In January, 1900, three months after the beginning of the Transvaal War, he proceeded to the Transvaal, and there he became colonel of the 2nd Irish Brigade—a motley collection of foreigners, which numbered amongst its members a good many Irishmen. This brigade, with Lynch at its head, took part in numerous operations against the English. Before joining this brigade, however, the defendant made a declaration of his willingness to take up arms on behalf of the Transvaal, and took an oath of allegiance to the South African Republic as a condition precedent to acquiring the franchise. Whether letters of naturalization followed or not is not clear. On March 21st, Lynch signed an address, headed "To Irishmen," which was stuck up outside the camp and published in the *Standard and Diggers' News* on March 22d. It called upon Irishmen to join his brigade "for the sake of liberty, etc., etc.," and was signed:

Arthur Lynch (Colonel Irish Brigade II.)
By Krugersdorp Laager, near Glencoe.

Such, in short, is the first of his offences. In reality, they were embodied in an indictment consisting of four counts which took

about half an hour to read. Each count was for adhering to, comforting and aiding the Queen's enemies, after which was set forth the various overt acts constituting the offence.

The trial commenced on January 23d, in the Lord Chief Justice's Court before Lord Alverstone (Lord Chief Justice), Mr. Justice Wills and Mr. Justice Channels, a true bill having been found against the prisoner on December 19th. An imposing array of counsel was engaged in the case, amongst whom may be mentioned, for the Crown, the Attorney General (Sir R. B. Finley, K. C.), the Solicitor General (Sir E. Carson, K. C.), Mr. H. Sutton, Mr. Charles Matthews and Mr. Guy Stephenson, instructed by Lord Desart, the Director of Public Prosecutions; for the prisoner, Mr. Shee, K. C., Mr. Avory, K. C., Mr. Brion and Mr. Dwyer.

The court having been opened, the usual proclamation was made and the jury were empanelled. About one hundred and fifty jurymen had been summoned, but as no one was challenged this proceeding only occupied a few minutes, and the Master of the Crown Office then read the indictment.

The prisoner was next called upon to plead, but before he did so his counsel moved to quash the indictment on the ground that it disclosed no offence under the statute. The motion was, however, refused by the court on the ground that this was not the proper time at which to take the objection.

The prisoner then pleaded "not guilty," the jury were sworn, and the Attorney General opened the case for the Crown. The prisoner's points of defence were, in the main, three in number. First, that already noticed; secondly that he was a naturalized burgher; and thirdly, that he was in the Transvaal and with the 2d Irish Brigade in his capacity as a journalist and war correspondent and not as a combatant.

On the first point, when it eventually came on for discussion, the prisoner's counsel ar-

gued that the words "be adherent to the King's enemies in his realm" must mean either (1) that the accused person being in the realm has been adherent to the King's enemies wherever they were, or (2) that the enemy being in the realm the accused had been adherent to them wherever he was. But every case that had been decided impliedly decided that the accused must be in the realm when he did the overt act.

The Lord Chief Justice—What do you say the words "or elsewhere" in the section mean?

Mr. Avory said that if the accused person was in the realm he might be giving aid to and comforting the King's enemies outside the realm. The point was, however, as will be readily surmised, not allowed. Nor had the contention of the defence that the prisoner was a properly naturalized burgher a more successful result. Mr. Shee's and Mr. Avory's argument on this point was to the effect that the Naturalization Act of 1870 laid down no limit of time or circumstances as to when a citizen might become a naturalized member of a foreign State. The legislation did not intend to treat as a traitor a subject who in fact became naturalized abroad.

The Attorney General replied that the point taken for the prisoner was, that although war was raging between this country and another, a British subject might lawfully become naturalized under the Act of 1870. He should ask their Lordships to say that this statute had no application to an act which in itself would be a crime. It was naturalization in view of the existence of a state of war, naturalization which could only be obtained upon this British subject pledging himself to fight against Great Britain. The naturalization could not in fact be obtained until the prisoner had adhered to the enemies of his country, and had made a declaration that he was willing to take up arms against this country. Thus, in effect, two overt acts

were committed before the supposed naturalization took place. The Lord Chief Justice, in deciding the point in favor of the Crown, said that none of their Lordships had any doubt about it, but having regard to the nature of the proceedings they thought it better that it should be argued out.

Finally there is the point that Lynch was a journalist and not a combatant, but though two or three witnesses were called by him to show that he was a correspondent, the evidence adduced by the prosecution was overwhelming against him. The trial, after lasting three days, ended on January the 24th in a verdict of guilty, the jury only being absent twenty-six minutes. The prisoner having nothing to say, the judges assumed the black cap and judgment was pronounced by Mr. Justice Wills, the senior *puisne* judge, in the following impressive terms:

"Arthur Alfred Lynch, otherwise Arthur Lynch, the jury have found you guilty of the crime of high treason, a crime happily so rare that in the present day a trial for treason seems to be almost an anachronism—a thing of the past. There can be no doubt that in times gone by there was great abuse, and many persons were indicted, convicted, and punished for matters which would not now be thought worthy of serious or, perhaps, any notice. There has been a kind of national reaction by which many persons have been disposed to treat serious crimes against the State as if the name of treason, and as if the thing, no longer existed. One moment of reflection will show you how erroneous is such a conception. Civilized communities exist for the purpose of mutual succor and support. They afford protection to their subjects from foreign aggression and domestic violence and wrong, and they expect in return loyalty and allegiance. No civilized community yet has failed to punish severely, when it has once been made out, defection from that loyalty, whether by way of open war or secret intrigue; and if every one who

disapproves of the foreign or domestic policy of his country was at liberty to take up arms against her and to attempt to join her enemies to her destruction, the very foundations of civilized society would be gone and violence and anarchy would take the place of ordered government. The misdeeds which have been done in this case, and which have brought you to the lamentable pass in which you stand, must surely convince the most sceptical and apathetic of the gravity and reality of the crime. . . . The only—I will not say excuse, but palliation that I can find for conduct like yours is that it has been for some years past the fashion to treat lightly matters of this kind, so that men have been perhaps encouraged to play with sedition and to toy with treason, wrapt in a certain proud consciousness of strength begotten of the deep-seated and well-founded conviction that the loyalty of her people is supreme, and true authority in this country has slumbered or has treated with contemptuous indifference speeches and acts of sedition. It may be that you have been misled into the notion that no matter what you did, so long as your conduct could be called a political crime, it was of no consequence. But it is one thing to talk sedition and to do small seditious acts, it is quite another thing to bear arms in the ranks of the foes of your country, and against it. Between the two the difference is immeasurable. . . . He who has attempted to do his country such irreparable wrong must be prepared to submit to the sentence which it is now my duty to pronounce upon you. The sentence of this court—and it is pronounced in regard to each count of the indictment—is that you be taken hence to the place from which you came, and from thence to a place of execution, there to be hanged by the neck until you are dead."

- The prisoner was then removed.

Since Mr. Justice Wills pronounced those words Lynch has been reprieved and his sentence of death commuted to that of penal

servitude for life. It may be of interest, however, to compare with them the last few words pronounced by Lord Chief Justice Abbott in passing sentence on the Cato street conspirators in 1820—the last to suffer the extreme penalty for high treason. He said: "Repent, I exhort you—repent, and obtain the mercy of that God whom you have offended. The judgment of the law is, that you, and each of you, be taken from hence to the gaol from whence you came, and that you be drawn on a hurdle to the place of execution, and there be hanged by the neck until you be dead; and that afterwards your heads be severed from your bodies, and your bodies divided into four quarters, and be disposed of as His Majesty shall direct, and may the God of Mercy have mercy upon your souls." On May 1st the first part of the sentence was carried out, "His Majesty having been graciously pleased to remit" the latter part.

In every other case since 1820 the prisoner when **sentenced to death** has had that sentence commuted; thus, for example, Frost, the Chartist, Smith O'Brien, M. P., the Irish Patriot, who received an unconditional pardon after seven years' transportation, and yet another Irishman, J. F. X. O'Brien, who, though sentenced to death, still survives to

tell the tale and to represent an Irish constituency in the House of Commons. Presumably the same course will be adopted in Lynch's case as was necessitated in that of Smith O'Brien, M. P., with regard to the representation of his constituency. There, the House of Commons, on May 18th, 1849, ordered a writ to issue for the election of a new member for the County of Limerick "in the room of William Smith O'Brien, adjudged guilty of High Treason."

It is curious to note the different expressions of opinion that find voice now that Lynch's sentence has been settled. Some are pleased, others—chiefly Irishmen, it must be confessed—regard even the commuted sentence of penal servitude for life as scandalous, and take the rather amusing point that as Lynch voluntarily returned from Paris to meet his trial he should be treated apparently with gloved hands. Treason is treason, and in these days, as in the days of our ancestors, a man who fights against his country deserves but little from her. It is submitted that Lynch received from England his whole deserts when he was given a fair trial (none could have been fairer, no judges more patient), an impartial jury and adequate legal representation.



A MAGISTRATE'S MARRIAGE FEE.

BY JONAS JUTTON.

"SQUIRE," I remarked to Justice Morgan a few days ago, "I am certain that you have had many strange experiences in uniting couples in the holy bonds of matrimony, for you have been on the bench many years, during which time you have bound together hundreds with Hymen's silken cord. I know that you have often received no compensation for your services, and again have been presented with bags of beans, turnips and what not for making two souls happy. But what I wish you to tell me is of the most interesting incident in connection with your marrying people, and also about the largest fee you have ever received. I am satisfied that you must have something interesting, so be accommodating and talk."

"Well," began the justice, "the most interesting incident in the marrying line that I ever ran up against, as well as regards the facts as to the largest fee I ever received, makes one and the same story.

"Several years ago, I was awakened one morning about four o'clock by a young runaway couple from the Blue-grass State, the line of which was but fifteen miles from the Tennessee town in which I then resided. The young couple were in a buggy, and were well-dressed, intelligent young people. The would-be groom told me his business, and requested me to go and arouse the county court clerk in order to get the license, stating that they would drive on to the Court House and await our arrival.

"I hurriedly slipped into my clothes, and going to the clerk's home awoke him and told him of the situation. He soon dressed and joined me, and we hastened to the Court House, where we found the young couple anxiously awaiting us. We entered the temple of justice, and after the clerk had lighted a lamp, he turned to the young lady with:

"How old are you, Miss?"

"I am fifteen," was the reply.

"I am very sorry to inform you, then," said the clerk, sympathetically, "that I cannot issue the license. The laws of this State require that you shall be sixteen years and a day."

"The young man's face paled, and I saw a great disappointment creep into the eyes of the girl who was willing to trust her happiness to his keeping.

"I will be sixteen to-morrow," suggested the girl, pleadingly.

"I am sorry, but that will do you no good," commented the dispenser of marriage papers. "The laws of Tennessee are very strict in regard to such matters."

"Tears sprang into the eyes of the would-be bride, while a light of happiness flashed into the face of her companion.

"If she were sixteen and a day then you could give us the license?" quickly spoke the young man.

"Yes."

"Then issue it at once, and give it to the Squire, and instruct him to perform the ceremony, when we can both make oath that Nellie is of lawful age. He can swear us day after to-morrow, and as he will have the papers we could not use them until he gives his permission."

"That is a little out of the regular order of things," said the clerk, as much to himself as to us, "but I do not know that it would be a breach of the law to grant your request, so I will do it."

"The license was issued and handed to me with instructions not to marry the couple until the girl would swear she was sixteen years and one day old. I promised, and we left the Court House.

"Now, Squire," said the prospective

groom to me, 'you go home and wait there until we come. I see some of the stores open, and I wish to make a few purchases. We will be at your home in a few minutes'; and he drove rapidly to a grocery a hundred yards away.

"When he reached my house a quarter of an hour later, he had the bottom of the buggy filled with all kinds of canned goods, and a dozen loaves of bread, and as he drove up he said:

"Go into the house and bring along three or four comforts, blankets, or something of the kind; and be quick about it, for the old man will be only an hour or two behind us, if he can find which way we have come. As soon as they awake and find Nellie gone they will be hot on our trail."

"I brought out the asked-for articles, and the young fellow said:

"Now, holler to your wife good-bye, and get in here with us. I will pay you well."

"I knew that the law could handle me for abetting an elopement when the girl was not of lawful age, but I felt sorry for that pretty little girl and handsome young man; and the promise of being well paid being further incentive, I called to my wife that I would not be back for several days, and for her to say nothing as to how I left and where I was going. In fact, she didn't know, nor did I know myself.

"Now," said the young fellow, as we drove off, 'the old folks will be sure to overhaul us if we go to any town, for the old man will work the wires for all they are worth. Squire, you know all about this country, so point out the way to the densest part of that river bottom—where you know we will be in no danger of being discovered. No one, though, will be likely to search for us there, believing that we have gone to some other town. I want you to stay right with us

until Nell is sixteen years and one day old and you have made us husband and wife. Remember, you shall have a nice fee just as soon as the ceremony is said.'

"I directed the way, and in an hour we were encamped about one hundred yards from the river bank, in a canebrake, where there was no possibility of our being discovered. The young fellow went to work with his pocket knife, and soon had a rustic little house constructed and covered with cane, in which he informed the girl she could sleep nights. Then a few yards away, under a large beech, we prepared our resting place. We treated the little lady like a queen, and she seemed as happy as mortal could be. All the horse had to eat was cane, and we would take him to the river to drink, where we also got our water. We camped there two nights, and the morning after the last one, the young lady said, happily, to her soon-to-be husband:

"I will be sixteen years and one day old at ten o'clock, for I've often heard my mother say I was born at that hour; but to make sure we will wait until twelve."

"Soon after we had eaten our noon lunch, the young lady made affidavit as to her age, and we drove out of the bottom to a farmhouse on the hill, where we got witnesses, and I joined the two in holy wedlock. As we drove on towards town after the ceremony, the happy groom handed me five twenty-dollar bills. That, my young writer friend, was the most interesting marriage affair I ever took part in, and the best paying one by at least ninety dollars. And I want to tell you that it turned out a happy marriage, for I have often heard of them since. But I wouldn't take such a risk again for the fairest woman in the land, because if the girl's father had not been of a forgiving nature I would now be behind the bars—at least I wouldn't much more than have served out my time."

LONDON LEGAL LETTER.

FEBRUARY, 1903.

A MOST interesting point has arisen in connection with a murder trial in England which has attracted wide attention. Early one morning in May last a young girl was found lying dead in the kitchen of the house in which she was living as a domestic servant in a small Essex village. The wounds which produced her death were of such a nature that the blood from them bespattered the walls of the apartment and lay in copious pools on the floor and stairway leading to her bed chamber. There was evidence that the murderer, not content with the death of his victim, had attempted to consume the body by saturating the night clothing with coal oil and then setting fire to it. It was ascertained that the girl in the course of two or three months would have become a mother. Notwithstanding the evidence of violence there was at first a theory of suicide, but that was soon abandoned, and suspicion fell upon a married man of exemplary habits who lived with his family near the house in which the body of the murdered girl was found. He was arrested, and in November last was put upon his trial. The evidence of the prosecution seemed at first overwhelming. The accused, Gardner, was a leading member of the congregation of a Primitive Methodist chapel in the village, the head of the Sunday School and the director of the choir. The deceased was also a member of the Sunday School and in the choir. Some months before the murder gossip associated Gardner's name with the girl. It was alleged that they had been seen to go into the chapel upon a week day alone, and two lads affirmed that having observed them and approached the building they heard suggestive words and voices. The matter was referred to the officials of the church and was denied

by Gardner, so far as any immorality was imputed, and he was continued as Sunday School superintendent and choirmaster. Another witness, a local preacher of the same chapel, gave evidence that notwithstanding this incident he had observed Gardner and the deceased walking alone together late at night upon a secluded road and had seen familiarities between them during the services in church. Upon the theory that the deceased was pregnant by Gardner a motive for the crime was thus found, for being a married man, Gardner would not care to stand the exposure that would ensue, and which would drive him out of the community. In the room of the murdered girl was found an unsigned letter, which it was contended by the prosecution was in Gardner's handwriting, asking her to show a light in the window of her bed-room at eleven o'clock the night she was murdered. The buff envelope in which this letter was enclosed was of a somewhat uncommon kind, but such envelopes were used in the office where Gardner was employed and accessible to him. Under the girl's body was found a torn copy of a newspaper, which was not taken in by her employer, but which was taken in by Gardner. There was also found a bottle, from which the coal oil had undoubtedly been poured upon the body, and this bottle was labeled "For Mrs. Gardner's children." A witness was produced to prove that Gardner was in the road in front of the house on the night in question at the hour when the deceased was requested to show a light in her window, and that the window was visible from where he stood. Foot-prints of some one wearing shoes with bars across the soles were found leading from Gardner's house to the deceased's and back again, and shoes

making such marks were found at Gardner's. He also produced to the police a knife with which the wounds might have been inflicted. It bore traces of mammalian blood, and had, when produced some days after the murder, been recently cleaned.

To meet this strong case for the prosecution the accused had practically only the evidence of himself and his wife and a neighbor to rely upon. Fortunately he had the assistance of very able counsel and a few sympathetic friends. He was able to show by experiments that it was impossible for the witnesses who spoke to what occurred at the chapel to have heard what they said they had heard, and that, therefore, there was no necessary implication of impropriety in his entering the chapel with the girl at her request, she having asked him, as he was working nearby, to open the door for her, as she was unable to do so unaided, as it stuck at the bottom. There was evidence that a few days later a workman was called in to rase the door. According to Gardner's story she simply wanted a book, and after obtaining it came out without any delay. The strength of the defendant's case lay in the alibi which was proved by Mrs. Gardner's evidence that she was with her husband the whole of the night, and that, owing to a violent thunderstorm and pains in her body, she was unable to sleep until quite light in the morning. When she woke, her husband was soundly sleeping in the bed beside her with one of the children on his arm. A neighbor corroborated to a slight extent the movements of the husband and his wife upon this night. It was proved that the murder was committed after midnight, and it was therefore evident that if the wife was telling the truth her husband must have left her side after she fell asleep at three o'clock in the morning, committed the murder, returned to bed and fallen into a sufficiently sound sleep not to disturb a sleeping child. Another remarkable feature of the case was that not a vestige of blood or

coal oil or mud was found on the prisoner's clothes, and from the way in which the murdered body lay and the condition of the room it would have been hardly possible for the murderer to escape without carrying away some trace of his crime. The bottle containing the coal oil was accounted for by Mrs. Gardner's evidence that she had given it to the girl with medicine in it for a bad cold some time before. No attempt was made by the defence to account for the footprints, except that the murderer had similar shoes. It was, however, proved that the girl had received indecent literature from a lad in the village, and that from her conduct it was inferable that she had or might have had another lover.

The jury, after four days' trial, were unable to agree, and the witnesses were bound over to the next assizes. Even those who were indifferent to the prisoner or considered him guilty were moved by great sympathy for the wife, who had no means of support except her husband. Before he was arrested he was earning only twenty-six shillings a week, but this sufficed to maintain his wife and six children. After his arrest the family were utterly destitute. Under these circumstances a fund was raised by public subscription which realized sufficient to keep the family and provide for the expenses of the new trial. Last week the new trial came off, and after another four days of struggle, the court sitting until late at night, the jury have again disagreed. The question now arises what course should the prosecution take? Shall the State go on again, and, if necessary, a fourth time, or even a fifth time, to try to secure a conviction? The effect of each ineffectual trial is to increase the difficulty of conviction, as well as the expense and the difficulties of the defence. Even with an unlimited purse one accused of murder cannot prevent his witnesses from dying or removing out of the jurisdiction, and he cannot assure against fail-

ing memory as to important details or concise dates.

This reflection is influencing the community to resent the announcement that there will be a third trial of Gardner in time. In the meantime, the lawyers are trying to find a precedent for three trials of the same person for murder, and are debating if it would not be better to accept the Scotch verdict of "not proven" rather than to stand out for a unanimous verdict of guilty or not guilty. The two trials have been held at two different towns on the circuit, and a third town at some distance from the others is named for the new venue. The alternative is to bring the accused up to London for trial, but that will involve the bringing up of the witnesses for the prosecution and the defence also. The expense of this could, of course, be met by the State without difficulty, but to the defence it would be prohibitive, even if the public subscribe as liberally for the third trial as for the second. It is, therefore, not improbable that the prosecution will be abandoned. This will be a lame and impotent conclusion, unsatisfactory to the government and terribly unjust to the accused if he is innocent; but there seems no other way out of the difficulty if the public insist that there must be a limit to the number of times a man can be put upon trial for his life.

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Fortunately, the Government have taken the wise step of entering a *nolle prosequi* in this case, and Gardner has been quietly liberated from his long confinement. Such an action on the part of the Crown in a capital offence is in itself a very extraordinary course and adds another to the sequence of remarkable incidents in this case. It is a virtual admission, not only that the prosecutor will

have a difficulty in proving the case, but also that the Crown authorities are strongly of the opinion that the case is improvable. There is always a liability that the prisoner may be indicted again on the discovery of new and vital evidence, but on the other hand, it has been decided that such a course is not a bar to an action for malicious prosecution, as it is tantamount to an ending of the trial in the prisoner's favor. A characteristic story in connection with this process is told by Lord Campbell in his life of Chief Justice Holt:

John Lacy, a notorious spiritualist of the early eighteenth century, a man who claimed to be an inspired prophet and miracle-worker, created, about the year 1704, great excitement in London, and some of his followers were arrested. One of them, John Atkins, was committed by Chief Justice Holt to trial for seditious language. Lacy thereupon called at Holt's private house and informed the servant that he had brought for the Chief Justice a message from "the Lord God." He was admitted, and thus addressed the judge: "I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou hast sent to prison." Holt immediately replied: "Thou art a false prophet, and a lying knave. If the Lord God had sent thee, it would have been to the Attorney General, for He knows that it belongeth not to the Chief Justice to grant a *nolle prosequi*; but I, as Chief Justice, can grant a warrant to commit thee to bear him company." This, says Lord Campbell, was immediately done, and both prophets were convicted and punished.

STUFF GOWN.

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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.

NOTES

"CHILDREN," asked the school committee man, "what is Political Economy?"

"Political Economy," answered the precocious son of the district boss, "is getting men to vote for you as cheap as you can."

I WAS a sagacious young attorney, just in that interesting condition when I was ready to toss up a coin to see whether I should quit in despair or "stick it out" a few days longer, when an "Auntie" called to tell me that "dee sheriff done lebel on mah mawl, Mistah Bob, 'n' won't you please, sah, try to fotch it back."

I succeeded in pacifying the old woman's creditor, and her mule was restored to her.

Then I said: "Well, Auntie, I can't work for my health; I must charge you a fee for this, you know."

"Yass, sah, Mistah Bob, youse been mighty penurious, 'n' I means ter pay yer."

Here she emptied her grimy tobacco sack on my table. It contained just forty cents in change.

"Dar, Mistah Bob, dat's all dee money I'se got in dis yere worl!" And then with dramatic pathos that would have won any jury, "Fo' God's sake, *tch it light!*"

THEY appeared in the office of the squire in a small Iowa town and wanted to get married. A justice court marriage in the Hawkeye State has little more ceremony than the

securing of a divorce on the ground of desertion. He lined the two up in front of his table and said to the would-be groom: "Do you take this woman for your lawfully wedded wife?" The groom replied with a decided voice, "Sure." Turning to the bride, the squire inquired, "Do you take this man for your lawfully wedded husband?" "Well, squire, I'm willing to give him a trial, but I'll tell him right now, he can't monkey with me like he did with his first wife. I'm willing for him to wear the suspenders, but I'm going to wear some of the clothing."

AN indictment in a recent Georgia case (Morris v. State, decided January 10, 1903), charged that the accused "did unlawfully and with force of arms engage in the practice of dentistry for fee, without registering," etc. Justice Candler of the Supreme Court, in an opinion delivered in this case, said: "We will remark, in passing, that we have in the past had frequent occasion to doubt the propriety and appropriateness of the indiscriminate and almost universal use, in indictments and accusations, of the time-worn phrase 'with force and arms.' We can not, for example, see the necessity of charging force and arms in indictments and accusations for perjury, forgery, vagrancy, and similar crimes involving the employment of no physical force. Suffering humanity, however, will attest the peculiar aptness of the phrase in cases like the present; and from this we should learn well the lesson that, amid the kaleidoscopic changes wrought by twentieth century progress and advancement, it behooves us to be careful lest we slip too far from the moorings of our fathers, or desecrate with too ruthless a hand the ancient landmarks of the English law."

IN Morgan County, Tennessee, before the establishment of the present county seat, and before any court house was built, they held courts in an old barn at Montgomery. Judge Edward Scott was holding court, and counsel for the plaintiff in an ejection suit suddenly found himself needing a certain title paper worse than a fellow ever needs a "gun" in Texas. The case was set for trial Wednesday morning. It was impossible for him to get the paper before Thursday. He wanted to secure a postponement until that day, but the circumstances were such that he knew he'd have a deal of trouble in accomplishing his purpose.

Fortunately for him the sheriff was his warm friend. The sheriff was popular, and had lots of mountaineers at his beck and call, who would do anything for him that he might ask. He and counsel for the plaintiff fixed up a little scheme that night.

The judge was very fond of spirits, and could drink a lot without apparent effect, unless something happened to excite him, when the liquor would fly instantly to his head and demoralize him. This the sheriff well knew. At night he set out and got some of the best peach brandy in the mountains, which was the judge's favorite tippie, if accompanied by honey, and the woods were full of honey. It was arranged that the friends of the judge who were taken into the secret should ply him with peach-and-honey vigorously in the morning at breakfast.

Two mountaineers were concealed in the loft of the barn, with instructions to get into the biggest row the mountains ever witnessed, the moment they heard a certain signal from below.

The application for a continuance or postponement was made, and the judge was spurning it "with contempt from the foot of the throne," when all of a sudden oaths began to fly around in the loft like brickbats in riot time, and several pistol shots rang out, right over the judge's head.

The liquor did its work at once. The judge turned pale with both fright and anger, and called out in stentorian tones:

"Mr. Sheriff, adjourn this court for five

hundred years. If these people get civilized by that time, perhaps some judge will come here and finish the call of the docket."

The sheriff quietly adjourned court till Thursday.

It was his first case, and he was defending a man accused of stealing a watch. After a brilliant defence the man was acquitted. The young lawyer was congratulated by his friends and one of them then asked: "How much did you receive as your fee?"

"Fifty-five cents." There was a howl of derision and shouts of laughter.

"You'll never make a lawyer," said one. "Who ever heard of a fifty-five cent fee"; and they roared again.

The tyro waited until the laugh subsided, and then said earnestly: "Boys, I know that fifty-five cents ain't much of a fee, but I took every cent the man had."

A CASE was being argued on appeal before the Supreme Court of the State. The city attorney in his argument gave expression to some severe strictures upon the charge of the court below to the jury.

When he had finished, counsel for the defendant in error arose, ponderously, as was his wont, stroked his long beard, and looked wiser than seven owls in a row. He excoriated the city attorney, who was something of a youngster, for his boldness in criticising the opinion of "one of the ablest, most learned, most experienced and upright judges in this State, may it please your honors." He called his antagonist a beardless youth several times, and closed with that accusation, as a parting shot. As soon as he took his seat, the beardless youth arose and respectfully addressed the court, saying he had but a word to say by way of closing.

"A young Spaniard," said he, "was once sent as ambassador to the Pope. When he presented his credentials, the Supreme Pontiff frowned down upon him and asked, 'Does his Majesty, the King of Spain, lack men in his kingdom that he sends a beardless youth—a boy, as his ambassador to the court of Rome?'"

"Sire," replied the ambassador, "if his Majesty, the King of Spain, had supposed that his ambassador to the court of Rome would be received for his beard alone, he would have taken reckoning of the cost, and sent a goat."

This wrested a laugh from the grave and reverend court,—and won the case.

It happened once (says "E. M.," writing of Lord Russell of Killowen, in *The Law Times*,) when he had first come to London and was laying the foundation of his great career that the future Lord Chief Justice went to the pit of a theatre. The piece was popular; the pit was crowded, and the young advocate had only standing room. All of a sudden a man at his side cried out that his watch was stolen. Mr. Russell and two other men were hemmed in. "It is one of you three," cried the man minus his watch. "Well, we had better go out and be searched," said Mr. Russell, with the alertness of mind that did not fail him at a trying moment amidst an excited crowd. A detective was at hand, and the suggestion was accepted. As Mr. Russell walked out, the idea flashed through his mind that if the man behind him had the stolen property he would probably try to secrete it in the pocket of his front-rank man. Quick as thought, he drew his coat tails about him—only to feel, to his horror, something large and smooth and round already in his pocket. While he was still wondering what this might mean for him, the detective energetically seized the hindmost man, exclaiming, "What, you rascal—at it again!" To Mr. Russell and the other man he apologized, and bade them go free. But Mr. Russell, before he had taken many steps, reflected that he could not keep the watch. He went back to the box-office and explained with a courage on which he afterwards said he rarely experienced greater demands, that though he did not take the watch he had it. So saying, he put his hand into his pocket and pulled out—a forgotten snuff-box!

THE form of oath taken by Chinamen in courts of law is not like the laws of the Medes

and Persians. The Celestial who was a witness in a felony case before the Thames magistrate on the 29th ult., says the *Westminster Gazette*, blew out a lighted candle, at the same time repeating the following words spoken by the usher: "If I do not speak the truth, and as this candle has been blown out, may I be blown out likewise." Some years ago a Chinaman appeared to give evidence at Bow street, and was politely consulted as to the method in which he would prefer to be sworn. "Oh!" said he with a fine eclecticism, "kill 'im cock, break 'im plate, smell 'im book, all samey." The significance of the words "break 'im plate" may, perhaps, need explanation even to persons "learned in the law," and the explanation is thus supplied in the text-books and authorized law reports: "The following is given in one case as the form of swearing a Chinese: On entering the box, the witness immediately knelt down and a china saucer having been placed in his hand he struck it against the brass rail in front of the box and broke it. The crier of the court then, by the direction of the interpreter, administered the oath in these words, which were translated by the interpreter into the Chinese language: 'You shall tell the truth and the whole truth. The saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer.'" (*R. v. Entiehnman*, 1 Car. & M. 248.)

ACCORDING to the French penal code, there is no age at which a child is absolutely exempt from punishment. If a child has acted *sans discernement*, he must be acquitted. If he has acted *avec discernement*, his punishment is to be mitigated according to a fixed scale. By the criminal code of the German Empire, a person cannot be criminally prosecuted for any offence committed before he has completed his twelfth year. By English law, children under seven are absolutely exempt from punishment, and from seven to fourteen there is a presumption that they are not possessed of the degree of knowledge essential to criminality, though this presumption may be rebutted by proof to the contrary.—*The Law Times*.

THE late Robert Malcolm Kerr, judge of the City of London Court, was noted for making most extraordinary remarks in court. Among his famous sayings the following may be recalled; the circumstances which evoked them may be conjectured.

"I am not here to lecture upon law; otherwise I should be here all day and night teaching the profession their business."

"King David said in his haste 'All men are liars.' If he had sat here as I have for over forty years he would have said it in his leisure."

"The moment you, a foreigner, land at Dover, you are supposed to know the whole law of England—which nobody ever knew."

"Always put everything into writing. Pens are cheap, ink is cheap, and paper is cheap."

"I cannot help costs accumulating. Lawyers must live, you know. If you were to establish the doctrine that lawyers were only to get a commission on what they recover there would be no adjournments, no refreshers—no anything. People would be made honest then. It would be a sad thing for the lawyers, but that would not matter."

"Counter-claims are an abomination, and are simply the modern substitute for the old dilatory and fraudulent pleas with which the public were familiar forty years ago."

"Never go to law under any circumstances. You had much better lose your money than go to law. As a rule, it only puts money into the pockets of the lawyers—the very worst form in which it can be spent."

I KNEW Baron Huddleston, who always referred to himself as "The Last of the Barons." He told me many interesting things, notably about a curious case tried at Limerick. A man was charged with robbery with violence, at that time a capital offence. While the trial was proceeding, a stranger called at a neighboring inn, apparently holiday making. He inquired of the landlord if there were any interesting places to be visited in the neighborhood and the landlord, after considering, said there was the Assize Court

handy, and, if his customer desired it, he, the landlord, would, through a friend of his, an usher, obtain him admission to the Court. This offer the traveler accepted, and he was duly admitted to the court, which he entered just at the moment when the judge was asking the prisoner if he had anything further to urge in his defence. The prisoner, in response, further asserted his innocence, and declared he was miles away from the scene of the assault at the time it occurred. "But," argued the judge, "you have no proof of it." Then suddenly the prisoner pointed to the new-comer and exclaimed, "Yes, he can prove it! I was with him on the day, and helped to carry his portmanteau on to a vessel at Dover. The portmanteau came open and a toothbrush fell out, which I put back, after he'd wiped it. Ask him—he can prove it!" The judge questioned the stranger, who said he could not remember, but that he kept a very exhaustive diary, which was at the inn where he was staying, and which no doubt would help them. Accordingly, an officer of the court was dispatched to the inn, and brought back the diary, wherein, on the date mentioned, that of the assault, was an entry containing all the particulars as given by the prisoner. Upon this the latter was acquitted. Subsequently both men were hanged for sheep-stealing. It was a put-up job, and the stranger was a confederate.

Another good story which Huddleston told me also concerned a charge of robbery with violence. The case for the prosecution rested mainly on the discovery of a "bowler" hat on the scene of the assault, which fitted the prisoner, and which the prosecution asserted belonged to him and proved the crime. But the defence argued that the hat was one in general use and might belong to any number of men, and that such evidence was too unreliable on which to commit a man of so serious an offence. The jury felt over-burdened with their responsibility and acquitted the prisoner. As the latter was leaving the dock he turned to the judge and said: "My lord, can I 'ave my 'at?"—*Walter Frith: Canada Law Journal.*

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

THE WORKING CONSTITUTION OF THE UNITED KINGDOM. By Leonard Courtney. New York: The Macmillan Company. 1901. (viii+383 pp.)

The day of philosophical discussions of the theory of institutions appears to be gone; and now we have instead descriptions of the actual functions performed by the government and of the machinery by which the various parts of the governmental system are chosen. This book, by the Right Hon. Leonard Courtney, P. C., M. P., is a favorable specimen of this new class; and to its author's career as Under Secretary of State for the Home Department, and in the Colonial Office, and as Chairman of Parliamentary Committees and Deputy Speaker, it owes much of its value as a clear and practical presentation of the English Government as it is. The most interesting chapters deal with The Parties, General Election, and Course of Business in Parliament; and chapters of timely value to Americans are those dealing with Crown Colonies, Self-Governing Colonies, and India.

THE ENCYCLOPEDIA OF EVIDENCE. Edited by Edgar W. Camp. Vol. I. Los Angeles, California: L. D. Powell Company. 1902. (1020 pp.)

It is interesting to note the evolution of legal literature. The natural outgrowth of the text-book, which discussed one general subject of the law, was the encyclopædia in which practically all subjects were treated, although each particular subject was treated, necessarily, more briefly than in the separate text-book. Now comes a further step—the encyclopædia which aims to cover, not the entire body of the law, but only one important phase of it. In the present instance the sub-

ject chosen is Evidence; the initial volume carries the discussion through Assault and Battery, the expectation of the publishers being to complete the series in ten volumes.

Such a work as the present stands half way between the digest, with its bald statement of cases, and the old-fashioned text-book, with its more or less satisfactory discussion of principles. The citation of cases is full; and the work will prove of value to the practitioner. But it is from such a work on Evidence as Professor Thayer's, rather than from an encyclopædia, that satisfactory knowledge of the law of Evidence as a whole, and of its essential principles, is to be gained.

UNITED STATES VS. MEXICO. Report of Jackson H. Ralston, agent of the United States and of counsel, in the matter of the case of the Pious Fund of California. Washington: Government Printing Office. 1902. (891 pp.)

This report, printed as Senate Document No. 28, 57th Congress, Second Session, gives a full and decidedly interesting account, including pleadings, briefs and record of the entire proceedings, of the controversy over the Pious Fund heard before a tribunal of the Permanent Court of Arbitration under The Hague Convention, sitting at The Hague, September 15, 1902, to October 14, 1902. The award of the Court, given on the day last named, was that Mexico should pay to the United States, for the benefit of the Archbishop of California and of the Bishop of Monterey, the sum of \$1,420,682.67, silver, being the amount of thirty-three unpaid annuities of \$43,050.99 from 1869 to 1902, and should in each following year, perpetually, pay an annuity of that same amount. This amount had been decided in 1875 and 1876 by Sir Edward Thornton, sitting as umpire, it being six *per cent.* upon one-half of the capitalized value of the Pious Fund; and the present court held that the claim now presented was governed by the principle of *res judicata* by virtue of the arbitral sentence of Sir Edward Thornton.

CYCLOPÆDIA OF LAW AND PROCEDURE. Edited by *William Mack* and *Howard P. Nash*. Vols. IV. and V. New York: The American Law Book Company. 1902. (1079; 1118 pp.)

CYCLOPÆDIA OF LAW AND PROCEDURE. Edited by *William Mack* and *Howard P. Nash*. Annual Annotations (1-4 Cyc.) New York: The American Law Book Company. 1902. (161 pp.)

These two volumes of the Cyclopædia cover law and procedure from the subject of Assignments through the title Build. Especially full is the treatment, in Volume IV., of the subjects of Assignments, by Judge Roderick E. Rombauer; of Assignments for Benefit of Creditors, by Marion C. Early; of Assumpsit, by Judge Jonathan Ross, formerly Chief Justice of the Supreme Court of Vermont; of Attachments, by Roger Foster; of Attorney and Client, by George F. Tucker, recently Reporter of the Supreme Judicial Court of Massachusetts; and in Volume V., of Bail and of Bonds, by Joseph A. Joyce and Howard C. Joyce; of Bailments, by George H. Bates; of Bankruptcy, by James W. Eaton and Frank B. Gilbert; of Banks and Banking by Albert S. Bolles.

The first volume of *Annual Annotations*, by which this series is to be kept up to date, has been issued. This volume contains references to all cases under subjects treated in Volumes 1 to 4, inclusive, which have been decided since these four volumes were published. The arrangement of this supplementary volume is simple and excellent.

PROCEEDINGS OF THE EIGHTH ANNUAL MEETING OF THE IOWA STATE BAR ASSOCIATION. 1902. (227 pp.)

The principal addresses printed in this report are the following: "The Use and Abuse of Expert Evidence," by M. J. Wade, Esq.; "Should the Marriage of Feeble-Minded and Degenerates be Permitted by Law?" by H. M. Remley, Esq.; "Justice Samuel F. Miller," by J. H. McConologue, Esq., President of the Association; "Ought Our Laws to be so Amended as to Exempt from Taxa-

tion Money and Credit and other Forms of Property Easily Concealed?" by H. S. Richards, Esq.; "Should the Law Providing for the Collection of Taxes be Changed so as to Enforce by Additional Penalty the Assessment of Moneys and Credits which now Escape Taxation?" by A. E. Swisher, Esq.; "Some Legal Phases of Insanity," by Paul E. Carpenter, Esq.; "Would the Adoption of a Law for the Taxation of Mortgages and Relieving the Real Estate Covered by Mortgages from so much of the Burden of Taxation be Desirable?" by E. E. McElroy, Esq.; "The Need of Law to Govern the Trial of Equity Cases," by George W. Wakefield, Esq.

The ninth annual meeting of the Association will be held at Des Moines in July, 1903.

THE AMERICAN STATE REPORTS. Vol. 88.

Containing cases of general value and authority, decided in courts of last resort of the several States. Selected, reported and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1903. (1067 pp.)

The more important notes of the present volume cover the following subjects: Limitation of Carrier's Liability in Bills of Lading; Repeal of Statutes by Limitation; Right and Remedies of a Mortgagee when the Property is by Judicial Sale or other Proceedings Transferred so that he no longer has any Remedy by Foreclosure or Suit for Possession; Larceny; What Constitutes Color of Title within the Meaning of the Law of Adverse Possession; Liability of a Principal for the Unauthorized Acts of his Agent; When the Question of the Existence of a Public Use may be Considered by the Courts. The reports from which cases are selected are: Georgia, 114; Illinois, 194, 195; Kansas, 63; Kentucky, 105; Massachusetts, 179; Missouri, 165; New Jersey Equity, 61; New Jersey Law, 66; New York, 169, 170; North Dakota, 10; Pennsylvania State, 201; West Virginia, 50; Wisconsin, 112.



J. A. Jefferson

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THOMAS JEFFERSON AS A LAWYER.

BY EUGENE L. DIDIER.

THE splendid fame which Thomas Jefferson acquired as a statesman has dimmed, if not destroyed, his earlier reputation as a lawyer. He came to the bar of Virginia well equipped for a distinguished professional career, both by education and family connection, the latter being a very important consideration in the colonial days. At the age of seventeen, he entered William and Mary College, at Williamsburg, then the capital of Virginia. He was very fortunate in having for his professor in mathematics and philosophy a Scotch physician, William Small. He afterwards said that he was indebted to this learned man for shaping the destinies of his life.

Jefferson was a very enthusiastic student, and devoted fifteen hours a day to his books, resembling, in this respect, his future political rival, Aaron Burr. His love of books, which was the chief solace of his later life, began while he was at college, and he became well acquainted with the literature of Greece, Rome, France and England. His college days ended in December, 1762, and the young student put Coke upon Lyttleton in his trunk, and left the gay little capital of Virginia to return to his home, at Shadwell, on the then western border of the Old Dominion. He journeyed leisurely, as was his wont, spending two or three days at one friend's house, a week at another, Christmas at a third. Meanwhile, Coke lay in his trunk untouched, but his silk stockings, his silk garters and silk-lined coat were in constant

use, for Jefferson in his youth was devoted to the courtly minuet; and not only danced himself, but, upon occasion, played the fiddle for others to trip the "light fantastic toe." Between dancing, fiddling and love-making, the young gentleman found little time for the grave study of the law.

When, at last, he reached Shadwell, the old place seemed extremely dull, after Williamsburg and the recent festivities in which he had been indulging. That winter of 1763 was a "winter of discontent" to the future statesman and President, distracted as he was between love and law. The following winter he travelled to Williamsburg to attend the General Court and to consult Chancellor Wythe on some points of law which sorely perplexed his love-distracted mind. During this visit his love affair came to a disastrous conclusion, and Rebecca Burwell, having declined a conditional engagement, based upon a future contingency, lost the opportunity of becoming the wife of the author of the Declaration of Independence.

After his disappointment in love, Jefferson turned to his law books as a solace and distraction. He became a close, steady and diligent student, keeping a clock on a shelf in his bedroom, and his rule was to arise as soon as he could see the time of the day, and to begin work at once. He led a systematic and laborious life, with his law books, his Latin, Greek, French and general literature; his farm, and regular exercise on foot and horseback. As an evidence of the social

standing and intellectual culture of Thomas Jefferson, when a young man of twenty, it may be mentioned that he was on intimate terms, not only with his preceptor, Chancellor Wythe, but with the accomplished Francis Fauquier, Governor of Virginia, who was declared by Jefferson the ablest man who had ever filled that office. He frequently dined with these distinguished gentlemen at the Governor's palace in Williamsburg, and bore his part in the wit-combats that took place there. Jefferson recorded in his diary that "Mr. Wythe continued to be my faithful and beloved mentor in youth, and my affectionate friend through life." The young law student was present in the House of Burgesses when Patrick Henry made his celebrated oration advocating the popular cause in Virginia, with matchless eloquence and amazing effect. Jefferson's patriotic young soul was fired by the bold utterances of Patrick Henry, and, in a few years, they were working side by side in the cause of American independence.

Jefferson became of age on April 2, 1764, and, even at that early age, was recognized as one of the leading gentlemen of his county (Albemarle.) The offices formerly held by his father, justice of the peace and vestryman of his parish, descended upon his youthful shoulders; to which must be added the employment of farming, an occupation to which he was through life practically devoted, and became the most scientific farmer of his time, in Virginia. Even in those early years, he was a ready writer, and systematic diarist, keeping a farm-book, a garden-book, a weather-book, a receipt-book, and a pocket-expense book. Everything he did, or thought, or read was recorded: Item, "put rd in the church box; paid Bell for books, 35s."

His most intimate friend at that time was Dabney Carr, who had been a fellow-student at college. They were inseparable companions. Both were students of law; both, de-

voted to reading; both clever; both enthusiastically patriotic. Two miles from Jefferson's early home was a high mountain, upon which he afterwards raised the stately mansion called Monticello. At the top of this mountain, in the deep recesses of the then virgin forest, under an ancient oak of gigantic size, the two friends constructed a rustic seat to which they retired every morning, and passed the day in studying law, and in intelligent conversation. They entered into a solemn agreement that, whoever died first should be buried by the other beneath that old oak. Young Carr was the first to die, and Jefferson faithfully carried out the contract, and, long afterwards, when Jefferson had taken up his residence at Monticello, the spot was made the burial-place of the family. Both friends have long since reposed beneath the ground on which they studied together in their early youth. Fresh from the writings of love letters and the perusal of Cicero's polished page, Jefferson opened that "old dull scoundrel, Coke, a work printed in black letter, and offering as little promise of entertainment or instruction as the outside of a gold mine does of the wealth within." The author himself, in his preface, does not promise a very inviting prospect to the student: "I shall desire that the learned reader will not conceive any opinion against any part of *this painful and large volume* until he shall advisedly read over the whole, and diligently searched out and well considered of the several authorities, proofs and reasons which we have cited for warrant and confirmation of our opinions throughout this whole work."

If Jefferson did not find entertainment in Coke, he found information, he found learning, he found a vast store of knowledge, which was of immense service in his public life. He bore ample testimony to the important service of Coke upon the fundamental principle of human liberty: "Coke Lyttleton," he wrote afterwards, "was the universal elementary book of law-students, and a

sounder Whig never wrote, nor profounder learning in the orthodox doctrines of British liberties. Our lawyers were then all Whigs. But when his black-letter text, and uncouth, but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the student's horn-book, from that moment that profession (the nursery of our Congress) began to slide into Toryism, and nearly all the young brood of lawyers are now of that line. They suppose themselves indeed to be Whigs, because they no longer know what Whiggism or Republicanism means."

After mastering Coke, Jefferson, who "hated superficial knowledge," proceeded to trace English law to its source. He read slowly, with much labor, but with some profit, the rugged law-Latin treatise of Bracton on the ancient laws of England, who was also, a contemporaneous interpreter of *Magna Charta*. He then went back, and perused with the deepest interest the book of King Alfred's laws. He always read with pen in hand, made notes, comments and extracts. Fifty years later, he wrote to a friend, "when I was a student of the law, after getting through Coke Lyttleton, whose matter cannot be abridged, I was in the habit of abridging and commonplacing what I read meriting it, and of sometimes making my own reflections on the subject." Even in those early years, Jefferson showed that he possessed an independence of mind, which prepared him to be the author of the Declaration of Independence. In speaking of this striking feature in Jefferson's mental constitution, James Parton says: "His most remarkable and rare quality is an absolute fearlessness of mind, a loyalty to truth, no matter to what conclusion the evidence may lead, no matter what an array of authors may have maintained the contrary. In a mind that is immature, or unformed, a disregard for authorities may be a mark of vanity and presumption; but when an intelli-

gence is superior, trained to investigation, and patient of labor, it is a quality to which the whole of the progress of the human race is due. An independent, superior mind is the most precious thing that human nature possesses."

As a student, Thomas Jefferson was a shining example for the young man of all time. Up at daybreak, he spent several hours before eight o'clock in the study of natural philosophy, morals and religion; reading works on astronomy, chemistry, anatomy, agriculture, botany, international law, moral philosophy, and mathematics. From eight to twelve, he read law and condensed cases; from twelve to one, he read politics. In the afternoon he read history, and in the evening he refreshed his mind with general literature, rhetoric and oratory. He continued this fascinating reading always until midnight, sometimes until two o'clock in the morning. Fortunately, he was blessed with a strong constitution, and had the good sense to take plenty exercise in the open air between studying, travelling, dancing and playing the fiddle.

When Thomas Jefferson was admitted to the bar in the year 1767, he was well equipped for the practice of his arduous profession. Few young men have commenced a legal career possessing a mind so well stored with both legal and general knowledge. Colonial Virginia was not a very inviting country for lawyers. As far back as 1642, the Assembly had passed a law that "all mercenary lawyers be wholly expelled." By "mercenary lawyers" was meant paid attorneys. Other laws on this subject were passed, at different times, even more stringent than this. The former lasted thirty-eight years, and terminated in 1680, when the House of Burgesses passed a law, allowing lawyers to practise in the courts of the colony under certain restrictions and limitations. The fees of lawyers were fixed by law at 500 lbs. of tobacco for pleading cases in the chief court of the

colony, and 150 lbs. in the country court. A fee of 500 lbs. of tobacco, between 1680 and 1750 averaged about three guineas, and 150 lbs. less than one guinea. Such fees did not offer a very great inducement to become a lawyer; nevertheless the profession of the law was built up in Virginia; the principal members were the younger sons of wealthy planters, and the eldest sons of western farmers.

Jefferson entered at once upon a good practice. He was the most methodical of men, and carefully recorded every case in which he took part. From these records we learn that during his first year at the bar, he was engaged in sixty-eight cases before the General Court of the province, besides the county court and office business. The second year his cases numbered one hundred and fifteen; the third year, one hundred and ninety-eight; the fourth year, one hundred and twenty-one; the fifth year, one hundred and thirty-seven; the sixth, one hundred and fifty-four; the seventh, one hundred and thirty-seven. From 1769, his practice before the General Court fell off on account of his pronounced views on the great questions then beginning to agitate Virginia and the other colonies. But his practice in the other courts increased, as well as his general business. During his first two years at the bar, his fees amounted to 600 pounds, a sum equal to at least \$6,000 at the present time.

Jefferson's position at the bar of Virginia is shown by the fact that the distinguished lawyer, Robert Carter Nicholas, who was made the attorney-general of the colony at the age of twenty-one, intrusted to him all of his unfinished business. The compensation of lawyers at that time was small, and Jefferson's fees did not average more than one pound sterling each. It has been estimated that, translated into the dollars of these days, it was as though a lawyer of the present day received fifty dollars for arguing a case before the Supreme Court of the United States, ten dollars for a case before a local court, two

dollars for a verbal opinion, and five dollars for a written one. Well might Daniel Webster say that, in that age, "lawyers worked hard, lived well, and died poor." It was necessary to make up for the smallness of the fees by the number of the cases. In seven years, Jefferson doubled his inherited estate by his law practice, his professional income averaging \$3,000 a year. Add to this, \$2,000 a year from his farm, and the young Virginia lawyer might be called a very prosperous young gentleman. He lived comfortably, but not extravagantly; his chief expense, outside of his household disbursements, was for books. He was what is now called a book-lover, and he gradually formed a library, which, in the course of time, became the best private library in the United States. Towards the close of his long life, when financial troubles overtook him, he was compelled to offer his books for sale *en bloc*. The valuable library was secured by the United States; the price paid was \$23,000; and Jefferson was allowed to retain the books at Monticello for his use during his life-time. These books were the nucleus of our magnificent Library of Congress, which is one of the great libraries of the world.

Jefferson loved his professional work, and devoted himself to it with his characteristic zeal, energy and intellectual ability. The printing press was late in being introduced into Virginia and the early laws of the colony had been preserved in manuscript, copies of which were supplied to the different counties at the public expense. When Jefferson entered upon the practice of the law, he found it difficult to get copies of some of the early laws, while others had perished. "I set myself, therefore, to work," he says, "to collect all that were existing, in order that when the day should come in which the public should advert to the magnitude of the loss in these precious monuments of our property and history, a part of their regret might be spared by information that a portion had been saved

from the wreck, which is worthy of their attention and preservation. In searching after these remains, I spared neither time, trouble, nor expense." The manuscripts which were old and worn he wrapped in oil skin; others were bound. By referring to Hening's Statutes at Large, the most valuable work on the early history of Virginia, it will be found that many of the early laws and old documents were copied from Jefferson's collection.

When Thomas Jefferson practised law it was a much more complicated, artificial, and knotty affair than it has gradually become during the one hundred and forty years that have elapsed since the time when the young Virginian appeared at the bar in knee breeches and silk stockings. In our day a lawyer cannot have too much learning. He needs a great variety of knowledge covering a vast range of subjects, in order to cope successfully with his rivals at the bar. But in Jefferson's time there was no place to display much legal learning or vast stores of knowledge. The General Court, where he practised with great success, was composed of the Governor and five members of the Council, the latter being a selection of wealthy and influential planters, appointed by the king. Certainly, not a very formidable body before which to display the learning of the law, and the grace of oratory! The Governor usually knew more about fox hunting, card playing and punch drinking than the "knotty questions of the law." One of the most important services that Jefferson rendered, directly to his State, and incidentally, to the whole country, was the revising all the Colonial and British Statutes at the time in force in Virginia, and reducing them to one code. In speaking about this matter, it has been justly said that he "divested them of their aristocratic features and feudal barbarism; and by abolishing entails, and rights of primogeniture, decreed the equal distribution of estates among children—the true

agrarian law of republics, beneath which the masses of wealth soon melt away."

The Puritans were the Spartans, the Virginians the Athenians of the New World. Thomas Jefferson was by birth and education a Virginia aristocrat. But his energetic mind would not allow him to live the life of a luxurious student of letters—a life of lettered ease. It was the peculiar distinction of Thomas Jefferson to discharge with unsurpassed ability every duty to which he was called, from the time that he first practised at the courts of Virginia, to his last years which were devoted to the great work of establishing the University of Virginia. It was said by Edmund Burke that the "law is one of the first and noblest of human sciences, a science which does more to quicken and invigorate the understanding than all other kinds of learning put together." Hence it is that all the greatest American statesmen,—Jefferson, Webster, Clay, Calhoun,—studied and practised law. Thomas Jefferson was a born statesman. His early studies, his practice at the bar, and his universal reading were but a preparation for his true vocation. At the early age of twenty-four, he was elected to the Legislature of Virginia, and although one of the youngest, he soon became one of the distinguished, members. It was the policy of Virginia to call young men of promise into the public service very early in life. The wisdom of such a policy was shown in the memorable case of Washington.

Jefferson practised law for seven years—1767 to 1774, when he was called from his chosen profession to the larger field of national politics. He displayed the same qualities at the bar that he afterwards showed as a statesman: he was learned, patient, laborious, painstaking. He prepared his cases with the greatest care, studied them thoroughly, and was perfectly posted in all the legal points bearing on the case in hand. At the bar he was more distinguished for his close reasoning and clear argument than for

eloquence. In fact, he never distinguished himself as a speaker either in court, or in Congress. His voice wanted strength, compass, flexibility. William Wirt, in his ornate and elaborate eulogy of Jefferson, delivered at Washington, on the 19th of October, 1826, touches upon this point with his usual flowing eloquence: "The study of the law he pursued under George Wythe; a man of Roman stamp, in Rome's best age. Here he acquired that unrivalled neatness, system and method in business, which, through all his life, and in every office that he filled, gave him, in effect, the hundred hands of Briareus; here, too, following the giant steps of his master, he travelled the whole round of the civil and common law. From the same example he caught that untiring spirit of investigation which never left a subject till he had searched it to the bottom. In short, Mr. Wythe placed on his head the crown of legal preparation: and well did it become him. Permit me, here, to correct an error which seems to have prevailed. It has been thought that Mr. Jefferson made no figure at the bar: but the case was far otherwise. There are still extant, in his own fair and neat hand, in the manner of his master, a number of arguments which were delivered by him at the bar upon some of the most intricate questions of the law; which if they shall ever see the light will vindicate his claim to the first honors of the profession. It is true he was not distinguished in popular debates; why he was not so, has often been a matter of surprise to those who have seen his eloquence on paper and heard it in conversation. He had all the attributes of mind, and the heart and soul, which are essential to eloquence of the highest order. The only defect was a physical one: He wanted volume and compass of voice for a large deliberate assembly; and his voice, from the excess of his sensibility, instead of rising with his feelings, and conceptions, sunk under their pressure, and became guttural and in-

articulate. The consciousness of this infirmity repressed any attempt in a large body in which he knew he must fail. But his voice was all sufficient for the purpose of judicial debate; and there is no reason to doubt that, if the services of his country had not called him away so soon from his profession, his fame as a lawyer would now have stood upon the same distinguished ground which he confessedly occupies as a statesman, an author, and a scholar."

When the year 1775 began, Thomas Jefferson was only a successful young lawyer, unknown outside of his own State. When that year closed, he was known all over the thirteen colonies as one of the leading patriots. While Fox, Burke, Chatham and Junius were teaching the people of England the inestimable blessing of constitutional government, Patrick Henry, Thomas Jefferson and Richard Henry Lee were proclaiming in Virginia that no power on earth has a right to impose taxes on a people, or take the smallest portion of their property without their consent given by their representatives—that this principle was the chief pillar of the commonwealth, without which no man can possess the least possible shadow of liberty.

Thomas Jefferson was one of the best educated men of the eighteenth century, either in Europe or America. One of his biographers deliberately declares that, "of all the public men who have figured in the United States, he was incomparably the best scholar, and the most variously accomplished man." It has been suggested that Patrick Henry and Thomas Jefferson would have made an unrivalled partnership as lawyers—Jefferson to prepare the cases, and Henry to plead them with his matchless eloquence; thus, each supplying what the other lacked.

Of few men can it be said with more truth than of Thomas Jefferson that he

"Sounded all the depths and shoals of honor."

During his long and interesting public life of forty years, he filled every office that he cared to hold both in his State and in the United States—member of the Virginia Legislature, member of the Continental Congress, Governor of Virginia, minister to France, Secretary of State, Vice-President of the United States, and, finally, President of the United States. In all of these various positions, he displayed conspicuous ability, and in each added new laurels to those already won.

On the 4th of March, 1809, Jefferson retired from public life, and returned to Monticello. He was glad to be again a private citizen in the republic of which he was one of the founders. Two days before the expiration of his second term, he wrote to his friend, the Duke de Nemours:

“Within a few days, I retire to my family, my farm, and my books; and having gained the harbor myself, I shall look on my friends still buffeting the storm with anxiety indeed, but not with envy. Never did a prisoner released from his chains feel such relief as I shall in shaking off the shackles of power.”

As a diplomatist, Jefferson was the equal of Franklin; as a statesman, he was excelled by no man of his time, or since; as a patriot, he ranks with Washington, Pinckney, Carroll and Patrick Henry. If, as has been well and truthfully said, to Gen. Washington more than any other man, this country owes its existence, to Thomas Jefferson, more than any other man, it owes the peaceful preservation of its unique political position and the successful carrying out of its magnificent destiny among the nations of the earth.

SCHOLARSHIP THE HANDMAIDEN OF THE LAWYER.¹

BY PETER J. HAMILTON.

AT the outset we are met with very different opinions on the subject of scholarship in law. Sir Walter Scott was a lawyer and a good one, and he declares that a lawyer without knowledge of history and literature is a mere mechanic, a man earning his daily bread. On the other hand Sir William Jones, possibly the most learned man ever at the English bar, said that in his profession scholarship was a dead weight, and we are all familiar with the remark of our Lord Coke, when there were but thirty-six reports and text-books, that law is a jealous mistress, which in parlance appropriate to the day we celebrate might mean that we must have no other valentine. To the same effect is the old saying that Lady Common Law must lie alone,—although I cannot undertake to say in what sense the word lie is used.

¹ Response to a toast at a banquet of the Mobile Bar Association, February 14, 1903.

And yet it would be strange if law is to be entirely dissociated from literature. In point of fact when we go back to the beginnings of things, law was literature. The first lisplings of letters were in numbers, in poetry recording customs and beliefs, themselves the laws of the day. Of course things have become differentiated, so that law literature stands by itself, and whatever form they assume, whether text-books or reports, law books are mere tools for the lawyer's business. Literature in the more general sense is a separate thing, and yet as it is part of our business to understand human nature, convince human reason and captivate human imagination, all literature must be laid under contribution. Whatever moves man must be a part of the lawyer's mental make-up, whether poetry, history, fiction, or above all the Book of Books, which has done so much to mould civilized thought and control civil-

ized action. Even Coke boasts that he has three hundred quotations from Virgil in his Institutes. William Wirt was a close student of literature, and his scholar, the famous Rufus Choate, made it a rule to let nothing interfere with an hour every day to be given to such pursuits. Augustine Birrell is one of the acutest essayists on purely literary subjects, and he is a practising lawyer of note in England and has written possibly the one law book which can be read with actual pleasure as a literary effort. Hannis Taylor of our own bar can also be mentioned.

There is no doubt there is a danger involved. Wirt before writing his famous *Life of Patrick Henry* consulted an eminent legal authority as to how such an attempt would be regarded and what effect it might have upon his business. Sir Walter Scott is an instance in point of a man who actually gave up law and devoted himself to literature, as is Macaulay, and both with eminent success. Irving also started as a lawyer, and Montesquieu was a magistrate. In fact, there are numerous instances, the most striking perhaps being that of a gentleman, known to us all, who lived some time ago in a little country town in England. This man seems to have known a good deal of law, married early, and was quite active,—in fact too much so in regard to poaching, and in consequence had to leave the country for London. There he first held horses, and went on the stage and wrote plays. What a fall was there! From being a lawyer, at least in the making, we find William Shakespeare descend to literature,—unless the other theory be correct that under the name of Bacon he was actually a lord chancellor, too. So that there is a danger of lawyers drifting into literature, and there is the other, possibly greater danger, of the public's getting the erroneous impression that he is neglecting his profession. The true solution of the difficulty is that suggested in the toast,—scholarship should be a handmaiden and must

not rival in our affections Lady Law herself.

There is a point of view from which scholarship is of the greatest importance to a lawyer. The tendency of the present day, fostered by encyclopedias and digests, is to make us a profession of case lawyers, or legal mechanics. Cases are important, of course, and, if we do not have them and do not find others to convince the courts, we shall not be able to enjoy law, literature or life. It is necessary to treat our profession as an art. But there is more to law than this, for it is a science, and in some sense the greatest of all sciences. It studies and enforces the principles underlying society itself, and regulates the relations and intercourse of all human beings. As such it can be studied in one of two ways,—either as a philosophy or as a history. Philosophically treated we look with the greatest reverence to Austin and Bentham, and their tendency it is which creates and is embodied in codes. Valuable as this view is, it is largely *a priori* and endeavors to start from fundamental principles. Particularly is this so with the Germans, even with my old instructor Windscheid, for the Germans are all influenced by Kant or his successors, although they may think they are studying historically. The difficulty about the philosophical method is that it is impossible to begin with a *tabula rasa*, for the present always grows out of the past; and therein is the value of the historical study. Law grows by assimilation of new materials on one side and sloughing off obsolete matter on the other. In the study of its development three great names stand out. The first is our old friend William Blackstone, who first put the common law in one book and in readable shape, much to the disgust and derision of some of his contemporaries. He showed us how much of English law goes back to feudal times and feudal principles. The second we find on our side of the Atlantic, and perhaps sometimes we

feel in reading Story like one of the unscholarly if older members of the Mobile Bar, who said, "You will find a statement of law that promises well, and then in the middle of a paragraph the rascal"—except he put it with an adjective besides—"will have a lot of old Latin that you cannot make head or tail of." And yet therein is the value of Story's contribution to our subject. He studied the civil law and showed how much common law owes to it. And this is of special interest to us, because, if you notice, much of the advance and improvement in jurisprudence is coming from adopting the forms or principles of the civil law, and this movement will continue. The fusion of Germanic and Romance institutions makes up much of our jurisprudence, as is shown so acutely by Oliver Wendell Holmes, recently elevated to the Supreme Court of the United States, whose book on Common Law no lawyer can afford to neglect. But any historical study of law is incomplete without recognizing the third, and perhaps greatest name of all, Sir Henry Maine. He and his successors have taught us to find the origin of law and customs, quaint and curious as they often are, in times before the Germans and the Romans separated from the old Aryan stock. His *Ancient Law* is one of the most interesting and valuable books ever written, a veritable classic, and even the later writers who

are studying primitive races of other stocks are merely following his lead. Such inquiries are teaching us at once the origin and the philosophy of law, and in this sense scholarship is not so much the handmaiden as the mother of law.

I have said that whether advocates, judges or text writers, we are becoming case lawyers, and yet we instinctively feel that this is not the highest type. When we wish to recall great legal names, they are rather Hardwicke, Mansfield, Marshall, Webster, Choate, Story, John A. Campbell, and we might add some less known but great lawyers, nearer home. They were not case lawyers, but dwelt on principles, with ever widening horizons. I think the antidote of our tendency to study law only as an art is to be found in remembering that it is also a science, and in the study of its literature, its origin and its history.

But I do not wish to have you think on this occasion what Lord Ellenborough once said to a tedious lawyer when the time came for adjournment. The barrister asked when it would be the court's pleasure to hear him further, and the judge replied that pleasure had long since been out of the question, although it was the court's duty to do so at the next sitting.

Therefore the plaintiff rests.



BUNCH v. GREAT WESTERN RAILWAY COMPANY.

¹ L. R. 13 App. Cas. 31; Shirley's Lead. Cas. p. 289.

With apologies to Westminster (and Locksley) Hall.

BY CHARLES MORSE.

*"Porter, may I leave my Gladstone, while as yet 'tis early eve,
In your keeping—will it safe be?—till the train is due to leave?"*

*"Safe as bank vaults," quoth the porter, nourishing a furtive crime,
"Trust me, lady, till the train comes in the long result of Time."*

*"Thank you, Porter! To the café I must take my famished course;
You will hold it till my hunger shall have spent its novel force."*

Falsar than all fancy fathoms, falsar than all songs have sung!
For that porter 'round the station in no mute observance hung.

He took up the cherished Gladstone, packed with Christmas presents tight,
Smote his corduroys with pleasure as he faded out of sight.

O, Amelia, unsuspecting! O, unhappy Amy Bunch!
O, the barren station platform! O, the dreary station lunch!

Better, Amy, thou wert sitting in the ladies' waiting-place
Fasting, and withal the Gladstone in thy silent, fast embrace!

Scarce her light refection ended when shrieks loud the engine-horn—
Forth she rushes 'midst the train-men, just a target for their scorn.

Then she dipped into the distance far as human eye could see,
Saw no vision of the porter, nor the bag that ought to be.

Gone her bargain-counter gleanings! This is truth the poet sings,
That a woman's crown of sorrow is rememb'ring stolen things.

On her pallid cheek and forehead came a color and a light
Which forboded for that railway a protracted legal fight.

* * * * *

Per the Lord Chancellor:

"Laches can't be charged to plaintiff, so defendant's not exempt;
It must as a carrier answer what was done in Law's contempt.

“And I doubt not that the porter has levanted far away—
Worser five grim years in Portland than a cycle of Cathay!”

Per Lord Watson:

“’Twas within the varlet’s duty of this bag to take the care;
Plaintiff she must have her action—lest she wither by despair.”

Per Lord Bramwell, dissentiente:

“While eschewing talk of bailments, plaintiff clearly risked her pain—
Nature gives the shallowest notions to a woman ’bout a train.”

Per Lord Herschell:

“We must leave it where we found it, found this case so seeming hard,
Where in *nisi prius* battle fell defendant, evil-starr’d.

“But the jingling of the guinea helps the hurt the plaintiff feels,
And defendant must not murmur—rather watch the man that steals.”

Per Lord Macnaghten:

“Men, my brothers—men, the Judges—ever judging things anew,
That which they have done but earnest of the things they shall undo!

“*Bergheim’s* case was badly reasoned, it no longer shall befool—
Cursed be the judge-made law the House of Lords can’t overrule.”

Per majorem partem:

Judgment must be writ for plaintiff.—So th’ increasing purpose runs,
And the law reports are widened with the process of the suns.



THE PLACE OF INTERNATIONAL LAW IN AMERICAN JURISPRUDENCE.

BY JAMES B. SCOTT.

INTERNATIONAL Law—to use Bentham's innovation of 1789, which has found favor with public, instead of the older and more expressive term, Law of Nations—has been variously denounced and praised as international morality or ethics; international courtesy or convention in the social sense of the word; comity as distinguished from rule of law, or merely and finally as the foreign policy which at a particular time happens to catch the fancy of nations. If admitted as law in general or as possessing some of the elements of ordinary municipal law, the principle that pinches is declared not to be law and to have no binding force whatever, because there is no Supreme Court of Nations in which the dispute may be litigated and no sheriff exists to execute the decree, supposing that one had actually been delivered. But the judgment of a municipal court is not self-executing, as for instance, when President Jackson stamped his foot saying, "John Marshall has made the decision, now let him execute it!" The executive officer of the court, the sheriff or marshal did not enforce it, and that, forsooth, changed the nature of the transaction! Suppose the sheriff meets resistance in performing the mandate of the court, the armed force of the nation may be called upon and in final result the nation is in the field. Now suppose a nation declares that a principle of international law has been violated and the demand for reparation is refused, war ensues, and the Field-Marshal is no less a person than the sheriff. It is submitted that the mere form of the sanction is immaterial, and that the nature of law cannot well depend upon the whim or ability of a sheriff, or the mere success or failure of an army in the field. If the

principle is binding at all—that is, if nations admit that a principle binds them, it is of no great moment whether the force is moral, ethical or physical. It does not make much difference in the end to the criminal, nor the rest of mankind whether he has his neck broken or is electrocuted, provided death results. It seems, therefore, unscientific, if not positively absurd, to make the essence of a thing depend upon a mere form of punishment.

But the question is after all a quibble of words—a mere *wortstreit*—as the Germans aptly phrase it; for if modern civilized nations agree to regard a body of rules and regulations as binding them in their mutual dealings and punish infractions of this code by embargo, reprisals, retorsions, pacific blockades and war, it would seem that the sanction, that is the penalty predicated upon the element of force demanded, is present. The difference of origin and form is merged in the result. For instance, an act of Congress is the joint product of House of Representatives, Senate and President (supposing he approves it, or it becomes a law over his veto or without his action); a treaty is the act of the President and two-thirds of the Senators present. There is indeed a difference in the origin and the stages through which law and treaty pass; but the Constitution ascribes to the treaty the force of law, saying in effect that the treaty so acted upon is law, the law of the land, in precisely the same sense that an act of Congress is law.

If, therefore, nations regard a principle as binding as a law which would seem not to be a law without this consent, express or implied, as evidenced by usage and custom, such principle certainly does have the force

of law, although it may differ from the municipal law just as a treaty differs in formation from an ordinary act of Congress.

The simple but forcible illustration of Abbé Galliani in maintaining a First Cause as against the doctrine of chance is clearly in point. There is—to paraphrase rather than to quote him literally—nothing strange in a man's throwing double sixes once; if he throws them two or three times in succession, the transaction becomes a trifle suspicious; but if he throws double sixes every time, the inevitable conclusion in the mind of every reasonable and thinking person is that the dice are loaded. Now if nations enforce a given tenet of international law as law every time it comes into play, it must surely be because it is law and binding, and if the Austinian definition of law does not include this law of nations everywhere existent in modern civilized life, enforceable and enforced as law, something must be the matter with the Austinian conception. The following extracts will make clear the attitude of John Austin and his school which, it must be admitted, has profoundly influenced English speculation. It cannot be said, however, that master and pupil have fanned into flame "the gladsome light of jurisprudence"; they have rather smothered it so far as international law is concerned. But to the words of the master.

"Closely analogous to human laws of this second class [set by men not political superiors, or not acting as such] are a set of objects frequently but improperly termed laws, being rules set and enforced merely by the opinion of an indeterminate body of men; e.g., where the word law is used in such expressions as 'the law of honor, the 'laws of fashion.' Rules of this species constitute much of what is usually termed 'international law.'"

"Positive morality, considered without regard to its goodness or badness, might be the subject of a science closely analogous to

jurisprudence. I say 'might be,' since it is only in one of its branches (namely, the law of nations or international law), that positive morality, thus considered, has been treated by writers in a scientific or systematic manner. For the science of positive morality considered without regard to its goodness or badness, current or established language will hardly afford us a name. But, since the science of jurisprudence is not unfrequently styled 'the science of positive law,' the science in question might be styled analogically 'the science of positive morality.' The department of the science in question which relates to international law, has actually been styled by Von Martens, a writer of celebrity, '*positives oder practisches Völkerrecht*': that is to say, 'positive international law,' or 'practical international law.' Had he named that department of the science 'positive international morality,' the name would have hit its import with perfect precision."

"Grotius, Puffendorf and the other writers on the so-called law of nations, have confounded positive international morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they conceive it would be, if it conformed to that indeterminate something which they call the law of nature."

"Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant with the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

"And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations as law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility and incurring its probable evils in case they shall violate maxims generally received and respected."

Professor Holland reverently revoices the ideas of the master in the following passage: "But there is a third kind of law which it is for many reasons convenient to coördinate with the two former kinds, although it can indeed be described as law only by courtesy, since the rights with which it is concerned cannot properly be described as legal. It is that body of rules, usually described as International law, which regulates the rights which prevail between state and state (*civitas* and *civis*.)

"The differences between these three kinds of law, private, public, and international, depend upon the presence or absence of an arbiter of the rights of parties.

"It is plain that if law be defined as we have defined it, a political arbiter by which it can be enforced is of its essence, and law without an arbiter is a contradiction in terms. Convenient therefore as it is on many accounts the phrase 'international law,' to express those rules of conduct in accordance with which, either in consequence of their express consent, or in pursuance of the usage of the civilized world, nations are expected to act, it is impossible to regard these rules as being in reality anything more than the moral code of nations."

If this arbiter should one day appear, it is clear that this objection would fall to the

ground. In the meantime, however, international law is enforced without him.

Sir Frederick Pollock has in a recent article in the *Columbia Law Review* for December, 1902, admirably met this objection: "The imperfect state of the law of nations, in respect that it lacks a cosmopolitan judicial court with power to execute its decrees, is a well-worn topic. It has been discussed ever since Dante wrote his treatise *De Monarchia*. Some writers have used it as an argument, or have even supposed it to prove conclusively that there is no such thing as a law of nations. With regard to this contention it seems fit to be considered that in the early history of all jurisdictions the executive power at the disposal of the courts has been rudimentary, if indeed they had such power at all. It is not universally true that even the highest courts in the most civilized modern states can always enforce their judgments. Thirty years before the American Civil War the State of Georgia defied the Supreme Court of the United States for eighteen months, with the open connivance of the President of the United States: 'John Marshall has made the decision, now let him execute it.' But the decision made by John Marshall stands as part of the law of the United States, and would do so even if its execution had been wholly frustrated in the particular case. In the Middle Ages there was nothing uncommon in rival courts within the same political allegiance obstructing one another's process and thwarting one another's jurisdiction in every way short of violence. More than this, courts have existed with an elaborate constitution and procedure and no compulsory powers whatever."

And after all that has been written or said on the subject perhaps the aptest description of the legal nature of international law is that for which Sir Frederick stood sponsor in his *First Book of Jurisprudence* (p. 13): "Customs and observances in an imperfectly or-

ganized society which have not fully acquired the character of law, but are on the way to become law." The German expression "*verdendes Recht*" says it all in two words.

It is not the purpose of this article to analyze the conception of law and supplant Austin and his followers by a definition equally faulty, nor is it intended to refute Austin, for that has been done so frequently that the novelty of the thing has been worn off. It is simply an attempt to show that international law, whether law in the abstract and narrow technical sense of the term, is enforced by nations and in the nation's tribunals as law, and that English and American courts have repeatedly enforced and do now apply the principles of the law of nations in the adjudication of a case properly involving a question of international law. Perhaps an anecdote may be permitted for the sake of clearness. A wag represented Adam and Eve as busied with naming the various creatures of the world, and it seems that Adam, after watching for some time, the antics of a toad, naively remarked to the Mother of Mankind: "It hops like a toad; it looks like a toad; let's call it a toad!" to which Eve evidently assented.

But before proceeding to an examination of the subject from the standpoint of law, it might be well to cite a few sentences from a celebrated utterance of Lord Salisbury, who in an address in the House of Lords (1887) used the following language: "I think, my Lords, we are misled in this matter by the facility with which we use the phrase 'international law.' International law has not any existence in the sense in which the term is usually understood. It depends generally upon the prejudices of writers of text-books. It can be enforced by no tribunal, and therefore, to apply to it the phrase 'law,' is to some extent misleading."

This remark is clever and cynical rather than solid and profound, for it happens that

the tribunals of Lord Salisbury's county have enforced international law for the last two centuries. The occasion for his remark was a resolution for establishing a court of International Arbitration which presumably has no sheriff. As, however, nations agree by treaty to submit a matter in dispute to the court and bind themselves to abide by the judgment of the court, the judgment is merged in the treaty and becomes as binding as the treaty of which it forms a part. A treaty is admitted to be binding and enforceable even although the sanction is war. The Behring Sea award (1893) and its effect upon the laws of the United States are admirably illustrated in the case of *La Ninfa*, 1896, (75 Fed. 513).

Passing now to international law as administered by the courts. It appears that Peter the Great's Ambassador got into trouble in London and that to appease his "Czarish Majesty" an act of Parliament was passed in 1708.

"Whereas, several turbulent and disorderly persons having in a most outrageous manner insulted the person of his excellency Andrew Artemonowitz Matneof, ambassador extraordinary of his czarish majesty, emperor of Great Russia, her majesty's good friend and ally, by arresting him, and taking him, by violence, out of his coach in the public street, and detaining him in custody for several hours, in contempt to the protection granted by her majesty, contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable; Be it therefore declared, that all actions and suits, writs and processes, commenced, sued, or prosecuted, against the said ambassador by any person or persons whatsoever, and all bail bonds given by the said ambassador, or any other person or persons on his behalf, and all recognizances of bail

given or acknowledged in any such action or suit, and all proceedings upon or by pretext or color of such action or suit, writ or process, and all judgments had thereupon, are utterly null and void, to all intents, constructions, and purposes whatsoever."

In the course of time it became necessary to interpret this statute and the question arose whether or not the statute was amendatory or merely declaratory of the law of nations. The statute clearly recognizes the law of nations as existent, but was it introduced by the statute and made binding as English law thereby, or was the penalty or sanction the only new thing in the act?

In the case of *Triquet v. Bath*, 1764 (3 Bur. 1478) it was squarely held by Lord Mansfield, C. J., that the law of nations was part of the law of England, as appears from the quoted portions of the judgment of the court:

"I remember in a case before Lord Talbot, of *Buvot v. Barbut*, upon a motion to discharge the defendant (who was in execution for not performing a decree), 'Because he was agent of commerce, commissioned by the King of Prussia, and received here as such'; the matter was very elaborately argued at the bar; and a solemn, deliberate opinion given by the court. These questions arose and were discussed.—'Whether a minister could, by any act or acts, waive his privilege.'—'Whether being a trader was any objection against allowing privilege to a minister, personally.'—'Whether an agent of commerce, or even a consul, was entitled to the privileges of a public minister.'—'What was the rule of decision: the act of Parliament or the law of nations.' Lord Talbot declared a clear opinion—'That the law of nations, in its full extent, was part of the law of England.'—'That the act of Parliament was declaratory, and occasioned by a particular incident.'—'That the law of nations was to be collected from the practice of different nations, and the authority of

writers.' Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, *etc.*; there being no English writer of eminence upon the subject.

"I was counsel in this case, and have a full note of it.

"I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador."

The same great judge reasserted this view in the later case of *Heathfield v. Chilton*, 1767, (4 Bur. 2015) in which it is said: "Lord Mansfield—'The privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England. And the act of Parliament of 7 Ann. c. 12 did not intend to alter, nor can alter the law of nations. His lordship recited the history of that act, and the occasion of it, and referred to the annals of that time. He said there is not one of the provisions in that act which is not warranted by the law of nations.'"

To the same effect is the opinion of Fuller, C. J., in *Re Baiz*, 1889, (135 U. S. 403, 420).

"Sections 4062, 4063, 4064, and 4065 were originally sections 25, 26, 27, and 28 of the Crimes Act of April 30, 1790, c. 9, 1 Stat. 118; and these were drawn from the Statute of Anne, c. 12, which was declaratory simply of the law of nations, which Lord Mansfield observed, in *Heathfield v. Chilton*, 4 Burrow, 2015, 2016, the Act did not intend to alter, and could not alter."

From the courts the doctrine passed into the text-books, and Blackstone, who had been counsel in both the cases cited, laid it down as undisputed law in his *Commentaries*, (1765): "Therefore the law of nations (wherever any question arises which

is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomery, and others of a similar nature; the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of."

And a more recent and highly considered authority—likewise a judge—says in summing up the doctrine laid down in the case of *The Queen v. Keyn*, 1876, (L. R., 2 Ex. Div. 63.)—"As between nation and nation there are no laws properly so called, though there are certain established usages of which the evidence is to be found in the writings of persons who give the history of the relations which have prevailed between nation and nation. Such usages are by the law of England a part of the law of England if no other law overrules them.

"There are some particular subjects upon which the laws of each nation affect the interests of all other nations, and in respect of such subjects every nation exercises a power of concurrent legislation over all mankind which is recognized by all other nations. This legislative power may be exercised either in the way of positive enactment by

the legislature or in the form of a judicial declaration. When direct legislation takes place the opinion of writers on international law as to what usages are just or convenient is useful as indicating to the legislature what are the limits within which other nations are likely to acquiesce in their legislation. When law upon such a subject has to be judicially declared it is the duty of the judges (in England at least) to recollect that they are declaring a part of the law of their own country, and that the statements of writers upon international law are valuable only in so far as they establish the existence as a historical fact of some positive usage, and that their opinion that a given usage would be just or convenient does not prove that it has in fact existed. If no such usage is shown to exist, the result will be that the general law must prevail, even though it may be shown that it is defective, and that it would be just, necessary, or expedient to supplement it by legislation." (Stephen: *History of the Criminal Law of England*. 1883.)

There must, therefore, be something the matter with a definition of law which would exclude therefrom a not inconsiderable part of the common law of England.

It is common learning that the common law passed with the English colonists to America, and that they both claimed and received its benefits. The Constitution of 1789 gives Congress the power "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations."

The law of nations must thus have been regarded by the framers of the instrument as municipal law, for nations do not punish offenses against foreign laws. It is also elementary that when a statute or law is adopted by another nation the interpretation of the law goes with it, and that technical words are given the same meaning and construction that they had in the borrowed statute. The law of nations was part of the

common law of England; it therefore became part of the municipal or domestic law of the United States, and was expressly recognized as such by the provisions quoted from the Constitution. (See the interesting case of *United States v. Smith*, 1820, 5 Wheat. 153, in which by Act of Congress of 1819 "the crime of piracy as defined by the law of nations" was made punishable by death.)

But the reasoning, however correct theoretically, may be said not to accord with the practice of the United States.

In the case of *The Scotia*, 1871, (14 Wall. 170) the Supreme Court had occasion to examine a question of maritime law, and Mr. Justice Swayne thus expressed himself in delivering the opinion of the august body of which he was a member: "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world."

"This is not giving to the statutes of a nation extraterritorial effect. It is not treating them as general maritime laws, but is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations."

The *Paquette Habana* decided in 1899 is, perhaps, the most recent, as it certainly is

the most explicit acknowledgment of the binding effect of international law. The case arose out of a capture in the recent Spanish-American war of two Spanish boats, the "*Paquette Habana*" and the "*Lola*." The question before the courts was, are fishing smacks in the absence of municipal law or treaty, protected from capture by the law of nations, and is such a law of nations part of the municipal law of the United States?

In the elaborate and singularly careful opinion of the late Mr. Justice Gray, who delivered the judgment of the court, the question is settled as clearly and authoritatively as a tribunal of justice can settle anything.

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."¹

It is to be noted that the learned justice not only declared international law to be part of our law, but also enumerated within the compass of a single paragraph the sources of international law as far as the American student or practitioner is concerned. Questions of polity cannot well get before our

¹ See a careful article by Mr. Everett P. Wheeler in *Columbia Law Review*, 141, on Law of Prize, as affected by decision upon captures made during the late war between Spain and the United States.

courts, for by our system of government there exists a complete separation of power, and no one of the three divisions of our government as defined by the Constitution—the legislative, executive, judiciary—may delegate any function expressly or impliedly vested in it. Hence it follows that the judiciary may not be vested with, nor control by its decisions a purely political matter. For instance, the political department of the government settles boundary controversies between this and foreign governments. Mr. Chief Justice Marshall laid this down in language which has become classic: "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government.

"There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

"After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the

legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature." (Foster and Elam *v.* Neilson, 1829, 2 Pet. 253; compare also *In Re Cooper*, 1891, 143 U. S. 472, and *The James G. Swan*, 1892, 50 Fed. 111.)

Congress has been specifically empowered "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." (The Constitution, Art. I, Sec. 8.)

It naturally follows that in these various matters the expressed will of Congress is binding upon citizens of the United States, and that courts of justice will give effect to an Act of Congress "as often as questions of right depending upon it are duly presented for their determination."

In the case of *The Charming Betsy*, 1804, (2 Cr. 64, 118) the great Chief Justice again said: "It has also been observed that an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce further than is warranted by the law of nations as understood in this country."

And in *The Nereide*, 1815, (9 Cr. 388, 423) the same eminent authority said: "Till such an act [of Congress] be passed, the court is bound by the law of nations, which is a part of the law of the land."

And as Mr. Bishop has gravely and impressively expressed it: "Doubtless if the legislature, by words admitting of no interpretation, commands a court to violate the law of nations, the judges have no alternative

but to obey. Yet no statutes have ever been framed in form thus conclusive; and if a case is *prima facie* within the legislative words, still a court will not take the jurisdiction should the law of nations forbid." Again: "All statutes are to be construed in connection with one another, with the common law, with the constitution, and with the law of nations."

As regards the third source—"judicial decisions,"—it needs no argument in a country whose jurisprudence is based upon the adjudged case, to convince even the casual reader of the authority of judgments of courts of competent jurisdiction, nevertheless, the weighty words of Mr. Chief Justice Marshall may well be quoted: "The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights which are recognized by all civilized states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon the law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." (*Bentzon v. Boyle*, 1815, 9 Cranch, 191, 198.)

A fourth source consists of the "usages and customs of civilized nations," for if *communis error facit jus*, it cannot be denied that usages and customs of nations long accepted and acted upon and based and bot-tomed on, "the great principles of reason and justice" are of fundamental importance.

If unmodified by the sovereign power of a nation—for the nation can bind its citizens or subjects even although a foreign nation may hesitate to accept its interpretation of a principle common to all—such usages and customs are not only the law, but the source of the law. If Congress has not manifested by statute a contrary intent, it is to be presumed that the Congress accepts international law as it exists, and confides its interpretation in a case involving private rights to the judiciary as in the case of any other law. The absence of congressional legislation means that international law is the common law of nations untrammelled by rule or regulation. (Compare by analogy the language of Mr. Justice Field in speaking of absence of congressional action in matters of interstate commerce. *Welton v. Missouri*, 1875, 91 U. S. 275.)

As evidence of "these usages and customs of civilized nations," the works of jurists and commentators are to be consulted, not indeed for their speculations—Lord Salisbury's "prejudices of writers of text-books"—as to what the law should be, but "for trustworthy evidence of what the law really is." To this exposition of this function of the text-book writer whose influence is far-reaching and permanent as his digest of the law of nations is accurate and satisfactory, no objection can well be taken. The *responsio prudentium* is unknown to our system of jurisprudence and the *jus condere* is unclaimed and unrecognized unless Lord Coke fare better with posterity than with his contemporaries.

The clear, crisp statement of Mr. Justice Gray regarding the weight properly due text-books and their authors does not indeed stand alone; but text-book writers still quote one another as if mere iteration of individual error or the prejudices of the writers of text-books make, in some mysterious manner, the law of the world. "Their theories," says Sir James Stephen

in his *History of the Criminal Law of England*, vol. II., p. 38, "all rest at last neither upon common usage, nor upon any positive institution, but upon some theory as to justice or general convenience, which is copied by one writer from another with such variations or adaptations as happen to strike his fancy. Moreover, the history of these theories show how uncertain and variable they are."

Text-books are, however, evidence. Lord Coleridge, C. J., admirably and trenchantly said: "But there is no common law-giver to sovereign States and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilized States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not in this country at least *per se* bind the tribunals. Neither, certainly does a consensus of jurists: but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreements". (*The Queen v. Keyn*, 1876, L. R. 2 Ex. Div. 63.)

The first source enumerated by Mr. Justice Gray is here put last not from any doubt that primacy or priority does not belong to it, but because a treaty with a foreign nation is by express constitutional provision law. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made,

under their authority." (Art. III., Sec. 2.)

This clause has been construed by the Supreme Court to mean, that a treaty is nothing more nor less than a law of the land, equal but not superior in effect to an act of Congress; that as law it repeals a treaty or a previous act of Congress inconsistent with its terms, and that it is itself repealed in whole or in part by a subsequent treaty or act of Congress inconsistent with the stipulations of the treaty-law. (*Foster and Elam v. Neilson*, 1829, 2 Pet. 253, 314; *Whitney v. Robertson*, 1887, 124 U. S. 190; *Geofroy v. Riggs*, 1889, 133 U. S. 258, 266, and cases there cited.)

It would seem, therefore, to be reasonably clear from the foregoing authorities—to quote what the writer of this article has elsewhere said—"that international law is part of the English common law; that as such it passed with the English colonists to America; that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic. Municipal law it was in England; municipal law it remained and is in the United States. No opinion is expressed on the vexed question whether it is law in the abstract; our courts, State and Federal, take judicial cognizance of its existence, and in appropriate cases enforce it, so that for the American student or practitioner it is domestic or municipal law."¹

¹ For international law as interpreted in law courts see the admirable and singularly felicitous address of Hon. Simeon E. Baldwin before the International Law Association (Rouen, 1900,) on "The Part taken by Courts of Justice in the Development of International Law."



JIM SMITH'S COON DEAL.

By GEORGE BINGHAM.

JIM SMITH lived back in the hills north of the town. He was tall, ugly and honery, but was a first-class coon hunter. He brought a "whole passel" of coons to town one day to sell, and after canvassing all the groceries with no luck, he stood on the edge of the sidewalk and looked at the coons and cussed. Jim was too "tight-hearted" to give them to anybody, and he was about ready to toss them into the wagon and drive back home, when a wise idea struck him. He chuckled, slapped his hand against his knee, and started toward the Court House with his coons. Some prominent citizens were on trial for barn-burning, and the court room in the little Kentucky town was crowded.

Old Judge Moss, who occupied the bench, looked over his nose-glasses at the witnesses in all his wiseness. When the door at the main entrance opened and Jim Smith came in with his coons, the judge looked above the heads of the jurors and frowned and wondered what that fellow wanted in there with all those nasty coons.

Jim paid no attention to the surroundings, but drilled on down the aisle, around the railings and approached his Honor from the rear. He bent over close to the judge's ear and whispered, "Jedge, I've got some mighty fine coons here, and 'lowed that you should git pickin' choice."

The judge looked vexed and frowned again, but he was a politician and he knew that to refuse buying any of Jim's coons meant that he would lose ten or twelve votes in the Sassafras Ridge precinct at the next election, so he said he believed he would take two of the smallest ones.

"All right, jedge; I'll carry them down to yore house right away, so you can have them fer supper."

The judge could not stand the "cattish" taste of coon meat, and his wife, he knew,

grew sick at the thought of them. But business was business; every vote would help. Jim Smith knocked at the door of the judge's home five minutes later. Mrs. Moss threw up her hands when she saw tall, grizzly-faced Jim Smith standing there with a dozen or more coons.

"Good mornin', Miss Moss. W'y, the jedge, he wanted some good coon meat, as he'd been eatin' cow and hawg so long, and tole me to fetch the whole bunch down here fer you to clean and cook fer his supper."

"I guess you are mistaken in the place. Mr. Moss doesn't want any coons."

"No, I hain't mistaken. Jedge Moss? W'y, I've knowed Jedge Moss and me an' my boys have been votin' fer him ever since he first commenced runnin' fer office. I say, don't know Jedge Moss!"

She stood and looked at the coons and at the man for a few seconds, and then said: "Well, what on earth does that man mean by sending all these old coons down here. He has surely gone crazy. But, if he sent them down here and wants them cleaned, bring them around here and I'll have them cleaned and cooked for him. I wouldn't eat one of the nasty things for five dollars! And if he eats them, it will be at a side table."

"Yes, the jedge, he 'lowed he hadn't had any coon meat since he growed up, and he wanted you to cook a plenty so's he could git his fill of them once."

Jim Smith then went through to the kitchen and piled the coons on the long table, and hurried to the Court House and again whispered to the judge.

"Jedge, she looked at them and 'lowed they was so nice that she believed she'd take them all."

The judge paid him for the lot, and Jim Smith took his money and went to get drunk. He couldn't stand all that prosperity.

JOHN SMITH v. THE UNITED STATES.

BY SAMUEL C. LEMLY, JUDGE ADVOCATE GENERAL, UNITED STATES NAVY.

WITHOUT desiring to criticise the decision of the Court of Claims in the case of *Smith v. The United States*, No. 21,636, I submit that this decision,¹ in view of the long-established practice of the Department, based on its interpretation of article 43 of the Articles for the Government of the Navy, and other provisions of the statutes; in consideration of the opinions of Attorneys General on the subject of courts-martial, both in the Army and Navy (particularly an opinion rendered with respect to the contentions of the attorney in his case, Mr. Ormsby,² on this point, XIX. Ops., 472); and having regard to the distinct ruling of the Supreme Court upon the question (see *Johnson v. Sayre*, 158 U. S. 109, 117, *post*,) is not understood.

It should be borne in mind that the contention of the claimant in this case, upon which the decision of the court principally rests, is that under the provisions of article 43 of the Articles for the Government of the Navy an accused person must be furnished with a copy of the charges and specifications upon which he is to be tried *immediately* upon his arrest for the alleged offense. The article referred to reads as follows:

"The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not

¹ In the case of *John Smith* the Court of Claims held that the provisions of article 43 of the Articles for the Government of the Navy that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest," means that he shall be furnished with such copy immediately upon his arrest.

² See *The American Bastille*, THE GREEN BAG, Vol. XIV, p. 520, November, 1902.

reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge."

This article is to be considered, it is submitted, in connection with Article 24, paragraph 2, which provides that no commander of a vessel shall inflict as a punishment confinement for a period longer than ten days, *unless further confinement be necessary in the case of a person to be tried by court-martial.*

The utter impracticability of furnishing an accused person with a copy of the charges and specifications against him immediately when he is caught red-handed in the commission of the offense, or else postponing such arrest until said paper can be prepared by the person having the necessary authority of law, is manifest, when it is remembered that general courts-martial may be convened only by the President, the Secretary of the Navy, or Commanders-in-Chief of fleets or squadrons (article 38), and that many vessels of the Navy are necessarily at times separated from the person so authorized to convene such courts, and to prefer charges and specifications. The practice of the Navy Department in this matter is as old as the law upon the subject (act of July 17, 1862, 12 Stats., 604), and since the question was raised by the attorney for the claimant in this case, and submitted to the Attorney General, has been in accordance with the opinion of that officer, dated January 18, 1890 (XIX. Ops. 472), wherein he holds "that there may be two arrests, namely (1) an arrest in an emergency, or upon discovery of the alleged wrongdoing, with a view to a preliminary examination, and, if necessary, the formula-

tion and specification of charges; (2) an arrest for trial; held, further, that article 43 in the provision declaring that 'the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest,' has reference to the arrest for trial, and not to the arrest in the first instance."

The court-martial in the case of Smith having been legally constituted, and having proceeded according to law and within its powers, the Court of Claims was without jurisdiction. (See dissenting opinion of Mr. Justice Peele, Court of Claims, No. 21,636, decided April 22, 1901, on demurrer, 36 C. Cls., R., 328.)

In the case of Johnson *v.* Sayre, *supra*, the Supreme Court said.

"The provision of article 43 of the Articles for the Government of the Navy, which prescribes that 'the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest,' evidently refers, as appears by the very next article, to the time when he 'is arrested for trial' by court-martial, and not to the time of any previous arrest, either by way of punishment or to await the action of a court of inquiry. Rev. Stat., sec. 1624, arts. 24, 43, 44, 56. Sayre, being already in custody to await the result of a court of inquiry, could not be considered as put under arrest for trial by court-martial, before the Secretary of the Navy had informed him of the report of the court of inquiry, and had ordered a court-martial to convene to try him. Immediately after that, and four days before the court-martial met, he was furnished with a copy of the charge and specification on which he was to be tried. This was a sufficient compliance with the article in question. And it is, at the least, doubtful whether the objection that it had not been sooner delivered to him did not come too late, after he had admitted before the court-martial that he had received a copy of the charge and specifica-

tion, and after objections to the jurisdiction of the court and to the form of the accusation had been made and overruled, and he had pleaded not guilty, and the evidence for the United States had been introduced.

"The court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise."

No civil court "has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try." (*Wales v. Whitney*, 116 U. S., 168.)

The sentence of a court-martial, when duly confirmed, "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever." With the legal sentences of competent courts-martial "civil courts have nothing to do, nor are they in any way alterable by them." "If it were otherwise," it is added, "the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts." (*Dynes v. Hoover*, 20 How., 81, 82.) This ruling has been abundantly affirmed and illustrated in later cases. (*Winthrop's Military Law*, Vol. I., p. 56.)

The Regulations of the Navy, Chapter XXIII., "Naval Administration and Discipline," provide amply for the protection of the rights of both officers and enlisted men accused of offenses against law and order. Article 1073 of said Regulations, as amended, provides:

"1073. (1) In order to avoid unnecessary recourse to courts of inquiry and general courts-martial, it is directed that where an officer or other person shall be reported for grave misconduct to his immediate com-

manding officer, the latter shall institute a careful inquiry into the circumstances on which the complaint is founded. To this end he shall call upon the complainant for a written statement of the case, together with a list of his witnesses, mentioning where they may be found, and a memorandum of any documentary evidence bearing upon the case which it may be in his power to produce.

"(2) He shall also call upon the accused for such counter statement or explanation as he may wish to make, and for a list of the persons he desires to have questioned in his behalf. If the accused does not desire to submit a statement, that fact should be set forth in writing."

But the preliminary investigation called for by these requirements, in themselves just to the accused and promoting the interests of discipline, necessarily preclude the immediate delivery of charges and specifications. In the case of Smith, it is understood that the vessel on which he was serving was on detached duty at some distance from the convening authority; and this must often occur in practice. By article 38 of the Articles for the Government of the Navy, the President, the Secretary of the Navy, and Commanders-in-Chief of fleets and squadrons alone are empowered to order trials by general court-martial, and under naval practice they alone may prefer and sign charges. It is physically impossible, in most cases, to deliver charges and specifications to an offender at the time he is put under arrest, if these words be taken to mean his apprehension when the offense

is discovered. It will hardly be contended that the law contemplates deferring arrest of offenders in all cases until the circumstances of the offense can be properly investigated, communication had with the convening authority, and formal charges and specifications prepared and returned.

It may be added that while there may in isolated cases and on distant stations be abuses of authority, it has been the uniform practice of the Navy Department to carefully guard against such, and in this particular instance, whatever glamour may to the lay (non-military) mind appear to surround Smith's offense, as shown by the proceedings in the case, including his statement, as published in full in the decision of the court, there is disclosed merely the plain case of an enlisted man, serving as a fireman in the Navy, deliberately refusing duty, which, as the vessel was in port at the time, was not of an onerous character. If, under such circumstances, enlisted men are to be allowed to judge whether orders given them are or are not appropriate, and whether or not they should be obeyed, there would be an end to discipline in the Navy.

It is understood that if the wish of this department in the matter is followed, the case of Smith will be appealed to the Supreme Court of the United States for final determination. In any event, those representing the interests of the Navy and the Navy Department in the premises can have no other purpose or desire than to be governed strictly by the provisions of law on the subject, as interpreted by the highest judicial authority.



REVEALED BY A FLASH OF LIGHTNING.

BY THOMAS W. LLOYD.

THE truth of the familiar saying, that "murder will out," is well illustrated by a case that was tried in Sullivan county, Pennsylvania, nearly fifty years ago, and which is absolutely unique in the annals of crime.

At the time referred to, there lived in Elkland township, Sullivan county, a German cobbler and his young and pretty wife. The husband's name was John Vitengruber and he was of a rather shiftless nature and strongly addicted to drink. They had one child, a boy about three years of age. The wife was about fifteen years younger than her husband, and they frequently quarreled. Some time after coming to Sullivan county they were visited by a young carpenter named John Ramm. Having come from the same section in Germany in which the Vitengrubers had lived, Ramm was permitted to make his home with them. But soon after his arrival the quarrels between husband and wife became more frequent and bitter, and strange stories began to be whispered about concerning Ramm, the boarder.

One Sunday Vitengruber suddenly disappeared. His wife and Ramm said he had gone over into an adjoining county to work at his trade. This story was believed, until about a month afterward, when a neighbor noticed that Ramm was not only wearing Vitengruber's clothing, but that he also carried his watch. This led to the arrest of Ramm and Mrs. Vitengruber, but there was nothing to show that their story was untrue, and they were discharged.

For some time afterward the pair continued to live in the log hut in the woods, and then something startling occurred. It was four months after the disappearance of Vitengruber that Joseph McCarthy was traveling,

one night, through the woods, near the hut where Mrs. Vitengruber lived with her par amour. There was a terrible storm in progress, and trees and limbs were being blown in every direction. A zigzag path led through the woods, directly past the little log house, and it was while wandering about in search of this path that McCarthy saw something that made his hair raise. The rain was falling in torrents. Suddenly McCarthy caught a sickening odor that seemed to come from an overturned hemlock tree. As he stood there, a vivid flash of lightning lit up the forest and directly in front of him, uncovered by the upturned roots of the overturned tree, McCarthy beheld the decomposed remains of a human body. It was just for an instant that McCarthy was able to see it, but that instant was enough to frighten him so badly that he ran blindly through the woods, coming out into a clearing near his own home.

Next morning, in company with a neighbor, McCarthy returned to the fallen tree, but the body was gone. In a shallow furrow, however, the imprint remained, and a close inspection revealed startling evidences of crime. The men found the nails of a human being, together with a bunch of hair and caps of hard skin that had evidently covered human heels. The hair was exactly the same color as the hair of Vitengruber. An effort had been made by somebody, that very morning, to chop off the trunk of the fallen tree, so that the upturned roots would fall back over the open grave, but this effort had been unsuccessful. The men examined the chips and, from their peculiar shape, determined that they had been made by Ramm, who was an experienced axman.

The arrest of Ramm and Mrs. Vitengruber followed and their trial came up at the next

term of court before Judge David Wilmot, the author in Congress of the famous "Wilmot proviso."

But the Commonwealth was unable to prove the *corpus delicti*, for even if there had been a human body under the tree, there was no proof that it was Vitengruber's. The attorneys for the Commonwealth were at their wits' ends, and it looked as though the defendants would be acquitted, when a new and sensational turn in the case occurred.

The last witness called by the Commonwealth was the four-year-old son of Mrs. Vitengruber. Judge Wilmot was at first inclined to rule out the witness, on account of his extreme youth, but finally decided to hear his testimony. During the interval between the time of Mrs. Vitengruber's arrest and her trial at court, the boy had been in charge of a minister of the gospel, and his appearance in court was the first time the mother had seen her child for two months. She was much agitated when he was placed on the stand, and soon began to sob convulsively. The boy was called to testify as to several articles of wearing apparel. One was a coat, which the lad said belonged to his father. Then the lawyer held up a pretty red cap and immediately the child cried:

"That's mine, that's mine! My mother made it for me," and ran, with extended hands to seize the cap.

But before he had crossed the space between the witness stand and the attorney's

table, Mrs. Vitengruber had rushed towards him and caught him in her arms. She kissed him over and over, and then suddenly turning, and pointing at Ramm, she shrieked:

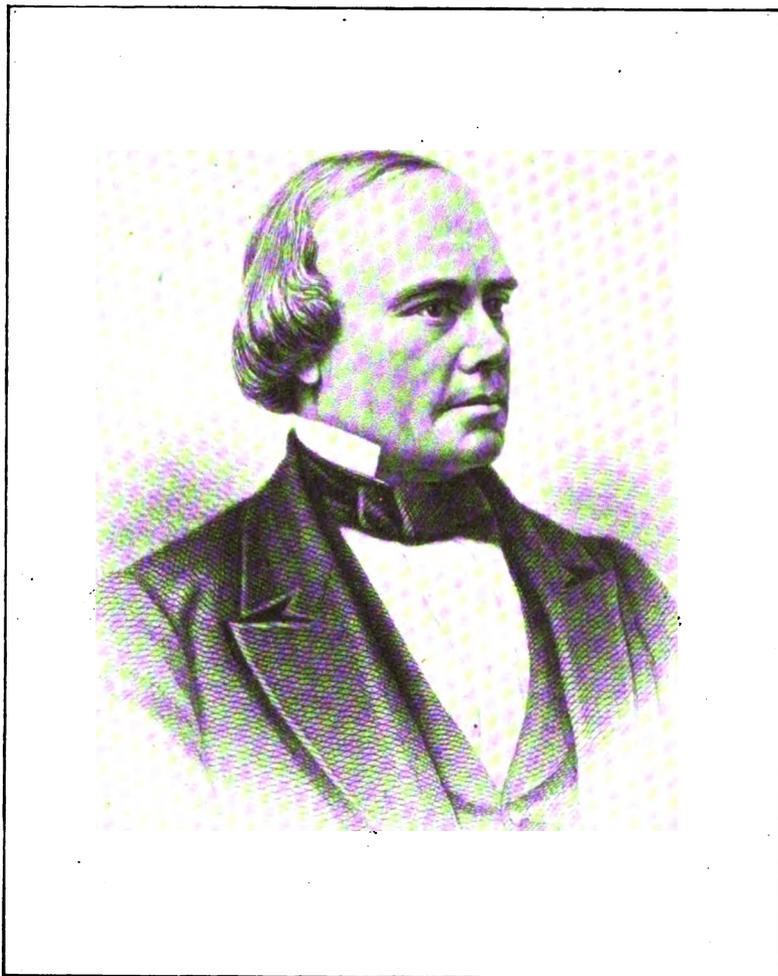
"He done it! He killed my husband and threw him in the lake! Oh, my God, help me! The priest, the priest!"

With these tragic words the woman fell to the floor, her boy still clutched in her arms. She soon became unconscious and was carried from the court-room.

So intense was the excitement which followed that Judge Wilmot adjourned the court until Monday morning, it then being late Saturday afternoon. That night Mrs. Vitengruber made a full confession, acknowledging her relations with Ramm, and her assistance in burying her husband's remains under a tree, after he had been killed by Ramm. Subsequently, after the storm had uncovered the body, they rolled the corpse into a bed-tick and took it out into the lake and threw it overboard. Before court convened on Monday morning, Ramm had also confessed, telling how, during a quarrel about Mrs. Vitengruber, he had struck her husband on the head with an axe and killed him. Ramm was hanged in the jail yard at Laporte, Sept. 14, 1856.

Mrs. Vitengruber escaped the fate of her paramour, because she became insane. Her dramatic confession in the court room caused her collapse.





B. R. Curtis.

A CENTURY OF FEDERAL JUDICATURE.

IV.

BY VAN VECHTEN VEEDER.

THE lawyers who came to the bench during the decade subsequent to 1845 were uniformly of a very high order of ability; in fact, no similar period of the court's history can show the accession of five abler lawyers than Nelson, Grier, Woodbury, Curtis and Campbell. Nelson and Grier were fortunately vouchsafed long and distinguished careers, but the service of the others was too brief to enable them to make any very extensive contribution to Federal jurisprudence.

Justice Nelson's (1845-72) career is one of the most remarkable in judicial annals. Beginning his judicial service as a circuit judge at the age of thirty, he succeeded William L. Marcy as a justice of the Supreme Court of New York eight years later; after serving in this position for six years he was advanced to chief justiceship, and presided for eight years. With, therefore, twenty-two years previous experience as a state judge, he was appointed associate justice of the United States Supreme Court in 1845, and finally terminated his judicial career in 1872 as a member of the Joint High Commission selected to arbitrate the Alabama claims. He was thus in active judicial service for a little short of fifty years. I know of only one instance in which such service has been exceeded: William Cranch, most widely known as an early reporter of the decisions of the Supreme Court, served continuously in the United States Circuit Court for the District of Columbia for a period of fifty-four years. Without any conspicuously brilliant qualities, Justice Nelson was a learned, practical and efficient member of the court, and bore his full share of its labors. He succeeded Justice Baldwin in support of Chief Justice Taney's

constitutional views. In the Dred-Scott case he concurred in the chief justice's opinion, believing that if Congress possessed power under the Constitution to abolish slavery, "it must necessarily possess the like power to establish it." During the civil war his conservatism and life-long political affiliations led him to oppose many of the government's acts, but his relations with the administration were as harmonious as his loyalty was undoubted. Justice Nelson was learned in international law and admiralty, but his most conspicuous service was in the domain of patent law. A good idea of his work may be obtained from the cases in the note below.¹

Justice Grier (1846-70) does not seem to be as widely known as the merit of his work warrants. Among lawyers who have had occasion to study the reports of his time he is known as one of the most learned and acute judges of this bench. To a judicial experience of nearly forty years duration he brought a varied culture and scholarly habits of mind. To his linguistic accomplishments

¹ *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 Howard 344; *The Eagle*, 8 Wallace 15; *The Prize Cases*, 2 Black 633; *The Plymouth*, 3 Wallace 20; *State of Georgia v. Stanton*, 6 *ib.* 50; *The Passenger Cases*, 7 Howard 283; *Dred Scott v. Sanford*, 19 *ib.* 393; *Tayloe v. Insurance Company*, 9 *ib.* 390; *The Collector v. Hay*, 11 Wallace 113; *Woodruff v. Parham*, 8 Wall. 123; *Meazie Bank v. Fenno*, 8 *ib.* 533; *Freeman v. Howe*, 24 Howard 45; *State of Pennsylvania v. Wheeling Bridge Company*, 18 Howard 421; *Hugg v. Augusta Insurance Company*, 7 *ib.* 595; *Bank of Commerce v. New York City*, 2 Black 620; *Bank Tax Case*, 2 Wallace 200; *The Justices v. Murray*, 9 *ib.* 274; *United States v. Baker*, 5 Blatchford 6. See also his charges on the fugitive slave laws in 1 Blatchford 635 and 2 *ib.* 559, and on treason in 5 Blatchford 549.

Some of his leading cases in the Supreme Court of New York are *Thomas v. Dakin*, 22 Wendell 9; *Schieflein v. Carpenter*, 15 *ib.* 400; *Browne v. Potter*, 17 *ib.* 164; *Fleet v. Hegeman*, 14 *ib.* 42; *Aymar v. Sheldon*, 12 *ib.* 439; *Masterton v. Mayor of Brooklyn*, 7 Hill 62; *Hutchins v. Hutchins*, 7 *ib.* 104.

may have been due his mastery of his native tongue; at all events, no other justice of the court has surpassed the ease, accuracy and finish of his written style. It is, indeed, surprising that among so many men of sterling ability the court should have had so few scholarly writers. Marshall, Taney, Curtis and Miller disclosed the utmost possibilities of severely plain and massive discourse, and Story, Bradley and others have illustrated the effect of a more elaborate and ornamental manner of speech. But a style which cannot be labeled with the marks of either of these extremes, which is easy but accurate, concise but not bare, and which, above all, is characterized by an indefinable air of distinction, has been rare. Justice Grier's learning and research were beyond doubt, but they are not forced upon the reader in a mass of needless quotations and the mechanical citation of a multitude of authorities. He gives, not the raw materials of an argument or exposition, but the results of his search for a guiding principle, reduced to form, and supported by illustrations and authorities which are the result of discrimination and taste. His expositions are always clear in statement and confined to the issues; probably no other justice contributed less *dicta* to the reports. The affectionate and eulogistic resolution in which the bar expressed its regret upon the occasion of his retirement referred particularly to "his rich and varied learning, his clear comprehension of legal principles, his power of close reasoning and forcible expression, his uprightness, simplicity and independence of character, his zeal and faithfulness in the discharge of his judicial duties, his pure and blameless personal life, and his kind and courteous bearing to members of the bar."

His dissenting opinion in *Gaines v. Hennen*, 20 Howard, 591, is a characteristic specimen of his style. "I wholly dissent," he said, "from the opinion of the majority of the court in this case, both as to the law

and the facts. But I do not think it necessary to vindicate my opinion by again presenting to the public view a history of the scandalous gossip which has been buried under the dust of half a century, and which a proper feeling of delicacy should have suffered to remain so. I therefore dismiss the case, as I hope, for the last time, with the single remark that if it be the law of Louisiana that a will can be established by the dim recollections, imaginations or inventions of anile gossips, after forty-five years, to disturb the titles and possessions of *bona fide* holders, without notice, of an apparently indefeasible legal title, '*haud equidem invideo, miror magis.*'"

In accepting Justice Grier's resignation, President Grant publicly recognized "the great public service which you were able to render to your country, in the darkest hour of her history, by the vigor and patriotic firmness with which you upheld the just powers of the government and vindicated the right of the nation to maintain its own existence." This has reference to Justice Grier's memorable opinion in the Prize Cases, involving the President's right to institute a blockade, and the rights and liabilities of neutrals with respect thereto. The crisis involved in the determination of these cases has been graphically described by Richard Henry Dana, to whose distinguished advocacy the result was mainly due. "The government is carrying on a war. It is exerting all the powers of war. Yet the claimants of the captured vessels not only seek to save their vessels by denying that they are liable to capture, but deny the right of the Government to exercise war powers—deny that this can be, in point of law, a war. . . . Contemplate . . . the possibility of the Supreme Court deciding that this blockade is illegal! What a position it would put us in before the world, whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to a cotton famine

and domestic dangers and distress for two years! It would end the war, and where it would leave us with neutral powers, it is fearful to contemplate."

This problem was solved by Justice Grier, speaking for the majority of the court, in an opinion which constitutes a valuable addi-

President was bound to meet it in the shape it presented itself without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact. It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by



Samuel Nelson

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tion to international jurisprudence. "The greatest of civil wars," he said, "was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The

one side, and the insurgents be considered as rebels or traitors." After referring to Queen Victoria's proclamation of neutrality, and similar declarations or silent acquiescence by other nations, he continued: "After such an official recognition by the sovereign, a citizen of a foreign state is estopped to deny the existence of a war, with all its

consequences as regards neutrals. They cannot ask a court to affect technical ignorance of a war which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious

ment, organized armies and commenced hostilities, are not enemies because they are traitors; and a war levied on the Government by traitors in order to dismember and destroy it, is not a war, because it is an insurrection."

In marked contrast to the strained con-



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sophisms. The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court is now for the first time desired to pronounce, to wit: that insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary govern-

struction of the law of treason which so long stained the annals of English jurisprudence, is his lucid statement, in *United States v. Hanway*, 2 Wallace, Jr., 204, of the American doctrine. The defendant was charged with participation in an armed opposition to an enforcement of the fugitive slave law. "The conspiracy and the insurrection connected with it," Justice Grier charged the

jury, "must be to effect something of a public nature, to overthrow the government, or to nullify some law of the United States, and totally hinder its execution or compel its repeal. A band of smugglers may be said to set the laws at defiance, and to have conspired together for that purpose, and to resist by armed force the execution of the revenue laws; they may have battles with the officers of the revenue, in which numbers may be slain upon both sides; and yet they will not be guilty of treason, because it is not an insurrection of a public nature, but merely for private lucre or advantage. A whole neighborhood of debtors may conspire together to resist the sheriff and his officers in executing process on their property—they may perpetrate their resistance by force of arms . . . and yet they will be liable only as felons, and not as traitors. Their insurrection is of a private, not of a public, nature; their object is to hinder or remedy a private, not a public, grievance. A number of fugitive slaves may infest a neighborhood, and may be encouraged by the neighbors in combining to resist the capture of any of their number; . . . they are guilty of a felony and liable to punishment, but not as traitors. Their insurrection is for a private object and connected with no public purpose. It is true that constructively they may be said to resist the execution of the fugitive slave law, but in no other sense than the smugglers resist the revenue laws and the anti-renters the execution laws. Their insurrection, their violence, however great their numbers may be, so long as it is merely to attain some personal or private end of their own, cannot be called levying war. Alexander the Great may be classed with robbers by moralists, but still the political distinction will remain between war and robbery. One is public and national, the other private and personal."

After the argument of the *McCardle* case, 6 Wallace 318; 7 *ib.* 509, which involved the

constitutionality of the Reconstruction Acts, the opinion became prevalent that the judgment would be averse to the government. Pending the consideration of the case by the court an act was therefore introduced in Congress repealing so much of the law as authorized an appeal to the Supreme Court on writs of *habeas corpus*, together with the exercise of jurisdiction on appeals already taken. When the court's attention was called to the pending act, the majority voted to await the action of Congress. To this action Justice Grier entered a vigorous protest, which he read in court. "This case," he said, "was fully argued in the beginning of this month. It is a case that involves the liberty and rights, not only of the appellant, but of millions of our fellow citizens. The country and the parties had a right to expect that it would receive the immediate and solemn attention of this court. By the postponement of the case we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for legislation to interpose to supercede our action and relieve us from our responsibility. I am not willing to be a partaker either of the eulogy or opprobrium that may follow, and can only say:

'Pudet haec opprobia nobis,

Et dici potuisse; et non potuisse repelli.'"¹

Justice Woodbury's (1845-51) short service gave promise of great distinction. He had already proved the variety and extent of

¹ Among other cases of interest in which Justice Grier formulated his views may be mentioned *State of Texas v. White*, 7 Wallace 700; *State of Pennsylvania v. Wheeling Bridge Company*, 18 Howard 421; *Rundle v. Delaware and Raritan Canal Company*, 14 *ib.* 80; *The License Cases*, 5 *ib.* 504; *The Passenger Cases*, 7 *ib.* 283; *Gordon v. United States*, 7 Wallace 193; *Chenango Bridge Company v. Binghamton Bridge Company*, 3 *ib.* 71; *Dred Scott v. Sanford*, 19 Howard 393; *Jackson v. James*, 20 *ib.* 296; *Marshall v. Baltimore and Ohio Railroad Company*, 16 *ib.* 314; *Richardson v. Goddard*, 23 *ib.* 28; *The Magnolia*, 20 *ib.* 296; *Barnard v. Adams*, 10 *ib.* 270; *O'Reilly v. Morse*, 15 *ib.* 62; *Corning v. Burden*, 15 *ib.* 252.

his powers in all three departments of government, and his untimely death has never ceased to be a matter of regret. His very able dissenting opinions in *Waring v. Clark*, 5 Howard 441, and *Luther v. Borden*, 7 *ib.* 1, have been justly admired; and the reports contain abundant evidence of his judicial powers.¹

The careers of Justices Curtis (1851-57) and Campbell (1853-61) present some points of similarity. After varied and distinguished services at the bar of their respective States, both were appointed to the Federal bench at the early age of forty-two; both resigned from the bench within a few years, and both subsequently added materially to their fame by distinguished services at the bar of the court in which they had served in a judicial capacity. They were alike men of massive intellect, profound learning, judicial instincts and sound judgment.

In Benjamin R. Curtis we have to consider a lawyer who, all things considered, has not been surpassed, if indeed he has been equalled, by any other judge in the history of the Supreme Court. The late Justice Miller, who, among his successors on this bench most closely resembled him in intellect, has expressed the opinion that Curtis was "the first lawyer of America, of the past or the present time. In analytical capacity to discover the principles of law which were involved in every case that came before him, and take a correct and truthful view of the facts of such a case, however complicated, and, above all, in the power of presenting these principles and facts to the court and jury, and impressing them by sound and convincing argumentation, Judge Curtis has

¹ *Jones v. Van Zant*, 5 Howard 215; *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 Howard 344; *The License Cases*, 5 *ib.* 504; *Planter's Bank v. Sharp*, 6 *ib.* 301; *Wilkes v. Dinsman*, 7 *ib.* 89; *East Hartford v. Hartford Bridge Company*, 10 *ib.* 511; *Leroy v. Beard*, 8 *ib.* 451; *United States v. Libby*, 1 Woodbury and Minot 221; *United States v. New Bedford*, *ib.* 401; *Tufts v. Tufts*, 3 *ib.* 456; *Stillman v. White Rock Manufacturing Company*, *ib.* 538.

never had an equal in this country. He had the capacity to see the points which were decisive of the case, and the manly courage to discard everything else. The highest tribute to his learning and skill as a lawyer and his frankness with the court that I can think of, and which I can say with strict truth, is this: that of the many causes I have heard him argue in the Supreme Court all were decided upon some ground discussed by him as material to the result. He selected his own field of battle, and, whether he won or lost, the issue was fought out on that ground. . . . Judge Curtis was not a man of brilliant talents, though possessed of a vigorous intellect. . . . His superiority as a lawyer was mainly due to the depth of his learning in the law, his capacity for discovering the principles involved in a case, and the training and discipline of his mind and habits. In the mere learning of the law he undoubtedly had his equals, possibly his superiors, among his contemporaries and rivals. But in the careful, skillful, unceasing training in mental, moral discipline, such as the athlete receives at the hands of his trainer, I doubt if any one approached him. . . . If an oral argument was made, it was the perfection of system and classification. Everything was considered and adjusted to its right place for delivery, and so presented as to leave no occasion for repetition. The substance of what should be said was thought over so often, and the force of the very words to be used in some places so well considered, that no gaps were left in the argument. . . . He rarely found it necessary in an argument in the United States Supreme Court to occupy over forty minutes, and I recollect only two cases in which he spoke beyond an hour. This was the result of the perfect use of language and power of clear presentation of his case arising out of training and discipline."

An examination of Judge Curtis' work at the bar and on the bench will substantiate

all the elements of this high estimate of his powers. Webster said of him that "his great mental characteristic was clearness"—clearness of thought and clearness of expression.

said Richard Henry Dana, "I listened to it with something of that surprise and delight with which one who has labored through the slow and repetitious process of arithmetic



J. A. Campbell

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Not only had he thoroughly mastered legal principles, but he possessed undoubted genius in their acute and comprehensive application. "Whenever I have heard Judge Curtis state his proposition on a subject which I had myself made a matter of study,"

sees his work done before his face by the methods and signs of algebra."

His rigorous logical method was enforced in a style of surpassing simplicity and power. "Vigorous, but not impassioned; massive, without ruggedness; devoid of ornament,

but distinguished for that purity of taste and that perfect propriety which nothing but familiarity with the classics can impart—his choice and suggestive words had the force of illustrations and rendered figures unnecessary. He never overlaid his argument with superfluous words, or stretched it beyond its strength, or weakened it by exaggeration, or made it subservient to the parade of his own learning or ingenuity; but having clearly and forcibly presented it was content to leave it to stand on its own merits." He never appealed to passion or prejudice, nor lost his temper, nor indulged in personalities; and the fairness, calmness and earnestness with which he presented a case enhanced the weight of his argument and made for conviction.

With his marked resemblance to Marshall in character and intellect, his appointment to the bench aroused the liveliest expectations. It may, perhaps, be doubted whether, in Marshall's place, he would have exhibited the originality and breadth of mind necessary in the creation of a new department of jurisprudence. His career was not entirely free from the disfiguring traces of a mind thoroughly imbued with the spirit of the common law. Upon more than one occasion during the civil war his intense conservatism led him to advocate the total subordination of the instinct and necessity of self defence on the part of the government in a critical and unprecedented emergency to the strict legal rules of peaceful times. Indeed, his retirement from the bench mainly, it would seem, in consequence of the apparently irreconcilable difference of opinion among his brethren, is evidence of a certain lack of moral fibre. Within less than a decade after his retirement the composition of the bench had undergone a complete change. Had he remained on the bench it admits of no doubt that he would have been one of the most conspicuous figures in the court's history. As it is, the record of his judicial service is con-

finied to fifty-one opinions in the Supreme Court of the United States, from the twelfth to the nineteenth Howard, and two volumes of reports on circuit. These opinions cover a wide range of subjects with uniform ability. His luminous and powerful dissenting opinion in the Dred Scott case was unquestionably his most conspicuous effort, but some other opinions have exercised great influence. In *Cooley v. Board of Wardens of Philadelphia*, 12 Howard 299, for instance, he solved the difficulty which the court had hitherto experienced in their construction of the commerce clause. He pointed out that the nature of a Federal power depended upon the subjects over which it was exercised. Hence, as commerce embraced a multitude of subjects, it was evident that over some, such as pilots, the concurrent power of the State extended, while others, such as imports in the hands of the importer, were exclusively under the control of the Federal Government.¹

The two volumes of reports of his cases on his circuit afford, perhaps, a better indication of the quality and extent of his judicial powers than his work on the supreme bench. He began his work on circuit in the midst of the violent public excitement arising out of the attempt to enforce the fugitive slave law in Massachusetts. The fugitive slave Shadrach had been forcibly rescued from the custody of the Federal authorities, and many leading Bostonians had been indicted for the offence. The admirable judicial temper with which, unmoved by public clamor, he approached this duty is indicated by his letter to his uncle, George Ticknor: "My duty is to administer the law. This will be done. Whether they are legally guilty

¹ Some of the principal opinions of Justice Curtis are *Murray v. Hoboken Land Company*, 18 Howard 272; *State of Florida v. State of Georgia*, 17 *ib.* 478; *General Mutual Insurance Company v. Sherwood*, 14 *ib.* 551; *Philadelphia, etc. Railroad Company v. Howard*, 13 *ib.* 307; *Steamboat New World v. King*, 16 *ib.* 469; *The Barque Laura*, 19 *ib.* 22; *Curran v. State of Arkansas*, 15 *ib.* 304; *Lawrence v. Minturn*, 17 *ib.* 100; *The Freeman v. Buckingham*, 18 *ib.* 183.

of the charge, whether either of them ought to be convicted, whether they will be convicted, are matters respecting which I have no responsibility whatever, and I can say with perfect truth, no wish whatever, save that justice will be done. But I desire and intend, so far as in me lies, to have the law

his refusal to permit the defendant's counsel to argue the constitutionality of the fugitive slave law to the jury, he delivered a masterly opinion on the respective functions of court and jury which demonstrated, at the very outset, his preëminent qualifications for judicial office. *United States v. Morris*, 1 Curtis



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administered; if they are not guilty, for their acquittal; if otherwise, for their conviction; and I think it will be done with great quietness and calmness, and I believe with the same steadiness in their cases as in those of the colored men who are accused of the same offence." In the ensuing trial, in support of

23. His charge to the jury in the case of the *United States v. McGlue*, 1 Curtis 1, upon the limits and application of the defense of insanity in cases of homicide, is one of the clearest expositions of this subject to be found in the books. Among the varied topics with which he dealt, his admiralty de-

cisions are especially able.¹ *Green v. Briggs*, 1 Curtis 311, is one of his most important constitutional decisions on circuit.²

A consideration of Judge Curtis' contributions to Federal jurisprudence would be incomplete without mention of his revision of the court's reports. The then fifty-seven volumes of reports of the court's decisions had been prepared by five different reporters with varying degrees of care and skill. Curtis revised and republished these judicial records in a series of twenty-two volumes. This reduction was the result of his marvellously concise statement of the facts involved in each case, of the points actually presented to the court in the argument, and of the points actually decided by the court. Nothing more forcibly illustrates the legal cast of Judge Curtis' mind than the fact that such an eminent lawyer, so deeply immersed in work, should, at his age, apply his mind to this laborious and exacting task.

It was, however, his subsequent career at the bar that gave Curtis his preëminent position in the profession. During the seventeen years following his resignation from the bench he argued forty-seven cases in the Supreme Court of the United States, eighty cases in the Supreme Court of Massachusetts, and, besides conducting an extensive practice in the United States Circuit and District courts and in other State courts, he prepared a volume of opinions as counsel which fill nearly one thousand closely-written folio pages. Many of these cases involved questions of great difficulty, and the remarkable acumen and thoroughness which invariably characterized his examination of a subject must have been an invaluable aid to the courts in reaching a well-founded conclusion. His remarkable argument in defense

¹ *Hennessey v. The Versailles*, 1 Curtis 353; *The Young Mechanic*, 2 *ib.* 104; *The Larch*, *ib.* 427.

² See, also, *Fisher v. Boody*, 1 Curtis 206; *Kellum v. Meerson*, 2 *ib.* 79; *Taylor v. Morton*, *ib.* 454, and his charges to juries on flogging in the Navy, 1 *ib.* 509; on Neutrality, 2 *ib.* 630 and on obstructing progress, *ib.* 627.

of President Johnson is unquestionably his masterpiece as an advocate, and may justly be considered the climax of his professional life. When, as Benjammin F. Butler, his vigorous antagonist, said, Curtis had finished his opening argument in this case, "nothing more was added, although much was said."

The variety and extent of Justice Campbell's early practice at the bar is illustrated by the reports of the Supreme Court of Alabama from the fifth Porter to the twenty-first Alabama. As a justice of the Supreme Court of the United States³ he espoused the constitutional theories of the Chief Justice Taney. Although opposed to secession, he believed in the right of a State to secede, and at the outbreak of the Civil War he resigned from the bench to participate in the Southern cause. He served throughout the war in a subordinate civil position, and upon the return of peace resumed the practice of his profession in New Orleans. There his mastery of the civil law soon placed him at the head of the bar, and thenceforth until his death, in 1889, he was one of the ablest and most influential members of the bar of the United States Supreme Court. In the *Slaughterhouse Cases*, in *New York v. Louisiana*, and many other leading cases of his time, his very powerful arguments exercised a marked influence upon the court's determinations. His great argument in *New York v. Louisiana*, 108 U. S. 76, in which he was opposed by David Dudley Field, was undoubtedly the crowning effort

³ Some of Justice Campbell's notable opinions are *Beacon v. Robertson*, 18 Howard 480; *Philadelphia, etc. Railroad Company v. Quigley*, 21 *ib.* 202; *White Water Valley Canal Company v. Vallete*, 62 U. S. 414; *Dodge v. Woolsey*, 13 Howard 331; *The Magnolia*, 20 *ib.* 296; *Howland v. Greenway*, 63 U. S. 491; *Carpenter v. State of Pennsylvania*, 17 Howard 456; *Garrison v. Memphis Insurance Company*, 19 *ib.* 312; *Taylor v. Carryl*, 20 *ib.* 583; *Anderson v. Bock*, 15 *ib.* 323; *Kendall v. Creighton*, 64 U. S. 90; *Zabriskie v. Cleveland, etc. Railroad Company*, 64 *ib.* 381; *Benjamin v. Hillard*, 64 *ib.* 149; *Christ Church v. Philadelphia Company*, 65 *ib.* 300; *United States v. Nye*, 62 *ib.* 403; *United States v. Hann*, Federal Cases, No. 15329.

of his professional career. In his opinion in the Slaughterhouse Cases Justice Miller said, "The eminent and learned counsel who has twice argued the negative of this question has displayed a research into the history of monopolies in England and on the continent of Europe only equalled by the eloquence with which they were denounced."

Although Justice Clifford's long service (1858-81) extended far into the next period of the court's history, his strong political convictions belonged to the past. He was a typical specimen of the old school Democrat, tenacious of his opinions, and unyielding to the changes of public sentiment. He steadily opposed the Federal tendencies resulting from the successful suppression of the Rebellion. "Money is undoubtedly the sinews of war," he said in his dissenting opinion in *Knox v. Lee*; "but the power to raise money to carry on war, under the Constitution, is not an implied power, and whoever adopts that theory commits a great constitutional error." Conservative to a fault, of somewhat aggressive judicial dignity, and without any brilliant qualities of mind, he was, nevertheless, a very able and efficient judge. He had good sense, clear judgment and a boundless capacity for work. It is questionable whether any other member of the court ever bore a larger share of the varied labors of the court than this conscientious and hard-working judge. All the

special subjects of the court's jurisdiction—admiralty, revenue law, patents, trademarks, copyright—bear the impress of his indefatigable industry. In the consideration of these subjects he overcame to a large extent the very conservative tendency of his mind, and successfully applied recognized principles of law to new conditions. The cases in the note below will give a fair idea of his work.¹

¹ *United States v. Cruikshank*, 92 U. S. 542; *Tennessee v. Davis*, 100 *ib.* 257; *Buffington v. Day*, 11 Wallace 113; *Knox v. Lee*, 12 *ib.* 457; *United States v. Reese*, 92 U. S. 214; *Hobson v. Lord*, 92 *ib.* 397; *Pollard v. Lyon*, 1 Otto 225; *The Lottowanna*, 21 Wallace 558; *Waring v. Mayor*, 8 Wallace 110; *State Tonnage Tax Case*, 12 *ib.* 204; *Hall v. De Cuir*, 5 Otto 485; *Ward v. Maryland*, 12 Wallace 418; *United States v. Hall*, 8 Otto 343; *Holyoke Company v. Lyon*, 15 Wallace 500; *The Belfast*, 7 *ib.* 624; *Insurance Company v. Gossler*, 6 Otto 645; *McAndrews v. Thatcher*, 3 Wallace 347; *The Lottowanna*, 21 *ib.* 558; *The Comanche*, 8 *ib.* 448; *Hobson v. Lord*, 2 Otto 397; *The Sunnyside*, 1 *ib.* 208; *The Atlas*, 3 *ib.* 302; *Dow v. Johnson*, 10 *ib.* 158; *Powhatten v. Steamship Company*, 24 Howard 247; *Coleman v. Tennessee*, 97 U. S. 509; *Ford v. Surget*, *ib.* 594; *Delaware Mutual Insurance Company v. Gossler*, 96 *ib.* 645; *McLean v. Fleming*, *ib.* 245; *Conrad v. Waples*, *ib.* 279; *Phoenix Insurance Company v. The Atlas*, 93 *ib.* 302; *Riggs v. Johnson County*, 6 Wallace 166; *Miner v. The Sunnyside*, 9 U. S. 208; *Hatch v. Oil Company*, 100 *ib.* 124; *The Star of Hope*, 9 Wallace 103; *The Kalorama*, 100 *ib.* 124; *The Lulu*, *ib.* 192; *The Maggie Hammond*, 9 *ib.* 435; *Laramie Company v. Albany Company*, 92 U. S. 307; *Goodman v. Simonds*, 20 Howard 343.

And the following decisions on circuit: *United States v. Holmes*, 1 Clifford 98; *Lawrence v. Dana*, 4 Clifford 7; *United States v. Hartwell*, 3 *ib.* 221; *Green v. Collins*, 3 *ib.* 494; *James v. Lycoming Insurance Company*, *ib.* 272; *Hearn v. New England Mutual Marine Insurance Company*, 3 *ib.* 318; *Pendleton v. Kinsley*, 3 *ib.* 416; *Parton v. Prang*, 3 *ib.* 537; *Cunningham v. Hall*, 1 *ib.* 43; *Richardson v. Winsor*, 3 *ib.* 395; *Union Sugar Refinery v. Matthiesson*, *ib.* 639; *Goodyear v. Beverly Rubber Co.* 1 *ib.* 348; *Calendar v. Came*, 4 *ib.* 393.

A FIJIAN COURT DAY.

BY ANDREW T. SIBBALD.

THE natives of Fiji are amenable to a criminal code known as the Native Regulations. These are administered by two courts,—the District Court, which sits monthly and is presided over by a native magistrate, and the Provincial Court, which assembles every three months before the

English and native magistrates sitting together. From the latter there is no appeal except by petition to the governor, and it has become the resort of all Fijians who are in trouble or consider themselves aggrieved. The District Court assembles at ten o'clock a. m., and has to inquire into several charges

before the Provincial Court can sit. The order is given to the native police sergeant to beat the *lali*, and straightway two huge wooden drums boom out their summons to whomever it may concern. As the drum beats become more agitated and pressing, a long file of aged natives, clad in shirt and *sulu* of more or less irreproachable white is seen emerging from the grove of cocoanut palms which conceal the village. The gala dresses are not a little startling. Here is a dignified old gentleman arrayed in a second-hand tunic of a marine, in much the same plight as to buttons as its owner as to teeth; near by him stands a fine young village policeman, whose official gravity is not enhanced by the swallow-tailed coat of a negro minstrel; while the background is taken up by a bevy of village maidens clad in gorgeous velvet pinafores.

The court house, a native building carpeted with mats, is packed with natives sitting cross-legged, only a small place being reserved in front of the table for the accused and witnesses. The magistrate takes his seat, and his scribe, sitting on the floor at his side, prepares his writing materials to record the sentences. The dignity with which the old native magistrate adjusts his shirt collar and clears his throat is a little marred when he produces from his bosom what should have been a pair of pince-nez, seeing that it was secured by a string round his neck, but is in fact a jew's-harp. With the soft notes of this instrument the man of law is wont to beguile the tedium of a long case. The first case is called. Reiterated calls for Samuela and Timothe produce two meek-faced youths of eighteen and nineteen, who sitting tailor-fashion before the table, are charged with fowl stealing. They plead "Not guilty," and the owner of the fowls, being sworn, deposes that, having been awakened at night by the voice of a favorite hen in angry remonstrance, he ran out of his house, and after a hot chase captured the

accused red-handed in two senses, for they were plucking his hen while still alive. Quite unmoved by this tragic tale, the native magistrate seems to listen only to the melancholy notes of the jew's-harp; but the witness is a chief and a man of influence withal, and a period of awed silence follows his accusation, broken only by the subdued twanging from the bench. But the native magistrate's eyes are bright and piercing, and they have been fixed for some minutes on the wretched prisoners. He has not yet opened his lips during the case, and as the jew's-harp is not capable of much expression, it is with interest that we awaited the sentence. Suddenly the music ceases, the instrument is withdrawn from the mouth, the oracle is about to speak. Alas! he utters but two words, "*Vula tolu*" (three months), and there peals out a malignant, triumphant strain from the jew's-harp. But the prosecutor starts up with a protest. One of the accused is his nephew, he explains, and he only wished a light sentence to be imposed. Three months for one fowl is too severe; besides, if he has three months, he must go to the central gaol and not work out his sentence in his own district. Again there is silence, and the jew's-harp has changed from triumph into thoughtful melancholy. At length it is withdrawn, and the oracle speaks again: "*Bogi tolu*" (three days).

The prisoners are pounced upon and dragged out by the hungry police, and after a few more cases the District Court is adjourned to make way for the Provincial. The rural police, a fine body of men dressed in uniform, take up positions at the court house doors, and the English magistrate takes his seat beside his sable colleague at the table. A number of men of lighter color and different appearance are brought in and placed in a row before the table. These are the leading men of the island of Nathula, who are charged with slandering their *Buli* (chief of district). They have, in fact, been ruined by a defective knowledge of arithmetic, as we

learn from the story of the poor old *Buli*, whose pathetic and careworn face shows that he at least has not seen the humorous side of the situation.

It appears that a sum of three hundred and fifty dollars, due to the natives as a refund on overpaid taxes, was given to the *Buli* for distribution among the various heads of families. For this purpose he summoned a meeting, and the amount in small silver was turned out on the floor to be counted. Now the Fijians who counted the money made different totals. They at once jumped to the conclusion that the *Buli*, who was by this time so bored with the whole thing that he was quite willing to forego his own share, had embezzled the money; but to make suspicion certainty they started off in a canoe to the mainland to consult a wizard. This oracle, being presented with a whale's tooth, intimated that if he heard the name of the defaulter who had embezzled the money his little finger, and perhaps other portions of his anatomy would tingle (*kida*). They accordingly went through the names of all their fellow-villagers, naming the *Buli* last. On hearing this name the oracle, whose little finger had hitherto remained normal, regardless of grammar, cried out, "That's him!" On their return to Nathula they triumphantly quoted the oracle as their authority for accusing their *Buli* of embezzlement. The poor old gentleman, wounded in his tenderest feelings, had but one resort. He knew he hadn't stolen the money, because the money hadn't been stolen at all; but who would believe his word against that of a wizard, and was not arithmetic itself a supernatural science? There was but one way to re-establish his shattered reputation, and this he took. His canoe was made ready and he repaired to the mainland to consult a rival oracle named *Na iwe* (the ivy tree). The little finger of this seer was positive of the *Buli's* innocence, so that, fortified by the support of so weighty an authority, he no longer feared

to meet his enemies face to face and even to prosecute them for slander. As the *Buli* was undoubtedly innocent, and had certainly been slandered, the delinquents are reminded that ever since the days of Delphi seers and oracles have met with a very limited success, and are sentenced to three months imprisonment.

And now follows a real tragedy. The consideration enjoyed by the young Fijian is in proportion to the length and cut of his hair. Now these are dandies to the verge of foppishness. Two of them have hair frizzed out so as to make a halo four inches deep round the face, and bleached by lime until it is graduated from deep auburn to golden yellow at the points. Pounced on and dragged out of court by ruthless policemen, they are handed over to the tender mercies of a pitiless barber, and in a few moments they are as crestfallen and ridiculous as that cockatoo who was plucked by the monkey. The self-assurance of a Fijian is as dependent on the length of his hair as was the strength of Samson.

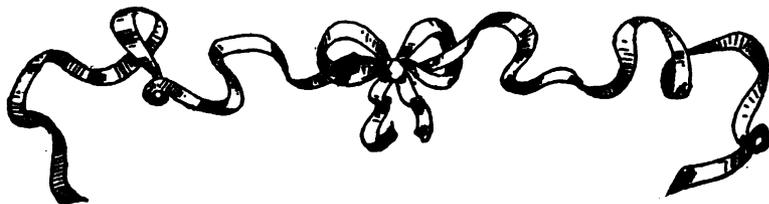
But now there is a shrill call for Natombe, and a middle-aged man of rather remarkable appearance is brought before the table. He is a mountaineer, and is dressed in a rather dirty *sulu* of blue calico, secured round the waist by a few turns of native bark cloth. He is naked from the waist upward. The charge is practising witchcraft (*drau ni kau*), a crime which is punishable with twelve months imprisonment and forty lashes, for the Fijians are so persuaded that a bewitched person will die, that it is only necessary to tell a person he is bewitched to ensure his death within a few days from pure fright. The son of the late *Buli* of Bemana comes forward to prosecute. The substance of his evidence is as follows: His father, who was quite well on a certain Saturday, was taken ill on the Sunday, and expired in great agony on the Monday morning. The portion of his people to whom the accused belonged had complained more than once of the *Buli's*

oppression, and desired his removal. It is the custom for a wizard who has compassed the death of a man to appear at the funeral with blackened face as a sign to his employers that he has earned his reward and expects it. The accused attended *Buli* Bemana's funeral with blackened face; moreover, an old woman of Bemana had dreamed that she had seen Natombe bewitching the *Buli*, and the little fingers of several Bemanas had itched unaccountably. These last, the witness considered were convincing proofs.

The accused, in reply, stated that he was excessively grieved at the *Buli's* death, and that his face at the funeral was no blacker than usual. Several witnesses followed who deposed that the accused was celebrated throughout the district for his skill in witchcraft, and that he boasted openly in days gone by that he had caused the death of a man who died suddenly.

The belief in witchcraft among Fijians is so thorough, and the effects of a spell upon the imagination of a bewitched person so fatal, that the English government has found it necessary to recognize the existence of the practice by law.

After some cases of larceny have been heard, the crier proclaims the court adjourned for three months. The spectators troop out to spend the rest of the day in gossiping about the delinquents and their cases. The men who have been sentenced are already at work weeding round the court house, subjects for the breathless interest and pity of the bevy of girls who have just emerged from the court, and are exchanging whispered comments upon the alteration in a good-looking man when his hair is cut off. The table is removed, and the room cleared of the paraphernalia of civilization. Enter two men bearing a large carved wooden bowl, a bucket of water, and a root of yagona. Conversation becomes general, witchcraft is discussed in all its branches, and compassion is expressed for the poor sceptical white man; *salukas* (cigaretes rolled in banana leaves) are lighted; the chewed masses of yagona root are thrown into the bowl, mixed with water, kneaded, strained and handed to each person according to his rank to drink; tongues are loosened, and the meeting is drawn to a close.



The Green Bag.

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THOS. TILESTON BALDWIN, 1038 Exchange Building, 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, facetiae, anecdotes, etc.

NOTES

JUDGE (after heated discussion).—"What do you suppose I'm on the bench for?"

Counsel—"Ah, your Honor, you have the advantage of me there."

A CASE was being tried in which Skipper Florence of Marblehead was a witness. He listened carefully to the evidence, and when he was wanted on the witness stand and his name was called, the skipper sat immovable. Again and yet again was "Mr. Florence" called, and yet no response.

Judge Story, who was from Marblehead, arose and addressed the court:

"Your Honor, Mr. Florence is present, and with your permission I think I can make him understand."

The permission was accorded and Judge Story called out: "Skipper Flurry."

In a moment Florence was on his feet, with his "Aye, aye, sir."

Actually it was so long since he had heard his own name that he did not recognize it.

JUSTICE F. E. DUNCAN of Des Moines, Iowa, gained some experience and incidentally lost one dollar to a prominent criminal lawyer recently. The lawyer dropped into the justice court one day.

"Are you ready to take up the Ada Hazlewood case?" asked the Court.

"Didn't know it was set for today," re-

plied the attorney. "Thought it was down for tomorrow."

"No, it was set for today, and the witnesses are here."

"Well, let's put it off until tomorrow; we are not ready," pleaded the lawyer.

"Can't do that," ruled the Court. "We'll take the State's testimony today, and you can put your witnesses on tomorrow."

"But I don't want to do that."

"Well, you'll have to do it."

"Bet you a dollar you don't take the State's testimony," said the lawyer.

"Guess we will if I say so."

"Is the bet still good?"

"Yes; I'll take it."

And the money was put up.

"The witnesses for the State in the case against Ada Hazlewood will rise and be sworn," ordered the Court.

"No, you don't," retorted the lawyer. "We waive examination and will go to the grand jury. Give me the two dollars."

And the Court turned over the money.

IN reconstruction days, just after the close of the Civil War, what is now the Fourteenth Judicial Circuit in Tennessee was presided over by a judge—honest and conscientious, but of small mental calibre,—before whom a nurse girl was on trial, charged with the wilful and malicious murder of the baby whom she was expected to care for and protect. The evidence seemed conclusive. The nurse was ably represented, as was the State, whose attorney made a ringing, logical speech, asking of the jury a verdict of murder in the first degree, which in the old Volunteer State means the beginning of eternity from the end of a rope. After the arguments of the attorneys, the learned (?) judge arose and de-

livered to the jury a charge which was about like this:

"Gentlemen of the jury, you cannot bring in a verdict of murder in the first degree, for the prisoner certainly would not have any malice towards a babe, and the prisoner, therefore, could not have killed the child with malice aforethought. Neither can you bring in a verdict for manslaughter, for it was not a man that was killed but a child, therefore it would be impossible for you to truthfully call it manslaughter. I recommend that you bring in a verdict of murder in the second degree."

Thus the verdict was rendered. The case went to the Supreme Court, and of course was reversed, and is to-day cited in one of Caldwell's Tennessee Reports.

The same judge was once presiding over a civil case, and as the proceedings were a bit tiresome, he read throughout the addresses of counsel. When the arguments were finished, and the judge's attention was called to the fact, he dropped his paper, turned to the jury and said:

"Now, you gentlemen have heard the speeches, and you can retire, consider the case and render your verdict."

THE following "Bill of Particulars" may be added to THE GREEN BAG'S collection of forms:

State of Minnesota, ss.

Court of Sociability,
County of Hennepin, District of Unity.
Eugene G. Hay, *et al.*, as Officers of the
Hennepin County Bar Association,
Plaintiffs.

vs.

John Doe, *et al.*, as Members of the Henne-
pin County Bar Association,
Defendants.

BILL OF PALATETICKLERS.

Minor Specifications.

ITEM I.

Manhattan (One only)

ITEM II.

Cotuits Celery. (Half-shell)

ITEM III.

Tomato Soup, Whipped Cream (All in it)
Radishes Olives

ITEM IV.

Fried Fillet of Pike
Potatoes Colbert (Net gain)

ITEM V.

Larded Tenderloin of Beef
Fresh Mushrooms (Main cause of action)
Browned Jersey Sweets, Asparagus Tips.

ITEM VI.

St. Julien
(May be stricken out on motion *pro forma*)

ITEM VII.

Punch Maraschino
(A name, not a command)

ITEM VIII.

Combination Salad (Dressed)

ITEM IX.

Neapolitan Ice Cream (All sundries herein)
Cake Fruits (No dates)
Cheese Wafers

Mocha

ITEM X.

"Baccy" (Put this in your pipe and smoke it)
Duly verified and served by Shattuck and
Wood, Hotel Nicolle, February 21, 1903.
The evidence being in, here follows:

THE ARGUMENT.

Presentation of Plaintiff's Case,
Mr. Eugene G. Hay, *Procurator Generale*.
For the Defense,

Mr. Joseph W. Molyneaux.

INCIDENTAL REMARKS.

"*Dies Nefasti*,"

Mr. Rome G. Brown, *Amicus Curiae*.

"Statute Reviling," By One of the Revilers.
Hon. Daniel Fish.

NISI PRIUS.

(Subject to Review.)

"The Reports," (Not a statistical treatment.)
Hon. C. B. Elliott.

ON WRIT OF ERROR.

"*Ex Mero Mortu*," *Per Curiam*.

"Bills and Other Things,"

Same Old Country,

Same Old Ills,

Same Old Statesmen,

Same Old Bills.

Hon. James D. Shearer.

JUDGE—"You do not seem to realize the enormity of the charge against you."

Prisoner—"No, I ain't got my lawyer's bill yet, but I'm expectin' the charge'll be enormous, all right."

MR. CASSIDY surveyed the examining counsel with undisguised contempt, which in nowise disconcerted the lawyer.

"And why, may I ask, did you not go to the help of the defendant, in the fight?" inquired the lawyer.

"For the r'ason," said Mr. Cassidy, in a tone of blighting scorn, "that at that toime Oi had no means of knowing which o' thim would be the defindant!" *Youth's Companion.*

THE lord steward, the treasurer, the comptroller and the master of the household, say *Tid Bits* in speaking of the King's household, are the four dignitaries who preside in a judicial capacity at the board of green cloth and the court of the Marshalsea—two little known courts of large and varied jurisdiction. The court of green cloth not only includes Buckingham Palace within its dominion, but the whole district within a radius of twelve miles, and at one time held the power of life and death over traitors and murderers. Now, alas, its function is chiefly to settle disputes on points of etiquette and precedence, or arrange kitchen and other domestic differences. The court of the Marshalsea, to which many officials, including constables, are attached, has jurisdiction over all royal houses other than Buckingham Palace.

IN the sixteenth century the Scottish Parliament appears to have given much consideration to the question of how best to deal with persons who sought by various means to enhance the price of commodities for their own advantage, for the statute-book contains quite a series of enactments on the subject. The leading Act is that of 1592, c. 150, which defines "forestalling" as the buying up of commodities on their way to market or before they are actually exposed for public sale, the making of any motion by word, writ, or

message for raising prices, or the dissuading of anyone from carrying his goods to market. "Regrating" is defined as the buying of victuals at a market and reselling them at the same or any other market within four miles, or buying growing corn on the field. "Engrossing," so far as it was a separate offence, appears to have consisted in the buying up of large quantities of provisions for the purpose of selling them again and thus enabling the "engrossers" to raise the price. Penalties of increasing severity, culminating in escheat of the offender's whole moveable property on a third conviction, were imposed on persons committing these offences, but few, if any, convictions are recorded, and, although these primitive economic enactments have not been expressly repealed, they are now in desuetude.—*The Law Journal.*

THERE are numerous instances of criminals being identified by their footprints, but a case at the Northumberland Assizes in which the identity of a burglar was proved chiefly by the marks of his teeth is probably unique in the annals of crime. A burglary had been committed in a general shop, and the only clue was that the criminal had left his boots behind and that the marks of his teeth remained in a piece of butter which he had bitten. A peculiarity in the shape of the boots caused suspicion to fall on an individual who was promptly arrested, and a cast of his mouth was at once taken by a dentist with his consent. The dentist was able to point out in Court that the cast exactly fitted the marks in the butter, where every peculiarity of the prisoner's teeth was reproduced, and he also stated that no two persons' mouths were exactly alike. There was also identification of one of the boots by a shoemaker as being one which he had repaired for the accused. Other evidence of any weight to connect him with the crime there was none; but the jury convicted him after a short deliberation, and there can be little doubt that his liking for butter was chief cause of his undoing.—*The Law Journal.*

THE following story, told by Lord Russell of Killowen, is quoted by "E. M." in *The Law Times*:

I remember a case in which a very innocent remark of my own elicited the fact of a previous conviction. A prisoner was addressing the jury very effectively on his own behalf, but he spoke in a low voice, and, not hearing some of his observations, I said: "What did you say? What was your last sentence?" "Six months, my Lord," he replied.

LITERARY NOTES.

THE two recently-published volumes of *Essays Historical and Literary*,¹ by John Fiske, show admirably the charm and versatility of Dr. Fiske as historian, philosopher and literary critic. The first volume deals with scenes and characters in American history, and the material in these nine essays—many of which were delivered as lectures—was intended to be embodied in a projected "History of the American People." The chapters on "Thomas Hutchinson, the Last Royal Governor of Massachusetts," and on "Thomas Jefferson, the Conservative Reformer," are especially interesting. The second volume covers a wider range of subjects, as is indicated by the titles of its ten essays,—for example, "Old and New Ways of Treating History," "John Milton," "Koshchei, the Deathless," and "Herbert Spencer's Service to Religion." It was at the conclusion of this last address, delivered at a banquet to Spencer in New York, in 1882, that Spencer said: "Fiske, should you develop to the fullest the ideas you have expressed here this evening, I should regard it as a fitting supplement to my life work."

The frontispiece of the first volume is an excellent photogravure of Dr. Fiske.

BISHOP LAWRENCE'S short Life² of Roger

¹ *ESSAYS HISTORICAL AND LITERARY.* By John Fiske. 2 vols. Cloth. New York: The Macmillan Company. 1902. (422 + 316 pp.)

² *ROGER WOLCOTT.* By William Lawrence. With portrait. Boston and New York: Houghton, Mifflin and Company. 1902. Cloth \$1 net. (238 pp.)

Wolcott is a just and welcome tribute to the memory of Governor Wolcott and a fitting record of his public services. The respect and admiration which the character of Governor Wolcott aroused in those who, like his present biographer, were his personal friends, were shared very widely by the people of Massachusetts. And when the ability, the honesty, and, in many instances, the courage with which Roger Wolcott administered the affairs of the Commonwealth is recalled, regret is keen that the field in which his public duties were exercised was that of state, and not national, politics.

The volume contains five portraits, one taken in childhood, one early in Roger Wolcott's college course, and the others in later life.

As in a way, a supplement to *The Conqueror*, of which Alexander Hamilton was the hero, Mrs. Atherton has edited a small but well-chosen collection of Hamilton's letters.¹ Some of these are familiar, as, for example, his letter to Duane wherein he discusses "the defects of our present system" of government, particularly "the fundamental defect"—the "want of power in Congress,"—and the letter to General Schuyler describing the misunderstanding between Washington and Hamilton, then an aide. Extremely interesting are those letters which relate Arnold's treachery and the capture and execution of André.

A number of letters to Hamilton are included in this volume; among them one from Colonel Fleury, begging for shoes for his bare-footed command, the postscript to which will bear quoting:

"N. B. As his Excellency could form a very advantageous idea of our being lucky in shoes by the appearance of the officers who dined today at headquarters, and were not quite without, I beg you would observe to him, if necessary, that each company had furnished a shoe for their dressing."

¹ *A FEW OF HAMILTON'S LETTERS.* Including his description of the great West Indian hurricane of 1772. Edited by Gertrude Atherton. With portraits. Cloth; \$1.50. New York: The Macmillan Company. 1903. xxi + 277 pp.)

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

A SELECTION OF CASES ON INSURANCE. By Eugene Wambaugh, LL. D., Professor of Law in Harvard University, Cambridge: The Harvard Law Review Publishing Association. 1902. Cloth; \$4.50 (xiv+1197 pp.)

A lawyer with a brief to write begins by making an exhaustive study of the cases in which similar problems have been dealt with by the Courts. In so doing he is not seeking *information*, in the ordinary sense of that word. His primary endeavor is to bring before his mind all the different combinations of circumstances which may give rise to problems related to his own. This he accomplishes not only by noting the facts of decided cases, but also by imagining variations from them. His next effort is to determine with accuracy the exact decision reached by the courts in that fraction of possible cases which have actually come before them. Finally, he is interested in detecting by analysis the considerations which have controlled the judges in the selection of one solution of these problems rather than another. It may happen that the several considerations which his analysis detects have presented themselves to different judges with unequal force. The result is a "conflict of authority." In that event his problem is to vindicate those considerations, which, if applied to his case, would result in a decision favorable to his client. If the authorities are uniform, his is either the easy task of urging a perpetuation of the existing judicial policy or the difficult task of recommending the substitution of a new one. His interest in the observations of individual judges is always subordinate. In such observations he merely finds either additional difficulty or additional help.

The writer of a text-book has before him

the same task as the writer of a brief. If he is so constituted that he can summon to his task that combination of thoroughness and alertness to which necessity spurs the brief-writer, his book is likely to be a good one. If he departs from the method of investigation just outlined he will produce the kind of result which has brought modern text-books into contempt.

The compiler of a good case book must take every step which has been indicated as essential in the preparation of a worthy brief or of a useful text-book—except, indeed, the publication of a statement of the results of his analysis. The word "publication" is used advisedly: because the compiler must necessarily indicate in permanent form for private use the conclusions to which his study has led him; so that every such compiler is already the author of a text-book that is ready to be clothed with literary form.

An examination of the work under review will satisfy the student of insurance law that Professor Wambaugh is the compiler of a good case book and is, therefore, the author of an unpublished text-book. This point is insisted upon because it is not uncommon to hear from members of the bar suggestions to the effect that the preparation of a case book is an easy matter: you merely select the cases and tell the publisher to have the selected cases printed. Obviously the whole question turns upon the meaning attached to the word "select." If the selection is the result of laborious scientific investigation, the suggestion is not objectionable. If the selection is made hastily and at random, then the suggestion is applicable to many of the published case books, but not to the one under consideration.

In this volume of nearly twelve hundred clearly-printed pages there are set forth between five and six hundred cases. Most of these are reported in full—at least so far as any question of insurance law is involved. A relatively small number are summarized in careful notes. In addition to the number stated, the notes contain the citation of a large number of cases referred to as in har-

mony or in conflict with a reprinted case, or as furnishing a useful basis of comparison with it. In connection with every reported case, in addition to the citations, appears a statement of its date and of the court which decided it. The student is also furnished with the text of such important statutes as 43 Eliz. c. 12 (creating the Court of Insurance Commissioners) p. 1; 14 Geo. III c. 48 (the Gambling Act), p. 8; and 19 Geo. II c. 37 Secs. 1-3 (the Act forbidding marine insurances without interest) p. 6. The appendix contains forms of policies in common use in the United States. The book is provided with a satisfactory index.

Professor Wambaugh, in his preface, gives four cautions to the student of insurance law which may be summarized here because they throw light upon the arrangement of the work. First, he warns us that insurance is not a mere application of contracts and agency, but "a separate subject having peculiar doctrines of its own." Then he reminds us that marine, fire and life insurance are not separate sciences, but are "the application of one science and that consequently it is impossible to understand one of these branches without the other." This is important in view of the attempt so often made to deal with insurance law in fragments. A notable instance of such an attempt is Biddle on Insurance, which professes to be a treatise on "Non-marine Insurance." In the third place, Professor Wambaugh observes that in insurance cases "judges have been prone to use inartistic and inaccurate language" so that the importance of ascertaining the exact facts in each reported case approaches its maximum. Finally, he calls attention to the fact that the solution of many questions presented in the reported cases and in daily practice may depend "not upon general principles, but upon the special words of the policy."

The cases from which the student is to construct a system of insurance law are grouped in twelve chapters. After the introduction, the topics group themselves in order as follows: Insurable interest as affecting

the validity of the contract, Concealment, Representation, Warranty, Other Causes of Invalidity, The Peril, The Amount of Recovery, Subrogation, Conditions Applicable after Loss, Waiver and Estoppel, Assignees and Beneficiaries. It is interesting to note that Professor Wambaugh departs from the traditional classification when he places Deviation, Unseaworthiness and Illegality under the head of "Other Causes of Invalidity" instead of among the warranties. It may be surmised that he prefers to use the term "warranty" as applicable only to matter of actual agreement between the parties and not to those requirements of customary law which operate independently of all agreement. The selection of cases under "The Amount of Recovery" is especially satisfactory. Read in connection with the chapter on Insurable Interest they suggest the conclusion that the principle of indemnity is the true basis of all insurance, as well in the case of insurance upon another's life, as in case of fire and marine insurance. In this connection it may be remarked that probably the most difficult and also the most interesting portion of the subject is that which is considered under the heading "Insurable Interest as Affecting the Validity of the Contract." Under this caption there are two subdivisions, "Why an Interest Is Requisite" and "Satisfying the Requirements of an Interest." This last sub-division is again subdivided to correspond with the distinctions between marine, fire and life insurance cases. The selection of cases in this chapter shows close study of the authorities in all the different jurisdictions. The decisions are so arranged that their facts present successive variations of the fundamental problem and the student is thus furnished with material for a mental exercise which it will be necessary for him to repeat in practice whenever he has a brief to write. What clearer justification can there be of this method of studying law than the consideration that the student trained in it is doing day by day the counterpart of that which he will be called upon to do in his practice every time he has

an opinion to write or an argument to prepare?

For class room work, for private study, for ready reference in practice, Professor Wambaugh's case book may be recommended as the product of careful investigation, clear analysis and discriminating selection.

A TREATISE ON THE POWER OF TAXATION, STATE AND FEDERAL. By *Frederick N. Judson*, St. Louis: The F. H. Thomas Law Book Company. 1903. (xxiii+868 pp.)

The title page does not indicate fully the unique and important place filled by this book. This is in truth a treatise upon constitutional law as to the special subject of taxation, and the field covered is shown by the following list of topics: Limitations upon State Taxation Growing out of the Relations of the State and Federal Government, Contracts of Exemption from Taxation, Regulation of Commerce, The Taxation of Steamboats and Vessels, Taxation of Interstate Commerce, Valuation of Interstate Properties for Taxation, Taxation of National Banks, The Fourteenth Amendment, Due Process of Law in Tax Procedure, Due Process of Law and the Public Purpose of Taxation, Due Process of Law in Special Assessments for Local Improvements, Due Process of Law and the Jurisdiction of the States, Equal Protection of the Laws, both in General and Particularly as to the Valuation of Property, Taxing Power of Congress, and the Enforcement of Federal Limitations upon the Taxing Power. There is an appendix containing the whole of the Constitution of the United States, and such parts of the State Constitutions as deal with taxation. The book deserves praise for originality, clearness, accuracy and utility.

A PRACTICAL EXPOSITION OF THE PRINCIPLES OF EQUITY. By *H. Arthur Smith*. Third edition. London:

Stevens and Sons. 1902. (lxvi+892 pp.)

The chief feature of this work is that it is distinctly practical. It does not give prominence to the history of the subject. It states

the law as it is, using the most recent cases, though not ignoring such old cases as are still useful. The work is a favorite in England, and, as the statutory fusion of law and equity in that country does not differ materially from the fusion that has taken place in the greater part of the United States, its sphere of influence might well be widened. It is not to be confused with an older work—the *Manual of Equity* by J. W. Smith.

THE ORIGIN AND GROWTH OF THE INTERNATIONAL SYSTEM. By *Hannis Taylor*. Reprinted from the Proceedings of the United States Naval Institute. Whole No. 104.

This address was delivered before the Naval War College, Newport, R. I., in August, 1902. Within the narrow limits of a dozen or fifteen pages Professor Taylor has summarized—it was impossible to do more—"the process of growth through which the system of rules regulating the relations of the states composing [the family of nations] came into existence." Of most immediate interest, perhaps, is his reference to the Monroe Doctrine, which (he says), "From the hand of President Cleveland . . . first received complete and scientific definition; and when the Government of Great Britain justly and wisely conceded the right of arbitration then asserted by the United States, solely by virtue of its primacy or overlordship, a final settlement was made of the place of this Republic in the family of nations, and the foundations laid for that close moral alliance since developed between the two board divisions of English-speaking peoples. If the Monroe Doctrine, as thus expounded, is not already a part of the international law of the world, it is rapidly tending in that direction."

JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION. Edited by *John Macdonnell*, C. B., LL. D., and *Edward Manson*. New Series. 1902. No. 2. London: John Murray. 1902. (393 pp.)

The current issue of the *Journal* contains two short articles of especial interest to

American lawyers: one, on the "United States Uniform Laws Commission," by M. D. Chalmers, C. S. J., Parliamentary Counsel to the Treasury (England); the other, "Notes on a Proposed General Treaty of Arbitration," by Montague Crackanthorpe, K. C., in which are discussed certain provisions of the Paunceforte-Olney Treaty of 1897 (which failed for want of ratification by the Senate which treaty it has been proposed during the last two years to take as the basis of a treaty between Great Britain and France. Two other good papers are those by G. G. Phillimore, entitled, "What Is a State of War in Law?" and by S. Leslie Thornton, Resident Magistrate in Jamaica, on "Prædial Larceny" (*i. e.* "larceny of things attached to the land or a farm"), which is a prevailing vice in that colony, and the growth of which the over-severity of the law has failed to check.

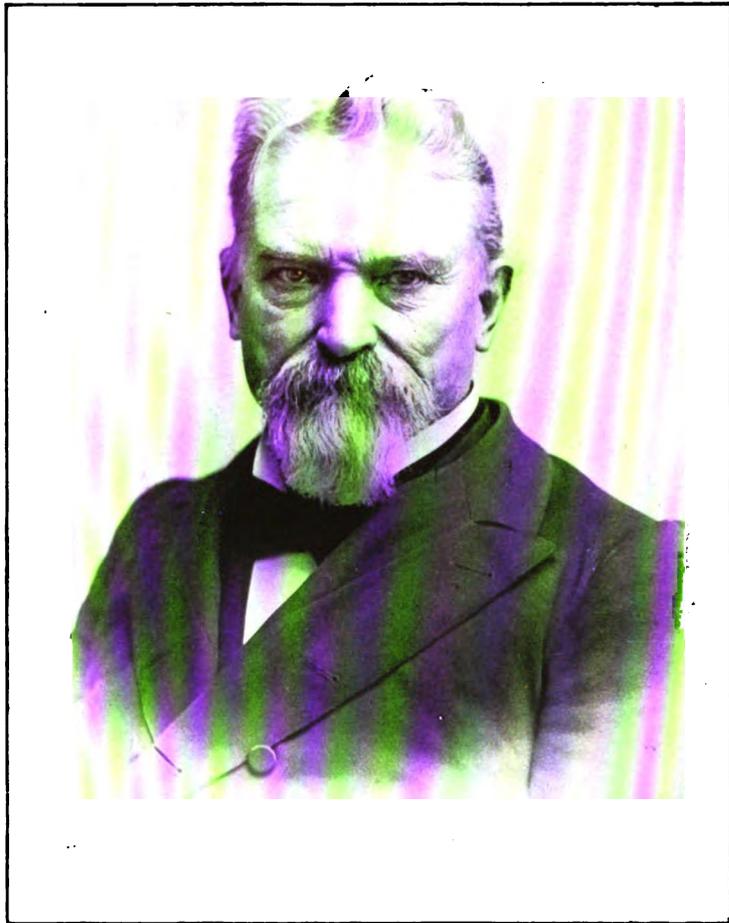
The "Review of Legislation, 1901," which fills the last half of this number, is compiled with the usual care and completeness. As usual, too, the "Review" presents certain entertaining bits of legal lore, as, for example, the account of the two murder societies in Sierra Leone, the Human Leopard Society and the Alligator Society. The "plant" used by these societies consists of leopard or alligator skins "made so as to make a man wearing the same resemble one of those animals;" a "knife with two or more prongs, commonly known as a 'leopard knife,' or an 'alligator knife';" and "borfima," a native medicine, which is "apparently harmless in itself until anointed with human fat, when it becomes an all-powerful fetish. Of course, to obtain human fat, people must be killed, and to procure victims the notorious Human Leopard Society was formed." Some of

the Acts noted in R. Newton Crane's excellent summary of our State legislation, for 1901, are possibly not familiar to many American lawyers; for instance, the Missouri statute which provides that nine out of a jury of twelve may render a verdict in a civil case, and the Wyoming statute under which a summons, writ or order in civil actions may be transmitted by telegraph or telephone.

REPORT OF THE TWENTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Philadelphia. 1902. Cloth. (870 pp.)

In this twenty-fifth volume of the proceedings of the American Bar Association, as in each of its predecessors, are printed several papers of permanent value. Besides the address of the President, U. M. Rose, Esq., the *Report* contains the annual address by Hon. John G. Carlisle, on "The Power of the United States to Acquire and Govern Territory," papers by M. D. Chalmers, Esq., Parliamentary Counsel to the Treasury (England), on "Codification of Mercantile Law," by Amasa M. Eaton, Esq., on "The Origin of Municipal Incorporation in England and in the United States," and by Emlin McClain, Esq., on "The Evolution of the Judicial Opinion," and the shorter addresses and papers delivered or read before the Sections of Legal Education and of Patent, Trade-Mark and Copyright Law, and at the second annual meeting of the Association of American Law Schools. The more important committee reports are those of the Committee on the Classification of the Law, and of the Committee on Commercial Law.

The next meeting of the Association—the twenty-sixth—will be held at Hot Springs, Virginia, August 26, 27 and 28, of this year.



JAMES R. DOOLITTLE.

The Green Bag.

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MAY, 1903.

JAMES ROOD DOOLITTLE.

By DUANE MOWRY.

THE history of the State of Wisconsin would be incomplete if it failed to take into account the valuable public services to it and to the country of the late James R. Doolittle. Indeed, it would be no far-fetched statement to say that Mr. Doolittle is, essentially and preëminently, a national character; and his public life and professional career extends far beyond the boundaries of his adopted State. It is doubtless true that posterity will remember him longest and best as a public servant. Yet his labors in an exacting profession have been scarcely less distinguished.

James Rood Doolittle was born in Hampton, Washington County, New York, on a farm adjoining Vermont, on the west side of the Green Mountains, on the 3d day of January, 1815. When four years of age, in 1819, his father removed with his family to the then far West, and settled in the thick forests of Western New York, in the southern part of old Genesee, now Wyoming county. He attended Geneva, now Hobart, College, New York, four years, graduating from that institution in 1834. Choosing the law for a profession, he was admitted to the bar in 1837. Excepting a few years spent in the study and practice of the law at Rochester, New York, and the years spent at college, Mr. Doolittle resided in Wyoming County, where, for a time, he was district attorney, until 1851, when he removed to Racine, Wisconsin. He at once commenced the practice of the law in his new home, but the following year was elected a circuit judge, and con-

tinued in the discharge of the duties of the position until 1856, when he resigned, after three years' service. In 1857 he was chosen a United States Senator by the Republican legislature of Wisconsin, and was reëlected to succeed himself in 1863, serving as a Senator two full terms, from 1857 to 1869. At the conclusion of his senatorial career Mr. Doolittle returned to his Wisconsin home to resume the practice of the law, continuing to make Racine his legal residence, but conducting a law office in Chicago. He died at the home of one of his daughters in Providence, Rhode Island, on the 23d day of July, 1897, in his eighty-third year.

Mr. Doolittle was yet a young man when he left his home in Western New York to try his fortunes on the western shores of Lake Michigan. It does not appear that any great professional honors or fame had preceded him. While his practice at the bar in the Empire State had been eminently respectable and satisfactory, it had not been conspicuous. Nor was it to be expected of one so young. But he had not been in his new home by the lake long before he had been able to arouse interest in himself, so much so, that the following year he was elected to the responsible position of judge of the Circuit Court, the highest local court of record in that part of the State. He was not long a judge, but long enough to call forth warm words of appreciation and commendation from his brethren of the bar, who characterized his administration

of the duties of the office as "upright, fearless and impartial."

Judge Doolittle did not become prominent, in more than a local way, until about the time he resigned the judicial office, in 1856, and withdrew from the Democratic party. It was midsummer of that year that he announced his intention to thereafter unite his political fortunes with the new Republican party, and he ably supported John C. Fremont, that party's candidate, for President. Mr. Doolittle's pronounced anti-slavery views made it impossible for him to remain longer in the Democratic party as it was at that time. And by espousing the extreme abolition doctrine, that the State might set at naught an enactment of Congress, for instance, the Fugitive Slave Law, he was able to secure enough support in the Wisconsin legislature of 1857 to be elected a United States Senator over Timothy O. Howe, who was not yet ready to accept a doctrine which contemplated denance of Federal authority. Of course, Mr. Doolittle's ability as a speaker was, by this time, well known, and he had been able to exert a wonderful influence over popular audiences with his powerful eloquence. Wisconsin was sending to the National Legislature a very able man, and its representatives at Madison knew this.

Yet the Wisconsin legislature, at its session in 1866, passed a resolution requesting Mr. Doolittle to resign his seat in the Senate, because, forsooth, he had chosen to sustain President Johnson and his policy. Mr. Doolittle's course may have been mistaken, but it was honest,—that fact the most bitter partisans of another "policy" ireely admit. But was it mistaken? Did Mr. Doolittle deserve the adverse criticisms which were heaped upon his almost defenceless head because he did what he conceived to be the patriot's duty during the trying times succeeding the great Civil War? It is our contention that he did not.

Mr. Doolittle was always loyal to his coun-

try. Mr. Lincoln's administration did not have a more capable and worthy friend than was Mr. Doolittle. The present Secretary of State, Mr. John Hay, who bore very intimate and confidential relations to President Lincoln and his administration, has written: "President Lincoln had a very sincere regard and esteem for Senator Doolittle, and considered him as one of the strongest and ablest supporters of the Union cause in the Senate." Mr. Doolittle's letters to his wife during Mr. Lincoln's administration corroborate and enforce what Mr. Hay has said. These letters have an added significance, because they were never intended for the public, and give us a true picture of the great commoner as he appeared to those nearest and dearest to him, his wife and children. In one of these letters, under date of March 15th, 1862, after referring to some adverse criticisms which the Wisconsin press had been making on his course in the Senate, he says: "But I will not bow my neck at the dictation of fanaticism, North or South. I will stand for the Constitution, and will sustain the President, and strengthen and not weaken his hands."

The assassination of President Lincoln was the beginning of the change in Mr. Doolittle's future political course. He at once sustained President Johnson, and Mr. Johnson's administration found no truer friend and supporter. He writes from Washington, under date of April 26, 1865, to "Dearest Mary," that "Johnson is all right," and follows with the remark that the country has no better friend than the new President. Mr. Doolittle was near to President Johnson from the beginning of his term as Chief Magistrate. Indeed, it may be safely asserted that the relations of the two were very confidential. In September, 1865, he writes from his home in Racine a letter directed "To the President," in which he discusses some local and public questions with the fullest freedom. A good deal of the matter contained in this letter is ancient history now, and, per-

haps, of slight consequence to the average reader of today. Nevertheless, it indicates what thoughts were engrossing our statesmen in the days succeeding the War of the Rebellion, the period when the problem of reconstruction was before the Congress for solution. Mr. Doolittle handles the questions of the hour in a frank and honest manner, although it must be admitted that he offers some suggestions which would strike the average individual at this time as exceedingly novel. One of these was the colonizing or deportation of the negroes by governmental act.

Mr. Doolittle had no patience with those who were pressing impeachment proceedings against President Johnson. He dissented from the doctrine that was urged in the impeachment of Mr. Johnson, that the President should be held guilty of high crimes and misdemeanors because he disagreed with two-thirds of the Senate on the construction of the laws.

At the trial of the President, Mr. Doolittle said, among other things, that "the President, as chief executive, is compelled, officially, to construe the laws of Congress. If he mistake the meaning of a doubtful statute, upon which the ablest senators and lawyers disagree, to say he can be found guilty of a high crime, or high misdemeanor, because he mistakes its true meaning while honestly seeking to find it, shocks the moral sense of the civilized world. It is a monstrous proposition. Intention, criminal intention, is of the very essence of crime. A public officer may commit a trespass and become liable to respond in damages in a civil suit, when, mistaking the law, he violates the rights of person or property of another. But to say that a high public officer, with good motives, and the honest intent to obey, though he mistake the meaning of a statute, can be found guilty of a high crime or misdemeanor, which shall subject him to the heaviest punishment which can fall upon a public man in high office, is

to assert a doctrine never before heard in any court of justice. There is no evidence to show on his part an intention to violate the Constitution or the law."

The concluding words of Mr. Doolittle's remarks at this memorable trial seem now very like the language of prophecy. They certainly express very nearly the ultimate judgment of history on this unworthy attempt to convict a President of that which he was not guilty. He said: "Sir, much may be forgiven, much must be forgiven, in times of high party excitement, for the judicial blindness which it begets. But when this temporary and frenzied excitement shall have passed away, as pass it will, and when men shall carefully review this case and all the evidence given on this trial, their surprise will be not that a few Republican Senators can rise above party prejudice and refuse to be driven from their clear convictions by party fervor, but their utter astonishment will be that any respectable Senator should ever for one moment have entertained the thought of convicting the President of the United States of a high crime or a high misdemeanor upon the charges and evidence produced upon this trial."

It was but a short step from an active and aggressive support of Mr. Johnson and his policy back to the Democratic party. And here we find Mr. Doolittle again at the conclusion of his second term as a United States Senator from Wisconsin. In 1872 he presided at the Democratic National Convention which placed Horace Greeley in nomination for the presidency. And he took an active part in that campaign. He had a fine presence, was in good voice, and made an excellent presiding officer. Mr. Doolittle continued to identify himself with the Democratic party until his death.

In addressing popular audiences, Mr. Doolittle appeared at his best. He was an orator of unusual power, and his eloquence was almost irresistible. He had a fine mind and

a vigorous body. It was his boast that up to his seventieth birthday he had never had a serious sickness, nor a headache, toothache or backache in his life. It was quite natural, therefore, that he should be in great demand by the political managers in different parts of the country. And he responded to these demands in no uncertain manner. It is probably true that during his time his voice had been heard by more people in the United States than any other living man. He took an active part in thirteen presidential elections.

But Mr. Doolittle was more than a speaker to popular audiences. He was a student and a thinker. He wielded a trenchant pen. His lecture on "The United States of America in the Light of Prophecy as Well as History," shows him to have been capable of careful and painstaking research. And whether we consider it from the viewpoint of history or theology, it alike reflects credit upon the scholarship, the literary ability and judicial fairness of its author. Mr. Doolittle has written on other subjects, social, political and economical. Some of these have been preserved in pamphlet form. He spoke before the Illinois State Bar Association in 1893 on "The Liberty of Pursuit as Affected by Combinations of Either Labor or Capital." In this address, Mr. Doolittle defines liberty of pursuit as "the essence of human liberty." He says it is one of the inalienable rights, to secure which it has become necessary to have governments among men. He also thought that "the liberty of pursuit by associated labor or by associated capital must be regulated by law." He advocated compulsory arbitration of unlawful conflicts between labor and capital, and deemed it wisest for the preservation of the public peace. The address is brief but thoughtful.

Mr. Doolittle's connection with the actual practice of the law in the courts after his term of office in the Congress had expired was not very pronounced. He was a wise

and safe counsellor in many important cases. And in this line of work he excelled. And it seems that in several cases he was able to impress members of the bar with his great ability before the courts. His forensic ability, was, of course, unquestioned. But the fact that he was compelled to withdraw from the active duties of his profession when he became a member of the national legislature, at a period of his life, too, when the actual practice would have been most valuable to him, served, we cannot help feeling, to make of our subject not as great a lawyer as it was possible to make, but did give to this country a truly great statesman, a good man, and a thorough Christian gentleman.

In the argument which Mr. Doolittle made before the United States District Court at St. Louis a few years ago, he made the following just observations in making reference to the functions of a judge. "But in the discharge of that high duty, I maintain, from the experience and history of judicial decisions in all the civilized world, that the true office of a great judge, in construing a doubtful statute made in derogation of the common law, is, like Mansfield, to lean toward the common law. The highest duty which rests upon the bench, in the midst of doubtful statutes and conflicting decisions, as well as the no less important but humbler duty which rests upon the jury, in ascertaining the facts, is, to follow the higher instincts of our nature, to heed that voice within which says: 'Do justice. Let not a doubtful statute entangle the innocent in its meshes. Cut your way directly through doubts and technicalities, and unless the law clearly forbids it, go where conscience and duty lead you to do justice to the parties.'"

Mr. Doolittle's changes in political life have been sharply commented upon and criticised. There are those who charged him with want of stability and certainty in political views. Others, less charitable, have questioned his honesty in this direction and have

even impugned the sincerity of his motives. These strictures are all unfair, unjust and untrue. They do violence to the memory of a truly great and worthy man. The fact is, that Mr. Doolittle's carefully thought out views of public affairs, his lofty notions of right and justice to all men and between man and man, his inherent hatred of all forms of wrong and oppression, in brief, his well-developed moral nature, made him think that the single word to govern his conduct, both in private life and public station was duty. And having satisfied himself upon that point the rest was easy. He was not vacillating, or dishonest or insincere. His private correspondence, to much of which the writer has had access, amply establishes that. But the limits of this article forbid the reproduction of it. One of Mr. Doolittle's neighbors has justly said that "he stood high among the first in the land as a statesman. His acquaintance with public men was very extensive, and his opinion with reference to public measures was often sought and had great weight in the deliberations of the leading men at Washington. . . . While some orators may have been more magnetic, few were more pleasing and convincing. His great abilities were needed and used at a critical period of our nation's history, and he stood a bulwark against secession and slavery, and in favor of liberty and union, and his name will be enrolled among the list of illustrious men who saved this great republic."

A gentleman who was very close to Mr. Doolittle when making his campaigns, who worked with him while he was a member of the Republican party, and who was very fa-

miliar with his entire public and professional life, gives this very moderate and just estimate of Mr. Doolittle. "The career of ex-Senator Doolittle has been an extraordinary one. He was long prominent in the affairs of the State and nation. The general summing up of his labors cannot be otherwise than emphatically in his favor. He was earnest and enthusiastic in whatever he undertook. It may be that his zeal sometimes got the better of his judgment. He will be sincerely mourned by all those at all familiar with his valuable services to our State. It will always be difficult to fill the places of such as he. He has gone down to his grave with the respect and kind remembrance of all who knew him. The epoch of his life work will ever be interesting to the historian. The name of James R. Doolittle will be honored by the people of Wisconsin as long as time shall last."

What more need be said? Mr. Doolittle was above reproach in both private life and when occupying official station. His habits were exemplary in every particular. He loved his home and was fond of home life. The church attracted him and it found in him a faithful member to the last. He loved his profession and never hesitated to extol its virtues on proper occasions. His call to greater duties as a national legislator had the effect to divide his love for it, for a time. But he never forsook it. And it is only just to his memory to say that the legal profession found no worthier friend, no abler advocate of its aims and possibilities, than was James R. Doolittle. A truer patriot, a better man, it would be difficult to find during his time.



AN ACORN NOW AND THEN.

BY JOHN COLLINS.

Smith talks with ease on what you please,
 And argues with a vim;
 And as for wit, he will admit
 Few lawyers equal him.

Yet very rare the cases where
 The court sustains his view;
 His Honor looks up law in books,
 Which Smith ne'er has to do.

But once he struck a streak of luck;
 The Court was on his side.
 And then he spoke, half in a joke,
 But with a touch of pride:

"Tho' in my mind the Court's inclined
 To take me for a dunce,
 I'm glad that he has wit to see
 That I am right for once."

"Yes," said the Court, with quick retort,
 "Chance often favors men;
 The sow that's blind is sure to find
 An acorn now and then."

THE LAW AS TO THE BOYCOTT.

BY BRUCE WYMAN.

ABOUT the year 1880, one Captain Boycott was a farmer of Lough Mark in the district of Connemara. This Boycott was also agent of the principal landlord, Lord Earne; and in his capacity as agent in that year had served notice upon several of the tenants. The result is a matter of history. The population of the region for miles around resolved to have nothing to do with him, and, as far as they could prevent it, not to allow anyone else to have anything to do with him. His laborers fled from him, and none would come

in their places. No one would supply him with food; he was cut off from every near base of supplies. No one would speak with him, he was excommunicated from all intercourse with his fellows. Then at last came laborers, and merchants, and friends from Ulster to his rescue. A small civil war was impending; but the Government sent a force of soldiers to Lough Mark, and under their protection the Boycotts returned to their position as citizens in a civilized community. Thus the episode closed.

The language had gotten now a new word—boycott—to commemorate that event. A new danger had been made known which spread terror throughout society. A new condition, therefore, confronted the law requiring its protection. For indeed the situation was new. It is true that conspiracy was a recognized word, was a known wrong, and was a legal head. But this new combination was the opposite of the old. In the old conspiracy the object of the combination was to do something to a person directly; in the new conspiracy the object was to do nothing to a person directly. All this required a new law of conspiracy which should be wider than the old, to cover both the conspiracy, the object of which was action, and the conspiracy, the object of which was inaction. To do this it was necessary to find a common denominator for both of these wrongs. This process involved the necessity of an accurate system in the law as to the boycott.

The form that the law in relation to the boycott has reached is seen in the latest opinion upon that subject—the elaborate charge of the Lord Chief Baron Palles in the case of *O’Keeffe v. Walsh* and others in the King’s Bench Division of Ireland, November 13, 1902. This was a civil action for a boycott brought by the plaintiff, the victim, against ten persons alleged to have coöperated in the conspiracy. The evidence in the case is reviewed by the learned judge in his charge, so that some quotations from the first portion of it will put everyone in possession of the principal facts in issue.

“That O’Keeffe was boycotted, at all events from the 3d of September, 1899, I did not hear denied by any of the learned counsel, and that that was done intentionally because he was an object of dislike to the persons assembled in Tallow, I did not hear disputed. The landlord, the Duke of Devonshire, procured the tenancy to be sold under the Land Act. O’Keeffe bought the tenancy

in as trustee. He allowed the tenants to remain in possession for a year, no rent being paid at all. Then he proceeded to evict them. Of course, when the word eviction is used, the dogs of war are let loose.

“I now come to the matter which has a real bearing on this case: was there an agreement to induce people not to deal with O’Keeffe, and if so, who were the parties to that agreement? The inception of the matter is in the second week of January, 1899, when there was a conversation between O’Keeffe and the defendant, P. F. Walsh. The evidence is that O’Keeffe said, ‘You are cutting my throat behind my back, and interfering with the Parkers about the possession of Roseville.’ Now, mark Walsh’s words. They are some of the most important in the case. He is sworn to have said: ‘Yes, and he would continue to do so, until he put the green grass growing before my (O’Keeffe’s) door, and he would do so in twelve months.’

“The next important meeting was that of 11th of June, 1899. Lawrence Walsh spoke opposite O’Keeffe’s door and in his speech is contained that which may be treated as the first evidence of boycotting. He is proved to have referred to the eviction of the Parkers and to O’Keeffe and to have said that ‘the people should unite and if they would, they would soon bring him’—presumably O’Keeffe,—‘to his knees. It was not because a man would get a bargain loaf at his shop that they should go and buy there.’ This is the first suggestion I find that the people should not deal with O’Keeffe; it is impossible that they can be withdrawn from you as not being evidence of an attempt to procure the boycotting of the plaintiff.

“The meeting that was afterwards held on the 3rd of September, 1899, was so held at the invitation and request of all the defendants here, its object was to make the boycotting of O’Keeffe more close and more op-

pressive. One speaker at that meeting said that the grabber was one of the meanest and basest creatures that walked the face of the earth. He said, 'we have one of those with a chaney eye before us. He is worse than a grabber, he is an evictor.' The man pointed at in this speech is O'Keeffe. Another speaker said: 'There is one thing you can do, and that is watch the farms, watch the houses; yes and watch the shops, too, and see who will go into them.' This was not merely an invitation, this is a direction to boycott. From the moment of this meeting, O'Keeffe's trade was according to his evidence practically extinguished.

"This brings me to the meeting of the 17th of June, 1900, which is important because it so nearly approaches the time of the agreement between the Parkers and O'Keeffe, the time at which the first phase of this case terminates. At that meeting Walsh is proved to have said: 'Twelve months ago I advised the people not to go to a certain coal-yard for coal. I told no one what that yard was, but everyone knew what yard I meant. (A voice:—'Down with the grabber.')

It is said that this person gives a cheaper loaf than anyone in Tallow; but they should see is this loaf the proper weight, or is it made of stuff that would give one a pain in the belly.—(A voice:—'Down with the grabber.')

For my part I would rather go where I would get an honest loaf, where I would be sure that it was not made of stuff that would sicken me.'"

In this principal case no concerted action was avowed, indeed it was disavowed. But the Chief Baron disposed of that difficulty in a summary way:

"I accordingly now proceed to give you a legal direction as to the mode in which an agreement, in a case of this kind, can be established. To prove an agreement, in the sense in which that word is used in the question I have submitted to you, it is not neces-

sary to prove that the defendants met, and in words agreed. Agree, as here used, does not mean that which commercially would be deemed a contract. An agreement of this description may be, and generally is, a matter of inference, deduced from the acts of parties done in pursuance of a wrongful purpose apparently in common between them. The essential characteristic of the evidence of such an agreement is common wrongful action, tending towards common, wrongful purpose. To infer such an agreement, you should be satisfied that the wrongful action, relied on as evidence of it is the action, not of one single isolated individual acting independently of others, but is the joint action of several actuated by a common wrongful purpose and tending to a common wrongful end. If there is such joint action, you are at liberty to infer that it resulted from an understanding between the actors so to act; and such an understanding would, for the purpose in hand, amount to, and constitute, an agreement. Therefore the distinction, between the independent action of one, and the joint action of several for a common wrongful purpose, is one which, as I have already told you, must be steadily kept in view by you throughout the entire case." And of a certainty there was evidence enough in this case to show that these things were the result of concert, not of coincidence.

Not every joint refusal to deal with a person which results in damage to him involves a legal wrong to a legal right. A mere strike, for example; stopping work, together with damage resultant, it is well agreed is not an actionable conspiracy. There must be something unlawful in what is done in order that there shall be held to be something unlawful in the combination. The question must then be put to legal analysis: First, what is the right of the plaintiff; second, what is the wrong of the defendants.

What is the right, then—the legal right? The ruling case in this matter is now *Quinn v. Leatham*, 1901, A. C., 495. The plaintiff in this case was a fletcher, the defendant was an officer in a butchers' union. Because the plaintiff would not discharge a non-union man in his employ—he was non-union because the union refused to take him in—the defendant threatened to call a strike of his union, not against the plaintiff, but against one of the customers of the plaintiff. That customer decided to give up the plaintiff and keep his employes when confronted with that alternative. The House of Lords at last held that all this made out a cause of action.

One part of the opinion of Lord Lindley was as follows: "As to the plaintiff's rights: He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided . . . he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. . . . If the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances."

A late case in America which throws much

light upon the right of the plaintiff against boycott is *Hundley v. Louisville Railroad*, 105 Ky. 162. It was averred in the petition that the plaintiff had no trade or calling except railroading; that for the past five years he has been in the employment of the defendant; that while engaged in the discharge of his duties he was wrongfully discharged by it; that it wrongfully blacklisted him, by placing upon its records a pretended cause of discharge, to wit, neglect of duty, with a view of injuring and preventing him from entering its employment or that of other railroad companies by which its employes discharged for cause will not be given employment by other railroad companies; that, on account of its conspiracy with other railroad companies, he has been deprived of the right to again engage in the employment of the defendant or other railroad companies; that the wrongful acts mentioned were committed for the purpose of making, and had made, it impossible for him to ever again get employment from the defendant on any of its lines, or from other railroad companies in the United States; and that he has been damaged thereby in the sum of \$5000.

Mr. Justice Paynter held for the plaintiff upon this basis: "It is the part of every man's civil rights to enter into any lawful business, and to assume business relations with any person. . . . If he is wrongfully deprived of these rights, he is entitled to redress. Every person is entitled to pursue any lawful trade, occupation, or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling, and be protected in it, as is the citizen in his life, liberty and property. Whoever wrongfully prevents him from doing so inflicts an actionable injury. For every injury suffered by reason of a malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. Such an act is an invasion of legal rights."

What the right of the plaintiff is as an ab-

stract question is then well agreed. A man has a right to deal with his fellows undisturbed. The intentional invasion of that business right is a *prima facie* tort. If this was not so at bottom the law would be found in a crucial instance like this to furnish a most inadequate remedy against oppression; but if, on the other hand, one who interferes with the business of another is put to his justification in every case, the law furnishes a complete remedy, excusing no man who does not show his excuse.

Chief Baron Palles, in his charge to the jury in the principal case under discussion—*O’Keeffe v. Walsh*—states this principle of law in this modern form:

“That, gentlemen, is the general principle, and the general principle only. There is a freedom for the mind and will; there is a freedom to adopt one’s own course of life. There is a freedom to trade, a freedom to buy and sell, a freedom to buy land, a freedom to sell land, a liberty to deal in your own goods. This liberty is secured to every man in this country, and part of that for which we pay our taxes is that the government of this country shall enforce and protect this liberty. ‘Wrongful’ imports the infringement of some right. I have explained to you the right that the plaintiff has to deal freely in his trade without interference by combined action; and I must now tell you that if there be an intentional interference in his trade by the combined action of the defendants which is not justifiable as an exercise of some correlative right of the defendants, that interference would be wrongful.”

What is the wrong, then—the legal wrong? It is hard to state in a satisfactory manner, even after it is appreciated. The difficulty is this: Any one of these defendants separately might have refused to have any dealings whatever with the plaintiff; he might have refused from whim, or caprice, or malice; and yet there would not be any legal wrong done by him. How, then, can it be a legal wrong

for several such to do in combination what any one of them might do himself without legal wrong? That is the paradox in the law as to the boycott.

A case of boycott by organized labor that is worth mention in this discussion is *Curran v. Galen*, 152 N. Y. 33; the plaintiff demanded damages of the defendants for having confederated together to injure him by taking away his means of earning a livelihood and preventing him from obtaining employment. He set forth that by an agreement between the Ale Brewers’ Association of Rochester and the Brewery Workmen’s Association all employes of the brewery companies should be members of the unions, and that by operation of this agreement his employers, the Miller Brewing Company, discharged him upon notice given to it by the union, the defendants in this action.

In the opinion of the court this was an actionable conspiracy: “The organization of the local assembly in question by the workingmen in the breweries of the city of Rochester may have been perfectly lawful in its general purposes and methods, . . . but so far as a purpose appears from the defence set up to the complaint that no employe of a brewing company shall be allowed to work for a longer period than four weeks, without becoming a member of the Workingmen’s Local Assembly, and that a contract between the local assembly and the Ale Brewers’ Association shall be availed of to compel the discharge of the independent employe, it is, in effect, a threat to keep persons from working at the particular trade and to procure their dismissal from employment. While it may be true, as argued, that the contract was entered into, on the part of the Ale Brewers’ Association, with the object of avoiding disputes and conflicts with the workingmen’s organization, that feature and such an intention cannot aid the defence, nor legalize a plan of compelling workingmen, not in affiliation with the organization, to join it, at the

peril of being deprived of their employment and of the means of making a livelihood."

A case of boycott by organized capital that is worth comparison with this last case is *Jackson v. Stanfield*, 137 Ind. 592. This Jackson was a broker engaged in buying and selling lumber; Stanfield was a member of a retail lumber dealers' association. The rules of this association provided that if any wholesale dealer should sell lumber direct, instead of through retailers, all of the members of the association of the retailers should upon notice refuse to have further dealings with such a wholesaler. In this particular case Jackson was the person injured by the operation of this rule.

In holding this a conspiracy, Dailey said: "The great weight of authority supports the doctrine that where the policy pursued against a trade or business is calculated to destroy or injure the business of the person so engaged either by threats or by intimidation it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil suit for damages therefor. It is not a mere passive, let-alone policy—a withdrawal of all business relations, intercourse, and fellowship that creates the liability, but the threats and intimidation involved in it."

In view of the indefinite language in which the boycott is described in most opinions the definite language of the learned Chief Baron in this latest case is worth quotation, as it marks a distinct settlement: "It is necessary that I should distinguish two things from one another. I must distinguish between the exercise by an individual of his own liberty to deal with whom he likes, and an act of that same individual and others in combination with him, inducing persons not to deal with another. Each of you is at liberty to deal with whom you like. No person is at liberty to coerce or to unduly influence your will; and if that which is complained of here were the isolated action of a single individual, as

distinct from the joint action of a combination of several, this action would not lie. You will commence, then, by keeping clearly in your mind (and I should be glad that you should do so all through my summing up, and your consideration of the case), the difference between the isolated action of a single individual, and the combined action of several to effect a common purpose. Some people have said that such a distinction is illogical; that what would be wrong if done by several must necessarily be wrong if done by one. Well, we have not to dive into the reasons of the law and see whether the law is right or wrong. At all events, a wrongful violation of another man's right, committed by many assumes a far more formidable and offensive character than when committed by a single individual."

The essential thing in the boycott, then, is the concert in the refusal by the many to have dealings with the one. One may refuse to deal with one, the law regards them a match; but many may not refuse to deal with one; the law holds that not fair. More exactly, perhaps, the law gives one man a privilege to cut off dealings with another, but the privilege is a personal one. It does not cover the action of many, all directed against a single man. At that point the law steps in, as indeed it must; for the one is helpless against the many, as experience has shown. That is why a boycott is a tort.

The solution of the logical difficulty follows from this different estimate that is put upon an act done by one and a like act done by many. It is not accurate to say that the single act and the combined act are the same; the truth is, that the concert gives the combined act a different potentiality from the single act. The antinomy is done away with if this solution be accepted. One man may do a single act without legal wrong; but many men may not do a like joint act without legal wrong. Formal logic does not oppose this solution now. And certainly public

policy requires that the boycott be held illegal in every instance of it. For nothing can excuse a boycott. No provocation, even such a social one as might palliate it, can do that. And no privilege, even such purpose in it as to advance the business interests of the associates can justify it. It is a means that the law will not suffer, whatever its end.

One other illustration will show this monster—the boycott—in its most hideous form—*Crump v. Commonwealth*, 84 Va. 927; the facts in which are well set forth in the opinion of Mr. Justice Fauntleroy:

"The evidence in this case shows that, while Baughman Brothers were engaged in their lawful business, as stationers and printers, the plaintiff in error and the other members of the Richmond Typographical Union, No. 90, conspired to compel Baughman Brothers to make their office a union office, and to compel them not to employ any printer who did not belong to the said union; that upon the refusal of Baughman Brothers to make their office a union office, the plaintiff in error and others composing the said Richmond Typographical Union, No. 90, conspired and determined to boycott the said firm of Baughman Brothers, as they had threatened to do, and sent circulars to a great many of the customers of the said firm, informing them that they had, with the aid of the Knights of Labor, and all the trades organizations in the city, boycotted the establishment of Messrs. Baughman Brothers, and formally notifying the said customers that the names of all persons who should persist in trading, patronizing or dealing with Baughman Brothers, after being notified of the boycott, would be published weekly in the *Labor Herald* as a black list, who, in their turn, would be boycotted until they agreed to withdraw their patronage from Baughman Brothers.

"Not only Baughman Brothers and their employes and their customers, but the hotels, boarding houses, public schools, rail-

roads and steamboats conducting the business, travel and transportation of the city, were listed and published under the obloquy and denunciation of the blacklist. One or two specimens will suffice: 'Boycott Baughman Brothers and all who patronize them.' 'Watch out for Baughman Brothers' rats, and find out where they board. It is dangerous for honest men to board in the same house with these creatures. They are so mean that the air becomes contaminated in which they breathe.' 'Boycott Baughman Brothers every day in the week.' 'Boycott Baughman Brothers because they are enemies of honest labor.' 'Boycott Baughman Brothers' customers wherever you find them.' 'The Lynchburg boys will begin to play their hand on Messrs. Baughman's boycotted goods in a short time. The battle will not be fought in Richmond only, but in all Virginia and North Carolina will be raised the cry, "Away with the goods of this tyrannical firm."' 'Let our friends remember it is the patronage of the Chesapeake & Ohio; Richmond, Fredericksburg & Potomac; Richmond & Danville, and Richmond & Alleghany Railroads that is keeping Baughman Brothers up.' 'We are sorry to see the Exchange Hotel on the black list. There will be two thousand strangers in this city in October—none of whom will patronize a hotel or boarding house whose name appears on that list.' 'The boycott on Baughman Brothers is working so good, that a man cannot buy a single bristol board from the rat firm without having his name put upon the black list.' 'The old rat establishment is about to cave in. Let it fall with a crash that will be a warning to all enemies of labor in the future.'"

The court spoke very sharply in its opinion in this case: "It was proved that the conspirators declared their set purpose and persistent effort to crush Baughman Brothers; that the minions of the boycott committee dogged the firm in all their transactions; followed their delivery wagon; secured the

names of their patrons; and used every means short of actual physical force to compel them to cease dealing with Baughman Brothers—thereby causing them to lose from one hundred and fifty to two hundred customers and ten thousand dollars of net profit. The acts alleged and proved in this case are unlawful, and incompatible with the prosperity, peace and civilization of the country; and, if they

can be perpetrated with impunity, by combinations of irresponsible cabals or cliques, there will be the end of government, and of society itself. Freedom—individual and associated—is the boon and the boasted policy and peculium of our country; but it is liberty, regulated by law; and the motto of law is: *Sic utere tuo, ut alienum non lædas.*”

THE ESSEX MARKET COURT.

BY JOSEPH GOLDSTEIN.

WHO has not heard of the famous “East Side” in New York City? It is at once the poorest as well as the dirtiest portion of the great metropolis. There poverty and crime stalk boldly hand in hand, for there they are in their element.

Small wonder, then, that in the midst of this district the strong arm of the law must always be in evidence to protect the lives and property of the respectable element in the community.

Standing on Essex street is a large Court House, known commonly as the “Essex Market Court,” presumably because vendors of fruit, vegetables and other eatables have their wares exposed for sale in the immediate vicinity.

Arrests are such frequent occurrences, that it is no uncommon sight of a morning to see lined up before the bar fifty or more prisoners whose offences vary anywhere from murder to drunkenness.

His Honor takes his seat on the bench precisely at nine o'clock in the morning, and has his hands full till four o'clock in the afternoon, when court adjourns.

The court is infested by lawyers of questionable intelligence and doubtful ability. They have their “offices” in one or two rooms in the tall, forbidding tenements immediately opposite the court house. The street for a whole block is bedecked with large signs,

which protrude far out into the street, on which are inscribed in large characters for the convenience of passersby the name of the attorney.

What is decidedly peculiar, but nevertheless true, is the prevalence of the belief among the would-be litigants that the man having the largest sign must of necessity be the most capable lawyer, and no sooner are they in trouble than they make a bee line for his office.

One lawyer, who does a remarkable business, due perhaps more to the dimensions of his sign than that of his head, has become quite a celebrity in and about this court, and has been voted the president of the Essex Market Bar Association by his admiring colleagues.

For obvious reasons his name should be withheld. He speaks English with a reckless disregard of the good rules contained in Goold Brown's grammar, and is quite original in his conduct of a case.

One morning, while this important personage was seated in his chair before his desk, endeavoring to ascertain what *caveat emptor* meant, which term he found in an answer served on him by an attorney, having a faint idea that it must have some reference to an “empty cave,” one of his many runners, whom he employed to stop people on their way to the court and ascer-

tain their business, rushed into the office.

"Come quick! Your friend Jakie has been arrested for coppin' a watch and he is now before de judge."

The president of the Essex Market Bar Association threw down his papers and grabbing his hat he rushed down the rickety stairs and across the street to the court.

The court was crowded with prisoners, police, witnesses, lawyers and sympathizers, but they made way for the lawyer, as he endeavored to reach his client, who was being arraigned.

"Have you a lawyer?" asked the judge of the prisoner. Solomon, as we will call him here, because that is not his real name, stepped up to the bar and delivered himself as follows:

"Mr. Judge, yer Anner, dat's is it, I am."

"Oh! are you retained by the defendant?" said the judge smiling indulgently at Solomon, for he knew him.

"Well, your man is charged with larceny."

"Larceny!" echoed Solomon, looking bewilderedly at the judge; "my man chust now, he told me, dat Jakie was copped for coppin' a watch. Did he cop a larceny, too?"

The judge broke into a laugh at this unexpected learned rejoinder of the president of the Essex Market Bar Association, and a titter ran around the court room.

"No, Solomon, all they charge him with is stealing a watch. Call the complainant."

Solomon stood by the side of his client, whispering encouraging remarks to him while the complainant testified that while he was a passenger on a crowded street car he felt a tug at his watch and when he felt for his timepiece it was gone; that he raised a cry of "Thief!" and grabbed the first man

he could, which happened to be "Jakie." The watch was not found on him, but he was nevertheless arrested. Was the complainant sure that the defendant took the watch? No, but he was the man who stood nearest to him.

"Well, Solomon," said the judge. "Proceed with the defence."

"All right, yer Anner, Mr. Judge," said Solomon, planting himself before the judge and raising the index finger of his right hand high into the air. "Judge, yer Anner, de fois. question, I wanna ask yer, please gimme a answer."

"Why, certainly," said the judge.

"Judge, yer Anner," said Solomon, growing serious and speaking deliberately, "are you a tief?"

"Why, Solomon, what a question!" said the judge in surprised tones. "Why, certainly not."

"Now, Judge, yer Anner," continued Solomon, growing still more serious, "am I a tief?"

"Certainly not," said the judge. "Who put that idea into your head?"

Solomon drew a sigh of relief. He drew closer and said, "Well, then, yer Anner, just like you are a tief, and just like I am a tief, just so—like dat—Jakie is a tief."

The forcefulness of this logic was too much for the judge, and, as there was no legal evidence anyway, he discharged the prisoner.

Solomon led Jakie out into the street, his face glowing with victory, followed by the admiring eyes of those in the court room.

One of the spectators, an aged Hebrew, with a patriarchal beard, exclaimed admiringly: "Dat's a smart Lower!"



THE EDUCATIONAL STATUS OF THE LEGAL PROFESSION

BY EDWIN G. DEXTER,

Professor of Education in the University of Illinois.

ACCORDING to the figures given in the annual reports of the United States Commission of Education, there were graduated from schools and colleges of law during the twenty-five years from 1876 to 1900, roughly 45,000 persons, mostly males. The annual output of Bachelors of Law from these institutions has varied considerably from year to year, the smallest class for the period being that of 1885, with but 744 members, while the largest, that of 1900 contained 3241. During the twenty-five years there was in general, however, a very marked increase in the output; the average number graduating annually for the first five years of the period being 1128, while for the last five, the average was 3040. A comparison of these figures gives us an increase of 169 *per cent.* for the quarter of a century, in professionally educated lawyers. The figures do not hold true, however, for the legal profession as a whole, since they take no account of those who entered it without the law school diploma. We have to turn to the figures of the 10th and 12th census for light on that point and we find from the first that there were in our country in 1880, 64,137 who made a living, or tried to, through the practice of law, while twenty years later the number had swelled to 114,723, an increase of 78 *per cent.*

From these two sets of figures we see that the *professionally educated* lawyers have increased 169 *per cent.* in roughly twenty-five years, as based upon the annual output, while the number of lawyers of all degrees of education has increased only 79 *per cent.* in but a little less time. The necessary inference is, that the legal fraternity

as a whole is better educated than it was, so far as that education has to do with the work of the professional school. That is, that there is a considerably larger percentage of Bachelors of Law among those practising before the bar to-day, than there was a generation ago. This is not at all to be wondered at, considering the rapid increase in the number of law schools, and the greater stress that is put upon preparation along all professional lines.

It is possible, by a comparison of the number of graduates in law during the last twenty-five years, with the total number of lawyers practising to-day, to determine roughly the percentage of the whole who are professionally educated. As has been stated, the number of the former is about 45,000. If none of these had died during the period and there had been no legal graduates from classes previous to 1875 alive at the end of it, the ratio of 45,000: 114,723 or .39 would represent this percentage. It is certain, however, both that previous graduates were alive and that later ones have died. At the number of the former we can only guess. Life insurance tables of mortality throw some light on the number of the latter. Taking the probable age of graduation from the law school as twenty-five years, we find that the average annual mortality for the next twenty-five years, the length of the period considered, is roughly ten per 1000, and a somewhat complicated computation shows that about 4000 of our 45,000 should have died previous to 1900. That is, there were alive in 1900, according to the laws of probable mortality 41,000 graduates of the last twenty-five law classes. This fact in it-

self would lessen our percentage of professionally educated lawyers, in the whole number enumerated by the 12th census. If, however, as we have a right to suppose there were still alive in 1900 legal graduates of classes previous to 1876 this fact would tend to raise that percentage. It seems to be probable that the two factors practically equalize one another and that we are safe in assuming that about 40 *per cent.* of our present-day lawyers, or one in two and one-half, have had the education of the professional school.

So much for their education along the technical lines of their profession. How about the broader academic basis? Although the bar examination varies materially in different States, it is probably true that it is equivalent in most to what may be expected from the graduates of the average American High School; not the best, but the average. The same degree of academic proficiency is demanded, too, for entrance to the law school, with requirements in this respect rapidly stiffening. Roughly speaking then, the profession has at least, the secondary school equivalent along the broader lines. How much farther they have gone we have no means of knowing, except for the 45,000 or so graduates of law schools. The United States Commissioner of Education helps us on this point, for in the reports already alluded to, he gives the percentage of students taking their degrees each year in the professional schools, who had already taken the bachelor's degree in arts or science in some college or university. That is, the percentage of law graduates who are also college graduates. Unless a man took his academic degree after he had taken his professional degree, which would probably occur but seldom, the percentages in the Commissioner's reports would be valid for the broadly educated lawyer. They are as follows for as many college years since 1881, as I could secure them:

Year.	<i>Per cent.</i>
1881	34
1882	34
1883	not given
1884	36
1885	34
1886	34
1887	29
1888	29
1889	25
1890	30
1891	23
1892	18
1893	not given
1894	12
1895	13
1896	20
1897	20
1898	16
1899	16
1900	17

The average of these percentages for the twenty year period is about 20, when the varying numbers in the classes is taken into consideration, showing that one professionally educated lawyer in five has also the broader academic degree. As has already been said we have no means of knowing the proportion for those who have entered the profession through the office rather than the law school, but it seems safe to assume that it is at least no greater for them. The percentages given above for the definite classes show very conclusively that the numbers taking the academic college course as a preparation to law are rapidly decreasing, the average for the first five years of the period studied being 34 *per cent.*, while for the last five it is but 17 *per cent.*, or exactly one-half. This, it seems to me, is contrary to the general supposition, and certainly contrary to what must be the case when the present tendency to place the law schools on a post-graduate basis is more widely administered, and has time to make itself felt.

So far the present paper has dealt only with the educational preparation of the rank and file of the legal profession. In order to make a comparison between this and the preparation of the leading lights within it, I have studied with considerable detail the academic and legal schooling of 857 lawyers and jurists of acknowledged eminence who were alive in 1900. (Note: Names of lawyers in *Who's Who in America* for 1900.) Every part of the country is represented in the number, and although it is true that not all who have achieved legal distinction are included, it is, I think, safe to say that each man considered has made more than an ordinary success in the practice of law and is therefore a fit object of study by those whose ambitions are similar.

The average age of the whole number is 57 years, but 5.6 per cent. being under 40 years.

For the purpose of study I have classified them as follows according to their educational preparation:

(a) Those who had gone no farther than the High School.

(b) Those who had taken the college course only.

(c) Those who had taken the law course only.

(d) Those whose training has been entirely abroad.

(f) Those who had taken both college and law courses.

(h) Those who had taken both college and post graduate courses.

(j) Those with college, professional, and post graduate courses.

All came within these seven classes with the exception of a very few who combined training abroad in various ways with that in our institutions, but the numbers were so few as to be disregarded without invalidating the results. In the table given below, however, the totals include them. In this table, the letters at the top of the columns

refer to the classification given. The table is divided horizontally into lines, the percentages in each one of which are for the men between the ages indicated by the number in the left hand column. The study by ages was undertaken in order to see what changes have taken place in the last half century and more in the legal training. By subtracting twenty-five years from the age of each group, we have approximately the number of years which have elapsed since active practice was begun. In the horizontal line marked "Tot. No." is given the number of men for each of the educational classifications, while the column similarly headed shows the number for each definite age group:

Age	a	b	c	d	f	g	j	Tot. No.	Tot. %
80 to 90	46.2	23.1	11.5			15.4	3.8	26	3.
70 to 80	42.5	24.2	5.8		10.	14.2	2.5	120	14.
60 to 70	45	23.3	10.4	.4	8.4	7.5	4.2	240	28.
50 to 60	40	17.1	13.6	1.9	13.2	9.8	3.5	257	30.
40 to 50	30.5	18.8	15.3	3.5	12.8	10.4	10.4	164	19.1
30 to 40	35.4	14.6	27.1		6.3	8.4	8.4	48	5.6
Total No.	341	174	109	11	90	83	41	857	
Tot. %	39.8	20.3	1.25	1.3	10.5	9.7	4.8		

The percentages in the bottom line of the table are for the total number found in each of the educational classifications and are perhaps of the greatest interest. The first (a) shows that roughly 40 per cent., or one in two and one-half of these picked men had made no use of our educational machinery beyond the secondary school. That is, men who had entered the profession through the law office and who had had no considerable breadth of training previous to doing so. This seems to be an unusually large number: much larger than for the eminent men of any of the other learned professions similarly considered, and these facts would seem to imply that success before the bar as compared with success in other professions is

more a matter of proficiency in an art than mastery of a science. The 20 per cent. at the bottom of the next column (*b*) is for those whose professional education was of the office, but who had the broader academic basis of a college degree. As I have already said, we have no means of knowing how many college men went directly into practice without the medium of the professional school, in the legal fraternity as a whole; but it seems probable to me that not as many as one lawyer in five has done so. If this be true, we must conclude that the college course, even without other dependence upon the schools, increases one's probability of success. But column *b* does not include all the college educated men: we find them also (in combination with other courses) in columns *f*, *h* and *j*, giving us a total of 45.9 per cent. with a bachelor's diploma in arts or science. This, we must bear in mind is for the picked men. For the rank and file we have already shown the percentage to be not more than 20 per cent. A comparison of the two can hardly leave any doubt of the wisdom of taking the broader college course if one has "hitched his wagon to a star" in the legal firmament. With one college man in five of the whole profession and one in two of its picked men, the fact seems clear. Column *c* is for the professionally educated lawyers without advanced training along academic lines, and gives us a total of 12.5 per cent. Columns *f* and *j* also contain graduates of the law schools, and we have as a total for such among our picked men, 27 per cent. Strangely enough, this is a smaller number than for the profession as a whole, according to the figures already given. This fact I cannot explain. Figures at best are misleading, and it may be that there is something wrong with mine. If not, we are forced to the conclusion that during the last twenty-five years, the law schools have not formed the best avenues of approach to the high places in the profession,

and that the broader college training, together with an apprenticeship in the office, have best fulfilled the highest demands. We must remember, however, that this statement is made for a twenty-five year period taken as a unit, and that during that time the law course has been both lengthened and strengthened. What is true for the whole period may not be so for the later years within it, and that this is so is at least suggested by the percentages for definite age groups in column *c*.

Little is to be gained by a discussion of columns *f*, *h* and *j* considered separately, and I will say simply that 14.9 per cent. of the whole number of men considered, and taken a post graduate degree (A. M. or Ph. D.) which was not *causa honoris*. Considered from the standpoint of the ages of those included in the several educational classifications, it is noticeable (*a* and *b*) that the numbers of those who had carried their education no farther than the secondary school and also those who had depended for success upon their academic degree alone, so far as the schools are concerned, are decreasing: for the former, from 46.2 per cent. to 35.4 per cent. in six decades and for the latter from 23.1 per cent. to 14.6 per cent. in the same time. This is only what might naturally be expected in the severer competition of today; not only more use of our educational machinery is demanded, if the latter is what it pretends to be, but a fuller use of those parts of it especially planned to meet exact needs.

The percentages in column *c*, with a somewhat gradual increase from 11.5 to 27.1 are in full support of the latter part of this statement and bear evidence of the increasing value of the technical law course. For the latter classes, the number professionally educated among our picked men, considerably exceeds the number among the rank and file, though hardly to the extent that we might reasonably expect them to. It is safe to say, however, that the gradual changes

in the law course are plainly showing themselves in the increasing efficiency of its product.

Columns *f*, *h* and *j*, considered individually show (*f*) but little changed in the number of those who have achieved success through dependence upon the college and professional course combined, (*h*) a slight decrease in those who have carried their academic work farther than what is required for the bachelors' degree, without combining it with a professional course, and (*j*) a marked increase in the number who continued the academic work, but who also took the law course.

We have no data for the rank and file with which to compare the percentages of these columns, but it seems probable to me that the total, at least for the last, is far in excess for our eminent lawyers of what it is for the profession as a whole. If that be so, we have evidence that the fullest education counts.

In conclusion I will say, that fully as the legal profession has made use of our educational machinery, the leaders whose school-

ing I have studied have been able to achieve eminence with a smaller investment of years in preparation than have those of any of the other learned professions. Of 1900 college professors similarly considered the average period of preparation was 5.36 years: of 540 physicians it was 4.09 years: of 655 clergymen it was 3.19 years, while for the lawyers it was 2.95 years. In this regard, however, the latter are somewhat rapidly increasing their investment. Considered from the decades of age upon which our table is based, the average number of years spent in the schools by those between 80 and 90 years of age was 2.5 years; 70 and 80, 2.2 years; 60 and 70, 2.5 years; 50 and 60, 2.9 years; 40 and 50, 3.6 years; 30 and 40, 3.2 years. When we remember that those of the later decades have had less time for post graduate work, which not infrequently follows after a lapse of years, this showing is extremely encouraging, and whatever may have been the educational shortcomings of our legal profession in the past, leads us to hope great things from it in the future.

A TREE THAT IS DEEDED TO ITSELF.

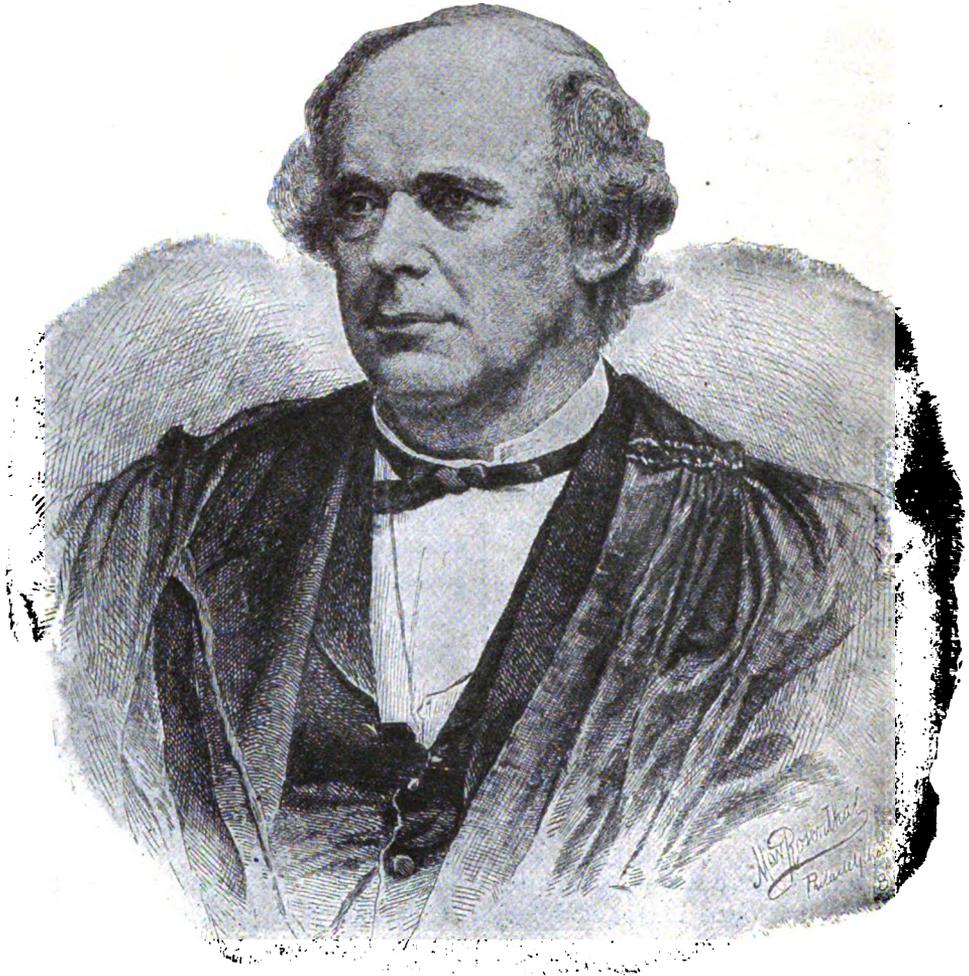
By L. B. ELLIS.

IN Athens, Georgia, there stands a magnificent oak tree that owns itself and some real estate, besides. Moreover, the legal document by which this forest monarch became such a property owner has stood the test of almost a century, without a question as to its soundness. The deed is recorded among both county and city records, and the following is an extract from it which will give the gist of the matter:

"I, W. H. Jackson, of the county of Clarke, of the one part, and the oak-tree (giving location) of the county of Clarke, of

the other part: Witnesseth, That the said W. H. Jackson, for and in consideration of the great affection which he bears said tree, and his great desire to see it protected, has conveyed and by these presents doth convey unto the said oak-tree entire possession of itself and of all lands within eight feet of it on all sides."

The oak is of great age, and unusual proportions and symmetry. It is truly lordly in appearance, seeming to appreciate its unique position in the world of trees.



H. P. [unclear]

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A CENTURY OF FEDERAL JUDICATURE.

V.

BY VAN VECHTEN VEEDER.

THE period following the Civil War forms a well-defined era in the court's history. New problems were met by new judges. The times demanded the highest order of ability. No more difficult and momentous questions were ever presented to any court than those which came before the Supreme Court during this eventful period. When the first judges of the new era took their seats the country was straining every nerve and exerting its utmost power to suppress the greatest civil war known to history. In consequence of the legislative and executive activities arising out of this emergency, great problems crowded for solution—the jurisdiction of military tribunals, the suspension of the writ of *habeas corpus*, the legislation to uphold the credit of the government, and many other questions of personal liberty and constitutional right of far-reaching importance. Upon the return of peace, the effort to re-establish order and to readjust affairs in accordance with changed social and political conditions developed further questions of great difficulty—the restoration of civil over military authority, the reconstruction of the State governments, and, above all, the war amendments to the constitution. The Thirteenth, Fourteenth and Fifteenth Amendments, designed to give further security to personal rights, brought before the court questions of great interest, involving the establishment of national supremacy together with the preservation of the just rights of the States. Reconstruction was followed by a period of wonderful material development. The feverish energies developed in deadly strife were turned into the channels of industry and commerce; vast enterprises were undertaken, and wealth accumulated on a gigantic scale. Indeed, the

conditions of life underwent a complete change; and out of these changed social and economic conditions arose a vast amount of litigation of vital consequence to the future prosperity of the country. Inventions multiplied the conveniences of life as well as the possibilities of achievement, drawing in their wake a large addition to the business of the court. The development of the agencies of steam and electricity, and their application to railway and steamship transportation and to the transmission of intelligence by telegraph and telephone, involved new and intricate legal problems. The enlarged commerce on the seas, on the great lakes and on the navigable waters of the country brought a great increase in the number of admiralty and maritime cases. Unlimited facilities for the formation of corporations, and their rapid development and concentration, have added enormously to litigation. All this progress in wealth and prosperity, and increased facilities for transportation and communication, gave new importance to interstate commerce and flooded the court with controversies concerning State taxation and regulations. The development of the mineral resources of the country, and the vast grants of the public domain in aid of the construction of railways and for educational purposes, have also added materially to the business of the court. The frequency with which the court has been forced to exercise its solemn function of nullifying unconstitutional acts of legislation affords a basis of comparison for estimating the extent and importance of the court's labors during this period. Aside from the action of the judges with respect to the attempt of Congress to confer jurisdiction upon the Supreme Court in claims for pensions

(2 Dall. 409; 13 How. 52, n.), an act of Congress was first declared unconstitutional in *Marbury v. Madison*, 1 Cranch 137, in 1803. From 1803 to 1864 there was only one instance of the exercise of such a power (*United States v. Ferreira*, 13 How. 40, in 1851.) During the next twenty-five years, however, this power was exercised fifteen times. Prior to 1860 less than fifty statutes and ordinances of States and Territories had been declared unconstitutional by the court. Between 1860 and 1889 the court nullified such acts in more than one hundred and thirty cases.¹

Since the outbreak of the Civil War there have been (exclusive of the present bench) fifteen justices. Chief among them in intellect and length of service were Miller, Field, Bradley and Gray. In the second rank of historical significance come Swayne, Chase, Strong, Waite and perhaps Blatchford. The remaining justices were Davis, Hunt, Woods, Matthews, Lamar and Jackson.

It may be well to consider these three groups of justices in inverse order, beginning with those who, by reason of their brief service or otherwise, attained least distinction.

Justice Davis (1862-77) was the only justice during the century who abandoned the bench for political preferment. His recorded opinions, from the second Black to the ninety-fourth United States, are respectable, but not noteworthy. He was not a good writer, and his written opinions are said to have been subjected to revision by the reporter. His splendid opinion in *ex parte Miligan*, 4 Wallace 2, is a genuine *tour de force*.

Justice Hunt (1873-82) was stricken with paralysis before he had completed ten years of service, and was retired on a pension by special act of Congress. His opinions, which are often made up largely of citations

from New York cases, with which his judicial experience in that State had made him most familiar, are not, in general, characterized by conspicuous force. Probably his best efforts were *United States v. Reese*, 92 U. S. 214; *Upton v. Tribilcock*, 91 *ib.* 405; *Pennoyer v. Neff*, 95 *ib.* 714; *Life Insurance Company v. Terry*, 15 Wallace 580; *Reckendorfer v. Faber*, 92 *ib.* 357; *Insurance Company v. Morse*, 20 Wallace 445; *Crapo v. Kelly*, 16 *ib.* 610; *Barnes v. District of Columbia*, 91 U. S. 540, and *Rees v. City of Watertown*, 19 Wallace 107.

Justice Woods' brief service (1880-87) was characterized by great industry. Probably no other judge wrote so many opinions during such a short service. He was very proficient in patent and equity cases. His style may be seen in *United States v. Harris*, 16 Otto 629; *Patch v. White*, 117 U. S. 210; *Presser v. State of Illinois*, 116 *ib.* 252; *Mobile v. Watson*, 116 *ib.* 620; *Wiggins Ferry Company v. State of Illinois*, 107 *ib.* 419; *Findlay v. McAllister*, 113 *ib.* 930; *Henderson v. Wardsworth*, 115 *ib.* 377.

Justice Matthews (1881-89) was known to be a man of brilliant powers, but considerable doubt was felt at the time of his appointment whether he had the judicial temperament necessary for the satisfactory discharge of the duties of his great office. During his brief service these apprehensions were quite completely dispelled. The reports contain convincing evidence of his mental powers and scholarship. One of his ablest efforts was his opinion in *Pritchard v. Norton*, in which he maintained, with great research, that the validity of a bond, as to the sufficiency of its consideration, is to be determined neither by the *lex fori* nor by the law of the place where it was made, but rather by the law in contemplation of the contracting parties as the law of the place of its performance. His dissenting opinion in *Kring v. State of Missouri* is still considered by many good judges to be more convincing than Jus-

¹ These figures are taken from statistics printed by Mr. J. C. Bancroft Davis in 1889, in an appendix to the one hundred and thirty-first volume of the court reports. The numbers would now require material additions.

tice Miller's statement of the views of the majority of the court.¹

Justice Lamar (1888-93) was a lawyer whose undoubted powers had been exercised and developed in the stormy arena of politics, and it was hardly to be expected that on coming to the bench so late in life he would excel among associates who had devoted their lives to the law. Nevertheless, he displayed marked ability in the discharge of judicial functions. His ablest effort on the bench was his dissenting opinion in the matter of *Neagle*, 135 U. S. 1, arising out of the attempted assassination of Justice Field. His opinions in *Kidd v. Pearson*, 128 U. S. 1; *McCall v. State of California*, 136 *ib.* 105; *Field v. Clark*, *Penny v. McConnaughy*, 140 U. S. 1; *Howard v. Stillwell Mfg. Co.*, and *Grand Trunk Railway v. Ives*, 144 *ib.* 408, are also worthy of note.

Justice Jackson (1893-95) came to the Supreme Court after seven years' able and efficient service in the United States Circuit Court. From the fifty opinions which constitute the published record of his service in that position, the cases of the *Kentucky and Indiana Bridge Company v. Louisville and Nashville Railroad Company*, 37 Fed. Rep. 567; *McIntosh v. Flint and Père Marquette Railway Company*, 34 *ib.* 582; *Lawrence Manufacturing Company v. Tennessee Manufacturing Company*, 31 *ib.* 776, and *United States v. Harper*, 33 *ib.* 471, attest his learning and grasp of principle and facts. The expectations aroused by his very complimentary appointment at the hands of a Republi-

can President were unfortunately not realized in consequence of failing health and untimely death. His admirable judicial style is illustrated in *Constable v. National Steamship Company*, 154 U. S. 51; *Lascelles v. State of Georgia*, 148 *ib.* 537, and *Pollock v. Farmers' Loan and Trust Company*, 158 *ib.* 601.

Turning now to the second group of judges, we may consider, first, the services of Chief Justice Chase and of his two colleagues, Swayne and Strong.

In natural ability Chief Justice Chase (1864-73) was probably the equal of either of his immediate predecessors. But his bent was administrative rather than judicial, and while his pride was undoubtedly flattered by his appointment to the bench, there can be little doubt that the performance of judicial duty failed to enlist the entire energy of his mind, and that he looked forward to and sought the Presidency. This qualified loyalty to his great office at a time when the court was dealing with problems which demanded the undivided application of the highest mental powers has materially affected Chief Justice Chase's reputation. Yet, notwithstanding his long preoccupation with political affairs, it must be admitted that he discharged the duties of his office with dignity and credit, and certainly with an entire absence of political bias. "Apparently, as it were, by common consent," as Justice Clifford said, "he seated himself easily and naturally in the chair of justice, and gracefully answered every demand upon the station, whether it had respect to the dignity of the office, or to the elevation of the individual character of the incumbent, or to his firmness, purity or vigor of mind." Nothing could have been more admirable than the calm and dignified manner in which he presided at the impeachment trial of President Johnson. And he resolutely maintained the dignity of his judicial office by refusing to hold court in the southern States until all possibility of claim that the judiciary was subordinate to the military power had been

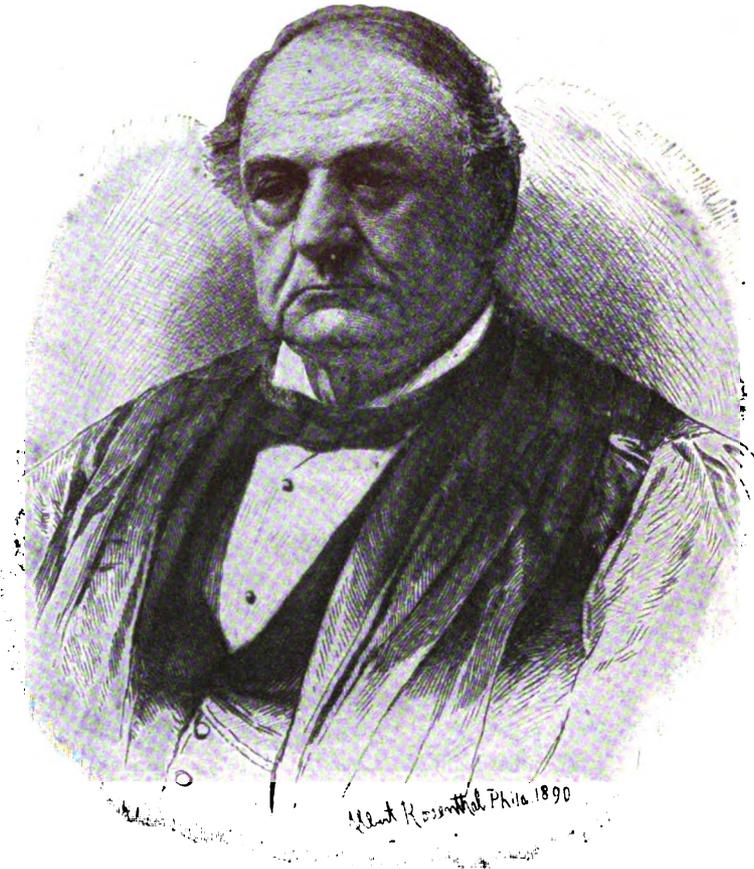
¹ Justice Matthews' most admired opinions are *Kring v. Missouri*, 107 U. S. 221; *Pritchard v. Norton*, 16 Otto 124; *Place v. Norwich Transportation Company*, 118 U. S. 468; *Hurtado v. State of California*, 111 *ib.* 516; *New Orleans v. Houston*, 119 *ib.* 265; *Vick Wo v. Hopkins*, 118 U. S. 356; the *Virginia Coupon Cases*, 114 U. S. 270; *The Great Western*, 118 *ib.* 526; *Bowman v. Chicago and Northwestern Railway Company*, 125 U. S. 465; *Smith v. State of Alabama*, 124 U. S. 465; *Ex parte Ayers*, 123 *ib.* 443; *The Great Western*, 118 *ib.* 526; *Hayes v. Michigan Central Railroad Company*, 111 *ib.* 228; *Carroll County v. Smith*, *ib.* 556; *Western Union Telegraph Company v. Hall*, 124 *ib.* 444; *Pepper v. Labrot*, 8 Federal Reporter 29.

removed by the express declaration of the President.

In the work of the Supreme Court he distinguished himself more particularly in the solution of the difficult problems of international law and prize growing out of the Civil War. His most conspicuous efforts in

from the Union, the chief justice exhaustively reviewed the nature of our government. His conclusion was as follows:

"The union of the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred princi-



W. H. Swayne

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the domain of constitutional law were *Texas v. White* and the *Legal Tender* cases, *Hepburn v. Griswold* and *Knox v. Lee*. In the former, where a claim by the State of Texas to certain United States bonds was met by the contention that the State had withdrawn

ples, similar interests and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to be per-

petual,' and when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble union more clearly than by these words. What can be

and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the Constitution, though the powers of the State were much restricted, still all powers not delegated to the United States nor prohibited to the States,



W. Strong

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indissoluble if a perpetual union made more perfect is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom

are reserved to the States respectively, or to the people, and we have already had occasion to remark at this term that the people of each State compose a State having its own government and endowed with all the functions essential to separate and independent existence, and that without the States in

union there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union, and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States." This exposition has been highly praised; but from the standpoint of political science Justice Grier's dissenting opinion deserves careful consideration.

In the *Legal Tender* cases he sat in judgment upon and denied the constitutionality of his own executive acts. "It is not surprising," he said in his felicitous explanation of his change of view, "that amid the tumult of the late Civil War, and under the influence of apprehensions for the safety of the republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Those who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have since the return of peace and under the influence of a calmer time, reconsidered this conclusion, and now concur in those which we have just announced." His course in this matter has been both praised and censured. But, as Justice Clifford afterwards said, "Men find it easy to review others, but much more

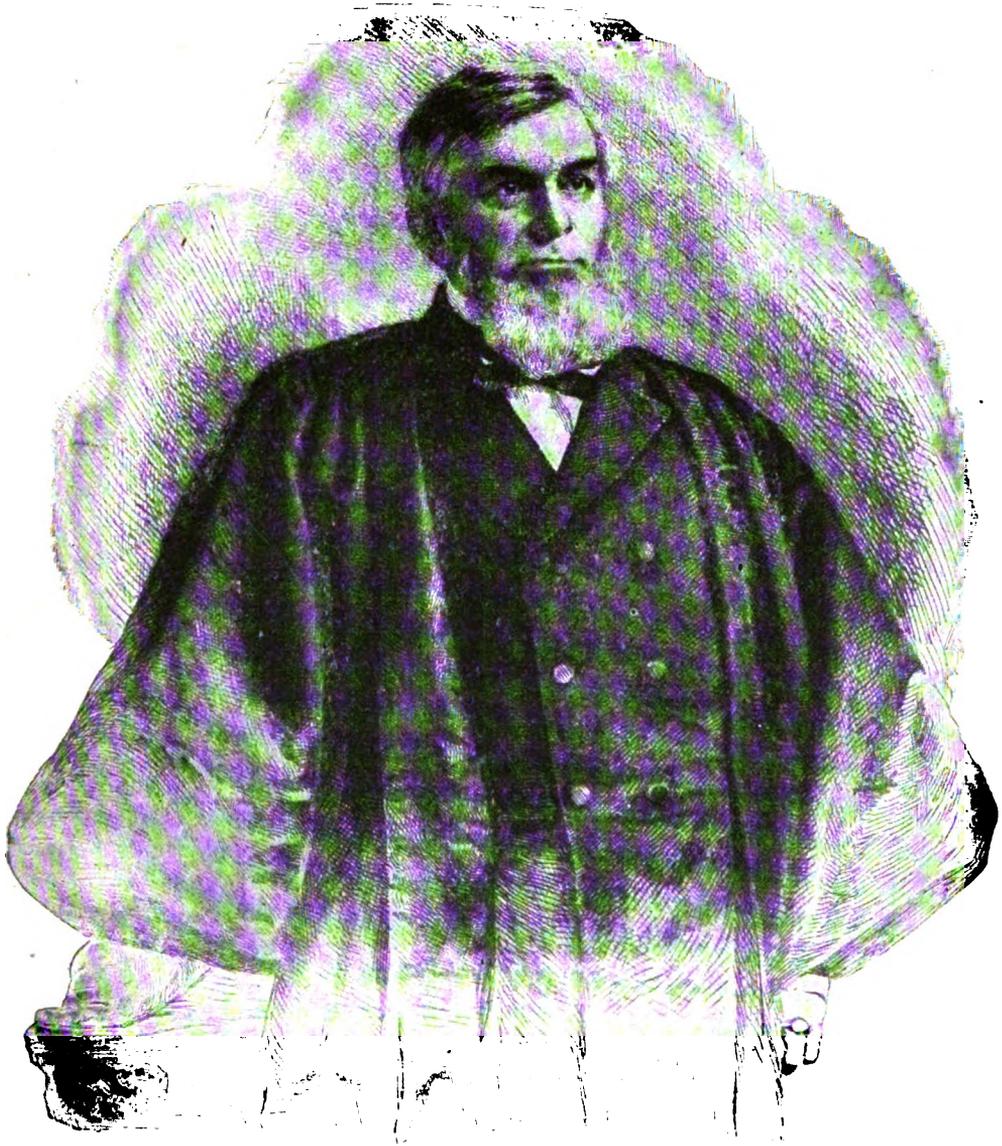
difficult to criticise and review their own acts, and yet it is the very summit to which the upright judge should always be striving. . . . Judges and jurists may dissent from his final conclusion and hold, as a majority of the justices of this court do, that he was right as Secretary of the Treasury, but every generous mind, it seems to me, should honor the candor and self-control which inspired and induced such action."

Chief Justice Chase's opinions, as recorded in fifteen volumes of Wallace's reports, display not only grasp of legal principles, but also admirable skill in applying them with clearness and force to new and perplexing conditions.¹

When Justice Swayne (1862-81) took his seat, Chief Justice Taney was more than eighty years of age, and four of the five associate justices either over or little under seventy. Coming to the bench in the prime of life, after a large and varied practice at the bar, and with settled habits of reflection and research, he was from the outset one of the most indefatigable workers in the court. The thirty-seven volumes of reports published in his time illustrate his energy and usefulness, if not conspicuous ability. See *Gelpcke v. Dubuque*, 1 Wallace 174; *Farrington v. State of Tennessee*, 5 Otto 679; *The China*, 7 Wallace 53; *Gilman v. Philadelphia*, 3 *ib.* 713; *Trist v. Child*, 21 *ib.* 441; *County of St. Clair v. Livingston*, 23 *ib.* 46; *Edwards v. Kearzey*, 6 Otto 595; *United States v. Rhodes*, 1 Abbott, U. S. 28.

No other justice who ascended the bench

¹ *Texas v. White*, 7 Wallace 700; *Hepburn v. Griswold*, 8 *ib.* 603; *Knox v. Lee*, 12 Wallace 457; *Cummings v. State of Missouri*, 4 *ib.* 277; *State of Mississippi v. Johnson*, 4 *ib.* 475; *The Grapeshot*, 9 Wallace 129; *The Circassian*, 2 *ib.* 133; *The Bermuda*, 3 Wall 514; *The Hart*, 2 Wall 258; *Mrs. Alexander's Cotton*, 2 *ib.* 404; *The Atlantic*, 3 *ib.* 425; *The Peterhoff*, 5 Wallace 28; *Ex-parte Yerger*, 8 *ib.* 85; *Veazie Bank v. Fenno*, 8 *ib.* 533; *Thomson v. Pacific Railroad Company*, 9 *ib.* 579; *United States v. Klein*, 13 *ib.* 128; *Lane County v. Oregon*, 7 *ib.* 71; the *Case of Jefferson Davis*, *Chase's Decisions*, 1; *Griffin's Case*, *ib.* 364; *Keppel's Administrator v. Petersburg Railroad Company*, *ib.* 167; *United States v. Morrison*, *ib.* 521.



M. R. Waite

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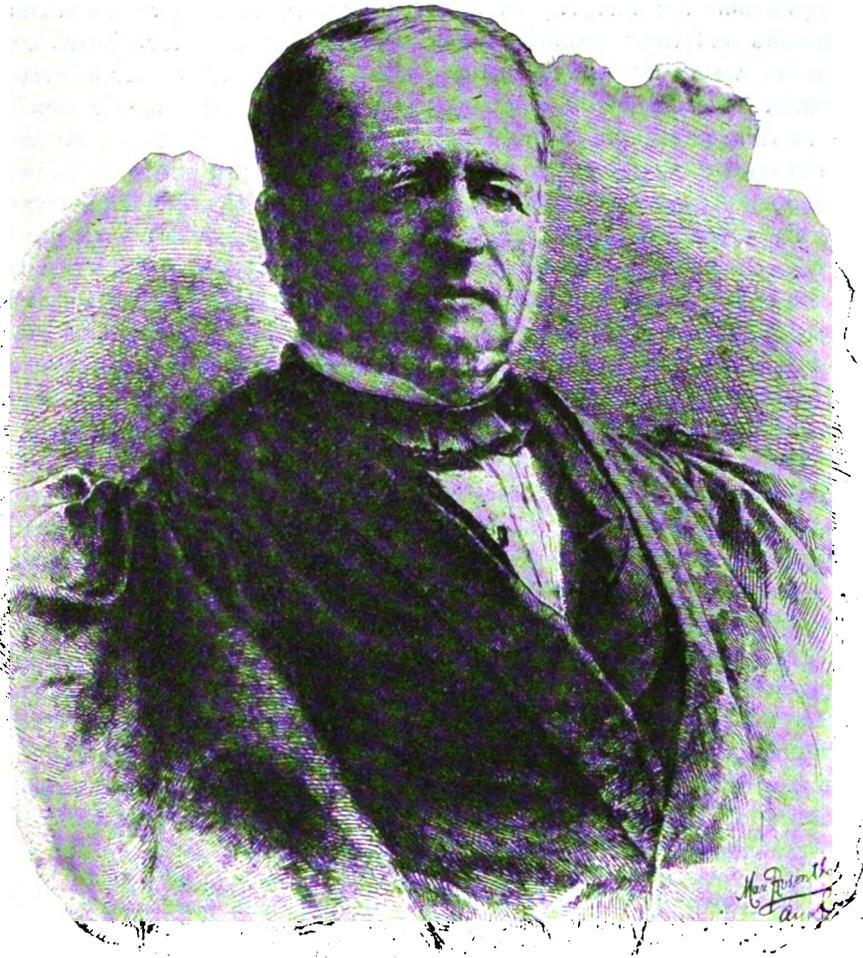
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as late in life as Justice Strong (1870-80) ever rendered such conspicuous service. He had given good evidence of judicial capacity as a justice of the Supreme Court of Pennsylvania, and throughout his term took an active part in the work of the United States Supreme Court. To say that his work compares favorably with the best efforts of the distinguished judges with whom he served during the decade from 1870 to 1880 is to pay a high compliment to his mental powers.¹ On constitutional questions he believed in a broad and liberal construction of national powers.

Coming to the bench without the prestige of any of his predecessors, Chief Justice Waite (1874-88) soon won the respect of his colleagues and of the profession by his modest demeanor, his great industry and his uncommon administrative ability. His business-like superintendence of the work of the court was of great consequence at a time when the business of the court was increasing so rapidly. During the first seventy-five years of the court's history the published reports had not averaged one a year; five volumes had been issued prior to Marshall's time, twenty-seven under Marshall, and thirty-six under Taney. The business of the court increased slowly during the first years of Taney's service, but from 1850 the increase

¹ Some of Justice Strong's interesting and able opinions may be found in *State of Tennessee v. Davis*, 100 U. S. 257; *Strauder v. State of West Virginia*, 100 U. S. 303; *Knox v. Lee*, 12 Wallace 457; *Civil Rights Cases*, 109 U. S. 3; *Ex-parte Virginia*, 100 *ib.* 313; *Bigelow v. Forrest*, 9 Wall. 339; *Munn v. State of Illinois*, 94 U. S. 113; *Corbett v. Nutt*, 10 Wall. 464; *Miller v. United States*, 11 Wallace 268; *State of Virginia v. Rives*, 100 U. S. 313; *The Scotia*, 14 Wallace 170; *Blyew v. United States*, 13 *ib.* 581; *Reading Railroad Company v. State of Pennsylvania*, 15 *ib.* 232; *State of South Carolina v. State of Georgia*, 93 U. S. 4; the *Confiscation Cases*, 7 Wall. 454; *Murray v. Charleston*, 96 U. S. 432; *Stewart v. Sonneborn*, 98 *ib.* 187; *Boon v. Aetna Insurance Company*, 12 Blatchford 24, 95 U. S. 1; *Bank of Kentucky v. Adams Express Company*, 93 *ib.* 174; *Shaw v. Railroad Company*, 101 *ib.* 557; *Milwaukee & C. Railway v. Kellogg*, 94 U. S. 469; *Sinking Fund Cases*, 99 *ib.* 700; see also, in the *Pennsylvania Reports*, *Caldwell v. Fulton*, 31 Pa. St. 475; *Rogers v. Gilinger*, 30 *ib.* 185; *Huff v. McCauley*, 53 *ib.* 206; *Pennsylvania Railroad v. Allen*, 53 *ib.* 276.

was more rapid. Beginning with about seventy cases in that year, the annual average had increased to something over four hundred during Waite's tenure. At the middle of the century the court's calendar did not average one hundred and forty causes, and had never reached three hundred in any term; in 1890 it numbered fifteen hundred causes. The work of the court during this time was not only large in volume, but of great importance and difficulty. Some of the most perplexing problems arising out of the Civil War still awaited solution, and the rapid development of commerce and industry which followed the restoration of peace brought before the court new and complex issues. Amidst the passions which enveloped the former, and throughout the intricacies of the latter, Chief Justice Waite preserved the calm and steady attitude of a mind conscientiously searching for the truth. One of his most interesting opinions was given in the case of *Reynolds v. United States*, which arose under the statutes designed to suppress bigamy in the Territories. The chief justice examined the history of religious freedom, and the nature, scope and relations of the marriage contract, and held that, although Congress could not prohibit the free exercise of religion, yet it was clearly within the power of every civil government to determine what should be the law of its own social life. It could not be, he said, that those who were by religion polygamists could commit an act which the law declared to be a crime and go unpunished, while those who were not polygamists were amenable to punishment. "Suppose one believed that human sacrifices were a necessary part of religious worship; could it be seriously contended that the civil government under which we live could not interfere to prevent a sacrifice? Or, if a wife justly believed it was her duty to burn herself upon the funeral pyre of her husband, would it be beyond the power of the civil government



Sant Desobry

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to prevent her carrying her belief into practice?"

Nothing illustrates to better advantage his freedom from political prepossessions than his conservatism in protecting to the fullest extent the rights and the integrity of the State governments and their authority. It would be idle to claim for Chief Justice Waite intellectual preëminence among his predecessors in this great office, or even among his colleagues; but it can be truthfully said that no more upright and conscientious judge has adorned the bench. If his opinions are not conspicuously able, they are brief and business-like, and never overstep the necessities of the occasion.¹

Quite as modest a judge as Waite was Justice Blatchford (1882-93), who, through more than a quarter of a century of continuous service in the Federal courts, fulfilled every requirement of a conscientious, laborious and competent public servant. To him, as the attorney-general said in his discriminating eulogy, the discharge of duty was an impulse and toil a habit. "It is not given to every man to be instinct with true genius, to exult in acknowledged intellectual superiority, to be chief among the chiefs in his chosen calling. Such men are rare, and their examples as often provoke despair as excite to emulation. But to every man it is given to make the most of the faculties that he has,

¹ Chief Justice Waite's work may be studied in Reynolds v. United States, 98 U. S. 145; Neal v. State of Delaware, 103 U. S. 370; Munn v. State of Illinois, 4 Otto 113; Stone v. State of Mississippi, 11 ib. 814; United States v. Reese, 92 U. S. 214; United States v. Cruikshank, ib. 542; the Telephone Cases, 126 ib. 2; The Harrisburg v. Rickards, 119 ib. 199; State of Louisiana v. Jumel, 107 ib. 711; New York v. Louisiana, 108 ib. 76; Antoni v. Greenhow, 107 ib. 769; Hall v. De Cuir, 95 ib. 485; Pensacola Telegraph Company v. Western Union Telegraph Company, 96 ib. 1; Minor v. Happersett, 21 Wall 161; the Sinking Fund Cases, 99 U. S. 700; Spring Valley Water Works v. Schottler, 111 ib. 347; Stone v. Farmers' Loan & Trust Company, 116 ib. 307; Baldwin v. Franks, 120 ib. 678; Mali v. Keeper of Jail, 120 ib. 1; Young v. United States, 97 ib. 39; the Headmoneys Cases, 112 ib. 580; Kennard v. State of Louisiana, 92 ib. 480; Ex-parte Curtis, 106 ib. 371; Spies v. United States, 123 ib. 131.

to cultivate them with unflagging diligence, to make sure that they deteriorate neither from misuse nor disuse, but continue in ever-growing strength and efficiency until the inevitable access of years and infirmities bars further progress. Justice Blatchford was the last man to claim for himself extraordinary gifts. But he had tireless industry, persistent application and a determination to work the powers he possessed to their utmost capacity. . . . Thus, if not brilliant, he was safe; if he did not make any large contributions to the science of jurisprudence, he won respect by the righteousness of the results reached in actual causes." Justice Blatchford will be remembered for his labors as a specialist. Sitting so long in the United States courts in the commercial metropolis of the country, he acquired wide experience in the law of patents, in admiralty, in bankruptcy, and in the administration of the revenue laws. It may be doubted whether his service on the supreme bench added materially to his reputation. He was never proficient in expression, and toward the end of his judicial service his opinions became painfully loose and disjointed in style and method. His decision in Gorham v. White, 7 Blatchford 513, which was afterwards reversed in the Supreme Court by a divided court (14 Wallace 513), affords a good opportunity to compare him with his colleagues.²

² Some of Justice Blatchford's other well-known cases are Dobson v. Hartford Carpet Company, 114 U. S. 439; Dobson v. Dorman, 118 U. S. 10; Blatchford v. Palmer, 6 Blatchford 256; Budd v. New York, 143 U. S. 517; Counselman v. Hitchcock, 142 ib. 547; O'Neill v. Vermont, 144 U. S. 323; United States v. Bennett, 16 Blatchford 338; In re Farez, 7 ib. 34, 345; Pennsylvania Railroad Company v. Miller, 132 U. S. 15; Ex-parte Phoenix Insurance Company, 118 ib. 640; Railway Company v. State of Minnesota, 134 U. S. 418; People v. Comp. Gen. Transatlantique, 10 Federal Reporter 357; Exchange National Bank v. National Bank of New York, 112 U. S. 276; Manchester v. State of Massachusetts, 139 ib. 240; Marley Sewing Machine Company v. Lancaster, 129 ib. 263; Horner v. United States, 147 ib. 446; Hart v. Pennsylvania Railroad Company, 112 ib. 331; City of Brenham v. German American Bank, 144 ib. 173.

BILL LIGNITE'S CONVERSION.

By J. C. TERRELL.

I N 1876, when a pocket pistol constituted the most important part of every Southern gentleman's attire, and when excellent Robertson County, Kentucky, goods supplemented with Tuck Boaz and Jud Roland's moonshine, sold in our markets overt at reasonable figures, every man was a law unto himself. While ordinarily human life was held rather cheaply, lynch law for aggravated offences for many reasons necessarily and rightfully obtained. Justice did not travel with leaden feet, and taxes were nominal. Two crimes were never condoned, theft of horses and disturbance of religious worship. They were severely punished, without benefit of clergy.

There then lived on Village Creek in Tarrant County, one Bill Lignite, a large man, with a heart as big as a court house. He had been a good soldier, was freckle-faced, with sorrel, bushy hair. He occasionally indulged. His truth was found at the bottom of a bottle, and when Bill so found it, he invariably exploded with voice and pistol, not to injure, but merely to celebrate. He then became unto himself a small Fourth of July.

An old-fashioned Southern Methodist camp meeting, led by Capt. (Rev.) W. G. Veal, first commander of R. E. Lee Camp, was being held at Henderson Spring, on Village Creek. Early Sunday morning found me there. A large brush arbor and a number of tents and wagons argued a big meeting. From near a grove a man mysteriously beckoned me to approach. I cautiously obeyed, and when he turned I recognized Bill, who appeared with a day-before-yesterday haggard look, and with troubled face and averted eyes, he slowly said: "Cap, yesterday at the Fort, at old Ed.

Terrell's, I tiked up on whiskey and started home with a full bottle. Passing here I saw two or three men and lots of women holding a prayer meeting. I rode under the arbor and just for fun shot into the brush overhead. I don't remember exactly, but my wife told me all. Oh, it is awful! What shall I do?" I told him that from a legal view there was no hope, that no one was ever acquitted in Texas of that crime proven. I asked him what church his wife belonged to. With a deprecatory nod towards the camp, he answered, "That shebang over there." Seeing that he was contrite and enhungered, I advised him to about-face on his sins and join that church. Looking quickly up, as with newly inspired hope, he answered, "You reckon?"

The day meeting was not a success, but at night, after a "powerful" sermon from the text, "The harvest is passed, the summer is ended and I am not saved," succeeded by a prayer by a gifted woman, in a weird and shrill voice, uncapping hell and dwarfing Dante's "Inferno" itself, and a call for mourners with the hymn, "Show pity, Lord; O, Lord, forgive," imagine my surprise at seeing Bill approach the altar, followed by neighbors and happy brethren. The very biggest brand had been snatched from the burning.

Bill proved true to his vows. He is now in the Panhandle of glorious Texas, with cattle on a hundred hills, and is begirt with numerous children.

Judge Grimsley took no cognizance of the offence. The grand jury failed to indict. Hence Poe, mentor of the Cross Timbers, stood mute, and I lost a fee. "So let the Lord be thanket."

WRONG WITHOUT REMEDY: A LEGAL SATIRE.

I.

BY WALLACE McCAMANT.

THE author's attention has been called for some years past to the facilities offered to able, unscrupulous, intelligent lawyers to levy blackmail on corporations by the control of a few shares of minority stock. Frauds perpetrated by majorities upon minorities in corporations are usually given publicity. Blackmail levied by minorities upon majorities seldom becomes a matter of public information, the interests of both parties preventing a disclosure. The result has been in the opinion of the author that the law, both that which has grown up by decisions and that which is the result of direct legislation on the subject has gone much too far in the protection of the minority stockholder, and the purpose of this work is to call attention to the abuses along this line which have crept into the law.

The author is well aware that he is likely to be criticised for publishing a work of this character, on the ground that it may tend to the perpetration of the very frauds which are outlined in the work; but these frauds are perpetrated with such frequency today, and the men capable of carrying them through are so thoroughly posted in the methods of working such frauds that the author does not believe this work can be justly held responsible for results of the character outlined. In any event, there can be no reform until public opinion is convinced that there are abuses requiring reform.

It is not the purpose of the author to suggest remedies, but it may not be amiss to state that in the opinion of the author the common law rule in regard to the inspection of corporate books and papers is a rule which justly protects the interests both of the minority stockholder and of the corporation. Under this rule the corporation may resist

a demand for an unlimited inspection of its books and papers on the ground that the motive of the stockholder seeking such inspection is a bad motive. In the opinion of the author statutes which deny the corporation the right to make this defence are ill-advised and are capable of the abuses outlined in the second chapter of this work.

It may not be amiss to add that in the opinion of the author statutes might with propriety be adopted in all the States similar to that which prevails today in one of them, whereby a minority stockholder, seeking to redress wrongs done the corporation, is required as a condition to securing a hearing upon his bill to offer to sell his stock at its fair value. If the parties cannot agree upon the value and the defendants to the bill desire to make the purchase, the court is required under the statute in question to determine the value and the defendants to the bill desire given an opportunity to purchase at the value fixed by the court. If the purchase is not effected, the minority stockholder is entitled to proceed with his suit. This legislation, it seems to the author, protects the corporation against blackmail and at the same time is fair to the minority stockholder.

THE SHIPWRECK OF A MORAL NATURE.

The rain was falling and the wind was blowing in gusts as a well-dressed man walked along the streets of a Pennsylvania city, buried in thought and oblivious to the weather. It was late on election night; Hamilton Anderson had remained down town receiving election returns as long as the returns had kept coming. He had finally started home, convinced that he was beaten in his candidacy for common pleas judge. He had

had a party majority of at least a thousand in his favor; but this majority had been wiped out and his opponent was elected with a lead over Anderson of not less than five hundred.

Anderson at this time was not a bad man. He had graduated from college seventeen years before with highly creditable rank in scholarship, and had read law thereafter. For fifteen years he had devoted his attention to the practice of his profession and had gradually acquired a good body of corporation clients. He was regarded by bench, bar and community as an able, resourceful, scholarly lawyer. He was particularly well versed in the law of corporations, and especially in that branch of it which defines the rights and obligations of stockholders and directors to each other and to the corporation; he had been retained in several cases involving questions in this branch of the law and with commendable research he had investigated the authorities until he had become saturated with the subject.

Anderson's code of professional ethics was a high one. The weak point in his character was undue deference to public opinion. To him it was more important to seem to be a good man than to be one. He was a firm man in any position he took, but he placed an unusually high valuation on a position of good standing in the community, and he was willing to sacrifice much to secure and maintain it.

For many years Anderson had been possessed with a judicial ambition. The salary of a common pleas judge was less than Anderson's professional income, but judicial work was congenial to him, and he was more than willing to make the financial sacrifice. His defeat was a bitter disappointment to him, and he was in no happy frame of mind as he wended his way homeward through the storm.

What should he do about it? Was he to remain at the bar in this county and practise before his successful competitor? The

thought was extremely unpalatable, not only because the judge-elect was a successful competitor, but also, and chiefly, because Anderson knew him to be an unfit man. His knowledge of the law was meagre, and he was lazy. He was undignified, and his court was sure to be a place where all manner of reprehensible pettifogging would be permitted. Moreover, Anderson knew he would not be intellectually honest; he would never lose sight of the effect his decisions might have on his own political future, and Anderson foresaw that law and evidence would be tortured to admit of decisions which would comport with the demagoguery of this judge. No, Anderson made up his mind he would not sacrifice his self-respect by practising in that man's court.

Anderson did not sleep much election night, nor for several nights thereafter. The more he thought about the situation the worse he felt. With his determination not to practise before his opponent, he saw that his ambition was disappointed and all his plans were wrecked. He grew more misanthropic every day. He found it hardest to bear the jubilant looks of his enemies and the merciless comments that came to him from all sides on his weakness as a candidate for office. Mad with disappointment and goaded by the unjust criticism to which he was subjected, he became a different man. He threw his principles to the winds and became the foe of society. He had convinced himself that money was well-nigh the whole secret of power and happiness, and he made up his mind to get money. He would not commit crime; none but fools were criminals. There were too many ways to get money without endangering one's personal liberty. Anderson set himself the more difficult task of getting money quickly without either earning it or bartering his reputation for it. For a man of his tastes there could be no happiness without high standing in the community.

Without conference with anyone, Ander-

son's plans gradually took shape. He proceeded to convert what little property he possessed into cash; from this he realized about \$15,000, with which to make his new start in life.

BLACKMAIL BY INSPECTION.

Several months after the election Hamilton Anderson removed to St. Louis. He took with him letters of introduction, which enabled him to secure membership in several of the clubs, and established at least a passing acquaintance with many men of substance and standing in the Missouri metropolis. His intelligence and companionable qualities soon began to make him popular. Moreover, he let it leak out that he was seeking local investments, and this gave him the standing which always comes to the man who has available assets. He soon picked up five shares of the stock of the Central Banking and Trust Company for \$1500. This corporation did a large business; it had large deposits and handled many important trusts; its loans and discounts aggregated large sums, and its stock paid handsome dividends. Anderson's investment was therefore a natural one. He promptly notified the secretary of the company of his purchase and had his name enrolled as one of the stockholders in the corporation.

A few days thereafter the secretary received a letter from Anderson demanding as a stockholder the right to inspect and examine the books of the corporation. To this Mr. Jacks, the secretary, replied that he was willing to accord Mr. Anderson any information which a small stockholder could reasonably ask, and enclosing a copy of the last statement of the assets and liabilities of the corporation, he requested Mr. Anderson to indicate his purposes in making the request and the specific information he desired. Anderson promptly replied, stating that it was impossible for him to indicate exactly what information he desired; that he claimed the

rights of a stockholder under section 932 of the Missouri code to an unlimited inspection of the corporate books. He added that he had employed an expert to assist him in making his examination, and that they would conduct their search at such time and in such manner as to inconvenience the corporation as little as possible in the conduct of its business. Mr. Jacks was thunderstruck by the impudence of this demand. He, however, replied courteously, acknowledging Anderson's letter, and asking whether he was to understand that the request was limited to an examination of the corporate records or whether Anderson contended that he had right to inspect the books containing the record of the general business transactions of the company. Anderson replied that under the law the corporation was charged with the duty of making a record of all its transactions, and that he desired an inspection of the books containing these records, as well as of the stock and minute books of the corporation; in conclusion Anderson requested the secretary to indicate categorically whether the examination would be permitted, and if so, that a time be named at which he could begin his work.

The board of directors held a meeting a few days after the receipt of this last letter and the entire correspondence was laid before them. It was unanimously resolved that the request be denied, and the next day the secretary wrote the following letter:

Hamilton Anderson, Esq.,

Alpha Club.

St. Louis, Mo.

Dear Sir:—Referring to your favor of recent date requesting an unlimited inspection and examination of the corporate and business records of this corporation, I have to say that the management has nothing to be ashamed of in the conduct of the institution and that I am willing to furnish any information which a stockholder may reasonably ask. But, as you well know, the business of a

bank and trust company is of the most confidential character. Its patrons would most certainly and properly complain if the state of their accounts, the amount of their indebtedness and the nature of their trusts should be disclosed. Such disclosure would most seriously impair the standing of the corporation and diminish the value of the stock. We are satisfied that these considerations must appeal to you as reasonable and sufficient to justify us in refusing the unlimited examination of our records which you have seen fit to ask. In conclusion I may add that it would most seriously interfere with the transaction of our business to permit this inspection; the books are in constant use throughout the day, and they have to be locked in the vaults at the close of business hours.

Very truly yours,

JAMES K. JACKS, *Secretary.*

A few days later a *mandamus* proceeding was begun to require the defendant officers of the Central Banking and Trust Company to permit the inspection demanded by Hamilton Anderson. The petition averred the demand and refusal, the petitioner's ownership of five shares of stock, the defendants' knowledge of such ownership and the petitioner's willingness to conduct the examination at such times and in such manner, to be determined by the court, as would interfere as little as possible with the conduct of the corporation's business. An alternative writ of *mandamus* was granted by the court to which in due time the defendants made answer. They averred that the information was not sought for a lawful or beneficial purpose, but for the vexation and annoyance of the corporation. They charged on information and belief that the petitioner had purchased his small stockholding a short time before with a view to making this demand and thereby levying blackmail on the company. They averred the confidential nature of the matters contained in their books and the serious injury which must follow in case the details

of their business were disclosed. In a separate count in the answer they averred their willingness to purchase petitioner's stock at any valuation which the court in its wisdom might place upon it, and in a third count they set up that it was impossible to grant the inspection because the books were in constant use and without their use the business could not be carried on. In conclusion they prayed the court to dismiss the writ and give them judgment for their costs and disbursements. The relator's counsel promptly demurred to each of the counts in this answer, and in due time the demurrer came on for hearing.

Mr. Graham, counsel for Anderson, had been thoroughly coached by his client. In support of the demurrers he argued that there were three matters only alleged in bar of petitioner's right to an inspection:

1. That the inspection was sought with an improper motive and for improper purposes.
2. That the corporation was willing to purchase the petitioner's stock for a valuation to be placed on it by the court.
3. That the inspection could not be granted without inconvenience and interruption to the business.

As to the first defence, Mr. Graham read section 932 of the Code of Missouri:

"The trustees or directors of the corporation shall keep correct accounts of their transactions . . . and each stockholder may, at all proper times, have access to the books of the company, to examine the same."

This statute, he contended, gave the stockholder an unlimited right to inspect the books of the corporation which contained a record of its transactions. Admitting that the first count in the defendants' answer stated a good defence at common law, he contended that the Missouri statutes altered the law and gave the stockholder the rights contended for by his client; that the statute cited was a part of the charter of every Missouri corporation, and that the inspection demanded was a law-

ful demand. As long as a party was acting within his legal rights, Graham contended that his motive was immaterial. This had been expressly held by the Missouri Court of Appeals in construing this particular statute. Moreover, the stock was Anderson's and the corporation had no right to compel him to sell it; private property, he contended, could not be condemned except for public use. Mr. Graham consented to a provision in the writ requiring Anderson to conduct his examination at reasonable times and in a proper manner, but he contended that the mere inconvenience to the corporation of having the inspection did not destroy the stockholder's right under the statute.

In support of these contentions Mr. Graham cited *State v. St. Louis Co.*, 29 Mo. App. 306; *State v. Sportsmen's Association*, 29 Mo. App. 330, and Thompson on Corporations, sections 4421, 4422 and 4423.

Counsel for the trust company enlarged on the confidential character of the information contained in the company's books and contended that the law ought not to aid in the destruction of a legitimate business, as it would do if the petitioner's contentions were upheld.

He cited a large number of authorities to show that the court will on an application for inspection examine into the purpose for which the inspection is desired, and will not permit the process of the court to be abused by blackmailers or used to gratify the idle curiosity of the stockholder. Graham easily distinguished all these authorities by showing that they arose in jurisdictions where the common law rule prevailed and that under such statutes as that of Missouri the motive of the stockholder in seeking the inspection was always held to be immaterial. In support of this contention he cited cases from England, from New Jersey, from Alabama and other American jurisdictions, all of which were in point.

The court announced that the argument of

the trust company's counsel would have been very pertinent if addressed to the legislature; the law should be as contended for by the company; but the province of the court was not to enact law, but to enforce the law as the legislature had declared it. The Missouri legislature in its wisdom had given to the stockholder an unlimited right to inspect and examine the books of the corporation, and this right was not dependent on the motive of the stockholder or the convenience of the corporation. Nor was there any power in the court or the corporation to compel Mr. Anderson to sell his stock. On all of the questions raised by the demurrers the authorities cited by Mr. Graham were decisive and binding on the court. The demurrers were sustained, and unless the trust company desired to further plead the writ of *mandamus* must be made preemptory.

Counsel for the company took five days' further time to plead, and next day there was a conference at the bank. All of those present agreed that Anderson was levying blackmail, that if he made his examination he would make public the information garnered from the books. The trust officer remarked that the publication of the contents of the trust records would mean the failure of several important deals which customers were now working on. The cashier said he could recall offhand three wholesale houses which would certainly be closed out by their creditors if these knew the extent of their indebtedness to the institution. Mr. Bernheisel, the president, finally remarked that the institution could better afford to lose \$50,000 than submit to this inspection and examination. The question was, what to do about it. Counsel for the company advised that he could promise nothing more substantial than delay as the result of an appeal. There seemed no way out of it but to buy Anderson's stock, and Bernheisel agreed to call on him for this purpose.

Anderson said that the stock was a good

investment, he did not need money and did not desire to sell. Bernheisel said he would make it to his interest to sell. The sale was finally consummated, Anderson receiving \$15,000 for that which had cost him \$1500 a few weeks before. He signed the following receipt:

Received of Frederick Bernheisel fifteen thousand dollars in consideration of which I hereby bargain and sell to the said Bernheisel all my stock in the Central Banking and Trust Company, and all stock therein which I may hereafter acquire. For the same con-

sideration I agree in the future to accept no retainer from anyone hostile or adverse in interest to said corporation and to pay the sum of \$5000 to said corporation as liquidated damages in the event of my violation of this agreement.

HAMILTON ANDERSON.

The trust company's officials were, of course, careful to keep this history quiet, and Anderson did not therefore suffer materially in reputation as the result of this first effort to retrieve his fortunes.

TRIALS OF THE DEAD.

By R. VASHON ROGERS.

OYEZ! Oyez! Oyez! Thomas Becket, some time Archbishop of Canterbury, you are hereby summoned to appear before our Sovereign Lord, the King; at his Palace of Westminster, on the eleventh day of June now next ensuing, there to answer to the charges laid against you of treason, contumacy and rebellion: and herein fail not at your peril. God save the King."

With some such words as these did his rough voice ring through the lofty arches of Canterbury's grand cathedral and roll echoing from aisles to choir, as the pursuivant from the King's Court stood before the shrine of St. Thomas still resplendent with precious jewels and refined gold,—the offerings (in part) of sovereign princes who had knelt tremblingly and humble before the altar of that famous queller of tyrants,—his foot resting in the hollows worn in the stones by the knees of the millions who had prayed there

"To the holy, blissful martyr
That them hath holpen, when that they were
seke."

The messenger, clad in the bizarre costume of his class, begrimed by the mud and dust of country roads, angered by the roughness of the journey, anxious to curry favor with a king whose frown was death, whose smile might be promotion, had come post haste from London, and making his way straight to the grand portal of the cathedral, loudly and defiantly knocking, demanded admission within the sacred precincts. The monks knew wherefore he had come, for already the determination of Henry VIII. to avenge his ancestor, the Second Henry, and to overawe any churchman who might think of opposing his ecclesiastical innovations was noised abroad: the aged Bishop Fisher and the good Sir Thomas More had been sent to that high court of justice where no traitors give false witness and no fawning sycophants sit on the bench. In solemn silence was the door thrown open; with the insolence of an official arriving from the capital, casting looks of contempt at the awed and cowering monks of the provincial city, with the irreverence of one whose religion veered and changed with that of the king, the haughty pursuivant

strode through the nave and choir right up to the shrine of St. Thomas, and there summoned the defunct Archbishop to appear, either personally or by proxy, before the king's Court of Justice, there to answer the information laid against him by his majesty's attorney-general for high treason, contumacy and rebellion.

Silence reigned supreme when the coarse accents of the summons had died away in distant echoes; the monks bowed their heads in heaviness and fear, but, perhaps with hope, as their imaginations wandered backward and they saw their brethren, long since passed away, standing with sharp scourges in their hands and heard the lashes fall fast and thick upon the bare back of a proud king who had done their saint to death; many worshippers were still doing reverence at the shrine, they knew of the wondrous stories told of St. Thomas' might, and doubtless, they half expected, half feared, the martyr would show some terrible sign of his anger. Nothing happened to the king's messenger as he retired as proudly as he had entered.

Day by day for thirty days (according to the Canon law) the pursuivant returned and repeated his summons, but the saint would not quit the tomb in which he had reposed for two centuries and a half, and to human sense "there was neither voice, nor any that regarded."

Judgment of ouster would have passed against the illustrious chancellor of Henry II. had not the king, to show his impartiality and great regard for the administration of justice assigned him counsel at the public expense. The Court sat at Westminster on June 11, perhaps in the great Hall of William Rufus, the scene of so many great and glorious pageants and events.

The attorney-general, Sir Christopher Hale, said all that needed be said against the dead traitor. Doubtless with Mr. Altoway (whom Lingard and Campbell say was for the Crown) was the Solicitor-General Rich, a

man whom Lord Campbell tells us brought a greater stain upon the bar of England than any other member of the profession, who laid traps to betray Bishop Fisher and Sir Thomas More under the guise of friendship, who disgraced himself at the trial of the former, and perjured himself to do to death the latter, and won his honors by palpable fraud, chicanery and perjury. Audley was chancellor; of him Campbell says, "Such a sordid slave does not deserve that we should say more of his vices or demerits. But no eunuch in a seraglio was ever a more submissive tool of the caprice and vengeance of a passionate and remorseless master than was Lord Chancellor Audley."

The advocate of the accused, alas! *stat nominis umbra*, pleaded eloquently for the martyred bishop, the miracle-working saint. The judgment was, however, predetermined; the hearing, but a hollow mockery; it declared that Thomas, some time Archbishop of Canterbury, had been guilty of the crimes charged against him, and decreed that his bones should be publicly burnt to admonish the living of their duty by the punishment of the dead; and that the offerings which had been made at his shrine, the personal property of the reputed saint, should be forfeited to the crown.

The sentence was executed in due form; and the gold, silver and jewels, the spoils of the demolished altar, were conveyed in two pondrous coffers to the royal treasury.

Shortly afterwards a proclamation was drawn up by the astute Thomas Cromwell, the *dcus ex machina* of the whole proceeding, to the following effect: "Forasmuch as it appeareth now clearly, that Thomas Becket some time Archbishop of Canterbury, stubbornly withstanding the wholesome laws established against the enormities of the clergy, by the King's Highness Most Noble Progenitor, King Henry the Second, for the commonwealth, rest and tranquility of this realm, of his forward mind fled the realm

into France and to the Bishop of Rome, maintainer of those enormities, to procure the abrogation of the said laws (whereby arose much trouble in this realm) and that his death, which they untruly called martyrdom, happened upon a rescue made, and that (as it is written) he gave opprobrious words to the gentlemen which then counselled him to leave his stubbornness, and to avoid the commotion of the people, risen up for that rescue, and he not only called the one of them Bawd, but also took Tracy by the bosom and violently shook him and plucked him in such manner that he had almost overthrown him to the pavement of the church, so that upon this fray, one of their company perceiving the same, strake him, and so in the throng Becket was slain: and further that this canonization was made only by the Bishop of Rome, because he had been both a champion to maintain his usurped authority and a bearer of the iniquity of the clergy.

“For these and for other great and urgent causes, long to recite, the King’s Majesty, by the advice of his council, hath thought expedient to declare to his loving subjects, that notwithstanding the said canonization, there appeareth nothing in his life and exterior conversation whereby he should be called a saint, but rather esteemed to have been a rebel and traitor to his prince.

“Therefore His Grace straitly chargeth and commandeth, that from henceforth the said Thomas Becket shall not be esteemed, named, reputed and called a saint, but Bishop Becket; and that his images and pictures thorow the whole realm shall be plucked down and avoided out of all churches, chapels and other places, and that from henceforth the days used to be festival in his name shall not be observed, nor the service, office, antiphons, collects and prayers in his name read, but rased and put out of all their books: and that all their festival days already abrogated, shall be in no wise solemnized, but his Grace’s ordinances and injunction there-

upon observed to the intent: his Grace’s loving subjects shall be no longer blindly led and abused to commit idolatry as they have done in times passed, upon pain of his Majesty’s indignation and imprisonment at his Grace’s pleasure.”

In the early church it was an unsettled question as to whether excommunication—with all its tremendous consequences in time and eternity—could be fulminated against departed souls. But as early as the days of Cyprian the practice had come into fashion; St. John of the Golden Mouth denounced the frequency of such excommunications: Popes Leo I. and Gelasius I. sided with Chrysostom. At the fifth general council, held in Constantinople, in 553, the question was raised as to the power of the Church to anathematise certain bishops who had been dead a hundred years. Some of the fathers doubted it, but Eutychius, a man well versed in the scriptures, settled the question by pointing out how good King Josiah, not only put to death the priests of paganism, but also dug up the bones of those who were dead.

A noted case occurred at the end of the ninth century; Pope Stephen VII. dug up the body of his predecessor, Pope Formosus, who had been seven months in his tomb; dragged it by its feet through the streets; sat it—in the synod which he had assembled to judge it—clothed in the pontifical robes; tried it; condemned it; deposed it; excommunicated it; cut off two fingers from the right hand; and threw it into the Tiber. The next year another pope, John IX., annulled these high-handed proceedings, and a council he held rehabilitated the name of Formosus, excommunicating those bishops who had convicted him of perjury. However, some seven years afterward Pope Sergius the Third, again dug up the poor body, and haled it to the judgment seat, again condemned it, cut off more fingers and the head and consigned it once more to the cold embrace of Father Tiber. The wickedness of these proceedings was

shown; the body was found by some pious fishermen, and on its being carried into St. Peter's the images of the saints there bowed down before it and did it reverence.

In 1100 St. Ivo of Chartres, the foremost canonist of his day, declared that the Church could not condemn the dead, that they had passed beyond human judgment, and that burial could not be refused those who had not been tried while living. But when heresy multiplied and heretics grew more obstinate, the churchmen found it hard to endure the thought that the bones of those who died not in the faith should pollute the sacred precincts of church and cemetery; so in time the principle became firmly established that those who had mistakenly received Christian burial should, so soon as the fact was discovered, be dug up and burned. The investigating the records of the dead became no small or unimportant part of the duties of the Inquisition.

Those accused of heresy could not escape the Inquisition even by death. Although the sinner had already been summoned before the judgment seat of the Judge of all the world, who would assuredly do right, still a man suspected of heresy, though dead, was often called before the bar of the Inquisition, that the true faith might be vindicated by the sentence of condemnation and the faithful edified by a sight of the punishment. If the heresy of the dead one would have only brought upon him, if living, a slight punishment, then his bones were simply dug up and cast out; if, however, his sin would have carried him to the stake had he been alive, then his bones were solemnly burned.

As, by the common law of England, "*nulum tempus occurrit regi*," so no lapse of time barred the Holy Church in these matters. Gherardo of Florence died in 1250, his descendants were notified in 1313 that his memory was being prosecuted for heresy. Some legists held that one hundred years were required as against the Church, and that time

ran not from the commission of the offence, but from its discovery. Heresy itself caused a forfeiture and the property of the dead heretic could be followed and taken. Good Catholics, however, might keep what they had gotten through the heretic if they had at no time knowledge of his wandering from the faith, and if he had died with an unsullied reputation for orthodoxy.

A well-known English case is that of John Wyckliffe. He died in 1384 and was buried in his old parish of Lutterworth: forty-one years thereafter the Synod of Constance published the following decree against him: "Forasmuch as by the authority of the sentence and decree of the council of Rome and by the commandment of the Church and the Apostolic See, after due delays being given they proceeded unto the condemnation of the said John Wyckliffe and his memory, having first made proclamation, and given commandment to call first whosoever would defend the said Wyckliffe or his memory, if there were any such (but there did none appear who would defend him or his memory), and moreover witnesses being examined, by commissioners appointed by Pope John and his council, upon the impenitency and final obstinacy and stubbornness of the said John Wyckliffe reserving that which is to be reserved (as in such business the order of the law requireth) and his impenitency and obstinacy even unto his end, being sufficiently proved by evident signs and tokens and also by lawful witnesses and credit lawfully given thereunto. Wherefore at the instance of the Steward of the Treasury, proclamation being made to hear and understand the sentence against this day, the sacred Synod declareth, determineth and giveth sentence that the said John Wyckliffe was a notorious obstinate heretick, and that he died in his heresy, cursing and condemning both him and his memory. This Synod also decreeth and ordaineth that the body and bones of the said John Wyckliffe, if it might be discerned and known

from the bodies of other faithful people, should be taken out of the ground, and thrown away far from the burial of any church according unto the Canon laws and decrees."

Thereupon he was ungraved, his bones burnt and the ashes cast into the river.

In the case of prosecution of the dead the

these notices were carefully recited. Yet sad experience showed that little was gained by any attempt to clear the accused, so often no one appeared, and sometimes when the children did appear the Inquisitor denied them a hearing.

These burnings were not economical; we find from some old accounts that in 1323 it

The order and manner of taking up of body of John Wickliff, and Burning his bones 41 years after his death.



children or the heirs of the accused were always cited to appear in court and defend his memory, this was done because they were interested parties and in case of condemnation they suffered by the penalties and disabilities of the dead condemned. Proclamation, too, was generally made in the churches inviting any one who chose to appear and defend. When judgment was given the publications of

cost 5 livres 19 sols and 6 deniers for the mere labor of digging up the bones of three heretics, a sack in which to stow them, a cord to tie the sack and two horses to draw them to the place of burning; then there was the wood for the fire, the vine branches, the straw and the stakes to pay for, and the executioner's fee as well.

LONDON LEGAL LETTER.

APRIL, 1903.

ECCENTRIC causes resulting in litigation seem to move in cycles. One of our chancery courts has been occupied every day for over a fortnight on the trial of an action brought by a young man who claims to have been persuaded to yield to spirit influences manifested through the writings of a planchette board, whereas in fact the board was animated by the very material hands of parties who, it is alleged, directed it to advise the young man to make an irrevocable settlement of all his not inconsiderable fortune in their favor. The settlement was made and the action is now brought to set it aside, on the ground of undue influence. The learned judge has reserved his judgment. In the meantime, in a Berlin court we have the spectacle of Frau Roche on trial for perpetrating sixty-one frauds and attempting nine others by alleged spiritualistic manifestations. In her case she claimed to be able to communicate to her devotees messages from kindred in the spirit world, and to invoke the shades of statesmen and heroes and philosophers who departed the life centuries ago. She not only conveyed messages, but she materialized flowers and fruit as presents and offerings from these personages to their awe-stricken admirers. The medium in Berlin has had the advantage of being able to call scores of witnesses to testify to her supernatural powers, and among them a judge of a court of appeals and the widow of a distinguished statesman. It will be interesting to note whether these two *causes célèbres* will be followed by others of a like nature in other parts of the civilized world.

In the same way, and doubtless by the suggestions that come from the publicity given to notable trials, an epidemic of grue-

some crimes is occurring in this country. Within a month past we have witnessed the conviction of a woman for the curious offence of losing, or attempting to lose, infants under the seats of railway carriages; the execution of two women from the same neighborhood in London for making way with infants committed to their care; the execution of a fiend who made a business of buying out small shopkeepers and then murdering them to get possession of their effects, in the latest case dismembering the bodies of his victims, which included the wife and young child, and burying the fragments in his door-yard, and the conviction of one Klosowski, or Chapman, who tried to pass himself off as an American, for poisoning three women with whom he lived in marital relations. And now the police are investigating the details of a crime charged against a man, who, after living with a lady of over fifty years of age, of good social connections, in a lowly moated house in Essex, is said to have murdered her and deposited her remains in the ancient moat which surrounds his house. His alleged crime was brought to light by his apprehension for the forgery of a small cheque upon her banking account. It is charged that in the three or four years which have elapsed since his disappearance he has forged orders on her bankers and stockbrokers by which he obtained possession of her fortune of about £6,000.

In none of these cases, except the last, was there any temptation which could have induced a sane man to commit murder, and the occurrences are, therefore, all the more interesting to sociologist and criminologist.

The present state of public indignation against the absence of laws restricting alien

immigration into England has latterly received a fresh impetus from the trial of Severino Klosowski (otherwise George Chapman), which has just been concluded at the Old Bailey, and to which allusion has been made above. Chapman's case was one of peculiar cruelty. According to the opening statement for the prosecution he is, although claiming to be an American, in fact, a Russian Pole, who formerly carried on a business which is now happily extinct in this country—that of a barber-surgeon. Later he became the landlord of the "Crown" public house in the Borough High street, south of the river. In the last few years Chapman is alleged to have made away with three women by administering to them tartar emetic, a poison with the effect of which he was peculiarly familiar from his old profession of barber-surgeon. He was, however, only indicted for the murder of one of these unfortunate persons, a young woman named Maud Marsh, who passed as his wife and acted as his barmaid. The facts of the case as outlined by the attorney-general pointed to an extraordinarily callous course of conduct on Chapman's part, each victim appearing to have been made away with simply as a matter of passing convenience.

The alien question has at last become a serious one in England. The immigrant alien who finds his way into London from southeast Europe, is capable of supporting himself at a much lower wage than the native workman, so that in the case of a number of trades in the East End, as for example, tailoring, furmaking, and the like, the English workman has been ousted, simply through his inability to live upon the sum which the average alien accepts with a contented spirit. The important case of the Bank of England note forgeries last December, in which every one of the eight forgers was an alien, and the present case of triple murder, for which Chapman has now been convicted, have awakened alarm at the preva-

lence of crimes committed by aliens in this country.

The present feeling in favor of strict legislation to impose some restriction upon their entrance to our gates, is no new one. In 1894 Lord Salisbury introduced an alien's bill; in 1895 Mr. Ritchie promised legislation on the subject; in 1896 it was one of the principal measures promised in the late Queen's speech; in 1897 Mr. Ritchie, again president of the Board of Trade, said in the Commons, "The government are pledged to legislation and do not wish to depart one iota from their pledges. I hope at no distant time to propose in Parliament legislation on the subject." In 1898, Lord Hardwicke carried a bill through the Lords, and yet the Royal Commission appointed by the government last year to enquire into the question did not sit at all from July to December, and is still engaged in taking evidence.

It is small wonder then, in view of such procrastination that press and public have joined in a severe criticism of the government. Even the colonies have found it necessary to legislate upon the subject, Cape Colony most recently. And yet the mother country, overcrowded as she is with her own large proportional population, has hitherto been content to act as the "midden heap and dustbin for all the refuse of the world." Such a course may be pleasing to a certain section of the population who considers it evidence tending to prove Great Britain's claim to be the freest country in the world, but there is now an enormous majority in favor of some kind of legislation in the direction of prohibition of immigration. It must be difficult for an American to realize that in a country where naturalization is hedged about with many conditions, the necessity for it should be almost dispensed with by what is, practically speaking, the welcome afforded to foreigners. An alien has only to cross the channel and settle down in London to receive, practically speaking, every advantage from

the country which it gives to its own subjects. He may not vote, it is true, or hold any official position, but neither of these privileges are coveted by the average alien. If he is a man of rank and education, any profession is open to him, be it church, bar or medicine, without naturalization; if he is in a lower rank of society, he may enter any business freely. If he is in the very lowest rank of the social scale he may and does compete with the English criminal. No questions are asked of him when he enters the country. He may be a pauper or an habitual criminal, a man of means or an honest workman, he can come in just the same. If he is an habitual criminal and engages in his profession at once, and in consequence falls into the hands of the police, the government has no power to deport him. Another government, if he came as a pauper or a criminal, would send him back to his own country and wash its hands of him, but in England there is no power to do that except, of course, in extradition cases, when the offence has been committed out of the country—and then only when his rendition is asked for. It has lately been estimated that more than 3 *per cent.* of the prisoners undergoing sentence in this country are aliens. This means that, putting the lowest cost of maintaining a prisoner at about eight shillings, or say \$2 per week, the government is spending £30,000 a year on the maintenance of alien convicts. In the course of a debate on alien immigration in the House of Commons on February 26th of

this year, some interesting facts and figures were brought to light. Sir Howard Vincent, a former director of criminal investigation in the Metropolitan Police, moved an amendment to the address representing that the great increase of destitute aliens in the East End of London and the considerable number of them who become a charge on the criminal law constitute a grave national danger. In the year 1891 the proportion of foreigners to the total of persons charged with crimes in London North of the Thames was only 7 *per cent.*, but in 1900 it had grown to 11 *per cent.*, and in 1902 to 13 *per cent.* In the last mentioned year 81,402 aliens settled in the United Kingdom—an increase of 11,000 over the figures for 1901. In January, 1903, 5,443 arrived, an increase of 1,300 over the same month in 1902. Seventy *per cent.* of them settled in the East End of London. In twelve months, ending October 31st last, 4,930 aliens were arrested by the Metropolitan Police. To realize what these figures mean the size of these islands must be considered. Were they applied to the United States of America they would seem almost infinitesimal, but to the British Isles it means a practical increase of one alien to every one and one-half square miles *per annum* according to last year's figures.

It can only be hoped that something will soon be done to regulate such an unfortunate state of things.

STUFF GOWN.



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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, factiæ, anecdotes, etc.

THE Right Honorable Christopher Pailles, Lord Chief Baron of the Exchequer in Ireland, whose learned charge in the recent Tallow case—O’Keeffe *v.* Walsh—is quoted at considerable length in Mr. Wyman’s article on the Boycott in this number of THE GREEN BAG, is one of the notable figures among English-speaking judges of the present day. Not only has the Lord Chief Baron sat on the Bench for twenty-nine years, but during that long period his judicial work has shown an intellectual keenness and vigor which has given him high rank among his contemporaries on the English, as well as on the Irish, Bench.

That in this late case of O’Keeffe *v.* Walsh the learned Chief Baron should take advanced ground on the boycott question is no surprise to those who remember his vigorous dissenting opinion in Quinn *v.* Craig (1899, 2 Irish Rep. 667)—entitled Quinn *v.* Leatham in the House of Lords. In that opinion he carried Allen *v.* Flood to what he believed to be its logical conclusion, but expressed regret because he felt himself “coerced by the judgment of the House of Lords in Allen *v.* Flood (1898, A. C. 1), to hold that the law is powerless to protect, from that which the jury has found to be the tyranny of a trades union, the sacred right of a workman to save himself and his family from starvation by the work of his hands.” Now, however, when Allen *v.* Flood has been deprived by later decisions of much of the authority which, at first, it

was supposed to have,—when, in the words of Lord Halsbury in Quinn *v.* Leatham, it has become “only an authority for what it actually decides”—the Lord Chief Baron has been free, in the Tallow case, to treat the questions of conspiracy and boycott with the vigor, the courage and the breadth of view which these subjects demand. His clear and logical charge has attracted much attention and approval in England; but in Mr. Wyman’s article it is now brought for the first time to the notice of the profession on this side of the water.

The United Irish League has been directly interested in the case of O’Keeffe *v.* Walsh in the sense that the defendants were officers or members of the League and were sued for acts done in pursuance of the usual plan of campaign of the League. This decision was a sharp blow at such methods; and the interesting query suggests itself whether the decision has not been an important factor in making the Irish political leaders willing to accept the pending Land Bill.

NOTES

THE following question and finding was put to and given by a Halifax, N. S., jury:

Question: Was the illness of the said John H. Mills, and of which he died, of a temporary character?

Answer: Temporary.

LITTLE Marion heard her father telling about some trouble he was having with a neighbor concerning a piece of land. “He threatens to sue me,” said her father. The next day the neighbor in question was coming toward the house with a bundle in his hand. Marion saw him coming and ran excitedly to her mother, exclaiming:

“O, mamma, Mr. Brown is coming now

to sue papa! He's got his sue in his hand!"

THE late N. M. Hubbard was defending a case that was being tried in northern Iowa some years ago, and a witness, produced for the plaintiff, after being duly sworn, committed perjury in the most startling manner. Finally Judge Hubbard said to the witness:

"Sir, do you believe in a God?"

But before the witness could reply, the attorney on the opposite side, speaking to Judge Hubbard, asked:

"Do you believe in a God, Judge Hubbard?"

To which the judge in the very deliberate and complacent way that was his alone, answered:

"I did, but when I remember the fate of Ananias and Sapphira and then see this witness living, I begin to doubt."

AN Irish advocate was arguing a case in the West. He represented the plaintiff who was trying to recover for a pig which a neighbor had killed when it broke loose and trespassed upon his property.

"Gintlemen," remarked the lawyer as he approached his climax, "is there to be no protection fur a mon and his property in this country. Do you, twelve intilligent men, think that the defindent was justified in his action. I say, gintlemen, it was nothing more than robbery. Think of it. Whan a mon will take another mon's goods and kill in broad day loight. Why, if yez foind for the defindent there, the toim is fast approaching when none of you will be safe in leaving your own dooryard."

And the jury laughed.

A FEW years ago, in Henry County, Tennessee, an old gentleman died, leaving a tract of land to be divided equally between his two sons, Bob and Tom. The land was divided according to law, but Bob claimed that the land that was given his brother was worth a thousand dollars more than his portion. Tom felt that his brother's land was worth a thousand dollars more than that he had received, and the case was carried into the Chancery

Court, over which Judge Jonathan Somers presided. The judge asked the litigants if they were willing to abide by his decision, and not carry the case to a higher court. They had implicit confidence in the Chancellor's wisdom and honesty and agreed that his verdict should be final. Then he told the brothers that as each claimed that the other had a thousand dollars the advantage that he would give Tom's land to Bob and Bob's land to Tom; and as they had promised to abide by the judge's decision they did so, and as a consequence, several lawyers missed iat fees, and the case was never heard of in Supreme Court.

WHEN Clifford's-inn disappears, Staple-inn will be the sole survivor of the old Inns of Chancery, for, though some others still exist in name, they are but shadows of what they were. The race of sergeants-at-law is reduced to two individuals—Lord Lindley and Lord Field—and Lord Alverstone and Lord James of Hereford are the only living persons who can boast that they held the office of Tubman or Postman in the Court of Exchequer. Those who were familiar with the old Courts at Westminster will remember the thrones which they respectively occupied in the court of the Chief Baron. The Postman had his "post" at the left extremity of the first row of seats assigned to the outer Bar, and the Tubman his box or "tub" at the other end. Both were members of the junior Bar, the Postman being entitled to the common law, and the Tubman to the equity and revenue, business of the Court of Exchequer. When a vacancy occurred in either office the Chief Baron nominated a successor by word of mouth in open court. Outside the court they had no privileges, but within its walls they had precedence of all their professional brethren, the Attorney-General not excepted. Lord James of Hereford was appointed Postman in the year 1867, and Lord Alverstone was both Tubman and Postman during his short career as a junior, from 1868 to 1878. It was Chief Baron Kelly who thus started him on the high road to fame and fortune.—*The Law Times*.

AN interesting example, says the *Youth's Companion*, of dramatic appeal to human experience during a trial and a conclusive test of the appeal closed a case that had been before a Western court for a number of years. As the case is reported in the *Kansas City Journal*, the plaintiff was suing a railway for damage to a building alleged to have been set on fire by a spark from a locomotive.

The counsel for the railroad based his defense on the ground that, since the fire was seen by employes on the train, and the train was in the station only four minutes, the fire must have been set before the engine pulled into the station. Four minutes, he maintained, were not long enough for a fire to start and get under way.

The lawyer for the plaintiff made this argument: "If a fellow is sitting on a sofa holding a girl's hand, the time travels like an express-train. But if you dump a lot of sparks on the pine roof of a dry building in the summer time, four minutes is ample to settle the fate of the structure, in spite of all efforts to save it."

There were some incredulous smiles. The attorney took out his watch, and handing it to the foreman of the jury, requested him to announce when four minutes were up.

The jurymen leaned over and looked at the watch. Then they got tired and settled back in their seats. The foreman of the jury lowered his hand as the signal for the beginning of the four minutes, and rested it on his knee. The attorney shifted his feet a few times and sat down. The judge looked at the clock, then out of the window.

A deputy marshal put his head in at the door to see what was the matter, and waited the result of the curious scene. Nearly every man in the room had his watch out and was studying the face of it. The speaker was sacrificing four minutes of his time, but he knew they were well invested.

At last the foreman of the jury announced that the four minutes had expired, and handed the watch back to the lawyer. To every man in the room the time had seemed twice as long. After the case the judge said it seemed like fifteen minutes. The wear-

some suspense had the effect on the jury that the lawyer had intended. It was an immediate object-lesson, a striking exposition, of how much might happen in four minutes.

The jury found that the defendant's engine had ample time to fire the building and the fire had enough time to get under way and make a blaze that the men on the train could see, and they brought in a verdict for the plaintiff of something over fourteen thousand dollars, the full value of the building.

A CASE came lately before the Second Division of the Court of Session [Scotland] involving the question of the "right of privacy" which has been the subject of so much discussion in the United States since the decision in *Roberson v. Rochester* (171 N. Y. 538.) A father employed a photographer to photograph his two daughters, and ordered and paid for eighteen copies of each photograph. The photographer's successors in business, of their own accord, made enlargements of the photographs and exhibited them in their studio for the purposes of their trade. To this the father objected, and, on the photographers refusing to desist from exhibiting the photographs, brought an action of interdict. In this action the aggrieved father has proved successful, the court (Lord Young dissenting) having held that a photographer who has been employed by a customer to take a portrait has no right to print copies of it for sale or exhibition without the customer's consent. The nature of a photographer's rights in the negatives of photographs taken by him in the ordinary course of business was discussed by the judges, the view of the majority being that neither photographer nor customer has the absolute right of property in a negative. The photographer is entitled to the custody of the negative in order to secure to himself the privilege of supplying possible future orders, while the customer has an interest in it to the extent of entitling him to prevent the photographer using it except on his order and with his consent: (*M'Cosh v. Crow & Co.*, 17th March, 1903.)—*The Law Times*.

"IGNORANCE of the law is no excuse," said the master of the rolls, the late Sir George Jessel, to the writer, some years ago, who retorted by asking the learned judge: "Can you find me a man who does really know the law?" The judge laughed and bade him ask something easier. Mr. Chalmers, parliamentary counsel to the English treasury, has recently made a pronouncement which is of interest to those who have had any dealing with the law. There is an absolutely tragic amount of humor in Mr. Chalmers' declaration that: "The present statute-book is now compressed for the general reader into the moderate compass of twenty-two thousand pages." This is bad enough, but worse remains behind; for when the conscientious subject of the English King, whose duty it is to know the law, has mastered the twenty-two thousand pages of statute law, there still remain over 1800 volumes, containing more than a million pages of common law judicial decisions to be assimilated. Should despair seize the unfortunate litigant, he may be consoled by Mr. Chalmers' remark that common law is made more accessible to the public by some two thousand text-books. No wonder that justice is always depicted as a blindfold deity, for what human eyes could stand the strain of the study of the millions of pages mentioned by Mr. Chalmers? Ignorance of the law may be inexcusable, but knowledge of the law is an almost physical impossibility.

The statute law with its 22,000 pages is not the largest book in the world, for there is in the British Museum, London, a single volume six feet in height by three feet three inches in width which requires four strong men to lift it. Perhaps the largest and most comprehensive work in the world is the Encyclopedia of the Literature of China which consists of 5020 large volumes and covers a period of twenty-eight centuries, from 1100 B. C. to 1700 A. D. One complete set of this work to that date can also be found in the British Museum; the continuation to the year 1869, consisting of 160 additional volumes, was destroyed in the Boxer troubles of a year or so ago.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

CASES ON INTERNATIONAL LAW. By J. B. Scott, J. U. D., Dean of the College of Law, University of Illinois. Boston: The Boston Book Company. 1902. (lxvii+961 pp.)

A mere glance at this work would be quite enough to enable the reviewer to say that it is indispensable to the person interested in international law, whether he be beginner or expert. What cannot be seen at a glance, though it is equally true, is that the book is of unusual interest and value to the general practitioner.

To begin at what has long been the beginning of any discussion of international law, the general practitioner has heard of the analytical jurist's doubt whether this subject is entitled to be called law at all. To the general practitioner this doubt may seem to be largely of a theoretical nature, but he probably has a related doubt of his own, a doubt whether international law, whether properly called law or not, is administered in courts. This book is an object lesson that removes simultaneously and promptly both the theoretical and the practical doubt. Here are some nine hundred pages of cases selected from the decisions of English courts and of the State and Federal courts of the United States; and in each case the court determined the rights of the parties by ascertaining and recognizing and administering international law precisely as if the subject were as determinable and as binding as the law of contracts. What the analytical jurist will say in the face of such proof is matter of speculation; but for the practising lawyer seeing is believing.

Yet even when the practical lawyer learns that international law—or at least part of it—is real law, and that as such it is admin-

istered in the ordinary courts, there remains another doubt. To the ordinary practitioner is international law of any practical use? Such a practitioner certainly does not have occasion to become an expert in this subject. He does not dream of representing his country abroad, or of representing his neighbors in Congress, or even of writing to the newspapers about the Monroe Doctrine. Even if it be clearly established that international law is not a mere mixture of etiquette, ethics, and fraud, administered ultimately through armies and navies, has the everyday lawyer much more use for it than the Hottentot has for snowshoes? This is an important question to which this volume gives several hundred concrete answers. To present all the answers would be to state all the cases, and this, though it would be well worth while, is clearly impracticable. Case after case illustrates the propositions that, although a problem in international law reaches the general practitioner rather seldom, it may reach him at any moment, and that the opinions of courts upon such a problem are so lawyerlike as to be valuable as part of the intellectual equipment of even such lawyers as may happen never to encounter international questions in the course of practice. In these pages, for example, are decisions showing whether your client can enforce in the courts a claim against a foreign government, a sovereign, an ambassador, a consul, or the domestic servant of an ambassador or of a consul. (*Triquet v. Bath*, p. 6; *DeHaber v. Queen of Portugal*, p. 180; *Vavasour v. Krupp*, p. 182; *Heathfield v. Chilton*, p. 189; *Parkinson v. Potter*, p. 192; *In re Baiz*, p. 197; *Wilson v. Blanco*, p. 206.) Again, can a foreign government maintain an action in a State court, and, if it brings such an action, can it be compelled to give security for costs on the ground that it is a person residing without the State? (*Honduras v. Soto*, p. 24; *Mexico v. Arragoiz*, p. 170; *The Sapphire*, p. 178.) Again, if a company was incorporated by one of the Confederate States during the Civil War, can the company maintain an action in a Federal court? (*The Home Insurance Company's Case*, p. 59.)

Space forbids further statement of the problems solved by the cases; but that the problems are interesting and important, and that many of them may easily arise in the course of ordinary practice, is sufficiently indicated by a mere list of topics.

Among the topics useful in time of peace are: The immunities of ships of war and other public ships; the right of asylum in legations and ships of war and merchant vessels; jurisdiction over offences committed abroad or on the high seas; extradition and interstate rendition; domicile, expatriation, and naturalization.

Among the topics useful in time of war are: The immunity of fishing smacks and the like from capture; belligerency; blockade; contraband of war; prize courts; and the effect of war upon trade, ordinary contracts, insurance, agency, partnership, and the Statute of Limitations.

Topics that have peculiar interest for citizens of the United States are: The status of the Confederate States during the Civil War, the extent to which the rights and liabilities of the Confederate States passed to the United States, and the question whether Chesapeake Bay is wholly within the territorial limits of the United States or is partly in the high seas.

That the volume is the result of careful research is shown by its presenting, in addition to the familiar cases, important decisions not easily accessible, such as *The Alleghanian*, p. 143, and *The Schooner John*, p. 677. That the collection has been brought down to date is indicated by the note on p. 674, digesting the *Insular Cases*, and the note on p. 449, containing the first decision of the Permanent Court of International Arbitration at The Hague.

Valuable as are the cases in the text, and thorough as are the annotations, it must be added that the volume contains another feature that is equally useful for the scholarly reader and equally creditable to the intelligence and enthusiasm of the editor. This is the Syllabus, which consists of forty-one pages of references to American, English, and Continental treatises and other authori-

ties, so classified as to give the investigator easy access to the whole literature upon any topic.

To all this vast and varied learning, whether in the text or in the foot-notes or in the Syllabus, an admirable key is furnished by the unusually excellent Index-Digest; and therefore the practitioner, however busy, will have little cause to regret that the prospective use of the volume by students made it necessary to print the cases without head-notes. Indeed, these cases are so interesting that an intelligent lawyer will enjoy reading the whole of almost any one of them.

The title-page states that the volume is based on Snow's Cases and Opinions on International Law. The additions and alterations are, however, extremely numerous and important. This is, indeed, a new work, for the plan of which we are indebted principally to the late Dr. Snow, and for the execution of which we are indebted principally to Dr. Scott. The result of the plan and of the execution is, as has already been said, a book that is indispensable to the specialist and interesting and useful to every lawyer. It only remains to add that there is no other book professing to give the English and American cases on this subject, and that this book has the merit—not unique, but nevertheless well worth mentioning—of being the work of a lawyer and of treating the subject from the lawyer's point of view.

COLLIER ON BANKRUPTCY. FOURTH EDITION.

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898, AS AMENDED BY THE ACT OF FEBRUARY 5, 1903. By *William H. Hotchkiss*. Albany, N. Y.: Matthew Bender. 1903. (xlii+984 pp.)

"What's in a name?" Much, from the publisher's point of view, when the name is the title of a well-known law book; and this is the reason, probably, why the present volume comes to us as "Collier on Bankruptcy" rather than as Hotchkiss on the same subject. Two years ago the third edition of "Collier on Bankruptcy" was reviewed at some length in these columns, and now we

have before us the fourth edition—if, indeed, that can be so called which is not merely a bringing down to date of the previous edition, but is a new work by the present editor. However, the important thing is that commendation given to the previous edition can be transferred to this new volume. The present editor, although re-writing this treatise, has availed himself freely of his predecessor's work, and by the light of the many bankruptcy decisions handed down during the last two years has been able to add materially to the value of the book.

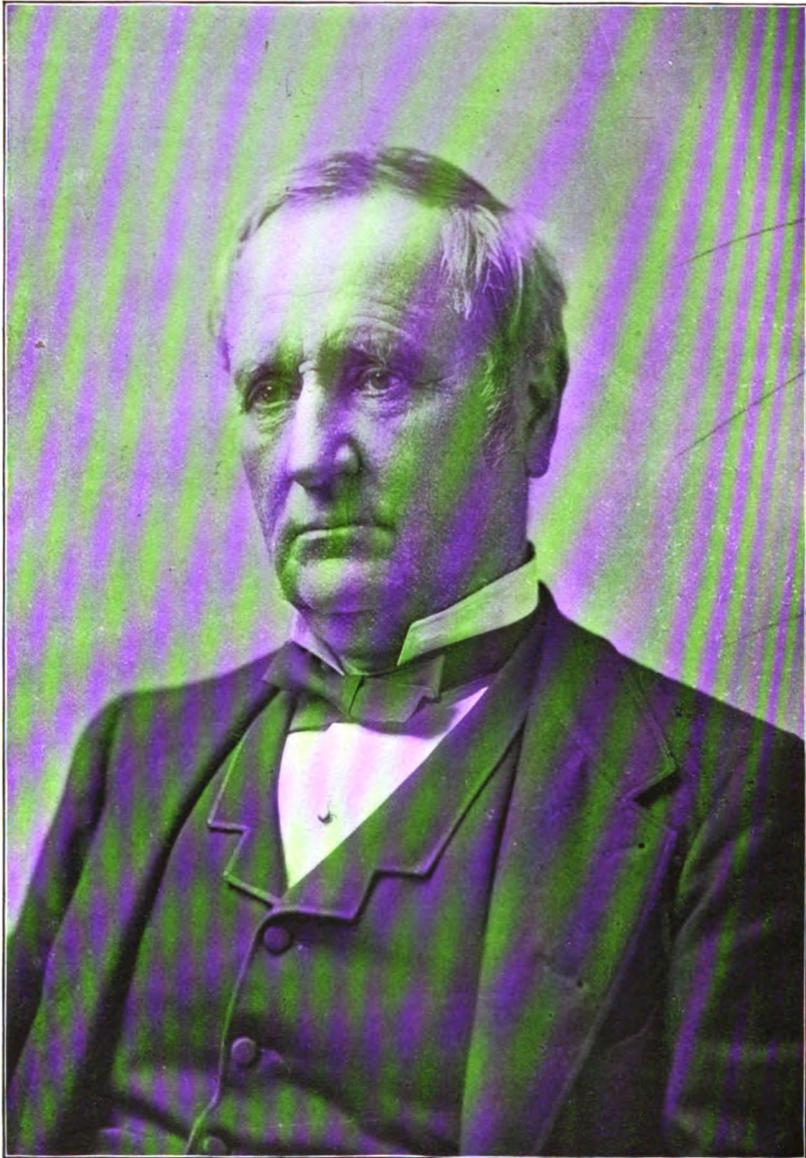
THE HEALTH OFFICERS' MANUAL AND PUBLIC HEALTH LAW OF THE STATE OF NEW YORK.

By *L. L. Boyce*. Buckram: \$2.50. Albany, N. Y.: Matthew Bender. 1902. (xii+289 pp.)

To the long list of law books already issued for the especial use of city, town and county officials of the State of New York, the publisher has added the above volume, which deals with the Public Health Law (Laws of 1893, chapter 601) and other kindred statutes, as amended to the close of the Legislative Session of 1902. The amount of litigation involving these statutes is small, with the result that the notes in the present volume are few and short. The Sanitary Regulations recommended by the State Board of Health for adoption by local boards, are reprinted in this volume.

CONSIDERATIONS ON THE STATE CORPORATION IN FEDERAL AND INTERSTATE RELATIONS. THE NORTHERN SECURITIES CASES. By *Carman F. Randolph*. 1903. (77 pp.)

The elaborate study of the Northern Securities Cases by Carman F. Randolph, recently printed in the *Columbia Law Review*, has been published in pamphlet form. The article is well worth reading. Mr. Carman sums up his argument in this proposition: "A corporation chartered by a State of the Union, like a natural person therein, is entitled to acquire property (not subject by the law of its being to a pertinent restraint on alienation) free from interference by the United States or another State."



J. A. Hendricks

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THOMAS A. HENDRICKS AS A LAWYER.

BY W. W. THORNTON.

THOMAS A. HENDRICKS was descended on his father's side from an old Huguenot family, which left France and settled in the Low Countries, and thence emigrated as Hollanders to New Jersey. Before the Revolutionary War the New Jersey descendants settled among the Germans of Ligonier Valley of Pennsylvania, where many of the name still reside. Abraham Hendricks was his grandfather, and held several minor offices in that State, serving three terms in the Legislature. John, the youngest son, father of Thomas, married Jane Thomson, whose grandfather had emigrated to Pennsylvania from Scotland when comparatively a young man. The admixture of Huguenot and Scotch blood was not an undesirable one.

John Hendricks moved to Ohio shortly after his marriage, and settled near Zanesville, where two sons—Abram and Thomas Andrews—were born to him, the latter September 7, 1819, in a pioneer log cabin. In 1820 he moved to Madison, Indiana, then the most considerable town in the State, the home of his brother William, who afterward became Governor of the State, and then served two terms in the United States Senate; and two years later settled twenty-six miles southeast of Indianapolis, on the Blue River, near the present site of Shelbyville.

John Hendricks was a man of means and was able to give Thomas as liberal education as the West then afforded. After attending the local schools of the vicinity he entered Hanover College, situated near Madison, and graduated from it in 1841. Hanover is a

Presbyterian college; and its curriculum at that day was little more extended than that of the average public high school of the present time.

The year after his graduation Mr. Hendricks began reading law in the office of Stephen Major, of Shelbyville (the father of Charles Major, the author). After several months' reading, he entered the law school located at Chambersburg, Pa., of which his uncle, Judge Alexander Thomson, was dean. This law school was really a branch of Gettysburg College, an old Evangelical German institution of excellent reputation. In after years Mr. Hendricks spoke of the delightful experiences he had at this law school. "I remained in Chambersburg," said he, "only eight months, but to me it was a very great event in my life. Brought up on the flat prairies and woods of Indiana, I had never seen such beautiful mountains and dashing streams as were in that old Cumberland Valley. To this day it seems to me a vision of beauty. There were numerous larger towns right about us. There was Hagerstown, amid the blue and golden scenery of Maryland; and Shippensburg, which was a bright, active young place; and Carlisle, which was one of the old forts in the valley and a military post. Our studies were examinations chiefly, not lectures on the law. The land possessed for me a sort of patriotism."

In the fall of 1843 he opened an office at Shelbyville for the practice of the law. In September, 1845, he married Miss Eliza Morgan of South Bend, Ohio, whose grandfather,

Stephen Wood, was a next door neighbor of Gen. William Henry Harrison. In 1848 he was elected a member of the lower house of the Indiana Legislature; and the next year a member of the convention that framed the present constitution of Indiana. In the Legislature he was chairman of the committee on banking; and as banks and banking was a subject much discussed in the constitutional convention, he took a leading part in the debates and became one of the leaders in that, the best representative body of the ablest men ever convened in the State.

Three months (May 16, 1851,) after the constitutional convention adjourned, Mr. Hendricks was nominated for Congress, and elected at the October election. He was re-elected twice, serving until March 3, 1855. In the following August he was appointed commissioner of the General Land Office, and continued to serve in that capacity until late in the summer of 1859, when he resigned. In 1860 he was nominated by the Democratic party for Governor, but was defeated by the Republican nominee, Henry S. Lane, chairman of the national convention that nominated John C. Fremont in 1856 for the Presidency. The same year he removed to Indianapolis, where he resided until his death. March 6, 1863, he took his seat in the United States Senate as the newly elected Senator from Indiana, and served one full term. In 1872 he was elected Governor of Indiana, the only member on the State Democratic ticket that was elected that year. In 1876 he was nominated by the Democratic party for Vice-President. In 1884 he was renominated for Vice-President, and elected. He died at his home in Indianapolis, November 25, 1885.

Mr. Hendricks, as an orator, was radically different from both Mr. Harrison and Mr. Voorhees. Mr. Harrison's speeches contain hundreds of remarkable sentences, many of them as quotable as those of a great poet. Mr. Voorhees' speeches are radically different from those of Mr. Harrison. They con-

tain but few quotable sentences; but on the other hand, there are many long paragraphs of great beauty. But you will find neither of these characteristics in Mr. Hendricks' speeches. "It was not eloquence," said Senator Ransom of North Carolina, "for he was not, like Webster, an orator in the highest sense of the word." "In illustrations he was sparing," said Judge David Turpie, afterward United States Senator; "in diction, choice, accurate; upon occasion ornate and elegant; fluent without superfluity. In pronunciation a purist, clear, precise, with an ear of most delicate fancy. In the collocation, or agreement of words in the clause or sentence, not so capable—as apt to close an important sentence with one of the smallest of English prepositions as with a term whose quantities might give to both the voice and ear a cadence of repose. For mere humor he found not often a place—though happy when so used; for invective or denunciation, very seldom. The most malignant miscreant in the record was treated by him usually as one who had but fallen into some mistake or error."

"His manner as a public speaker," said Senator Benjamin Harrison, in closing the memorial services held in the Senate, "was animated and graceful. In style he was clear, often pungent, and always persuasive. Large audiences always assembled to hear him, and if he did not win over his adversaries, he left them kindly disposed, and always strengthened and consolidated his own party."

"I may say, then, Mr. President," said Senator William M. Evarts, "that my estimate of the late Vice-President is that of an eminent lawyer. Certainly his eloquence was persuasive and effective. Certainly his method of forensic address was quite admirably free of all superfluity. If it be truly said, as I believe it is truly said, that the greatest trait in the greatest orator, notwithstanding all the splendor of his eloquence, Demosthenes, was that, more than all other orators, he was distinguished by the fact of the abso-

lute directness with which every movement in his conduct of the debate was governed, that no superfluous word was used, none taken for ornament, but always for effect, we must, at least in our profession, consider these traits that I have ascribed to the forensic eloquence of Mr. Hendricks worthy of admiration."

"His speech ran flexible as the brook," said W. D. Owen of Indiana. "His uttered thoughts took the form of such chaste simplicity you did not realize their vigor. He was ornate only on requirement. His figures of speech were emphasis, and his illustrations arguments. . . . His logic was instinct with power, and moved in ever-augmenting procession."

There are few orators but what might not be proud of this quotation, taken from an address he delivered before a millers' convention that met in Indianapolis in May, 1878.

"As a boy I was acquainted with the miller, and I thought him a great man. When he raised the gate with such composure and confidence, and the tumbling waters drove the machinery ahead, I admired his power. And then he talked strongly upon all questions. He was very positive upon politics, religion, law and mechanics. Any one bold enough to dispute a point was very likely to have a personal argument thrown in his face, for he knew all the gossip among his customers. He was cheerful. I thought it was because he was always in the music of the running waters and the whirling wheels. He was kind and clever, indeed, so much so that he would promise the grists before they could be ready, and so the boys had to go two or three times. He was a chancellor and prescribed the law, every one in his turn. That miller, standing in the door of his mill, all white with dust, is a picture even upon the memory of this generation. It is the picture of a manly figure. I wonder if you gentlemen, the lords of many runs and bolts, are

ashamed to own him as your predecessor. It was a small mill, sometimes upon a willowy brook and sometimes upon a larger stream, but it stood upon the advance line of the settlements. With its one wheel to grind Indian corn and one for wheat, and in the fall and winter season one day in the week set apart for grinding buckwheat, it did the work for the neighborhood.

"Plain and unpretentious as compared with your stately structures, yet I would not say it contributed less toward the development of the country and the permanent establishment of society. So great a favorite was it, and so important to the public welfare, that the authorities in that day invoked the highest power of the State, that of eminent domain. That mill and miller had to go before you and yours, and I am happy to revive the memory of the miller, who, with equal care, adjusted the sack upon the horse for the boy to ride on, and his logic in support of his theory in politics or his dogma in religion."

In the trial of a case, Mr. Hendricks trusted only to chance when he was compelled to do so. In this respect he and Mr. Harrison were very much alike. It was always said of the latter that before coming into court he cross-examined his own client and his witnesses. Mr. Hendricks usually did about the same thing, but in such a manner they scarcely or ever realized it. He studied a case in all its details; and was seldom thrown off his guard by a surprise.

Not only was he a close observer of the facts of his case, but he was a diligent student of the whims and notions that prompt and move men and how to reach and hold their attention. An anecdote will probably illustrate this better than anything the writer can say.

"Do you pronounce the word 'e-i-t-h-e-r' 'eether' or 'eyther'?" said an acquaintance to him. "That depends where I use the word," said he. "If I am addressing a college-bred audience, or perhaps speaking at a political

meeting, I say 'eyther;' but if I am addressing a jury, I say 'eether.' For the jurymen are drawn from the common walks of life, and if I were to say 'eyther,' some jurymen's attention might be directed from my line of argument or reasoning, by turning over in his mind the question why I should say 'eyther' instead of 'eether,' and in that way I would lose my grasp upon him and fail to lead him to the conclusion to which I desire to bring him."

Mr. Hendricks greatly loved the practice of the law; and no part of it better than the trial of a case.

"In capacity for rapid absorption of a case," said Judge Walter Q. Gresham, afterward Secretary of State under President Cleveland, "arrangement of facts in their proper relation, and application of principles to facts, Mr. Hendricks greatly excelled. While he justly stood in the front rank of the profession, perhaps his real sphere was that of the advocate. In this line he had no superiors, perhaps no equals. As a lawyer he was self-reliant and courageous, and when a case took a sudden and unexpected turn, and defeat seemed almost inevitable, he exhibited rare skill and great reserve power. It was on such occasions he appeared to best advantage. His style of speaking was admirable; while he was earnest—at times vehement—he was always graceful and dignified, and therefore pleasing and persuasive. His equanimity and uniform courtesy to the court and bar, in defeat as well as victory, was worthy of all praise."

"The law to me has always been a fascinating business," Mr. Hendricks said upon one occasion. "I never go into a court room to try a case but it seems picturesque ground to me. I like to watch a case begin and expand, and see the various kinds of characters that attend it."

"His deportment toward his brethren of the bar," said Judge Turpie at the bar meeting held after his demise, "the jury, his

auditors and especially toward the officer presiding, was the model of courtesy and complaisance. . . . He was especially able in adaption. Fact was closely fitted to fact, and the whole structure of circumstances dovetailed into the law of the case. The parts matched like mosaics in the most highly finished mechanism. To this was united a suave plausibility and a subtle economy which made much—the most—of the little that fell to his side. He had a copious command of familiar terms and expressions, even upon obtruse topics, which became his interpreters to the jury, and this kind of interpretation had for itself the choicest medium, a voice which Persuasion herself had attuned to the very touch."

"He had many natural advantages," said Thomas M. Browne, Congressman from Indiana, "a voice of melody, a pleasing countenance, a cultivated intelligence, a clear and easy elocution. There was in his manner in court and before the jury that which was captivating. When he spoke he had no recourse to rambling epithets, stilted metaphor, or frenzied declamation. He wasted no time in his exordiums, but grappled the point in controversy without delay. His ideas were never trivial nor his language inflated. His words were generally of simple Saxon, his logic elevated and forcible; there was neither extravagance of expression nor of gesticulation. Some of his contemporaries at the bar were more picturesque and vehement, but none were more graceful or adroit. He was at times touchingly eloquent, his pathos moving the feelings and moistening the eye of the most obdurate. He resented an assault upon the instant, and sometimes with marvelous bitterness, but he always maintained a perfect mastery over his passions. He was both dignified and courteous in his bearing, and commanded the most respectful attention from all."

About 1860 he and William M. Evarts were engaged, with others of great ability, in the

trial of a case at Cincinnati. A quarter of a century afterward Senator Evarts in the Senate Chamber referred to this trial and Mr. Hendricks in the following language:

"I think now, as I thought then, that among the eminent men who took part in the preparation and delivery of opinions, and those who took part in the debates, not infrequent, of an interlocutory nature, no man appeared better in his composure of spirit, in his calmness of judgment, in the circumspect and careful deliberation with which, avoiding extreme extravagances, he drew the line which should mark out fidelity to the Constitution, as distinguished from addiction to the supremacy of party interests and party passions."

In 1882 Mr. Hendricks delivered an address to the graduating class of the Central Law School located at Indianapolis. We doubt if in the English language can be found a more appropriate address to a class of young men about to enter upon the practice of the law. It is really one of those addresses from which quotations cannot be made,—it is a single quotation, one not to be dismembered; but we give a few extracts from it:

"Some of the great achievements in the cause of civil liberty have been won at the bar. Men have grasped imperishable fame by the defences there made in the cause of human rights. Remorseless prosecutions, under cruel laws, have been met and resisted, defied and defeated, with giant strength and lion courage, in the cause of liberty."

"Truth is stronger than error; it is a firmer

and surer support for any cause. Experience hath shown that, in all the multiplied affairs of men, truth is consistent and faithful, whilst falsehood is treacherous. It is only the sham and the pretender, the half-made lawyer, that in the hour of conscious weakness feels that he must resort to misstatement of either law or fact. The man of real ability and solid attainments, invoking truth as his friend, leans with confidence upon his own powers. He who abandons confidence in truth is a bankrupt in the profession."

"Levity of manner will destroy the effect of a speech otherwise good. There is no facility more dangerous to the advocate than wit. It will not be held in restraint. The jury may laugh, but they are not convinced. They regard their duties as important and serious, and they readily suspect they are being trifled with when the crowd laughs. The parties think the lawsuit in the highest degree serious. Humor is pleasing, and, within proper restraint, may safely be indulged. The advocate should seek the purest and strongest language, and the best and most beautiful style he can command. I have no respect for the opinion sometimes expressed, that a plain and blunt style should be adopted out of deference to the understanding and taste of the jury. More advocates fall below than rise above the jury. The purpose of addressing a jury, as any other body of men, should be to make upon their minds distinct and permanent impressions. The beauties of poetry, and the charms of fancy, as well as the power of reason and the force of logic, may help to recover a desperate cause."



THE SIX CARPENTERS' CASE.

In the King's Bench, Michaelmas Term, 1610.

Reported in 8 Coke, 146a.

By J. B. S.

FYTTE THE FIRST.

Six carpenters once sat down to drink
 In the Queen's Head Inn, at Cripplegate;
 ('Twas four by the clock of the afternoon)
 And mine host and his guests were feeling first rate.
 "Some wine, Master Vaux," the guests bawl out.
 "How much, an' it please you," the host replies.
 "A quart at the least;" the host makes haste,
 And it bubbles and sparkles beneath their eyes.
 They emptied the mug and they smacked their lips,
 And paid for the spirits the price he set.
 "More wine and some bread!" the jolly six cried,
 And the order was neatly and properly met.

FYTTE THE SECOND.

"Good morrow," quoth Tom, and he rises to go.
 "Good morrow," quoth Vaux, "but who pays for the drinks?"
 "Not I," William says, as he feels for his purse,
 But discovers therein not a metal that clinks;
 Jack makes his regrets, but no money he has;
 Harry says that his credit's as good as pure gold;
 Dick and Francis remember engagements to keep,
 And mine host, not his wine, 't is appears to be sold,
 Master Vaux, nothing daunted, demanded his pay,
 And caught at his guests and requested the pence.
 But they 'saulted and battered the host it would seem,
 And rapidly hied them unfeelingly hence.

FYTTE THE THIRD.

Next morning in court Master Vaux airs his woes;
 The six jolly toppers sit sober and pale,
 For his claim is no longer for spirits and bread—
 An eightpence at most—the amount of the sale.
 But trespassers they from the ent'ring his door—
 "Non-feasance ain't trespass," the six whispered low—
 His leave and his license they lost by their tort,
 And were trespassers all *ab in-it-io*.
 The six heaved a sigh and were feeling depressed,
 When Chief Justice Coke, in a spirit of play,

Suggested that trespasses *in-it-io*
Applied to the law in a different way;
"If a sheriff," he says, "enters into Vaux's Inn
And a trespass there did, notwithstanding his writ,
His tortuous conduct would forfeit all claim
And the leave of the law wouldn't help him a bit.
But permission to enter, express or implied
(In the case of a hostler, it's one or it's both)
If exceeded in fact, as it was in this case,
Will tax with a trespass," the Chief Justice quoth,
"Not the whole of the action, but only the act
In excess of the leave. If one enters of right
And pockets a penny from Master Vaux's till,
'Tis larceny, sure, though it's done in the night."

FYITE THE FOURTH.

Master Vaux looked dejected and paid the law's bill;
The six jolly toppers filed leisurely out.
The barristers laughed at their clients' expense,
And mine host and the six paid the costs of the bout.
The moral of this is: Good sir, if you drink,
Pay the cost of the thing 'ere it passes your lips;
If your spirits are more than you need for yourself,
And you sell of the same to any who sips,
Don't sue if not paid the full price of the bill,
But insist that the old one is paid for before
You fill up the subsequent bumpers to one
Who enters unvouched-for the Sample Room door.
Let the six jolly carpenters teach you at least
The lesson that students of law schools all know,
'Tis only abuse of the law and the writ
Makes a trespasser liable *in-it-io*.



SHOULD TRADE UNIONS BE INCORPORATED?*

BY EUGENE WAMBAUGH.

IN answer to the question whether trade unions should be incorporated, the instinct of most people seems to be to say, "Why not?" The present attitude toward corporations is not, to be sure, thoroughly friendly. No, it resembles the view of some savages as to the Evil One—an institution not to be loved, but to be feared, respected, propitiated, imitated, and, though possibly by and by to be regulated or destroyed, for the present to be considered inevitable and normal. Yet, although this is the contemporary attitude of the public, and although corporations, large and small, are now so very common as to encourage the impression that they are the most natural things in the world, the truth is that corporations are merely artificial, that they are nothing but creatures of the legislature, and that they should not be created unless their existence is for the public welfare. Consequently, to the question whether trade unions should be incorporated the proper counter-question is not "Why not?" but "Why?"

In the present instance the presumption against incorporation is stronger than usual. Incorporation is a privilege, giving among other advantages concentration, permanence, and partial exemption from losses; but incorporation is apparently urged upon trade unions by capitalists, and capitalists have recently contended that organizations of workmen ought to be ignored and if practicable abolished. Doubtless it is possible at one time to believe in dealing with workmen one by one and at another time to believe in dealing with workmen in a body; but the change from one of these beliefs to the other, and especially the change from belief in no organization at all to be-

lief in the most consolidated form of association possible, is a change so radical that it must be expected to be made slowly and to be accompanied with careful explanation. In this instance, however, the change of front has been made with such suddenness and with such slight explanation as to inspire doubt whether it is wise. Again, the change has been made in a time of excitement; and, although it is possible for excited persons to be safe advisers, the probability is the other way. Obviously, the suggested incorporation of trade unions should be examined with unusual care, both by workmen and by the general public.

The one reason urged for the incorporation of trade unions is that thus there would be an increase in workmen's responsibility. The word "responsibility" has an embarrassing number of meanings, and several of these meanings are germane to the present discussion. The word is sometimes used in the legal sense; and then a person is said to be responsible whenever a remedy against him is given by the law. Thus, if workmen combine to threaten persons taking the place of strikers the workmen combining are said to be legally responsible. Again "responsibility" is sometimes used in simply a business sense; and then no man is called responsible unless he has property so large and so accessible that the holder of a judgment can procure satisfaction. In this business sense it may happen that those same workmen are not responsible. Still again, "responsibility" is used in another sense somewhat similar to the business sense just now pointed out, but distinctly disgraceful; for, in an instance where a wrongdoer, whether a natural person or a corporation, is believed to be so influential that—although in the legal sense there is responsibility and although in the business

* A paper read before the American Social Science Association, at Boston, May 14, 1903.

sense also there is responsibility—the law, through the imperfections of legislators or of judges or of jurors or of other officials, will not in fact be executed, the wrongdoer thus exempt is said to be irresponsible. It is in this last sense that irresponsibility has been attributed, perhaps inaccurately, to the owners of a building carried to an unlawful height in the most conspicuous square of Boston. In short, one is not fully responsible if no action is given against him by the theory of the law, or if he is so poor as to be below the law, or if he is so influential as to be above the law.

It is certainly desirable that everyone who is conceived to be possibly a wrongdoer should be responsible in each of the three senses explained; and hence the next question is whether in one or all of these senses the incorporation of trade unions tends to create, or at least to increase, responsibility.

Throughout the discussion it must be borne in mind that any workman personally committing a wrong against person or property is responsible legally, and that in a business sense he is responsible to the full extent of his property—less exemptions from execution,—and that in case he has been guilty of a crime or of disobedience to an injunction he is subject to imprisonment. Further, it must be borne in mind that, in addition to this individual liability of workmen, trade unions, though unincorporated, are in the legal sense responsible for the wrongs done through the orders of their officers while acting within the general purposes of the associations, and that this last responsibility attaches to the common funds. Still further, the contracts of individual workmen and of unincorporated organizations create responsibilities in the same sense as do wrongs against person or property. Finally, it is not known that there is any jurisdiction in which individual workmen or their organizations are above the law. The principal difficulties in gaining satisfaction against workmen and

unions are practical; namely, that they are not wealthy and that it is not easy to identify perpetrators of wrongs to person and property, and that it is still less easy to prove connection between wrongs and the unions.

The question whether incorporation would materially alter the situation suggests a distinction as to the kinds of incorporation now available in many jurisdictions. On the one hand workmen may be incorporated for benevolent purposes exclusively; and on the other hand they may be incorporated wholly or partly for business purposes.

If we suppose that the corporation has exclusively benevolent purposes, it will collect money from its members and will pay it back to them or to their representatives in such emergencies as sickness, death, and lack of employment. This is a sort of insurance—objectionable, by the way, from the point of view of insurance men, for the reason that the whole fund may be destroyed by one disaster, and questionable from the point of view of the general public, because it is not desirable that workmen, and especially workmen in any one business, should treat themselves for charitable or social purposes as a distinct class, and also because the existence of a large fund for the unemployed encourages unnecessary and unsuccessful strikes precisely as excessive wealth promotes extravagance and idleness. Now, it is obvious that it is foreign to the purposes of a benevolent organization to promote directly its members' business interests—for example, to declare strikes or boycotts and to make contracts as to rates of wages. Yet it is not inconceivable that the officers might do such acts in the supposed interest of the corporation; and in that case, in the absence of express authorization or subsequent ratification by the members, there is a difference of opinion upon the question whether such acts are to be deemed the acts of the corporation. If the view should prevail that such acts create no corporate liability, the result is that

the responsibility of workmen is in no sense increased by incorporating labor unions for benevolent purposes exclusively.

Yet persons suggesting incorporation with a view to increasing responsibility have in mind, very probably, incorporation for benevolent and business purposes combined, or possibly incorporation for business purposes exclusively. In this discussion it is convenient to call a corporation organized with mixed purposes or with exclusively business purposes a business corporation. Let us imagine, then, that a trade union is incorporated for the purpose both of providing for sick or unemployed members and of regulating the relations between workmen and their employers. Such a corporation might have officers managing its affairs, stockholders, shares with a certain par value, and a fund composed primarily of the proceeds of the sale of shares. This corporation would not be legally responsible for the wrongs or contracts of any one or more of its stockholders, but it would be legally responsible for the wrongs or contracts authorized by its officers in the course of its business. Further, the assets of the corporation would be liable for the damages caused by these wrongs and contracts. Finally, there would be a legal liability on the part of the stockholders themselves to pay into the corporate fund such sums as might be necessary to enable the corporation to meet these claims, although, to be sure, this stockholder's liability is subject to qualifications and usually does not extend beyond paying for the stock in full and making an additional payment of the same amount.

More specifically, in case of illegal interference ordered by the proper representatives of the corporation, or in case of breach of a contract entered into by those representatives as to rates of wages, there would be a new legal responsibility, namely a legal responsibility on the part of the new legal entity, the corporation itself, and this new legal re-

sponsibility would be supported by a new business responsibility, because there would be corporate assets.

Yet it must not be inferred hastily that these new responsibilities would be of value. In the first place, although there is difference of opinion upon the question whether the legal liability for the wrongs and contracts described would attach to such corporate funds as might be raised not by sale of stock but by contributions made clearly and exclusively for benevolent purposes, such as aiding stockholders when sick or unemployed, there is not the slightest doubt that such contributions would be perfectly protected if held by a separate body, for example, a benevolent corporation composed, possibly, of precisely the same persons. To take from the business corporation the control of funds meant to take care of cases of sickness and death would obviously be just. To treat funds for the unemployed in the same manner would be of doubtful propriety; for the lack of employment would often be due to a strike, and the declaring and managing of strikes in the interest of stockholders would be a considerable part of the work of the business corporation. However improper it might seem to capitalists thus to separate the benevolent funds, the separation would certainly take place, and workmen would deem this course justified by such devices as those whereby the railway companies of Pennsylvania evade the constitutional provision forbidding them to mine coal.

Now, as the sums required by trade unions for benevolent purposes, including the support of strikers, are much larger than the funds required for any other purpose, it is probable that the capital stock of the business corporation would not be large, and that in a business sense such a corporation would hardly be called responsible.

Nor is this result changed by the existence of a limited liability of the stockholders themselves, for the actual inefficiency of claims

against individual workmen is one of the chief grounds for urging incorporation.

Further, the legal liability of the business corporation for the wrongs committed by its authority, as distinguished from breaches of its contracts, would largely be illusory; for the records of the meetings of stockholders and directors would seldom indicate that wrongs were authorized, and in most instances it would be practically impossible to prove that the wrong in question was not the unauthorized act of the wrongdoer himself, and, as has been said, the corporation would not be legally responsible for such an independent act, even though committed by a stockholder, and, it may now be added, even though committed with the thoroughly accurate belief that the act would aid the corporation to bring to a successful close the undertaking in which the corporation was engaged.

It seems, then, that the incorporation of trade unions, even for business purposes, would not result in as great responsibility, either in the sense of legal responsibility or in the sense of business responsibility, as might easily be imagined. The chief results attained with certainty by incorporation would be that the legal responsibility of the incorporated trade union would exist in the place of the legal responsibility of the unincorporated association, that the trade union would assume a more solidified and permanent form, and that the new organization could sue and be sued in its collective name without the necessity of ascertaining and naming the members. In case of litigation the change would be a convenience. The question remains whether the advantages of the change would be purchased at a price too large for workmen and for society in general.

Are there not incidents which cause corporate organization for business purposes to be a difficult form for trade unions? A corporation is not temporary, but permanent,

and it is not easily terminated when changed conditions render its existence unnecessary. The conditions surrounding employments, both skilled and unskilled, are changing constantly, and it is impossible to predict whether a few years hence it will be desirable to have among coal miners, for example, one association or two or more. Again, a corporation is necessarily governed by a small body, and perhaps in fact by only one person, and against the acts of the governing power of a business corporation the minority of the stockholders can have little remedy. The stockholders have not even that remedy of withdrawal which in the case of an unincorporated association acts as a check upon mismanagement, for a stockholder cannot withdraw without obtaining a purchaser for his stock. Now, the stockholder in a trade union, wishing to withdraw because of dissatisfaction, or of removal, or of change in occupation, would find this difficulty peculiarly irksome. He cannot have unlimited power of selling his share; for otherwise he might sell to a person not interested in the business or to a capitalist, and control of the corporation might pass into hostile hands. Finally, when the stockholder in a trade union died, something would have to be done to prevent the share from passing into the ownership of a representative unfit to have voice in the corporation's affairs.

Undoubtedly machinery can be devised to meet these difficulties; but the machinery must consist of devices whereby stock in the corporation is deprived of the usual incidents of corporate stock and whereby ownership is rendered as analogous as possible to membership in a voluntary society—and, by the way, one obvious regulation of this sort would forbid any person to own more than one share, or at least to have more than one vote. The difficulties, then, though not insurmountable, call attention to the fact that for workmen a business corporation is not an appropriate mode of organization.

The business corporation is worse than inappropriate. It endangers the chief benefit for which the public is indebted to trade unions. It is to trade unions that the public is indebted for restraint upon the vast power of combinations of capitalists. Yes, it is a fact, that to workmen, more than to economists or to statesmen, the public is thus far indebted for this great and necessary service. The trade unions, doubtless, have been seeking their own ends; but both because workmen are so numerous that their welfare is of great importance to the whole community, and because the curbing of the power of combinations of capitalists as to workmen is necessarily a curbing of that power in every direction, the fight of the workmen has been a fight for each and every one of us. A converse benefit received by the public at the hands of capitalists—in-sistence that workmen must obey the law—has also been dependent upon the thoroughly sincere opposition of workmen and capitalists. If incorporated trade unions, instead of being the exception, became the rule, would this opposition continue?

Notice the change that would take place in conditions. When trade unions are incorporated as business enterprises, they will be much more easily and permanently controlled by one group or by one man than while they remain mere voluntary associations. The controlling power can easily be ascertained and consulted by employers. Between the trade union corporation and the employers it is perfectly feasible to effect an alliance, defensive and offensive. Unquestionably the alliance would mean an increase in wages; and unquestionably it would mean a still greater increase in prices. Already it is said that employers would recognize incorporated trade unions, and would be willing to make long contracts with them as to the rate of wages. In short, the danger is that trade unions incorporated for business purposes will combine with capitalists, and that the

resultant combination will be managed largely in the interest of capitalists and in disregard of the interest of the public. Such a combination of workmen and capitalists would be able to defy the law, and, in fact, would be, in the disgraceful sense pointed out near the beginning of this discussion, irresponsible.

It is true that one cannot predict this result with certainty; but it is a possible result, and it would be disastrous, and the danger is quite imminent enough to overbalance the slight advantages that might be brought about by turning trade unions into business corporations.

Here, then, is an occasion for declining to encourage the wholesale creation of artificial persons with dangerous powers. Doubtless an artificial person may be benevolent and beneficent; but doubtless such a creature may be morally irresponsible and practically uncontrollable. There is wisdom as well as imagination in Mrs. Shelley's romance of *Frankenstein*, picturing an artificial creature made by man, with human form as nearly as might be,—a creature strangely powerful, but without moral sense and beyond the control either of its creator or of itself.

The whole argument against incorporation cannot be presented by any one person, and still less the arguments on both sides. What has been attempted has been to present from the point of view of the public so many of the more important considerations as to show that incorporation should not be favored hastily. As has been pointed out, in any case the presumption is against creating an artificial person—a corporation—and the presumption is the stronger in this case, where the suggestion comes not from workmen, but from capitalists, and somewhat suddenly; and the reason given, namely that incorporation would cause new and valuable responsibility, largely fails, even though the corporation should have capital stock and business purposes; and the structure of a

trade union as a business corporation must be abnormal; and finally, there is attached to trade union incorporation for business purposes a grave danger to society.

In short, in this instance incorporation, though attended with a few conveniences, is unnecessary, inappropriate, and dangerous.

Do not forget the danger. If incorpora-

tion of trade unions should lead to combinations of workmen and capitalists, the results would be far-reaching. One result might be a species of industrial peace; but peace at that price would cost too much. Opposition of workmen and capitalists—lawful opposition—is one of the most valuable assets of the public.

SIR WALTER SCOTT AS A LAWYER.

BY NEIL McCRIMMON.

SCOTT passed his final examination for the bar in 1792 and was called to the bar on the 11th of July of the same year, and in a short autobiography (which Mr. Lockhart includes in his biography) he has left an account of the way in which he and his friend, Mr. William Clark, read for their final examinations. It is best told in Scott's own words: "The rule of my friend Clark and myself was, that we should qualify ourselves for undergoing an examination upon certain points of law every morning in the week, Sundays excepted. This was at first to have taken place alternately at each other's houses, but we soon discovered that my friend's resolution was inadequate to severing him from his couch at the early hour fixed for this exertion. Accordingly, I agreed to go every morning to his house, which, being at the extremity of Prince's street, New Town, was a walk of two miles. With great punctuality, however, I beat him up to his task every morning before seven o'clock, and in the course of two summers we went by way of question and answer, through the whole of Heineccius' *Analysis of the Institutes and Pandects*, as well as through the smaller copy of Erskine's *Institutes of the Law of Scotland*." The examinations were passed by both of them, with credit, as they deserved, after such diligent and persistent study.

Scott got a copy of his notes on Hume's lectures bound, which he presented to his father, who was very proud of it, and looked forward to the time when his son would be one of the leaders of the Scottish bar. It was customary in Edinburgh at that time for each candidate who succeeded in passing the finals for the bar to give a dinner to his friends. Scott gave his dinner, at which his father was present, and it is recorded that "the old clerk of the Signet was very joyous on that occasion." A thesis was necessary as well as a dinner, and Scott's thesis was on the title of the Pandects, "Concerning the disposal of the dead bodies of criminals." After the ceremony of putting on the gown was completed, Scott created a great deal of amusement amongst his companions by mimicking the air and tone of a Highland lass waiting at the Cross of Edinburgh to be hired for the harvest work.

"We've stood here an hour by the Tron, hinny, and deil ane has speered our price."

With his first guinea he bought a night-cap and with his first fee of any consequence he bought his mother a silver taper-stand, which could be seen on her chimney-piece twenty-five years afterward.

One of the first duties required of Scott, as his father's apprentice, was to proceed to the Highlands, to enforce a writ of execution

against a family of McLarens. It was on this trip that he first saw the country which he describes in the "Lady of the Lake." An escort to a sergeant and six men, from the garrison at Stirling, accompanied him. It is related that the sergeant was a good storyteller, and that he knew no end of stories, which he related to his youthful companion. He met on this trip a Mr. Alexander Stewart of Invernayhle, an enthusiastic Jacobite, who had been out with the Pretender in 1715 and 1745. This veteran had had a broadsword duel with Rob Roy, and by the time the youthful apprentice had heard the stories of the sergeant and Alexander Stewart, he had ample material for both song and story running through his head, which he afterward utilized in "Rob Roy" and "The Lady of the Lake." It was not until after his call to the bar, in 1792, that he made what he himself called his "raid" into the Liddesdale country. There he met the original of Dandie Dinmont and Meg Merrilies, and in his successive raids into that border district he gathered the materials for many of the songs and stories with which we are so familiar now.

He had his first case at the Jedburgh Assizes. He defended a veteran poacher and sheep stealer, and got him off. "You're a lucky scoundrel," Scott whispered to his client when the verdict was announced. "I'm just o' your mind," quoth the desperado, "and I'll send ye a maukin (*viz.*, a hare) the morn, man."

In another case, in the same town, he was not so lucky. The prisoner, whom he defended for house-breaking, was well aware that he could not get off against the clear evidence which the crown produced. He took a fancy to his counsel, however, and asked Scott to visit him at the jail before he left the place. Scott complied with his request, and was informed by the prisoner that he was without money to pay his fee, but that he would give him a bit of advice, which might be useful to him when he had a house of his

own. "Never keep a large watchdog out of doors," said the prisoner; "we can always silence them cheaply, but tie a little yelping terrier within; and, secondly, put not trust in nice, clever, gimcrack locks; the only thing that bothers us is a huge old heavy one, no matter how simple the construction, and the ruder and rustier the key, so much the better for the housekeeper." Sir Walter told the story some thirty years afterwards at a judge's dinner, and wound it up with a rhyme:

"Yelping terrier, rusty key,
Was Walter Scott's best Jeddart fee."

About the same time he was retained by a solicitor on behalf of a clergyman who was charged before the General Assembly of the Church of Scotland with habitual drunkenness, singing of lewd and profane songs, dancing and toying at a penny wedding with a sweetie wife, and, moreover, of promoting irregular marriages as a justice of the peace. Scott devoted a good deal of attention to the case, and was well prepared when his turn came to address the venerable court. He gathered confidence as his argument proceeded, and when he came to analyze the evidence touching a certain penny wedding, repeated some of his client's alleged conversations in a tone so bold and free, that he was called to order with great austerity by one of the leading members of the august assembly. He was much confused by the rebuke, and when a little later he had to recite a stanza of one of his client's ditties, he did it in a faint and hesitating style.

He had some student friends in the gallery, who, thinking he needed encouragement, shouted, "Hear! Hear! Encore! Encore!" The grave and reverend gentlemen, after recovering from their astonishment at the impertinence of the youngsters, had them turned out of the gallery, and Scott had to finish his address as best he could. He joined his

allies over a bowl of punch later on, and to cheer him up after what he thought was a dismal failure, one of them proposed a song entitled "The Tailor."

"The tailor he came ben to sew,
And weel he kened the way o'!"

"Ah," said Scott, with a groan, "the tailor was a better man than me, sirs; for he didna venture ben until he kened the way."

He waited for clients for some years, but his fees were small. His fee-book shows his earnings to have been as follows: he made in his first year £24 3s., in his second year £57 15s., in his third year £84 4s., in his fourth £90, and in his fifth from November, 1796, to July, 1797, £144 10s.

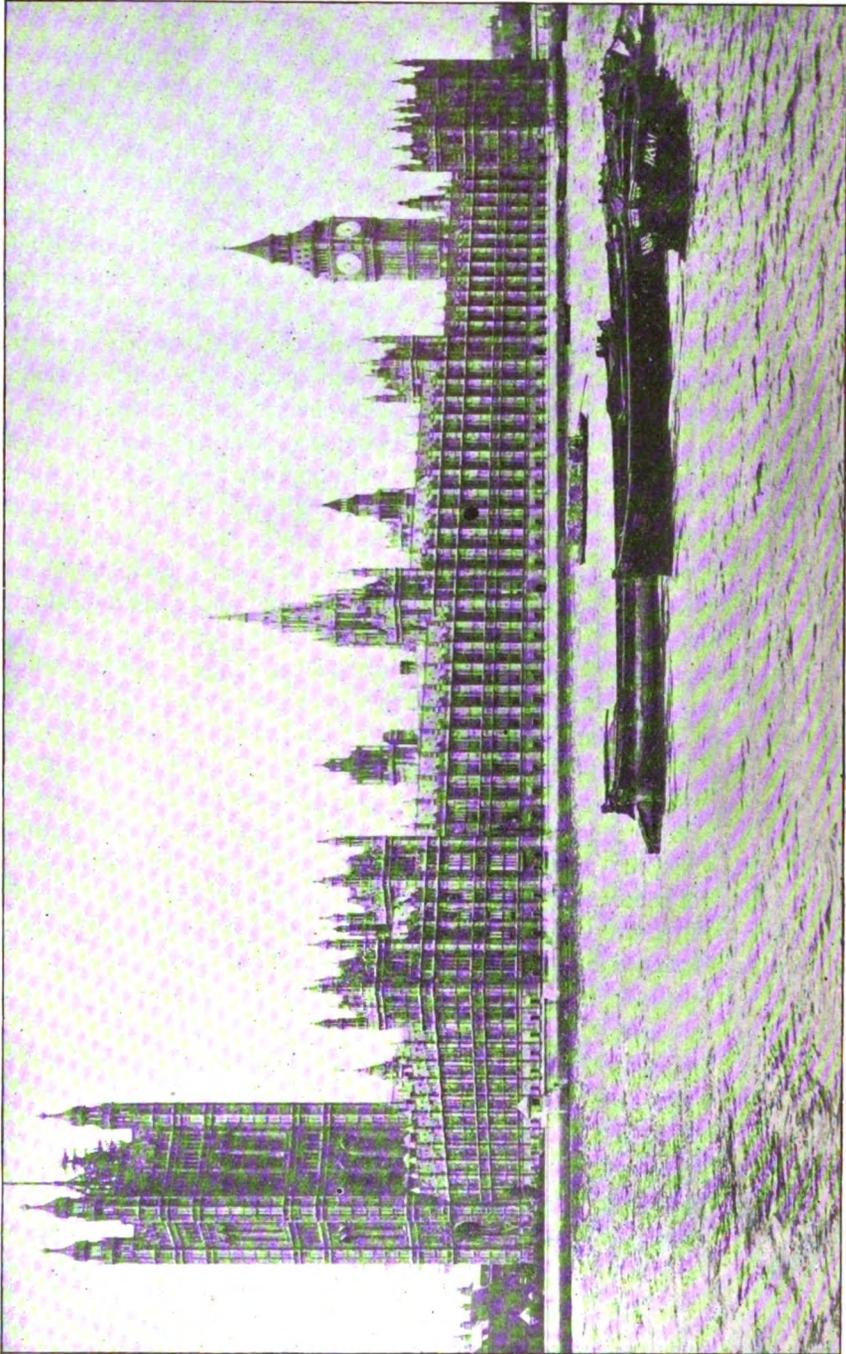
He was appointed sheriff of Selkirkshire on the 16th of December, 1799, at a salary of £300 *per annum*. To quote his biographer: "The duties of the office were far from heavy; the territory small, peaceful and pastoral . . . and he turned with redoubled zeal to his project of editing the ballads, many of the best of which belong to this very district of his favorite border."

He was appointed clerk of the Court of Sessions about the year 1806, at a salary of £1300 a year, but he did not receive the salary attached to the office until some years afterward. His predecessor was one George Home

of Wedderburn, an old friend of Scott's family, who had held the position for over thirty years. Sir Walter offered to relieve him from the duties of the office, and allow him to draw the salary during his lifetime. A patent was accordingly issued in their joint names. Scott found, however, that Mr. Home had no present intention of going over to the great majority, and in a letter some years afterward he complained to an intimate friend of having the old man of the sea on his back.

A few of Scott's friends regretted that an important case had not been entrusted to him, as advocate. They believed that he would have reached an eminent position at the bar, if he had had a fair chance. Let us venture the opinion that Scott's mind after his first trip to the Highlands with the sergeant, from Stirling, never rested seriously upon legal procedure or legal principles. He was day by day, in imagination, wandering over the hills, and chasing the otter with Dandie Dinmont and his dogs, crooning over the fire in the quiet glen at midnight with Meg Merriles, or following the fortunes of Di Vernon and Rob Roy, and many another favorite child of his pen, until at the last, and after more of triumph and of defeat than falls to the lot of even the world's greatest favorites, he left a name which will live forever in the memory and affection of his fellow-men.—
The Canadian Law Review.





HOUSES OF PARLIAMENT.

THE BRITISH HOUSE OF COMMONS.

BY LAWRENCE IRWELL.

THE Houses of Parliament which occupy the site of a former royal residence, known as the Palace of Westminster, were erected as recently as 1840, from plans designed by the late Sir Charles Barry. The building, which contains the House of Lords, as well as the "Lower Chamber," forms a parallelogram almost a thousand feet long by about three hundred feet in width, and is surmounted by four lofty spires, the southwest or Victoria tower being some three hundred and forty-five feet high, and the northwest—the clock tower—measuring three hundred and twenty feet. The clock, known as Big Ben, strikes the hours upon a bell which is said to weigh nine tons. The situation of the edifice—all the world knows it overlooks the river Thames—is in some respects ideal, but the beauty of the structure as seen from Westminster Bridge is marred by the decay of the magnesian limestone, due to the influence of the atmosphere.

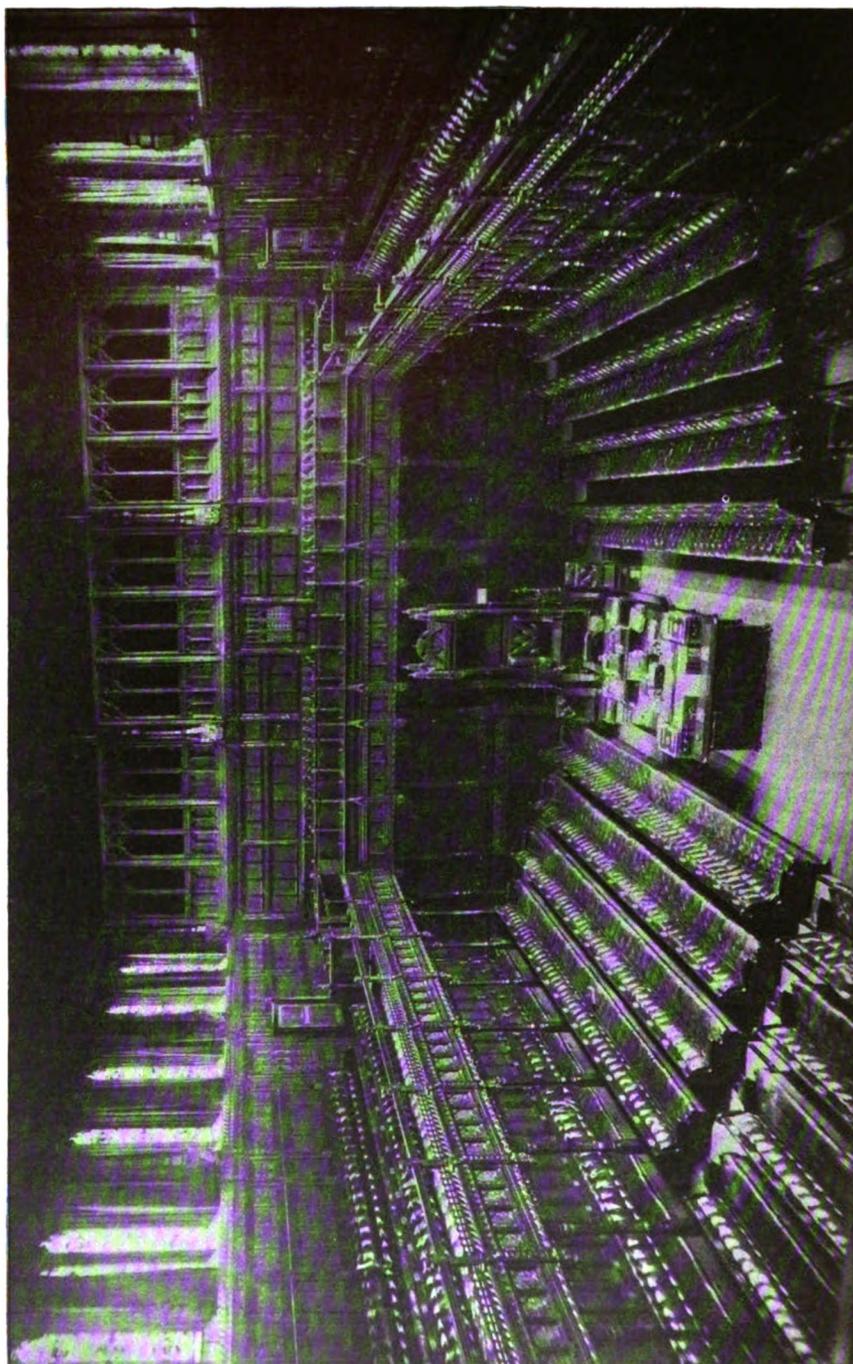
The peculiarity which strikes a stranger upon entering the House of Commons is the small size of the Chamber. At the time it was built, the people's representatives did not number more than four hundred, but so many new constituencies have been created since, that there are now six hundred and seventy members of Parliament for Great Britain and Ireland.

In probably every other legislature Chamber in the world, each representative has a seat assigned to him, with a desk in front of it. In the British House, however, there are no desks, and the only members who are sure of finding seats are ministers and ex-ministers, the occupants respectively of the so-called Treasury bench and the front opposition bench. The result is that on important occasions there is something ap-

proaching a rush for seats as soon as the doors of the Chamber are opened in the morning. The process by which a seat may be secured is curious. By leaving his hat upon the bench, a member may engage a place for the evening, but it must be his ordinary working hat, and not a hat brought specially for the purpose of retaining the seat. This question was decided by the Speaker a few years ago when a member brought with him half a dozen hats to monopolize seats for colleagues who did not visit the House until the ordinary hour of meeting—four o'clock in the afternoon. During the influenza epidemic of (I think) 1894, the Speaker went so far as to recognize a card left on the bench as a substitute for a hat in order to enable "honorable gentlemen" to protect their heads from the draughts in the lobby.

There are no pages in England's elective Chamber. Nobody, except a member, is permitted to pass beyond the place called "the bar," just inside the chief entrance to the House, so that when an attendant has papers to deliver he gives them to some member sitting near "the bar," and they are passed from hand to hand until they reach their owner.

As in other legislative halls, the legislators are forbidden to refer to each other by name. To this rule, it must be admitted, there is one exception. Upon rising to continue a debate during the Speaker's occupancy of the Chair, "honorable gentlemen" must use the formula, "Mr. Speaker, Sir;" but when the House is in what is known as "Committee of the Whole," the member who acts as president, and who, strange to say, sits with the clerks at the table, is addressed, not as "Mr. Chairman" or "Mr. President,"



HOUSE OF COMMONS.

but by name—"Mr. Lowther," that being the cognomen of the present chairman.

In referring to members of the House, the word "Honorable" must not be omitted. A lawyer is referred to as "honorable and learned"; a soldier as "honorable and gallant"; a Cabinet Minister as "Right Honorable." And although there has been a case in which a man had been convicted of a criminal offence prior to his expulsion from the House, yet during a debate in which he was mentioned, the word "honorable" was punctiliously employed whenever his name was spoken.

The rules of the House of Commons are strict. For example, it is a breach of order for a member to read a newspaper when seated in the Chamber, although he may quote an excerpt from one in the course of a speech; but if he should attempt to peruse anything that looked like a daily or weekly paper while a debate was in progress, his ears would be assailed by the sound of "Order, order," from the Chair as soon as the Speaker saw what he was doing. It is asserted that some members resort to the deception practised by a young lady who put "Trilby" in the binding of a New Testament, and was observed reading it in church. It is certainly possible to put part of a newspaper inside the programme known as "the orders of the day," which is delivered at every member's London address each morning, and to read it in this way without being discovered. If the Speaker's attention were drawn to this deception, however, the offending member would be sternly requested to observe the rules of the House.

When a newly-elected member makes his appearance at "the bar" of the Chamber, he is escorted to the table to take the oath by two other members. This custom is a relic of the time when personation was possible; and although a representative's credentials are now ample proof of his identity, yet it is not likely that he will be allowed

to take the oath unless the usual formality is complied with. Nevertheless, it is true that the late Dr. Kenealy, in 1875, was by special resolution, and after some delay, permitted to receive the oath from the clerk without being escorted from "the bar" by the customary sponsors. This case is unique, the reason for the resolution being that no member was willing to introduce the Tichborne claimant's counsel to the House after he had been disbarred for unprofessional conduct.

The retirement of a member is much more remarkable than his initiation. He cannot resign in the way that a person relinquishes his membership of a club or society, and if he becomes bankrupt or insane he, *ipso facto*, ceases to be a representative of the people. Moreover, if he is guilty of infamous conduct, he is sure to be expelled. Whenever a member of Parliament accepts from the monarch any position of honor or reward, his seat becomes vacant, and a new election must be held. This fact enables a legislator who wishes to close his parliamentary career to do so by accepting some post of profit from the Crown, such as the stewardship of the Chiltern Hundreds, to which no duties are attached. An application for the office must be made to the Government, and if it is granted a nominal sum is paid to the applicant; but if any suspicion of disgraceful behavior has been aroused, the stewardship will be refused, and a motion to expel the offender from the House will be promptly made. This procedure does not prevent his re-election by the voters.

No business can be transacted in Great Britain's elective Chamber unless a quorum of forty members is present. But when a debate has once commenced, it proceeds, even if the Speaker and the member who is talking have the House to themselves, for the former pays no attention to the empty benches until his notice is directed to them by a representative of the people. As soon

as that is done, he at once begins to "count the House." This does not mean that he simply counts the number of legislators who are in the Chamber. Before doing so, he touches certain electric bells which ring in every part of the building a summons to members to leave the library and the smoking room and to return to their parliamentary duties. After a lapse of three minutes, the doors of the Chamber are closed and

strated, and a second count may take place very soon after the first. In this way a great deal of time is often wasted.

Reference has already been made to the part which a hat plays in keeping a member's seat for him. Yet this is only one of the duties performed by this article of apparel. While a member may sit in the House with his hat upon his head, he must take it off upon rising to leave the Cham-



ST. STEPHEN'S CRYPT.

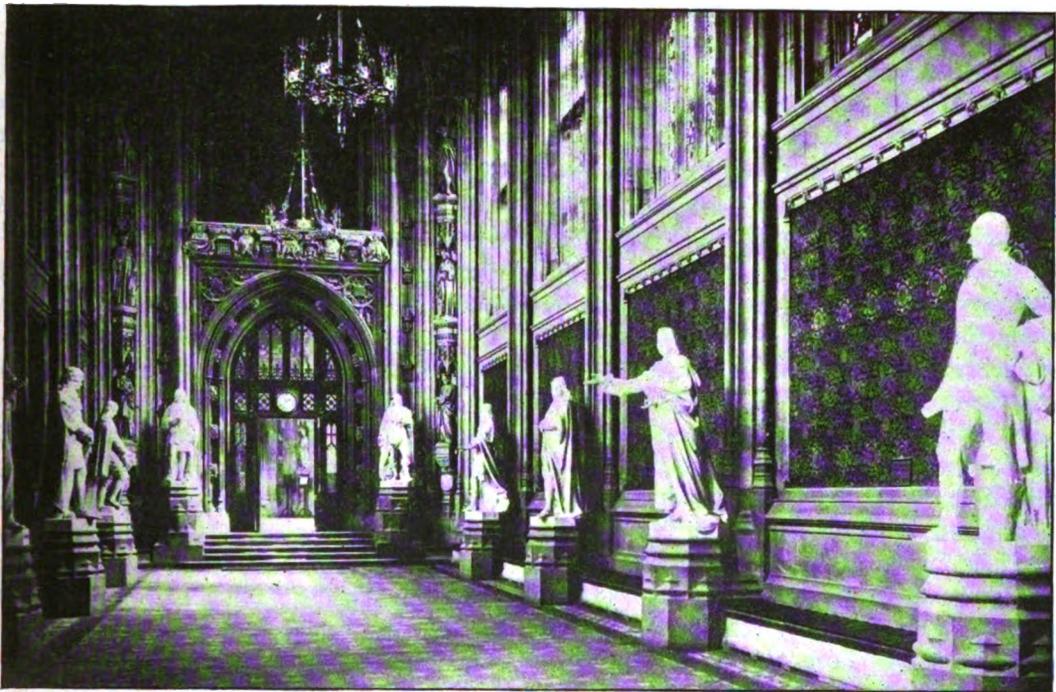
locked, and then Mr. Speaker counts the number of men in the House, using as a pointer his "cocked" hat, which, it is said, he never wears. Upon reaching the fortieth member, he resumes his seat, and the debate proceeds. When forty members are not present, he leaves the Chair without saying anything whatever, and the session is over for the evening. It is not uncommon for the benches to be deserted again as soon as the presence of a quorum has been demon-

ber, as well as upon entering it; and if he does not do so, the whole assembly, irrespective of party, will shout "hat" until he removes his headgear. The general rule is that the legislator who is addressing the Speaker must do so standing and bareheaded, but to this rule there is at least one exception. When a debate has ended, and the question under discussion is about to be put from the Chair, any member who wishes to ask for information must do so in a sitting

position, with his hat upon his head. The late Mr. Gladstone, who seldom took his hat into the Chamber, was once compelled to borrow one in order to comply with the regulations. As his head was of exceptionally large size—it is said that his hats had to be made for him—the proffered hat only covered a small portion of the top of his head, and his efforts to balance it produced so much laughter that his voice was inaud-

ment to cover necessary expenses; but a small number of members, less than a dozen, exclusive of the Irish representatives, are paid by the voluntary contributions of their constituents.

The Speaker is elected by the House, being nominated by the government,—and occasionally opposed by the political party that is not in power. After his election, he must confine himself strictly to his official



ST. STEPHEN'S HALL.

ible. Finally, the late Lord Herschell, at that time in the Commons as Solicitor-General, who also had an unusually large head, came to the rescue with the loan of his hat.

A member of Parliament who holds no office receives neither remuneration nor pay-

ment to cover necessary expenses; but a small number of members, less than a dozen, exclusive of the Irish representatives, are paid by the voluntary contributions of their constituents. The Speaker is elected by the House, being nominated by the government,—and occasionally opposed by the political party that is not in power. After his election, he must confine himself strictly to his official duties, taking no part whatever in politics. In every sense, the Speaker of the British House of Commons is a non-partisan of whom the city which he represents is extremely proud. The present holder of the office is the Right Honorable William Court Gully, Member for Carlisle since 1886.

WRONG WITHOUT REMEDY: A LEGAL SATIRE.

II.

BY WALLACE McCAMANT.

HAVING met with reasonable success as a money-maker at St. Louis, Anderson determined to escape the heat of a Missouri summer by an extended trip. He went first to Minneapolis; there he spent a few weeks most pleasantly in the beautiful lake country, improving every opportunity to enlarge his acquaintance with the business and business men of Minnesota's great city. While there he purchased for a small sum a few shares of stock in the Provident Fire Insurance Company. He then went westward over the Canadian Pacific, stopping leisurely at Banff, the Glacier House, Vancouver and Victoria, and then went to Seattle. He tarried in Seattle several weeks and had no difficulty in making the acquaintance of the leading men among Seattle's citizens. While there Anderson picked up ten shares of the stock of the Puget Sound Electric Company. He then visited Portland, Ore., and amused himself with side trips to the trout streams in the Cascades, to the seashore and up the Columbia to The Dalles. Incidentally he purchased a few shares of stock in the Banks-Elverson Company, a wholesale dry goods company, whose stock was held almost entirely by Banks and Elverson; they had, however, permitted some of their employés to acquire small blocks of stock, thinking thereby to increase the efficiency of their service to the business. Anderson had found one of these stockholders hard up, and had had no difficulty in purchasing his stock for a small sum of money. Finally as the summer was wearing away, Anderson turned his face toward St. Louis. When he reached there he found the following letter with his mail:

Hamilton Anderson, Esq.,
St. Louis, Mo.

Dear Sir:—You are hereby notified that on

the 10th day of September, at the hour of 2 P. M., a meeting of the stockholders of the Puget Sound Electric Company will be held at the company's office, at Seattle, Wash., to authorize the trustees of the corporation to purchase a block of the stock of the Seattle and Suburban Street Railway Company. The board is advised that under the law this purchase might be made without specific authority from the stockholders, but inasmuch as the purchase involves the expenditure of a large sum of money, the board prefers to secure authority from the stockholders before consummating the deal. It is hoped that all the stock will be represented at the meeting either in person or by proxy.

JOSEPH WILSON, *Secretary.*

Accompanying this notice was a letter from Mr. Williams, one of the trustees whom Anderson had met in Seattle, enclosing a blank proxy, and asking that Anderson sign and forward it. Instead of so doing Anderson took the train for Seattle. He reached there the day before that set for the stockholders' meeting, and had no difficulty in learning the details of the proposed deal.

Jacob Kauffmann, the owner of a large block of the stock of the Seattle and Suburban Street Railway, had recently died, bequeathing the stock to his wife. She had decided to make her home in Germany, the country of her birth, and in her desire to close up her business in Seattle she had given an option on the stock to the Puget Sound Electric Company at a price at least \$40,000 less than the stock was worth. The stock had a special value to the electric company in that this street car company was the largest consumer of power in the entire Puget Sound country. It controlled nearly all the lines in Seattle, and had besides a line thirty-seven miles long

running to Tacoma, where it owned some additional lines and franchises. While the Kauffmann stock did not alone control the street railway company, it was so large that, added to the stock now held by several of the trustees of the Puget Sound Electric Company, it would insure the control of the street railway company to the former corporation. The Puget Sound Electric Company had never yet been able to sell its power to the street railway company; the power had for years been purchased from its competitor, the Cascade Light and Power Company, and the Puget Sound Company's officials figured that there was a profit of at least \$20,000 per year in this contract. The contract was about to expire, and the control of the street railway company at this time was particularly desirable. The Cascade Light and Power Company appreciated the importance of controlling the Kauffmann stock, and the day after Mrs. Kauffmann had executed her option, the president of the Cascade company had offered her an advance of \$25,000 on the price named in the Puget Sound Company's option. She was naturally desirous of selling at the higher figure, but her option was signed, sealed and delivered, and a small consideration had been paid her for the option; so she could only hope that the Puget Sound Company would fail to take it up.

These were the circumstances under which the stockholders of the Puget Sound Company met on the afternoon of September 10th. They were few in number, nearly all the stock being held in a few large blocks. There was but one opinion expressed at the stockholders' meeting, and all voted in favor of granting authority to buy the stock except Anderson. He voted "No," and asked to have his written protest against the purchase inserted in the minutes. As he owned only a small block of stock, no attention was paid to his protest, and the board of trustees immediately afterward authorized the president and secretary to carry out the terms of the option

and purchase the Kauffmann stock. Arrangements had been preliminarily made to finance the deal, and it was expected to complete it the next morning, as soon as the bank opened.

Imagine the surprise of the trustees when they were served at the conclusion of their meeting with an order from the Superior Court to show cause three days thereafter why they should not be enjoined from purchasing the Kauffmann stock, and in the meantime they were ordered to desist from all acts looking to such purchase. On investigation they found that the order had issued on a complaint filed in the name of Hamilton Anderson, duly verified. The complaint averred Anderson's ownership of ten shares of stock in the Puget Sound Electric Company, the action of the stockholders' meeting, Anderson's protest against the action taken, and the complaint then set forth that, unless enjoined, the trustees and officers of the corporation would consummate the purchase; this purchase was alleged to be *ultra vires* and unlawful. The Puget Sound Electric Company, Herman Geiser (its president), Joseph Wilson (its secretary), Gustaf Peterson, Martin L. Mantor and Emerson Williams, who, with the president and secretary, constituted its trustees, were all joined as parties defendant, and all served with the order to show cause. It seemed preposterous that the owner of ten shares out of ten thousand in the stock of the corporation should be able to block a deal so evidently to the advantage of the corporation, and the officers gave themselves little concern as to the result of the application. They were much annoyed at the delay, but as they still had about two weeks before the Kauffmann option expired, they expected that the deal could not be prevented by the time consumed in getting this application out of the way. They placed the papers in the hands of counsel, instructing him to press for an early decision.

At the time set for a hearing of the applica-

tion Mr. Harkins appeared for Anderson and made a brief argument. He cited *Hotel Co. v. Schram*, 6 Wash. 134, wherein it was held that one corporation in Washington cannot subscribe for the stock of another corporation. He then cited a more recent decision of the Washington Supreme Court, *Parsons v. Tacoma Smelting Company*, 65 Pac. 765, wherein it was squarely held that a Washington corporation could not own stock in another corporation, even where the stock was held by an individual in trust for the corporation, and that any contract looking to the purchase of corporate stock by a corporation was *ultra vires*, void, and gave the purchasing corporation or its trustee no right to vote the stock attempted to be purchased.

While these decisions were binding on the court and controlled the case at bar, thereby obviating the need of further argument, Mr. Harkins added that they did not stand alone, but that the same rule prevailed in Maine (see *Franklin Co. v. Lewiston Institute*, 68 Me. 43), in Connecticut (see *Mechanics' Association v. Meriden Co.*, 24 Conn. 159), in Georgia (see *Central Co. v. Collins*, 40 Ga. 582), in Tennessee (see *Buckeye Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427), in Ohio (see *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350), in Illinois (see *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798), and elsewhere; in fact, Green's *Brice's Ultra Vires*, page 91, note b, and Morawitz on Private Corporations (sections 431, 433,) stated it as settled law that in the absence of express legislative authority American corporations cannot become stockholders in other corporations.

Mr. Budd, counsel for the company, then made his argument. He produced and read counter affidavits, showing that Anderson was the owner of only ten shares out of the ten thousand which made up the capital stock of the Puget Sound Electric Company; that nine thousand six hundred and fifty shares of the stock had been represented at the meet-

ing, and the wisdom of making this purchase of the Kauffmann stock had been so clearly demonstrated that nine thousand six hundred and forty shares had been voted in favor of giving the board this authority. He attacked the good faith of the plaintiff in bringing the suit, and declaimed against the injustice of allowing so small a minority of the stock to thwart the purposes of so large a majority. He showed by affidavit that of the three hundred and fifty shares of stock not represented at the meeting, three hundred were held by two men then traveling in Europe, who would have favored the purchase of the stock if they could have been reached. On the legal question involved, Mr. Budd showed that the articles of incorporation expressly named the purchase, sale and ownership of corporate stock as one of the objects and pursuits to carry out which the corporation was formed. In reply, Mr. Harkins called attention to the fact that in *Parsons v. Tacoma Smelting Company* the articles of incorporation contained the same provision relied on by the defendants in this case, and the Supreme Court held that it made no difference, that the corporation could exercise only the powers granted by the statute and these powers could not be enlarged by the language of the articles of incorporation.

After hearing the argument, the court announced his decision from the bench:

"It is true that this plaintiff owns only a small block of stock in the defendant corporation. But the ear of the court is open to the man of small property rights as well as to the rich man. A small sum of money may be as important to a poor man as a large sum to a rich man. The question involved here is one purely of law. The court is satisfied from the authorities relied on by plaintiff that it is not lawful for this defendant corporation to become a stockholder in the Seattle and Suburban Railway Company and that this plaintiff has standing to enjoin the purchase of the Kauffmann stock. It is not contro-

verted by the defendants that the purchase will be made unless the injunction is granted, and in fact the affidavits filed by the defendants fully establish the allegations of the complaint. The plaintiff's bond on injunction will therefore be fixed at \$1000, and the injunction will issue."

That afternoon a meeting of the trustees of the Puget Sound Electric Company was held, at which Mr. Budd, as counsel for the company, was present. Budd advised the board that he could not secure relief by appeal within the short time yet remaining in which to take advantage of the Kauffmann option, and said the only thing he could advise was to buy Anderson's stock at any figure short of \$40,000. The board winced at this alternative, but they figured that the

Kauffmann stock was worth the money, even if they had to submit to blackmail in a large sum to carry out their purchase. The upshot of the matter was that Mr. Williams called on Anderson and effected the purchase of Anderson's stock for \$30,000. It was one of the stipulations in their agreement that the terms of the sale should be deemed confidential. The \$30,000 was charged up as an expense in effecting the purchase of the Kauffmann stock, and no stockholder now objecting thereto, this purchase was consummated, and a few weeks later the Puget Sound Electric Company secured the power contract with the Seattle and Suburban Railway Company. Anderson took the train for St. Louis, a wealthier and happier man.

CURIOSITIES OF SUICIDE.

WHAT is the most popular form of suicide? In France, drowning seems the commonest method, possibly because it is the handiest. Professor Merselli, of Turin University, tells us that drunkards and people who are tired of life and worn out with its miseries take to hanging; those to whom family misfortunes have made life unendurable choose drowning. It is perhaps not so wonderful that crossed or jealous lovers should resort to poison or the revolver. Protestants are more apt to fly to suicide than Catholics, who, again, are less impatient of life than Jews, inclined as that race is to mental alienation. Another writer on this subject has observed that a man will, by preference, hang himself, and a woman drown herself; and, as a national peculiarity, it may be mentioned that the percentage of those who select sharp instruments as a means of death is so great in England that it may be said that the English people are the greatest "cut-throats" in Europe.

Many persons who have never before dis-

played great originality have distinguished themselves by inventing novel forms of suicide. We have all heard of the Roman lady who swallowed red-hot coals; the foreign gentleman who put an end to himself with a small private guillotine also acquired posthumous renown. But perhaps the most original, though unsuccessful, would-be suicide on record, is the young lady in London who knelt down, like a votary of Jugger-naut, in front of an omnibus. A young lady "deliberately went in front of the horses of an omnibus and knelt down," according to a policeman who observed her singular conduct. On being rescued, she stated that "she wanted to be killed;" but she might have selected some method at once less prosaic and less original of gratifying her desire. Many hansom cabmen would have executed the business without even being requested to do so. In a fiery furnace an iron worker, at Low Moor, preferred to meet death. His fellow workmen saw him pitch himself headlong into the flames of a raging furnace, in

which, no doubt, he was before many moments had elapsed, utterly consumed. The natural question is—why did he do it? Probably he could not tell the reason himself if he were alive. A pleasanter way of quitting the world was that adopted by a Parisian grisette, who filled her small bedroom with flowers, and when her mother went to call her in the morning she found her dead. The young creature understood vegetable physiology and chemistry sufficiently to be able to adapt them to fatal ends.

At Plymouth, a man named Jolly tied his feet together, and then threw himself into the water, having previously announced his intention of committing suicide in that particular way. November is generally believed to be the month of suicides. It is certainly a melancholy month. Professor Merrill, who has made a special study of the subject, says it is not true that suicide is more frequent "in damp, cloudy and dark weather, such as helps the development of melancholy passions." August is the month in which the greatest number of suicides take place in Paris, one hundred and six occurring in that month, as against forty-one in February, the slackest month. Last year, July was the suicidal month in Paris. In this country the "flowery month" of June is the favorite time.

Suicide is so common in London that it does not excite public feeling; there is so much misery in a great metropolis that it is only wonderful that human beings can endure it at all. Some men and women plunge into the river in order to draw attention to the condition of their families.

"Policeman," said a respectably-dressed man, "why did you not let me do it? I have a wife and eight children. I went home last night and found my wife fainting at her needlework, and the children crying for bread. I could see nothing in front of me but death." To his wife he had written: "My dear little wife, we must part. But

where? At the workhouse gate? No little darling, 'till death us do part' was the promise we made, and death is the kindest and best." Fortunately he was seized before disappearing for the last time, and publicity given to the case by the newspapers resulted in upwards of five hundred dollars being sent to the Mansion House for the benefit of the man's wife and family.

"Nature intended me to be a man; fate made me a grocer," were the words written on a piece of paper left by a young Frenchman, who blew out his brains with a pistol. That young man had mistaken his calling, but it would be a serious thing for society if all grocers were to think and act in like manner. A spice of humor attaches to the valedictory address of a Paris cabman who strangled himself. He wrote: "I leave this world because it pleases me to do so. I have had enough of driving people about in this world. I am going to see if, in the other world, people drive differently. All I ask is that no fuss may be made about me." And with the view of insuring that the letter should not go astray, he wrote upon the envelope, "To Anyone."

"I am no longer able to support my parents," was the reason assigned by an octogenarian in Buda-Pesth for attempting to commit suicide. This man's name was Janos Meryessi. He had for the last few years been a beggar, and was eighty-four years old. His father and mother were said to be aged one hundred and fifteen and one hundred and ten respectively. Meryessi was rescued by an Hungarian member of Parliament, as he was about to jump into the Danube off the Suspension Bridge. His story was investigated by the police and declared to be true.

For a mother, half mad or wholly mad with grief or misery, to murder her children and then kill herself, is not an event without precedent. But for a father, who appeared to his neighbors, to his intimates, and to the doctor who examined his brain after death,

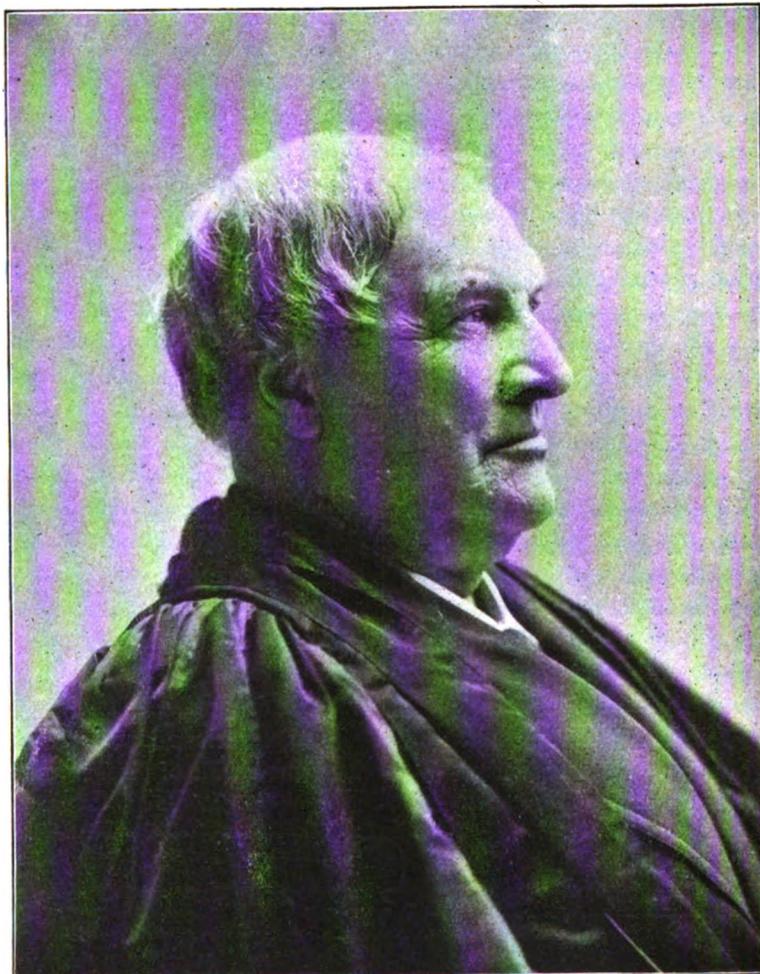
to be entirely sane, to slaughter his whole family—a wife and six children, one of them a well-grown lad—to do this out of affection, and with the most anxious avoidance of any pain or violence, and then with his victims just dead, to write letter after letter explaining his motives and means, to draft a sensible will, to pass out among his friends in order to secure witnesses to the document, and then return to the charnel-house and execute himself—this might have interested Don Quixote. Yet this is what a druggist's assistant did. Owing to various pecuniary troubles, he could not bear to desert his wife and children, and decided that the whole family should die together. He explained his plan to the whole family should go away to the next world together. He explained his plan to his wife, a noble-hearted woman, he says, who did not wish to survive him and she agreed to it, provided only that all should go at once as an undivided household. He therefore mixed some prussic acid with half a pound of treacle, and gave the first dose to his wife in bed with her two younger children. She took it, he says, quite consciously, and as easily "as if it had been beer or tea," or, as he again says, "like a lamb." All died easily, he wrote, and without pain, and then the father wrote four letters, drew up a will, and then went out to have his signature wit-

nessed. Returning, he lay on the sofa and swallowed the poison.

France holds the record for suicides. In Prussia, again, a very large number of persons seem to be tired of a world afflicted with pessimism and compulsory military service. In Austria, the number of suicides is nearly double that of England, but both Italy and Russia are lower on the list. The increase in most European countries has been considerable during the last eight years, but in France it has been enormous. The total for the past twelve months is seven thousand five hundred and seventy-two, one-fifth of these being in and around Paris. It is remarkable that poverty has only caused four hundred and eighty-three suicides in all France, and the figure includes a morbid fear of impending misery without actual privation; one thousand nine hundred and seventy-five cases may be traced to mental aberration, and one thousand two hundred and twenty-eight to physical suffering. Among the moral causes domestic troubles stand first, and alcoholism next. There are two hundred cases of disappointed love, and only twenty-seven from jealousy, dislike of military service giving twenty-five.

What is suicide? The medical department of one American insurance company defines it as the result of disease or bodily infirmity.





SAMUEL F. MILLER.

A CENTURY OF FEDERAL JUDICATURE.

VI.

BY VAN VECHTEN VEEDER.

IT now remains to consider, in some detail, the services of those judges who have in various ways been conspicuous among their brethren during this period. The justices who have been thus reserved are: Miller (1862-90), Field (1863-97), Bradley (1870-92) and Gray (1882-1902). It is needless to add that if living judges were within the scope of this sketch it would be necessary to consider Mr. Justice Harlan's services in this connection.

No justice of the Supreme Court during the last half century holds a higher place in the estimation of the legal profession than Justice Miller. Justice Miller's intellect was not stronger than Justice Field's; he was surpassed by Justice Gray in learning and industry; he was inferior to Justice Bradley in general scholarship, and to Mr. Justice Harlan in power of expression. But in the intuitive perception of legal principles and their luminous application to new conditions he was unsurpassed among his colleagues. In the domain of constitutional law, in which he exercised his highest powers, he was surpassed by Marshall alone; and many other branches of federal jurisprudence owe their stability and symmetry, in no small degree, to his profound abilities. His mind, like Marshall's, was original and creative, rather than dependent upon the recondite learning of the past. He had a natural aptitude for judicial duties; he readily grasped the scope and details of a case, and was quick to discover the ultimate issues involved, which he determined in his own mind without hesitation and always with provident foresight of the consequences which might be legitimately drawn from his conclusions. This clear perception of things,

and of the requirements of the situation, his foresight as to consequences, and his independent and fearless discharge of the most difficult judicial duties through a long term of years, have given him a secure position among the great luminaries of the law.

Justice Miller was a man of strong personal characteristics. He first practised medicine for ten years, and was led to relinquish that profession, it is said, in consequence of an overwhelming sense of personal responsibility; whenever he lost a patient he was oppressed by the thought that perhaps a different treatment would have saved human life. At the age of thirty-two, therefore, he changed his profession; and so rapid and conspicuous was his success that within fifteen years thereafter he was appointed an associate justice of the Supreme Court of the United States. He therefore came to the bench in the prime of life, with a mind trained by twenty-five years' experience in two professions, each of which require learning, knowledge of men and, above all, the habit of decision. Intellectually and morally, he was simple, rugged and frank to a fault. He masked real kindness behind a gruff and abrupt judicial demeanor, and many amusing stories are told of his occasional inability to assert his rather imperious disposition within the bounds of judicial decorum. He was once holding court during the dog days in St. Louis, and listening to a prosy argument in an equity suit. The only persons in the court room besides himself and the lawyers engaged in the case were the court attendants, who were dozing and sweating in their corners. Justice Miller had loosened his collar and cravat, his linen duster was flung open, and he was vigorously working a large palm

leaf fan. From time to time he shifted uneasily in his seat and glared impatiently at the lawyer, who was talking around and around the issue. Finally, unable to restrain himself longer, he glanced furtively around the court room, and believing everybody else to be asleep, fairly shouted at the energetic lawyer, "Damn it, Blank, come to the point!" "What point, your Honor?" inquired the astonished lawyer. "I don't know," was the reply: "any point, some point!"

Justice Miller's judicial labors extend through seventy volumes of reports, from the second Black to the one hundred and thirty-sixth United States. His own opinions, numbering above seven hundred, constitute a contribution to Federal jurisprudence which has not been surpassed in value by any other justice of the court. While he bore his full share of the burden of the solution of the wide range of subjects that came before the court, and attained particular distinction in many, he won his highest fame as a constitutional jurist. It was in this class of cases that he displayed most signally his remarkable capacity for seizing upon the vital points of a controversy, his instinctive command of legal principles, and his statesmanlike foresight and breadth of view.

There is only one conspicuous exception to his powerful influence among his colleagues. His very able dissenting views in *Gelpcke v. City of Dubuque*, 1 Wall. 175, reaffirmed in *Meyer v. City and Muscatine*, 1 Wall. 384, and throughout the consideration of the subject, were ineffective in limiting the doctrine of the majority of the court with respect to a general commercial jurisprudence. But even in these cases, his judicial *dicta* upon the general subject of local taxation and municipal bonds exercised wide influence in the settlement of the law with respect to those subjects.

In considering Justice Miller's work, it is customary to begin with his great opinion in the Slaughterhouse Cases, 16 Wall. 36, which

he considered his most important contribution to our constitutional jurisprudence. These cases involved the construction of the war amendments to the Constitution, and it cannot be denied that, as he stated at the outset of his opinion, "no questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of the country, and so important in their bearings upon the relations of the United States, had been before the court during the judicial life of any of its members." The action arose out of a statute of the State of Louisiana, which, assuming to regulate the business of slaughtering animals for food within the city of New Orleans, created a corporation upon which it conferred the exclusive right of slaughtering animals for food within that city; it directed the place where cattle should be landed and slaughtered, made regulations for the maintenance of a public slaughter house by the corporation, at which all butchers were compelled to slaughter, required the corporation to provide all the conveniences for this purpose, and regulated the charges to be made. The butchers of New Orleans, considering this monopoly an invasion of their personal rights, contested its validity on the ground that the new amendments to the Constitution forbade such a grant by the State. The Supreme Court held, however, that the act was a police regulation for the health and comfort of the people, and as such was within the power of the State, and was unaffected by the Constitution or its amendments. Justice Miller delivered the opinion of the majority of the court. He asserted that the war amendments were designed primarily to prevent discrimination by the States against the colored race, and that in their construction this fact, which indicated their main object, should be kept steadily in view. The only privileges and immunities that were protected by the amendments were those which affected citizens of the United States as such. Citizenship of the United States and

citizenship of the States were two different things. In the amendments those who are citizens of the States are pointed out, but the privileges and immunities of such citizenship are neither defined nor protected. The only rights which are protected from the encroachments of State legislatures are the privileges of the citizen of the United States, and these are such as belong to the citizens of every national government. But the rights of trade and commerce within a State are not among them.

There can be no doubt that this judgment has exercised vast influence. Had these amendments been given the scope which many contended for, a marked tendency toward centralization would almost inevitably have resulted. Justice Miller's opinion has been criticised upon other grounds, which will be examined hereafter; but its author always regarded it with pride. "Although this decision," he said, some years later, "did not meet the approval of four out of nine of the judges on some points on which it rested, yet public sentiment, as found in the press and in the universal acquiescence which it received, accepted it with great unanimity, and although there were intimations that in the legislative branches of the government the opinion would be reviewed, and criticised unfavorably, no such thing has occurred. . . . And while the question of the construction of these amendments, and particularly the fourteenth, has often been before the Supreme Court of the United States, no attempt to overrule or disregard this elementary decision of the effect of the three new constitutional amendments to the Federal Government has been made. . . . The necessity of the great powers conceded by the Constitution originally to the Federal Government, and the equal necessity of the autonomy of the States, and their power to regulate their domestic affairs, remain as the great features of our complex form of government."

Although Justice Miller may thus be cred-

ited with having stayed, in this conspicuous instance, the tendency toward centralization, he was, nevertheless, a strong Federalist in his constitutional views; he believed in giving full scope to the political powers of the national government. The most powerful statement of his general views will be found in his dissenting opinion in the *Legal Tender Case* of *Hepburn v. Griswold*, 8 Wall. 603. His argument in favor of this exercise of power by Congress was, briefly, as follows: The implied or auxiliary powers conferred upon Congress are founded largely upon the general provision which closed the enumeration of powers granted in express terms, namely, that Congress shall have power also to make all laws necessary and proper to carry into execution the enumerated powers. Although the Constitution prohibits any State from coining money, emitting bills of credit or making anything save gold and silver coin a legal tender, yet no such prohibition was placed upon the power of Congress in relation to this subject; on the contrary, Congress was expressly authorized to coin money and to regulate the value thereof. The "necessity" need not be absolute, nor the adaptation of the means to the end unquestioned. The power to declare war, to suppress insurrection, to raise and support armies, to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for the common defence and general welfare, are all express powers, and the operation of the legal tender acts in the execution of these powers left no doubt that the means adopted in the emergency bore to the necessity a proper constitutional relation. Moreover, when there is a choice of means, the selection rests with Congress, not with the court; hence if the act of Congress was in any sense essential to the execution of an acknowledged power, the degree thereof was for the Legislature, not for the court, to determine.

The extent of the national powers was further discussed in the case of *Ex parte Yar-*

brought, 110 U. S. 65, in which Justice Miller delivered the opinion of the court sustaining the national authority over Congressional elections. "That a government," said Justice Miller, "whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption. . . . If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other."

In the Prize Cases the court had vindicated the authority of the Executive to repel the onset of open war by exercising all the powers of a belligerent without waiting for a formal declaration of war by Congress. The celebrated Neagle case, 135 U. S. 1, vindicated the right of self-preservation in time of peace. Neagle, a deputy marshal assigned by direction of the Attorney-General to protect Justice Field from threatened assault by

a disappointed litigant, had, in the reasonable exercise of his duty, killed the aggressor; and when apprehended by the California State authorities, he was released by a writ of *habeas corpus* issued by a United States court. This action was sustained by the United States Supreme Court in accordance with the doctrine of a general criminal law formulated in *Tennessee v. Davis*, 100 U. S. 257 (in which Justice Field had dissented). Justice Miller's opinion on behalf of the majority of the court is a vindication of the inherent right of the executive, independently of legislative authority, to protect the judiciary in the performance of its duty. "In the view we take of the Constitution of the United States," said Justice Miller, "any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the Constitution of the United States," said meaning of this phrase [that a party seeking the benefit of the writ of *habeas corpus* must show that he is 'in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, or is in custody in violation of the constitution or of a law or treaty of the United States.' U. S. Rev. Stat., Sec. 753.] It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So, also, the law, which is intended to prevent crime, in its general spread among the community, by regulations,

police organization and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed. If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be subject to the laws of a State and by those laws could be punished, the security would be very insufficient. . . . We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected."

In the construction of the commerce clause of the Constitution, also, he favored a broad, national policy. Perhaps his opinion in *Crandall v. Nevada*, 6 Wall. 35, denying the right of a State to levy a tax upon persons residing in the State who may wish to leave it, or upon persons not residing in it who may have occasion to pass through it, is his most impressive statement of his doctrine of nationality in this connection. His opinion in the case of the Clinton Bridge, *Woolworth*, 150, in favor of the right of Congress to assume the control and regulation of all railroad traffic which exceeds the bounds of a single State, was the first declaration of the authority of Congress over this subject. And his opinions in general upon this subject, culminating in *Fargo v. Michigan*, 121 U. S. 230, maintained a broad scope of national authority.

It was, however, by his exertions in favor of the marked extension of the authority of the court in the use of the writ of *habeas corpus* that he reached the opposite extreme from the view of the police power which he had championed in the Slaughterhouse Cases.

Ex parte Lange, 18 Wall. 165; *Kring v. Missouri*, 107 U. S. 221; *Medley*, Petitioner, 134 *ib.* 160. His view was that "there is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanctions of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." *Ex parte Lange*, *supra*. But it may be doubted whether he did not occasionally carry this theory to unwarranted extremes; in *Kring v. Missouri*, *supra*, for instance, it would seem that Justice Mathews' dissenting opinion embodied the better reasoning.

The fact that Justice Miller showed no discrimination, in granting the writ of *habeas corpus*, between Federal and State sentences, serves to call attention to the fact that he was a firm defender of private rights. Believing in a broad and liberal construction of the political powers of the national government, he was nevertheless a vigorous and consistent defender of the civil rights of the citizen. Justice Miller delivered many opinions which are recognized landmarks in the judicial history of individual liberty.

One of the most famous of these cases is *Kilbourn v. Thompson*, 103 U. S. 168, concerning the right of the House of Representatives to punish for contempt. The House, as well as the Senate, had been in the habit of calling witnesses before committees to testify in regard to various matters in which an investigation had been ordered. They had also exercised very freely the power to punish by fine and imprisonment for refusal to answer questions propounded in such examinations. Upon the bankruptcy of the banking house of Jay Cooke and Company, the government being a large creditor, a committee of the House was appointed to inquire into the matter, particularly with reference to certain settlements which were deemed adverse

to the interests of the United States. In the progress of the investigation, Mr. Kilbourn, a real estate dealer of Washington, was called as a witness, was questioned in regard to his dealings with various persons, and was ordered to produce his books for inspection. He declined to conform to these demands of the committee, and was at length, by order of the House, committed for contempt. From this confinement he was finally released by a writ of *habeas corpus*, issued by the chief justice of the Supreme Court of the District of Columbia; whereupon he brought a civil action for damages against the Sergeant-at-Arms and the members of the committee of the House. On a demurrer to the answer of the defendants, which set up the order of the House as their defence, the Supreme Court of the District of Columbia held the answer to be good. But on a writ of error to the Supreme Court of the United States that decision was reversed.

Justice Miller's opinion reviews the history of the subject as found in the various cases before the House of Commons of Great Britain, which were afterwards carried to the English courts, and reaches the conclusion that, while in that country, by reason of the history of Parliament and of its original possession of full judicial powers, the House of Commons could punish for contempt, there is no inherent authority in any purely legislative body, apart from that remnant of judicial power remaining in Parliament, to punish parties for offences of this character. Referring to the Constitution, under which alone Congress could exercise such power, he declared that there is a total absence of such authority. But inasmuch as both branches of Congress had certain specific powers to make orders which required the examination of witnesses, the House could in such cases punish contempt by fine and imprisonment. Such occasions were, however, limited to such cases as the punishment of its own members for disorderly conduct or failure to attend

sessions, or in cases of contested elections, or in regard to the qualifications of its own members, or in case of an effort to impeach an officer of the government, and perhaps a few others. But neither the Senate nor the House had any right to organize an investigation into the private affairs of a citizen, and, except in a case in which the Constitution expressly conferred upon them powers which were in their nature somewhat judicial, and as such required the examination of witnesses, they possessed no power to compel attendance and enforce answers to interrogatories which did not relate to some question of which it had jurisdiction.

"If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we cannot give our assent to the principal that, by the mere act of asserting a person to be guilty of contempt, they thereby establish their right to fine and imprison him beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an authority which can only exist in a limited class of cases, or under special circumstances; otherwise the limitation is unavailing and the power omnipotent."

Referring to the independence of the different branches of the government, and the necessity that each should keep within its appropriate powers, he concluded with these wise reflections upon legislative powers:

"While the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches [legislative, executive and judicial] from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature, to be exercised by the Federal government, presents powerful (and growing temptations to those to whom

that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them. The House of Representatives having the exclusive right to originate all bills for raising revenue, whether by taxation or otherwise; having, with the Senate, the right to declare war, and fix the compensation of all officers and servants of the government, and vote the supplies which must pay that compensation; and being also the most numerous body of all those engaged in the exercise of the primary powers of the government,—is for these reasons least of all liable to encroachments upon its appropriate domain. By reason, also, of its popular origin, and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people,—the great source of all power in this country,—encroachments by that body on the domain of coördinate branches of the government would be received with less distrust than a similar exercise of unwarranted power by any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositaries of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny.”

In *United States v. Lee*, 106 U. S. 196, and *Loan Association v. Topeka*, 20 Wall. 655, he asserted the inviolability of private property. In the former case the government claimed the Arlington estate of the Lee family by virtue of the terms of a tax sale during the Civil War, and denied any recourse to the former owners. But Justice Miller asserted that the doctrine that, except where Congress has so provided, the United States cannot be sued, has no application to officers and agents of the United States in possession

of property for public uses, when sued therefor by persons claiming to be the lawful owners. “No man in this country,” he said, “is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.”

In *Loan Association v. Topeka*, he expounded the doctrine that there can be no lawful tax which is not laid for a public purpose. “It must be conceded,” he said, “that there are such [private] rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the

property of its citizens at all times subject to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist and which are respected by all governments entitled to the name. . . . To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation.”

But while Justice Miller was thus valiant in protecting the just rights of the citizen in life, liberty and property, he was seldom an extremist. His views are characterized by a wise reasonableness which led him, while giving due attention to the rights of the individual, to uphold with equal firmness the just rights of the State and of the government as established in the fundamental law. It is not within the province of the Supreme Court, as he pointed out in the course of his luminous statement of the origin and history of the constitutional provision with respect to due process of law, in *Davidson v. New Orleans*, 96

U. S. 97, to redress all the ills of society. Probably no better illustration of this sanity and balance of judgment can be found than his opinion in *Boyd v. United States*, 116 U. S. 616. An act of Congress had authorized the court, in revenue cases, to require a defendant or claimant to produce in court his private books and papers, in default of which the allegations of the public prosecutor were to be taken as confessed. The court held that the procedure was in conflict with the Fifth Amendment in so far as it required a party to incriminate himself; but Justice Miller was of the opinion that where the court, by an order, required the production of specific papers, therein named, this proceeding was not in conflict with the Fourth Amendment. “While the framers of the Constitution,” he said, “had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practised in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only unreasonable searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants which were called general warrants, because they authorized searches in any place, for any thing.”

Illustrations of this wise conservatism might be indefinitely multiplied. In *Bridge Proprietors v. Hoboken Company*, 1 Wall. 116, the obligation of contracts, within the meaning of the constitutional provision, was wisely restrained. He believed that it was not within the constitutional power of a legislature to limit the taxing power of a succeeding legislature. *Washington University v. Rouse*, 8 Wall. 439; *New Jersey v. Ward*, 95 U. S. 104. Compare his opinions in *Gaines v. Thompson*, 7 Wall. 347, and *United States v. Schurz*, 102 U. S. 378, concerning the exercise of control over executive officers.

His opinion in *United States v. Kagama*, 118 U. S. 375, is an exhaustive review of the

power of Congress over the Indian tribes. That case established the doctrine that, while the government of the United States had theretofore recognized in the Indian tribes a state of semi-independence and pupilage, it has the right and authority to govern them by acts of Congress, instead of controlling them by treaties; this results from their being within the geographical limits of the United States, and from their necessary subjection to the laws which Congress may enact for their protection, and for the protection of the people with whom they come in contact. The States have no such power over them as long as they maintain their tribal relations.

Although Justice Miller's fame rests upon his eminence as a constitutional lawyer, he bore his full share in the solution of the multifarious problems which came before the court; and in many subjects he made contributions of great practical value. His judgments in *Johnson v. Towsley*, 13 Wall. 72, and *United States v. Throckmorton*, 98 U. S. 61, giving to the official proceedings preliminary to the issuance of land patents, in some respects, the conclusiveness of judgments and decrees, have contributed materially to the stability of land titles resting on United States patents. His opinion in *Lovejoy v. Murray*, 3 Wall. 1, with respect to the effect of a judgment in tort as a bar; his review of admiralty jurisdiction in *The Hine v. Trevor*, 4 Wall. 555; *Shanks v. Klein*, 104 U. S. 18, on partnership, and *Nicholls v. Easton*, 91 U. S. 716, on bankruptcy, indicate the variety of his labors. His opinion in *Watson v. Jones*, 13 Wall. 679, is one of the most elaborate expositions of ecclesiastical jurisdiction to be found in the books. Referring, in this case, to the fact that the novel and important questions involved had been held under advisement for a year, he concluded with this quiet thrust: the court were "not uninfluenced by the hope that since the civil commotion, which evidently lay at the foundation of the trouble, has passed away, that charity, which

is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all the Christian virtues, would have brought about a reconciliation."¹

¹The following are Justice Miller's leading cases: Constitutional law: In general: *Slaughterhouse Cases*, 16 Wall. 36; *Hepburn v. Griswold*, 8 *ib.* 603 (*diss.*); *In re Neagle*, 135 U. S. 1; *United States v. Lee*, 106 *ib.* 196; *ex parte Yarbrough*, 110 *ib.* 651; *Crandall v. Nevada*, 6 Wall. 35; *Chicago, etc. Railroad Co. v. Minnesota*, 134 U. S. 418; *Murdock v. Memphis*, 20 Wall. 614; *Gaines v. Thompson*, 7 *ib.* 347; *United States v. Schurz*, 102 U. S. 378; *Buck v. Colbath*, 3 Wall. 334.

Civil rights: *Kilbourn v. Thompson*, 103 U. S. 168; *Loan Association v. Topeka*, 20 Wall. 655; *Boyd v. United States*, 116 U. S. 616; *Davidson v. New Orleans*, 96 *ib.* 97; *Kelly v. Pittsburgh*, 104 *ib.* 78; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Campbell v. Holt*, 115 U. S. 620; *ex parte Lange*, 18 Wall. 165; *Kring v. Missouri*, 107 U. S. 221; *ex parte Bain*, 121 *ib.* 1; *Medley, Petitioner*, 134 *ib.* 160; *ex parte Garland*, (*diss.*)

Commerce clause: *Fargo v. Michigan*, 121 U. S. 230; *Clinton Bridge case*, *Woolworth*, 150; *Reading Railroad Co. v. Pennsylvania*, 15 Wall. 284 (*diss.*); *Chy Lung v. Freeman*, 92 U. S. 275; *Pound v. Turck*, 95 *ib.* 459; *Packet Company v. Catlettsburg*, 105 *ib.* 559; *Morgan Steamship Co. v. Board of Health*, 118 *ib.* 455; *Wabash Railway Co. v. Illinois*, 118 *ib.* 557.

Contract clause: *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *New Jersey v. Yard*, 95 U. S. 104; *University v. People*, 99 *ib.* 109; *Brine v. Hartford Fire Insurance Co.*, 96 *ib.* 627; *Greenwood v. Freight Co.*, 105 *ib.* 13.

Taxation: *State Railroad Tax Cases*, 92 U. S. 575; *Woodruff v. Parham*, 8 Wall. 123; *Headmoney Cases*, 112 U. S. 580; *Western Union Telegraph Co. v. Massachusetts*, 125 *ib.* 530.

General commercial law and public bonds: *Gelpcke v. Dubuque*, 1 Wall. 175 (*diss.*); *Meyer v. Muscatine*, *ib.* 393 (*diss.*); *Riggs v. Johnson County*, 6 *ib.* 202 (*diss.*); *Butz v. Muscatine*, 8 *ib.* 575 (*diss.*); *Humbolt Township v. Long*, 92 U. S. 642 (*diss.*); *Thompson v. Allen County*.

Relations with Indian tribes: *United States v. Kagama*, 118 U. S. 375; *Gong-Shay-Ee*, 130 *ib.* 343.

Patents and copyright: *United States v. American Bell Telephone Co.*, 128 U. S. 315; *United States v. Steffens*, 100 *ib.* 82; *Mahn v. Harwood*, 112 *ib.* 354 (*diss.*); *Trade Mark Cases*, 100 *ib.* 91.

Corporations: *Hawes v. Oakland*, 104 U. S. 450; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 *ib.* 1.

Land titles: *Johnson v. Towsley*, 13 Wall. 72; *United States v. Throckmorton*, 98 U. S. 61.

Torts: *Lovejoy v. Murray*, 3 Wall. 1; *Wooden Ware Co. v. United States*, 106 U. S. 432.

Admiralty and international law: *The Hine v. Trevor*, 4 Wall. 555; *Dow v. Johnson*, 100 U. S. 158; *United States v. 269½ Bales of Cotton*, *Woolworth*, 236; *United States v. Rauscher*, 119 U. S. 407.

Miscellaneous: *Watson v. Jones*, 13 Wall. 679 (ecclesiastical jurisdiction); *Nicholls v. Easton*, 91 U. S. 716 (bankruptcy); *Shanks v. Klein*, 104 *ib.* 18 (partnership); *Memphis, etc. Railroad Co. v. Southern Express Co.*, 117 *ib.* 1 (common carriers); *Gardner v. Collector*, 6 Wall. 499 (statutes); *Ker v. Illinois*, (extradition).

A NEW PROBLEM OF THE LAW.

BY ARTHUR F. GOTTHOLD.

IN these days when two out of three practicing lawyers write text-books out of office hours, and the third dictates legal monographs before breakfast, it is rare to find a question, the answer to which will not be found in Somebody on Something.

Nevertheless, both courts and text writers have heretofore dodged all mention of the rules of law as applicable to airships.

It is far from being the writer's intention to fill this gap. All he hopes to do is to suggest some of the problems which will have to be answered in the future, and perhaps to point out a few useful analogies.

At first sight it might seem as if the Courts of Admiralty would step in and take charge of the international phase of the subject, but maturer thought shows us how absurd it would be for those grave tribunals to notice the affairs of a ship which sailed above the rain belt from Tucson, Ariz., to the Matterhorn.

Again we may ask whether the rules as to lights, passing, *etc.*, which now control shipping, will be equally controlling of air-shipment. For instance, it must be decided whether an electric aëroplane descending at an angle of forty-five degrees has the right of way over a sailing craft on the port upward tack. Then, too, how about lights? Red and green are all right in their primitive way, but we must have others above and below. Until the adoption of an international code, the writer begs to suggest celestial blue for the upper part of the craft, and solferino for the lower part.

Or is an airship bound by the rules of the road? And if so, what road—to turn to the left, as in England, or to the right, as in this country?

All of these difficulties, however, are mere matters of detail and can easily be arranged

by a congress of the hot-air artists of the world.

There are, however, graver problems. It has often been loosely stated that a man's right in his land extends *usque ad cælum*. No deep research is necessary to prove that these statements are pure dicta. It would certainly be monstrous to suppose that M. Santos-Dumont must respond in damages for a technical trespass to the owner of every house over which his machine may pass.

That the owner of a house should have the exclusive privilege of mooring to the top of his own flag-pole is well enough, but that he should attempt to control the columns of air above is monstrous.

"Free as the air" may in time be warped into a legal maxim of great value.

The incorporation of a line of airships in Mexico brings us face to face with another great problem. International traffic from one inland port to another means an immense increase in the number of customs bureaus, or smuggling and immigration will be unrestrained. The possibilities of this are appalling. Countless questions present themselves. For instance, if a balloon is left over a hydrogen retort and springs up over night, does it thereby become a *fructus naturalis*? And has the hydrogen maker a mechanic's lien?

Will it be possible to acquire an exclusive franchise between certain points, so as to shut out competing lines?

What will be the position of the Interstate Commerce Commission?

A careful study of the lives and works of Aurora, Icarus, Phaeton and Darius Green fail to shed any light on the intricacies of the situation.

But it is submitted that the subject demands immediate attention, and that some competent jurist should treat it.

**A LAWYER'S STUDIES IN BIBLICAL LAW.
INHERITANCE.**

BY DAVID WERNER AMRAM.

THE difference between the subject of inheritance in ancient and modern law is a fundamental one. According to modern law, property or rights incident to property are heritable and descend to the heir charged with the debts of the deceased. In the ancient Hebrew family, however, the heir inherited not only property so called, but the entire family. It will be remembered that in former articles of this series the theory of the immortality of the family was premised. The head of the family was merely the temporary representative, in whom its powers were lodged. When he died, he was succeeded in office by his heir, who had precisely the same status as the ancestor. The heir succeeded to the authority of the patriarch over his family, as well as to the duties which the patriarch was required to perform. He became the *Goël*, the redeemer of kinsmen who were in bondage, and the avenger of wrong done to the kinsfolk. He inherited the rights and duties incident to his position in like manner as he inherited the property.

There is little doubt that in most ancient times the question, Who is the heir? was differently solved than at a later period. Primogeniture, or the right of the oldest born to succeed to the family estate, is a comparatively modern institution. In primitive societies it was probably the right of the stronger which determined the course of the inheritance, and as we find in Oriental royal families, that after the death of the reigning prince internecine strife usually ensues among his descendants in their struggle for the crown, so, no doubt, the question was always determined, until a more or less fixed rule of succession took its place. As has been suggested, the conservatism of royal

families has preserved for us many ancient customs which at one time were common to all the people.

Another system of inheritance was that of ultimogeniture or the right of the youngest born to inherit, a custom that prevails in some ancient boroughs of England to-day under the name of "Borough English." Its origin may be traced in the migratory habits of nomadic peoples. When the older sons left the father, the youngest remained to succeed to the father's estate. Attention has been directed to the fact that all of the forefathers of Israel as well as its chief leaders were younger sons. Abraham was not the elder son of Terah but a younger son. Isaac was younger than Ishmael. Jacob was younger than Esau. Jacob, the ancestor who gave his name to the entire Jewish people, was the classical representative of the junior right, for both his parents and grandparents were younger children. Judah, Joseph and Moses were likewise younger sons. Practically, however, the right of the younger son was of no importance at Jewish law, as all of its institutions are based on a different theory.

The word "heir" was practically synonymous with the "son." All of the sons shared in the inheritance, the daughters being excluded. In the absence of a son, other members of the family could inherit, among them any one who had been made one of the family of adoption. The remark of Abraham that "one born in his house" would be his heir, using a phrase similar to that used in speaking of his servants, indicates that certain customary right had already sprung up in the patriarchal family whereby the want of a male child was supplied by a species of adoption. The order of succession

is given in a law in Numbers (27: 6-11) whereby the daughters also were given a right to share in the inheritance, if there was no son to inherit. The story of the woman of Tekoah indicates that the desire of the kinsmen to avenge the death of the brother by slaying his murderer who remained the sole heir was prompted not so much by their zeal for the law as by their desire to gain the inheritance which his death would throw to them (II Samuel, 14: 5-7). In the words of the woman of Tekoah, they said, "Deliver him that slew his brother that we may kill him for the life of the brother whom he slew, and we will destroy the heir also, and so they shall quench my coal which is left and shall not leave to my husband neither name nor remainder upon the face of the earth." These last words indicate the importance of the son in the family to keep alive the name of the father and to keep the inheritance intact and hand it down to his children. The bearing of this upon the Levirate marriage is clear. In that case the deceased having left no son, the estate would revert to the collateral kinsmen, and the chain of the family would be broken; hence, the law provided that the brother of deceased should marry the widow, and their son become the adopted child of the deceased, bearing his name and continuing the family.

As the oldest son succeeded, as a rule, to the headship of the family, he was somewhat favored in the distribution of the estate, receiving a double portion which by a Deuteronomic law (21: 17) the father was not permitted to diminish. The relation of the son to the succession was fixed by immemorial custom which, however, seems to have been broken from time to time by the action of the patriarch in assigning to the eldest born a smaller share or none at all. It was for the purpose of finally checking this that the law in Deuteronomy was promulgated, and at the time when the law of Succession was promulgated, the right of the son to inherit

was so well established that he is not mentioned in the list of the heirs except negatively. The law stated that if a man has no son, the estate should be inherited in a certain way by others. Under the patriarchal system women could have no share in the inheritance because they were members of the family only as long as they were unmarried. A married woman became a member of her husband's family, and it is obvious, therefore, that if women had been permitted to inherit, they would on their marriage have taken the inheritance out of the family of their father and brought it into the family of their husband. This, under the theory of the patriarchal family could not be permitted. But in time the hardship of actually excluding women from the inheritance prompted a law reform. The question was raised in the case of the daughters of Zelophehad (Numbers 36: 1-12; Joshua 17: 3-6), and it was decided that where there were no sons, daughters might inherit; and to avoid the danger of the estate passing out of the family, it was provided that the daughters thus inheriting should marry within the family of the tribe of their father.

It will be noticed that, under the scheme of succession established by this case, the father was not named as one of the heirs. This indicates that as long as the father was living the son had nothing to transmit by inheritance; and this ancient rule of the patriarchal family, although no doubt modified by the condition of later times, remained in the law as a survival and reminder of the time when the father was master and the son could own nothing in his own right.

There is one institution of modern times, namely the last will or testament, which existed among the ancients, but in so different a form as to be recognized with difficulty. *A priori*, a system like that of the ancient Hebrews, precludes the idea of the testamentary distribution of the estate with which we are familiar. Under modern law

a man may disinherit his children and give his estate to strangers. This under the ancient Jewish law was impossible. Children could not be disinherited, and even if the land had been sold by the father, it reverted to the family in the year of the Jubilee. To discover the rudiments of the modern last will and testament in the Bible requires a comparative study of ancient legal institutions. Sir Henry Maine helps us again in this point. He has shown in his usual perspicuous fashion how the modern last will was developed from the ancient Roman testament and how in the course of time the modern will acquired characteristics directly the reverse of those of the ancient will. Three principal characteristics are to be noted: First, that it takes effect only on the death of the testator; second, that it is secret as long as the testator is living; and third, that it is revocable by him at his pleasure. The old Roman will had none of these characteristics. It took effect during the testator's life time, was public and irrevocable. Sir Henry Maine failed to observe the striking resemblance between the ancient Roman will and the gift of an inheritance among the Hebrews. He, like many others, although a profound scholar and a careful student, was not sufficiently familiar with the science of ethnological jurisprudence which has grown up among the German scholars, the study of which might have led him to still greater generalizations than those which first stirred the scientific world in his "Ancient Law." There is probably no custom or phase of social and legal development which is unique, and it is not too much to say that every institution of the world has been developed among more than one people. There is perhaps no one of the institutions of the Hebrews which is not found among some other people, and it is only by a broad and comprehensive view of the whole field of jurisprudence and its manifestations among all peoples that a truly

scientific view of the Jewish law and of customs and institutions may be obtained. It is for these reasons that nearly all of the work done in this field thus far is of little or no value. Jewish history and Jewish law have been treated as though they were unique phenomena in the world. But sociology and comparative jurisprudence present result of development and growth similar to that which produced other systems, al- to us the most irresistible evidence that the customs and laws of the Hebrews were the though in its details and in its final shape the system of the Jews may have many points of differentiation.

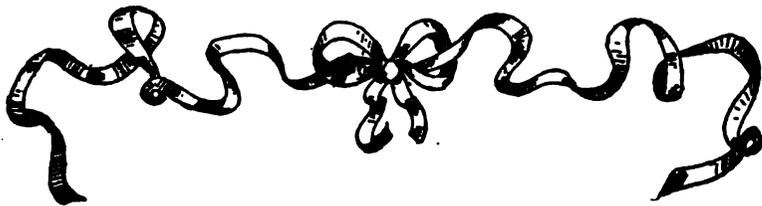
The beginning of testamentary disposition of estates may be seen in the famous episode of the blessing of Jacob by his father Isaac. Jacob stood before his father and Isaac blessed him saying, "God give thee of the dew of heaven and the fatness of the earth and plenty of corn and wine: let people serve thee; be lord over thy brethren, and let thy mother's sons bow down to thee: cursed be every one that curseth thee, and blessed be he that blesseth thee." (Genesis 27: 28-29.) This was the blessing which must be read, not as a mere sentimental outburst of the father's feeling, but as having some formal significance, whereby Isaac blessed his son; that is to say, made him the heir before he died. Now, after Jacob left, having obtained the blessing by a fraud, Esau came in, and when the fraud was discovered, both Isaac and Esau were overwhelmed. They both felt that the words which had gone forth were irrevocable. All that Isaac could say was, "Thy brother came with subtilty and hath taken away the blessing." It seems that it ought to have been easy enough for Isaac to revoke the portion of the blessing by which he made Jacob lord over his brethren, yet Isaac seems to have been bound by his own words, for in reply to Esau's appeal for a blessing, Isaac answered, "Behold I have made him thy lord, and all his brethren

have I given to him for servants, and with corn and wine have I sustained him; and what shall I now do unto thee, my son?" Isaac seems to have been moved to the depths of his being at the helpless condition in which he was left, and finally he blessed Esau; in other words, gave him what remnants of blessing he still had at his disposal, "Behold thy dwelling shall be the fatness of

the earth and of the dew of heaven from above, and by thy sword shalt thou live and shalt serve thy brother, and it shall come to pass when thou shalt have dominion that thou shalt break his yoke from off thy neck." (Genesis 28: 39-40.) Jacob had been made the master by his father's formal gift, and the gift was irrevocable. This was the ancient Hebrew will.

EX PARTE ROLLO.

Trcspass quare clausum fregit
 Just to serenade his Fair;
Ferox canis, Pater's purchase,
 Lurked within the garden there!
Dulcis carmen flowed from Rollo,
 But it melted not the brute
Quid convertit Rollo's trousers—
 Will his next friend please bring suit?
 —*The Brief.*



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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.

WHEN John Marshall was Chief Justice of the Supreme Court of the United States he was one day driving with a horse and buggy in Virginia and suddenly discovered that the tire on one of the wheels was slipping off. The distinguished jurist knew more about constitutional law than he did about buggy wheels and loose tires, but he did know that by wetting the rim of the wheel he would cause it to swell and thus tighten the tire. So coming shortly afterward to a little stream, he drove into it and got a small section of the wheel wet and then drove out and backed in again, of course wetting the same section of the wheel, while the other part of the rim remained dry. While the judge was considering the situation and wondering how he could get the whole rim wet, an old dark-eye came along and seeing his predicament, told him to back in again. This he did and the negro, taking hold of the spokes of the wheel, turned it around, thus wetting the entire rim. Judge Marshall remarked: "Why, I never thought of that." The old negro replied: "Well dey is some men dat jus' nat'ly has mo' sense dan odders."

MR. JOHNSON: "Ah see dat when Rastus Brown was tried foh stealin' hens, it came out at de trial dat he had de *animus furandi*."

Mr. Walker: "Ah allus tole dat niggah dat he'd ketch some awful disease from livin' in dat Irish tenement."—*The Brief*.

A BILL of exceptions in a damage case was

filed at the January term of the Macon (Missouri) Circuit Court. This record embraced a line that reflected seriously on the piety of one of the attorneys for the defendant, and as the lawyer was an elder in the Presbyterian church there was room for comment. When Judge Shelton's eyes struck the exclamatory phrase they twinkled, but his face was serious as he called Major B. R. Dysart—the alleged originator of it—over to him.

"Major," he said, "I have just been reading this record in the Walsh Construction Company case. I was inexpressibly pained to notice in it some very disrespectful language you used in the presence of the Court."

A funeral solemnity would fall short of describing the condition of Dysart's features.

"What do you mean?" he asked.

"Of course you may have been excited a bit during the trial, Major. I know those other fellows were worrying you like everything, but that is hardly an excuse for using cuss words. You should have waited until you got them outside. It won't do"—

"Does your Honor mean to intimate that I swore in your presence while trying a case?" demanded the Major, sternly.

"I don't intimate anything, Major, but you just look at that," and he handed the transcript to Dysart. There nestling in the midst of a long argument over an objection, printed as plain as No. 3 typewriter letters could print it, were the words:

"It is a damned obscure injury."

It took nearly five minutes for the Major to think out how it happened. Then he grabbed a pen, shoved it into the ink bottle and viciously scratched out the revolutionary sentence, over which he wrote:

"It is a *damnum absque injuria*," meaning a damage without an injury.

THE country grocery store at Chaffin's was crowded, and the village idlers were discussing the probable outcome of the litigation between Charles Hubbard and William Baxter. Hubbard had sold Baxter fifty tons of hay and Baxter denied the agency of his wife.

Hubbard consulted Charlie Simmons, the slickest lawyer in town, and placed the case in his hands for adjustment. "Charlie," said Simmons, dropping his glasses and looking wise, "we must prove that Baxter acted as his wife's agent in the transaction, or we shall lose the case." Hubbard's face appeared thoughtful, and then he replied: "I'll do it. I will see Reube Parsons tonight at the grocery store, and ask his help in the matter."

"Hello, Reuben," yelled Charlie Hubbard, as he entered the small grocery store at Chaffin's. "Wait until I'm through this checker game and then I'll be with you," replied Reuben.

Charlie told Reuben the case, and said that he heard it whispered in the community that Reuben had an elastic conscience. "Not so," rejoined Reuben, although he admitted that he handled the truth a little carelessly, at times.

"Well, Charlie," said Reuben, "that Baxter to my mind, is a gol durned skinflint."

"Oppression of the poor and defrauding people is agin the Kittykism. You say that Baxter said I would tell a lie for twelve and a half cents?"

"Yes, he did, at Barber's crossing this morning," answered Hubbard.

"Charlie, your case is won; I'll prove it to him. I'll tell eight for a dollar."

The cider was passed around, but the interview had been carried to Baxter, and he settled.

TOM H. MILNER of Belle Plaine, Iowa, is known far and wide as one of the wittiest and most eccentric lawyers in the State. He was recently addressing a jury in this county where the controversy was over the value of a drove of hogs. Milner was for the plaintiff who had sued the railroad company for the loss of his hogs in the wreck. Milner said, among other remarks: "Yes, we talk

a whole lot about hogs and pork and we legislate against pork and trichinæ; but when ham and egg times come in the spring we stop the legislation and forget all about its dangers in our greed for ham and eggs. That ends it all."

OLD Deacon Williams of Iowa was noted for his "malapropisms." He never lost an opportunity of twisting words or using them out of place.

"The diseased came to his death," *etc.*, was his invariable custom in speaking or writing of a deceased person.

"What's the judge doing this morning?" a spectator asked of the Deacon, as the court was arraigning a batch of prisoners.

"Oh, he's just arranging some prisoners," was the reply.

The deacon coined one absolutely new word in a burst of eloquence to the court.

"Your honor," he said; "I insist there is no *compullion* for doing this."

And the court could not find it, either.

IN one Western town a justice court jury recently resorted to a novel means of securing their fees. They sat on the case and retired to the jury room, only to be out few minutes before they had reached a decision. The foreman appeared at the door and announced that he would like to speak to the justice. The judge waited upon him and he explained the jury had reached a verdict and had placed it in a sealed envelope. They wanted their fees, he said, and would not surrender the verdict until they had the money.

"But," protested the attorney for the plaintiff in the case, "the time for you to demand your fees was at the beginning of the case, not now." The jurymen said he didn't know about that if it was no fees it would be no verdict and he shut the door. The attorney for the plaintiff made a proposition to his adversary to divide the fees, but the latter did not care whether a verdict was returned or not. The plaintiff had to produce the six dollars to secure the sealed envelope. He was compensated by getting a verdict.

It is difficult to imagine anything more annoying than the constant coughing of some person in a court room during an argument. Sometimes a point is lost and often a witness becomes confused and embarrassed by the interruption. Once Lord Brampton, better known as Sir Henry Hawkins, interrupted a case at the High Court of Justice in London in order to reprove a troublesome cougher at the back of the court. "There is a gentleman at the back," said the judge, in his grave, measured way, "who has a very bad cough, and who has constituted himself a kind of chorus to the evidence. I hope that that person will go home and go to bed!" For a few seconds there was an expectant pause, an awful silence in which you could have heard a pin drop. Nobody moved, however, and what is more to the point, for the rest of the day nobody coughed.

Coughing seems to be contagious, for if one person in a court room begins to cough there is a tickling sensation in many a throat which can only be relieved by coughing. The writer was in an Irish Court during a very sensational trial. A large crowd had gathered and silence reigned for an hour or more, when it was broken by someone coughing, a second joined in, then a third, and it seemed as though coughing would be general. Baron Dowse, the presiding judge, interrupted the proceedings and said: "The court will adjourn for ten minutes so that all can relieve themselves of their cough." There was no need for an adjournment for the coughing ceased and was not renewed, although the court sat for five hours longer.

IN the Kansas District Court, recently, a jury returned a verdict finding a certain accused person guilty of larceny. The verdict had not been prepared in the technical form desired, and the judge sent the jury back to make the necessary corrections. The jury was gone for half an hour, and when it returned it brought in a verdict acquitting the prisoner! But a verdict even more amusing was perpetrated by a jury at Pittsburg the other day. The case was a criminal one, and

after a few minutes' consultation the jury filed into the box from its room.

"Have you agreed upon a verdict?" asked the judge.

"We have," responded the foreman, passing it over.

"The clerk will read," said the judge.

And the clerk read:—

"We, your jury, agree to disagree!"—*Exchange.*

THE case of *Ryan v. Ryan*, which was an action for probate of a will and was tried by Mr. Justice Barton last week, disclosed an extraordinary amount of ingenuity on the part of the solicitor who had received instructions from the deceased and had prepared the will. The deceased, a man named Ryan, had been struck down by paralysis and deprived of nearly all power over his muscles. He was unable to speak or to move his hands or arms, but, as it was proved, his brain was unaffected, and his intellect was clear. He still had power to open and shut his eyes, and the solicitor arranged that the closing of his eyes was to mean an affirmative answer to a question, and the keeping them open a negative answer. By means then of an elaborate and exhaustive series of questions, which the testator answered in that manner, the solicitor extracted his wishes and prepared the will, and the testator assented to its contents in the same way. The will was contested by a legatee under a former will. Mr. Justice Barton held that the will was properly executed and decreed probate. He considered, however, that the matter was one in which investigation was reasonable, and he gave the opposing party his costs out of the estate.—*The Law Times.*

AMONG other "Surviving Absurdities and Curiosities of the Law," J. M. Lely, in *The Law Magazine and Review*, cites the following example:

Corn Rents.—By an Elizabethan statute, 18 Eliz., c. 6 (omitted from the Revised Statutes as "Private," but especially saved so recently as 1800, by sect. 7 of the Ecclesiastical Leases Act of that year, 39 & 40 Geo.

III, c. 41), it is enacted that "for the better maintenance of learning, and the better relief of scholars" in the Universities of Cambridge and Oxford, and the colleges of Winchester and Eton, no authorities of those institutions shall make any lease of their lands "except that the one-third part at least of the old rent be reserved and paid in corn, that is to say, in good wheat, after six shillings and eight pence the quarter or under, and good malt at five shillings the quarter or under, to be delivered yearly upon days prefixed." In default of this payment in kind, payment of the value is directed to be paid in ready money, and either the corn or the money coming of the same is to be expended to the use and relief of the commons of the colleges only "and by no fraud or color let or sold away." "And all leases otherwise hereafter to be," still declares the Legislature, "shall be void in all law to all intents and purposes."

CHIEF BARON PALLES related the other day, in King's Bench No. 2, an incident which happened just after he was called to the Bar in 1853, and which seems to have impressed itself on his memory and intellect. Mr. Edmund Hayes, K. C., who was at the time solicitor-general, and who became in 1859 third justice of the Court of Queen's Bench, was arguing a case before Mr. Smith, the Master of the Rolls. Mr. Hayes was appearing for a gentleman who charged particularly high rates of interest, and counsel put forward his claims with great force and persistency. "I see, Mr. Hayes," said the Master of the Rolls, "you want your pound of flesh." "My pound of flesh!" said counsel in an astonished voice. "What's that?" "Oh, that," said the judge, hastily, "that's poetry, you know." "My Lord," said Mr. Hayes in tones of lofty indignation, "I came here for law, not poetry."—*The Law Times*.

THE first real seed of strife in Ireland (says Charles Johnson, in an article on "Ireland and Her Land Laws," in *Harper's Weekly*), was sown by Henry the Eighth in 1537, when, following the policy he had al-

ready initiated in England, he decreed the disestablishment of the Continental monastic orders, the Franciscan followers of the Saint of Assisi, the Order of the Spanish Dominic, the friars of Saint Bernard, whose ruined abbey-churches all over Ireland still preserve the memory of a period of rare and profound culture and religious enthusiasm. The abbey and priory lands thus confiscated by Henry Tudor were distributed among his own adherents, and largely among the servants of the Anglican Church, of which he had decreed himself to be the head. The newcomers by no means followed in the footsteps of the older Normans, nor did they take any steps to make themselves morally at home in their new country. They were definitely an element of foreign invasion; in a sense the Normans never were. Everything that spoke of the old nationality was hostile to them, and this hostility they never outgrew.

A period of conflict was begun in Ireland, which came to a culmination about the time James the Sixth of Scotland became James the First of England. Two great nobles of Ulster, the heads of the O'Neills and the O'Donnells, were compelled to seek refuge on the Continent, and their lands were declared forfeited to the crown and distributed among adherents of the English party. This was the beginning of the so-called "partition of Ulster," which took place in the year 1611, noteworthy for two famous events in English literature—the retirement of Shakespeare and the authorized version of the Bible. To the period of conflict now succeeded a period of chicanery, a dark chapter which included two revolutionary wars. The English law courts were made the instrument of any amount of injustice and dishonesty; forged titles were filed in abundance; fraudulent accusations were made; false charges were brought forward, with the invariable result that the estates of native Irish families passed into the hands of English or Scottish settlers, many of whom were frankly adventurers, and all of whom profited by a system of legal plunder thinly veneered with political sophistries. At the close of this period there

were two classes in Ireland—the legal owners of the land, mainly English and Scotch, and the actual tillers of the land, of native birth and speaking Gaelic, who were, to all intents and purposes, the serfs of the former.

The old native tribal tenure, under which the elected chieftain held the tribal land in trust, gave place to absolute ownership by the imported landlord, whose serfs were subject to private taxation, whether in kind or in coin. Thus the landlord class and the tenant class came into existence; and it is by no means to be wondered at that a landlord class, thus imposed on the country by a system of legalized expropriation, should never have succeeded in forming strong and healthy relations with the class of cultivators, whose original tribal ownership in the land still held morally good in their own eyes. . . .

Many of the evils which afflicted Ireland for two centuries have already been withdrawn, for the most part comparatively recently. The penal laws affecting Irish Catholics were finally repealed in 1829, as the result of O'Connell's national movement. The Anglican Church, which owed its existence to the confiscations of Henry VIII., was disendowed by Gladstone. The Land League agitation, of which Parnell was the central figure, gradually ameliorated the condition of the cultivators, securing for them fixity of tenure, instead of the leases renewable every year, at a rent fixed by the courts, instead of one arbitrarily decreed by the landlord.

The bill introduced by Mr. Wyndham takes one step more in the same direction, gradually restoring to the Irish cultivators the land of which they were deprived by the legal chicanery of the Stuart period. But while thus restoring the land to the people, it does something else well worthy of notice, and certain to bring forth great results in the future. It leaves the landlord class still in their homes, for the most part surrounded with parks and private demesne land; and left, not to drag out an existence of genteel poverty, but with money in their pockets, available for foreign investment, but equally available for investment in Ireland itself.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

A SELECTION OF CASES ON THE CONFLICT OF LAWS. By *Joseph Henry Beale, Jr.*, Professor of Law in Harvard University and in the University of Chicago. Three volumes. The Harvard Law Review Publishing Association. 1902.

This selection of cases, as the compiler announces in his preface, is the ripe fruit of seven years' service in teaching the Conflict of Laws. Coming, as it does, from the pen of Professor Beale, who has already attained distinction as a thorough student of legal topics and an able writer, it is scarcely necessary to affirm that the work has been excellently well done.

His starting point is the fundamental conception that the Conflict of Laws embraces four main heads, namely: (1) The jurisdiction of states over persons, things and transactions within their limits; (2) The creation of rights and obligations, resulting from such jurisdiction; (3) The recognition and enforcement within one state of the rights and obligations thus created in another, and (4) The legal procedure by which, if at all, such foreign rights and obligations may be enforced.

Accordingly, the work is divided into four parts, corresponding to the four heads just mentioned, their order being slightly transposed. The classification is as follows: Part I.—Jurisdiction. Part II.—Remedies. Part III.—Creation of Rights. Part IV.—Recognition and Enforcement of Rights. Each of these parts is sub-divided into appropriate chapters and sections, which, if space permitted, would be well worthy of reproduction here, furnishing, as they do, quite a thorough outline or analysis of the subject. It will be observed, doubtless with regret by many, that the plan above outlined does not

embrace within its scope the *situs* or locality of crimes, though comprehending all other rights and wrongs of whatever nature.

These four parts (under which a great number of cases are arrayed) are followed by a "Summary," containing the author's statement of the important principles controlling this branch of the law, in the form of a clear, though brief and concise, synopsis, with references to the preceding cases. It may perhaps be open to doubt whether it would not be wiser in using the book, to read the summary before working on the cases, though the compiler evidently thinks otherwise. That is a matter of individual taste and judgment. Unfortunately, the author has made little or no attempt in his summary to go beyond the actually decided cases (and only such of these as are reported in the collection itself.) The profession has thus lost in large measure the benefit of the generalizations of principles which Professor Beale, from his ability and familiarity with the whole line of decisions on the subject, is so competent to make, and which are peculiarly needed in this branch of the law.

The cases are well selected, including not only most of the leading English and American cases, but also many decisions of the Colonial and European courts. The three volumes include upwards of four hundred and fifty reported cases, of which about seventy-five are the decisions of continental courts.

An examination of the cases reported shows that most of the familiar and leading cases upon this branch of the law have been included in the collection, but there are some not reported, the omission of which, we think, is to be regretted, though doubtless the compiler had good reasons therefor. As examples, we note the omission of the following valuable leading cases:

On the subject of domicile: *First National Bank v. Balcom*, 35 Conn. 351; *Cooper v. Beers*, 143 Ill. 25; *Mears v. Sinclair*, 1 W. Va. 185; *White v. Tennant*, 31 W. Va. 790.

On the effect of the statute of frauds: *Leroux v. Brown*, 12 C. B. 801; *Downer v.*

Chesebrough, 36 Conn. 39.

On the validity of marriages: *Medway v. Needham*, 16 Mass. 157; *Pennegar v. State*, 87 Tenn. 244; *Van Voorhis v. Bintlall*, 86 N. Y. 18.

On foreign divorce: *Doughty v. Doughty*, 27 N. J. Eq. 315.

On the transfer of personalty in various forms: *Weinstein v. Freyer*, 93 Ala. 257; *Richardson v. DeGiverville*, 107 Mo. 422; *Hornthall v. Burwell*, 109 N. C. 10; *Williams v. Dry Goods Co.* 4 Okl. 145.

On the liability of a promisor to the assignee of a chose in action: *Levy v. Levy*, 78 Penn. St. 507; *Trimbey v. Vignier*, 1 Bing. n. c. 151 (or *Bradlaugh v. DeRin*, L. R. 5 C. P. 473.)

On wills of personalty: *Healy v. Reed*, 153 Mass. 197; *Price v. Dewhurst*, 8 Sim. 279.

Other cases might be mentioned, but the reason that probably induced Professor Beale to omit them in the first instance—want of space—operates with equal potency upon the reviewer.

It is also unfortunate (from the point of view of the profession) that the index is so meager, since the usefulness of any law book to the practising lawyer must depend largely upon the ease with which he can find what he looks for. The index to these three volumes (containing some sixteen hundred pages) is comprised in about one page at the end of the third volume.

But all these constitute defects from the standpoint of the practitioner rather than from that of the student, for whom the work is primarily designed. The latter, at least while he remains a student, will have little occasion to use the index, and he may be stimulated rather than retarded by being forced to look up some of the leading cases for himself, or by hearing them expounded or distinguished in the lecture room.

To those law schools which use the case system of instruction the work will probably prove a great boon, deservedly increasing at the same time the reputation of Professor Beale as a law writer.



Wm. Foxley

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WILLIAM PINKNEY.

THE LAWYER.

By JOHN PHILIP HILL.

THE achievements and experiences of every man who has aided in shaping the political destinies of his country, and who has at the same time attained distinguished eminence at the Bar, should be of especial interest to lawyers. Although the public services of William Pinkney of Maryland may not have made so lasting an impression as the broader statesmanship of some of his contemporaries, yet his career is one that deserves to be remembered, and is particularly worthy of study and emulation by those who desire success in the profession which he so eminently adorned.

Born at Annapolis, on the 17th of March, 1764, he began life with none of the prestige of wealth or of powerful family connection. His father had early emigrated to Maryland and located at Annapolis. The elder Pinkney was a staunch loyalist, and whatever property he may have had was confiscated during the Revolution. So William Pinkney was early forced to rely on his own industry and strength of character, and to his diligence and excellent natural ability his success was entirely due.

His early instruction was received at the King William School, an ancient academy of Annapolis, where, under the direction of a certain Mr. Brefhard, he mastered the elements of English, and obtained a slight grounding in the classics. When he was about thirteen years old the loss of his father's property ended this regular school-

ing, which seems to have been nearly all he obtained at that time of his life. He continued his studies, however, during his whole life, and finally became well educated, both in English and the classics, even working on the latter under a tutor during his official residence in London.

Information concerning his early life is scant: He tried medicine, and studied in the office of a certain Dr. Dorsey, but fortunately he discovered his true bent, and, under the friendly and able patronage of Judge Chase, began the study of law, which he kept up with diligence during the whole course of his life.

In 1786 he was admitted to the bar, and selected Harford County as the "arena of his first professional efforts." He made so favorable an impression, that two years later he was elected a delegate to the convention of the State of Maryland, which ratified the Constitution of the United States. In October of the same year he was elected member of the Maryland House of Delegates, and here his intelligent activity and ready, convincing eloquence soon achieved for him considerable reputation. One of his best speeches in that period, advocating certain manumission privileges for the Maryland slaves, shows a style ornate and flowery in places, and occasionally somewhat involved, but in the main clear and strong, with a ready flow of apt words, and an interesting manner of presentation.

The record he established in the Legislature gained for him, in 1790, an election to Congress, which was promptly contested. His able conduct of the case soon secured him a ratification of the election, which he, however, declined. He had recently married Miss Anne Maria Rodgers of Havre de Grace, a sister of Commodore Rodgers, and it is very probable the "reasons of a prudential and private nature" assigned for declining the honor were dictated by the fact that pecuniarily his profession offered richer prospects of means to meet his added obligations. In 1792 he was elected a member of the Executive Council of Maryland, and held the Presidency of this body till 1795, when he resigned to become a member of the Legislature as delegate from Anne Arundel County.

So far his activity had been confined strictly to Maryland, where his prestige and authority had become recognized and certain, but the report of his sound legal ability had spread abroad, and, in 1796, entirely unsolicited, he received from President Washington an appointment as one of the Commissioners on the part of the United States under Mr. Jay's treaty with Great Britain. He reluctantly accepted this position, and with his family embarked for London, which he reached in July, 1796. Thereupon he began a new and broader period in his life, and the eight years of his residence in England were busily devoted, in addition to his official duties, to diligent self-culture and education that made up for the defects in his early training, and made possible the great success of his later years.

Judging from the letters he wrote during this period, his life in England was very pleasant. He was well received by the English people, mingled considerably in society, of which he was exceedingly fond, and was keenly alive to every opportunity for observation and information. As he said himself, he wished "to see as much as possible."

He attended the theatres often; did some shooting at the country estates of his acquaintances; was present at many of the debates of Parliament, and kept close watch of the political tendencies of the times both at home and abroad. His business on the Commission was of a nature calculated to interest him, and to give opportunity for the exercise of his special talents. His written opinions delivered to the Board of Commissioners respecting the "laws of contraband, domicile, blockade, and the practice of the prize courts," with which the board had to deal, show great legal learning, clear reasoning and thorough investigation. At the same time he attended the courts and kept up his legal and general studies.

But he was of an essentially restless disposition, and began to tire of his life in England. His thoughts turned longingly to his well-loved Annapolis, and the active work of his profession. As he himself said in 1799: "I am told that I am considerably altered since I came here, and I incline to think there is some foundation for it; but I shall not grow much wiser or better by a longer stay. I am become familiar with almost everything around me, and do not look out on life with as much intentness of observation as heretofore, and of course I am now rather confirming former acquisitions of knowledge than laying in new stores for the future. I begin to languish for my profession. I want active employment. The business of the Commission does not occupy me sufficiently, and visiting, *etc.*, with the aid of much reading, cannot supply the deficiency. My time is always filled in some way or other, but I think I should be the better for a speech now and then. Perhaps another twelvemonth may give me the opportunity of making speeches till I get tired of them—and tire others, too."

As time passed these desires grew stronger. In 1803 he wrote: "I do not desire office. It is my wish to be a mere professional laborer—to cultivate my friends and my family, and

to secure an honorable independence before I am overtaken by age and infirmity." The close of the work of the Commission in 1804 was very welcome, and Mr. Pinkney returned with his family to America, greatly benefited by his English experiences in all save in finances.

Immediately on his return in August, he resumed his professional pursuits, making his residence in Baltimore in order to obtain wider opportunities. His reputation was too firmly established to admit of his long holding a private position, and within a year he received the appointment of Attorney-General of Maryland. This office he accepted, at the same time asserting that it would be "personally inconvenient and disadvantageous;" that he would hold it only till his friend, Mr. Johnson, was constitutionally capable of taking the office, and that he accepted only in order to reconcile the conflicting claims of two of his friends. His tenure of the office was indeed of short duration, but he gave it up under other circumstances than he had anticipated.

In 1806 the arrogant and high-handed capture of American ships by the British necessitated further negotiations on matters similar to those that had fallen within the province of the Commission of which Mr. Pinkney had formerly been a member. The presence in England of an American agent well versed in these matters was imperative, and very fittingly Mr. Pinkney was selected to represent the United States. He was therefore appointed Minister Extraordinary in connection with the Resident Minister, Mr. Monroe, to attempt to adjust the claims and grievances connected with these important matters.

His pleasant reception by old acquaintances in England was somewhat embittered by the adverse criticisms his acceptance had excited in some quarters; but confident, as he always was, that he was doing his duty and in a measure sacrificing his best interests

to the public service, he entered with his usual activity into the consideration of the weighty problems that finally caused the war of 1812. In 1807 he succeeded Mr. Monroe as United States Minister to the Court of St. James, and held this office till his recall in 1811. During all this time he took a firm and consistent, though conciliatory, attitude on the questions at issue. His letters to Mr. Madison and others, and his official papers show that he had a clear understanding of the matters in dispute. His position has been subjected to considerable criticism, and he has been blamed as lacking force in his relations with Great Britain. It was his duty, however, to do all possible to avert war, and his conduct secured for him the respect of all with whom he was associated. The Non-Importation Act met with his hearty approval, and during his residence in London he kept in intimate touch with home affairs, and creditably filled a very difficult position.

During the latter years of his residence in England his health was quite poor, and the climate suited neither him nor his family. The expenses of maintaining a proper establishment, and of educating his children in a fitting manner were far in excess of his salary, and the diminution of his private means made serious pecuniary embarrassment much to be feared. He ardently desired once more to be in Maryland, among the friends and companions to whom his heart constantly turned. As he said himself, every day added something to his cares and nothing to his happiness; he was growing old among strangers, and needed the excitement of his own particular work. The futility of his mission became thoroughly impressed upon him. At last, in 1810, the motive of inadequate means grew so powerful that he was compelled to ask for his recall. As time went on his requests grew more urgent, till in 1811 he was notified of his recall. In February, he had an audience with the Prince Regent at Carlton House; expressed his regret at the futility

of his attempts to "set to rights the embarrassed and disjointed relations of the two countries," and soon thereafter returned to the United States. He arrived in Annapolis in the following June.

Much the same events thereupon transpired as on the occasion of his first return from England. He took up again with strengthened powers his temporarily deserted profession, and as before soon received substantial tokens of the confidence and respect of the people both of his own State and of his country. His election to the Maryland Senate was followed in a short time by his appointment by President Madison as Attorney-General of the United States. He entered at once on the congenial duties of the latter office, and found many cases of a familiar nature awaiting his attention. He exhibited in the discharge of his business as Attorney-General a "force of argument and eloquence, and an extent of learning which raised him at once in the public estimation to the head of the American Bar."

The pregnant and vital questions of the politics of the day enlisted his active participation, and it was at this period that under the name of "Publius" he wrote the influential pamphlet in which he declared "the war with England — irreproachably just." He ably traced the course and nature of Britain's preposterous claims; clearly stated England's theory of perpetual allegiance, and its harmful acts, and called on Maryland and the whole country to support the administration in its just and honorable attitude.

The passage of a bill in Congress by which the Attorney-General was required to reside at the seat of government, made it necessary for Mr. Pinkney either to give up many of his interests, or to resign the office he held as director of the national law affairs. The latter he decided to do, and in 1814, again retired to private practice with the most sincere expressions of esteem and friendship from President Madison, who attested

his regret at losing so efficient an officer.

Soon after his resignation he was engaged on one of his most celebrated cases, that of the claims of a certain Mr. Pinto of Buenos Ayres for recovery of neutral property, seized on board the British ship *Nereide*, which was tried before the Supreme Court. In his decision in the case Mr. Chief Justice Marshall, although he overruled Mr. Pinkney's arguments, paid a flattering tribute to his masterly and eloquent conduct of the case.

During the war of 1812 Mr. Pinkney showed the sincerity of his former advocacy of the war by actually engaging in the defence of his country, and at Bladensburg, while acting as major of a battalion of riflemen attached to the Third Brigade of the Maryland militia, was severely wounded. His military service was, however, merely incidental.

In 1815, he added to the duties of his lucrative practice the obligations of Congressman from Maryland, elected from Baltimore. Extraordinary diligence was the supreme characteristic of this rarely endowed man. He took considerable part in the debates of the House, especially on the subject of the Commercial Convention of 1815 between the United States and Great Britain, but his chief interest was for his profession, and when, in March, 1816, he resigned his place as congressman, he felt as though he had been negligent of his trust, and had not lived up to his responsibilities.

His acceptance at this time of a foreign mission was dictated by the necessity of respite from the "anxious days and sleepless nights" which his enthusiastic interest in his work entailed. Furthermore, he desired greatly to see Italy. He wished to visit that classic land, the study of whose poetry and eloquence, as he expressed it, was the charm of his life, and from whose shores he hoped to return to his work with renewed enthusiasm and added power for public speaking. His first mission was to visit the Neapolitan

court as special minister to demand indemnity for the seizure and confiscation of American merchant ships in 1809. He was then to proceed to St. Petersburg as Minister Plenipotentiary to the court of Russia.

Mr. Pinkney landed at Naples in July, 1816, and after several months spent in fruitless conferences and discussions, proceeded to visit Rome and some of the principal Italian cities, stopping thereafter at Vienna and Berlin. His immediate departure for St. Petersburg was delayed on account of a slight diplomatic question concerning the trial of a Russian consul in Philadelphia, and it was not till the early part of 1817 that he reached the Russian capital. His reception here was in every way agreeable, and he found in the Russian court and society ample opportunity for the keen observation in which he delighted. His stay in Russia was, however, comparatively short. On account of ill health he had asked for his recall before leaving Italy, and when the recall came in 1818 he joyfully returned for the third and last time to his best-loved manner of life.

During the closing years of his career he constantly practised with the same faithfulness and ardor before the Supreme Court, and from the fourth of January, 1820, till his death represented Maryland in the United States Senate. It was at this time, in the Senate, that he delivered one of the most powerful of the speeches of his life against the clause prohibiting slavery in the bill to admit Missouri to the Union. He kept up his professional and political interests with unabated vigor till, prostrated by overwork and excitement in the preparation and delivery of an argument before the Supreme Court, he was attacked by the sickness, which, in a brief space, proved fatal.

His death on the twenty-fifth of February, 1822, was a sorrow and shock to his all associates. Mr. Harper, Mr. Webster, Mr. Clay, Mr. Marshall, and the most prominent men of the day recalled and eulogized his remarkable powers and rare qualities. The Supreme Court, the Senate, and the House of Representatives attended his funeral and passed resolutions. Evidences of the respect in which he was held were general in his own State and throughout the whole country.

Mr. Pinkney achieved a reputation as a statesman, and his kindly courtesy and pleasant manners won the affection of those with whom he came in contact, but his great aim in life was neither political nor personal popularity. With him distinction as a lawyer was the one and worthy goal, and his professional life reveals most clearly the elements of his success. The best characterization of him was that of a distinguished lawyer who said of him, "that he did not believe that he ever undertook a cause, however insignificant it might be, without entering into it, as it were, with his whole soul, and managing it as if his whole professional reputation were at stake upon the issue. It was his pride and passion never to appear in court, but after having entirely mastered the business which he was to transact. Sleep, exercise, the pleasures of society, he was always ready to renounce, rather than hazard the loss of an inch of the ground which he had gained, or seem at any moment unequal to his reputation." His sterling traits of mind and character, and his passionate love for his profession achieved for him a lasting success which justifies his reputation as one of the foremost lawyers the United States has ever produced.

CONFESSION AND AVOIDANCE.

BY ALBERT W. GAINES.

It created a sensation in the Darktown congregation,
 When Ezekiel said he wished to be a saint;
 And the members all asserted that when 'Zekiel got converted,
 'Twas enough to make Old Nick himself grow faint.
 But they took him on probation to accomplish his salvation,
 They exhorted him a better life to lead;
 Notwithstanding this, howe'er, he was summoned to appear
 To the charge of dancing—deadly sin—to plead.

"I iz come befo' de Session, fo' to make you my confession,"
 Said Ezekiel, with a solemn countenance;
 "I distinctly recollects all dem solemn, wahnin' texts,
 Dat you coted 'bout de gamblin' an' de dance;
 How dat when I got de 'ligion, sho' I mustn't cut de pigeon-
 Wing no mo'; an' dat dancin', 'twuz de Debbil's own;
 Dat 'Come seben, come eleben' wouldn't take me up to Hebben--
 An' I vow'd dat I would leabe 'em all alone.

"Zi wuz stridin' an' a-reachin', an a-comin' to de preachin',
 In a mighty hurry, night or two ago,
 On a sudden I wuz facin' an open doo' adjacen'
 Down dar in de Pickaninny Row;
 Zi wuz in de doo' a-glancin', I cud see dey's gwyne to dancin',
 (An' my bredren, dem gals des fahly shine!)—
 As dey wuz 'bout to begin it, jes' allows I'll stop a minute,
 As dey passes up an' down de dancin' line.

"Den de fiddle 'gins to singin' an' de banjo 'gins to ringin',
 An' de promptah, he shout: 'S'lute an' balance fo','
 An' dem niggahs go paradin' wid dey pahtnah's promonadin',
 An' dey chassees back and foth across de flo';
 As de promptah calls de figgahs like a wave ob sea, dem niggahs
 Sweeps across an' back an' thu so vehey neat,
 Sho—I tells you, pahson, truly, dat I gits somewhat unruly,
 An' I feels a mighty fidgits in ma feet.

"Den dey wahms up to de dancin', all retirin' an' advancin',
 An' dey stahts into de Ole Virginny reel,
 Den dey 'gins to dance he hoedown, growin' gradual to de breakdown—
 (You can imagine, bredren, how dis niggah feel!)
 Den de music libely growin', all de instruments a-goin',
 An' de ragtime floats upon de air so sweet,

An' dem gals all in dey ruffles, as dey dance de double shuffles,
Den I feels it wuss—dat fidgets in de feet.

“How it happens I’s no notion, but dis coon wuz soon in motion,
When de promptah, he calls out: ‘Gran’ right an’ lef’,
I wuz in among dem niggahs, an’ a-dancin’ all de figgahs,
(For in truff, no coon can dance ‘em like myse’f);
Yes, I danced de heel an’ toe, double shufflin’, ‘cross de flo’,
Jig and juba, clog, an’ den de highlan’ fling;
Den I jin’d in de cotillion—an’, pahson, ‘twuz wuth a million,
Jes’ to see de way I cut de pigeon-wing!

“But, my bredren ob de Session, in considerin’ dis confession,
I des wahnts to tell you what de lawyahs say:
‘Dat no man can be convicted and no punishment inflicted,
Whar de irresist’ble impulse holds de sway—’
Now, I hopes you ain’t gwyne doubt it, when I say I’s sorry ‘bout it,
Yes, suhs, dreffe sorry, bredren, I repeat;
But I’s not guilty I’s insistin’, kase no possible resistin’
Can obercome de fidgets in de feet.”

RESTRAINTS ON MARRIAGE.

By W. C. SULLIVAN.

PUBLIC or sound policy is a term of which no entirely satisfactory definition has yet been given, and no rash venture will here be made into the unexplored regions of lexicography. It will suffice to say that it is as its name implies, that policy which has for its object the promotion of the common welfare,—not, indeed, of the body politic, but of the individual members composing that body.

Restraints on marriage are either general or special. General restraints are prohibited as being opposed to the policy of the law, while certain special restraints are permitted where they are not of such a nature as to foster those evils which are so readily engendered by encouraging celibacy. There is some conflict and no little discordant reason-

ing, however, in the application of these general rules. “It is impossible to reconcile the authorities or arrange them under one sensible, plain, general rule,” said Lord Loughborough in *Stackpole v. Beaumont*, 3 Ves. Jr., 96. And the reconciliation is no nearer today than it was when Lord Loughborough spoke, if the language of numerous American judges and English Chancellors is to be accepted, so numerous and so sweeping in their character have the distinctions whereby the general rule prohibiting restraints on marriage has been abolished become. Thus, it has frequently been said that a restraint, though general in its terms, may be imposed, if properly framed. If this be true, the rule is but one of construction, however, and not one of policy, though to try to

prevent marriage has been called the blackest of all political sins. *Lowe v. Peers*, 4 Burr. R., 2225. But it is essential to remember, in this connection, that this objection is one which forces its way through flesh and bone, to the very heart and life of the question at issue. It does not depend upon whether or not a certain provision "tries" to prevent marriage, but the question rather is, Is that its tendency? This rule has not been established by nice and close reasoning. The question has never been a close one, but its foundation and framework are so plainly visible throughout the whole superstructure that he who runs may read. The doctrine is one based on principles of policy, the object whereof is the promotion of the common welfare. Being a question of policy it cannot, at the same time, be one of construction, for public policy cannot be overcome or assisted, strengthened or weakened by any consideration outside of itself. Rules of construction are not at home in this field of the law. They are like the proverbial bull in the china shop, making no end of trouble and doing no amount of good, but contaminating and destroying whatever they come in contact with.

The law looks not to the form of the provision, but to its substance, where questions of public policy are concerned; it is the general tendency which, alone, is considered, and if found to contravene the policy of the law, then the door to temptation is summarily closed, without further inquiry, refusing to either admit or recognize it in any of the courts of the land.¹

Where the policy of the law is concerned, there is but one question for the court, and that—Is the nature of the contract such as might have made it injurious to the common welfare? In other words, is that its

¹ *Tool Co. v. Norris*, 2 Wall. 45, 46; *Oscanyan v. Arms Co.*, 103 U. S. 261; *State v. Johnson, Admr.*, 52 Ind. 197; *Clippinger v. Hepbaugh*, 5 W. & S., (Pa.) 315; *Brown v. The First National Bank of Columbus*, 137 Ind. 668.

tendency? It matters not that any particular contract is free from the taint of evil. The law looks to the general tendency of the class to which it belongs.²

Such being the case, how can it be material whether a particular provision "tries" to prevent marriage, or is in the form of a condition or of a limitation, a condition precedent or subsequent; whether it concerns realty or personalty, or is accompanied by a gift over or not—so long as the only question open to consideration is what is the natural tendency of such a provision?

In *Bellairs v. Bellairs*, L. R., 18 Eq. 516, Sir George Jessel, M. R., recognized the impropriety and futility of any further inquiry in this class of cases, saying, "Now if the rule were really one of policy you never could evade it by a change in the form of words. But it is admitted you can so evade it; that if you put it in the form of limitation—if, for example, you had given this life interest to this young lady until she married, and then upon marriage had given it over—it is not disputed that that would have been good. Therefore, it seems to be a rule of construction. The reason of the rule may have been policy." In substance, then, the Master of the Rolls said: It seems to be a rule of construction because it is conceded that you can evade it by putting it in the form of a limitation. It was this concession that made it seem to be a rule of construction, and it is indisputable that change of effect by alteration of form, without affecting substance, can be attained only by rules of construction. But the Master of Rolls, in the same breath, adds: "The reason of the rule may have been policy;" though he did not proceed to ascertain what the reason actually was, satisfying himself with suggesting what it may have been. And there seems to be some inconsistency here. If "the reason of the rule may have been policy," it may well be asked how "it

² *Greenhood on Public Policy*, p. 5; *Brown v. The First National Bank of Columbus*, *supra*.

can be evaded by a change in the form of words." This very doubt would seem to impose the necessity of solving it. However, his reason for failing to do so would appear to be quite evident, when the concession made on the record is borne in mind, for, when once made, it mattered not what the reason was so far as the case in hand was concerned. It was governed not by the general rule, but by that rule as modified by the admission in the record. The only point decided by the Master, and not admitted by the concession, was "If the rule were really one of policy you never could evade it by a change in the form of words." Where, therefore, as is now universally the case, it is recognized that the rule prohibiting general restraints on marriage is one of policy, it cannot be evaded.

As Lord Mansfield said, in *Long v. Dennis*, 4 Burr. R., 2052, "Conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness. They are contrary to sound policy."

"Unqualified restrictions on marriage are discouraged on grounds of public policy, and instead of aiding them by applying liberal rules of construction, the courts have been disposed to construe them strictly, in such manner as will favor the persons on whom the restraints are laid." (*Waters v. Tazewell*, 9 Md., 291, 309.)

"Where a condition is in restraint of marriage generally, it is deemed to be contrary to public policy, at war with sound morality, and directly violative of the true economy of social and domestic life. Hence such a condition will be held utterly void." (*Maddox v. Maddox*, 11 Grat., 804, 807.)

Authorities to the same effect are legion.

The rule is, therefore, one of policy and not of construction. Indeed, an admission that the question is one of construction is self-destructive, for on what ground could the general rule be upheld in that event? It cannot be on ground of policy for, as we

have already seen, public policy and rules of construction are not agreeable one to the other; they have no feature in common. Rules of construction are devised in order to glean purpose and intent; public policy carries its purpose and intent emblazoned on its face, and depends not upon intent, but upon tendency. Where sound policy is involved, rules of construction are unnecessary and tend to confuse rather than to enlighten. Where rules of construction are employed, public policy has no application. It follows then that the objection to general restraint of marriage must and does rest on grounds of policy, or else it has no foundation upon which to repose, and the prohibition must be absolute, extending to everything tending to restrain marriage, or it must leave the privilege of so doing untrammelled, unfringed and unimpaired.

There is one class of cases requiring some slight additional consideration, namely, whether or not the intention of the provision is to prevent marriage or to provide for the grantee until marriage. It is thought that special reference should, perhaps, be made to this case, since the purpose of the provision is so very commendable, and one which it would seem proper to encourage. But, unfortunately, the *tendency* here, as elsewhere, is to prevent the grantee from marrying. And that tendency is the grand criterion in all these cases. What is the tendency or effect of the provision? Does it unreasonably restrain marriage? Is it such a restraint as operates for the protection of the party restrained, or is it such as to foster the evils so graphically depicted in *Lowe v. Peers*, 4 Burr. R., 2225? All these are proper questions, but the inquiry into the intention of the grantor can throw no light whatever upon the subject.

If the courts could give effect to the wishes or intentions of the parties, when ascertained, rules of construction would be of considerable assistance to them in attaining the

desired end. But this they cannot do. They cannot inquire into the motives of the parties, but must stop short when they have ascertained that the contract is one which is opposed to public policy. The purpose of this rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice public good for private benefit. (*Elkhart County v. Crary*, 98 Ind., 242.)

"Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency and not its actual results." (15 Amer. & Eng. Encycl. of Law, 2d. ed., 934.)

In *Hartley v. Rice*, 10 East, 22, the plaintiff declared in assumpsit upon a wager made on the 25th of November, 1799, whereby he bet with the defendant 50 guineas that he, the plaintiff, would not be married in six years; stating that in consideration that the plaintiff promised to pay the defendant 50 guineas in case he, the plaintiff, should be married within that time, the defendant promised to pay the plaintiff the like sum if the plaintiff should not be married within that time.

The plaintiff was nonsuited, Lord Ellenborough saying: "On the face of the contract its immediate tendency is, as far as it goes, to discourage marriage; and we have no scales to weigh the degree of effect it would have on the human mind. . . . No circumstances are stated to us to show that the restraint was reasonable; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract."

Blanc, J., also said: "Now it is impossible to say that such a contract might not have an effect on the mind of the party to deter him from marrying during the six years; but a contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law; and nothing is stated here to show

it to be otherwise in the particular instance."

The general prohibition is one dependent for its enforcement neither upon the common nor upon statute law (15 Amer. & Eng. Encycl. of Law, 2nd. ed., 933-4;) and, indeed, to paraphrase the language of Lord Loughborough in *Stackpole v. Beaumont*, 3 Ves. Jr., 96, how these numerous rules of construction should have ever become engrafted upon our law is impossible to be accounted for, but upon this circumstance, that there was a blind adherence to the text of the English law. Our judges did not reason; but only looked into the books, and transferred the rules, without weighing them, as positive rules to guide them.

The tendency of the American courts in dealing with restraints on marriage is "to construe them strictly, in such manner as will favor the persons on whom the restraints are laid." (*Waters v. Tazewell*, *supra*.)

In the language of the Missouri court, in *Williams v. Cowden*, 13 Mo. 211: "The preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too important to society to be weighed in the scale against individual or personal will. In this case, it need scarcely be more specifically intimated, that the clause in question, however well intended, virtually presented and held up a continued reward for that species of immorality to avert which the institution of marriage was so divinely ordained and has been so wisely upheld. By its terms, no offence, but that of marriage, however, suitable; no crime, even, could divest his child of the estate bequeathed her. Surely society has not been organized thus to uphold a direction to property, which is not its creature, and which could not even be acquired or transmitted without its aid and protection but which it must be obvious might thereby undermine and overthrow the main foundation upon which it reposes."

A VIEW FROM THE STENOGRAPHER'S TABLE.

BY JOHN COLLINS.

IN the trial of a law case each of the actors looks from his own point of view. That of the counsel for plaintiff is exactly opposite to that of the counsel for defendant; while the court, seated on a pedestal, high above everybody else, views the proceedings from a lofty, judicial aspect; and of course his opinions are bounded strictly by the law as it may be applied to the facts in the case. The jurors look at it from still another point of view, which in many cases is not bounded by law, facts, or anything else.

And the view from the stenographer's table! Well, the stenographer is not supposed to have any view. But being human, he cannot help having thoughts about the facts, and at times he even ventures to have his opinions on points of law raised by counsel in their arguments to the court. These opinions may be right or wrong; he nevertheless holds them, until the point is decided by the court, when of course he knows exactly what the law is.

The stenographer is interested in the methods pursued by the different attorneys in the examination of witnesses, for on these largely depends the ease or difficulty with which he can perform his work. Some attorneys put their questions with a fiery impetuosity, shooting them, as it were, from the mouth of a cannon—or a pistol, as the case may be. From the polished lips of others the questions flow out in a steady, unbroken stream of great volume, like oil from the pipe lines of the Standard Oil Company, Sometimes, especially in cross-examination, an attorney will put a string of questions in rapid succession, not waiting to learn whether the witness answers or not, and the witness is compelled to squeeze his answer in between the questions, much as a pedestrian crossing a crowded thoroughfare is

compelled to dodge between the rapidly moving vehicles; and often he is exceedingly fortunate if he finds a chance to answer at all.

Other lawyers ask a question in clear, intelligible language, with great precision, and wait until the witness has answered it before putting the next question. When the stenographer strikes an examination of this kind, after the red hot one above referred to, he feels much like the traveler over an arid plain, who has been without water for a long time, when he comes upon a pure stream, fringed with grass and leafy trees under whose shade he may escape the scorching rays of the sun. When these fiery, impetuous fellows are pushing the witness to the wall, as they appear to think, the stenographer sometimes fancies they are getting the worst of it all the time—in other words, that the attorney is improving his chances of losing the case by every answer he draws from the witness. But the stenographer may be wrong in this, as he doubtless is in many things.

The following verse illustrates a feature which formerly gave no little annoyance; but it has been corrected in great measure, because the use of shorthand in the courts has tended to educate attorneys as well as stenographers. The man who frequently sees his image in the mirror will be likely to keep his face washed.

Upon the stand the witness sat;
The lawyer handed him a plat
On which were lines and figures drawn with
engineering skill.

“Now, tell the jury just the spot
Defendant stood and fired the shot,”
The lawyer said, “and try to talk distinctly
if you will.”

The witness answered: "This is where
Deceased was at, and over there
I seen defendant standing just a little bit
before
He fired the shot, and over here
Is where he stood and drunk his beer;
And here's the place the man fell down and
laid upon the floor."

The shorthand man, of course, must
make
His record full, and had to take
The words that seemed to make the thing to
every one so clear;
But if he had forborne to write,
And left the page untouched and white,
He would have written just as much as that
which did appear.

Frequently three or four attorneys and
the witness are all talking at once, while the
court, too, is trying to get in a few words.
It must be apparent that on such occasions
no human hand can take down every word
uttered, and the stenographer must decide
with lightning rapidity what is important
and what is not. Any material omission
from the record would call down upon him
the censure of court and counsel, and might
do irreparable injury to one of the contest-
ants.

Where a trial relates to ordinary matters
the words used are such as the stenographer
writes almost every day, and the outlines
are as familiar to him as the letters of the
alphabet. He instinctively makes them with
scarcely any mental effort. In cases involv-
ing technical, scientific or medical questions
the words employed are of an entirely differ-
ent character, and he is constantly coming
across words he seldom has occasion to
write, and he necessarily writes them with
considerable mental effort and with much
less rapidity than those with which he is more
familiar. When the rapid-talking lawyer

comes to cross-examine the expert witness,
to whom these colossal words may seem
commonplace, the stenographer is likely to
wish witness and lawyer could look at things
from his table. He has tried to express this
idea in verse, as follows:

When learned doctor, from the stand,
With erudite pomposity,
In words few jurors understand,
Replete with ponderosity,

Says plaintiff, from some force applied
To occiput externally,
About ten thousand deaths has died,
And tortured is infernally;

Then shows, in words grammatical,
The case's etiology,
Prognosis problematical
And its obscure pathology;

While lawyer, with scholastic zeal,
From lexicons and treatises,
Has stuffed his cranium till we feel
No brain is so complete as his,

And fires his questions intricate
With great impetuosity,
While witness does not hesitate,
But answers with velocity;—

The shorthand man would like to be
Transferred to some locality,
Where such acute verbosity
Would end in quick mortality.

But things will probably go on without
much change. It would be a most uninter-
esting world if all people were alike. Impul-
sive lawyers will continue to press their ex-
aminations with great rapidity, and super-in-
telligent witnesses will still live and air their
learning. The stenographer must do the best
he can to meet the emergencies as they arise.

THE WORK OF THE NEW YORK LEGAL AID SOCIETY.

BY WADDILL CATCHINGS.

FEW law offices have a practice greater and more diversified than that of the New York Legal Aid Society. Nearly sixteen thousand people were given legal assistance during the past year. Sixty-seven different nationalities were represented among these. When the Society was organized twenty-five years ago by some German philanthropists in New York City, its assistance was confined to German immigrants. The need for such a society among all classes of the poor was so evident that this limitation was soon removed.

The Society does not conduct a volunteer charitable bureau, but a practical business law office. In addition to the main office on Broadway there are three branches, one on the East Side, in the building of the University Settlement, one for sailors, on State street, and the third, principally for the benefit of women, up town on Tenth avenue. The entire time of twelve attorneys and a large force of stenographers and clerks is required to carry on the work.

The money to support the Society is received largely from the seven hundred or more members, but to a certain extent from the contributions of persons taking a passing interest in the work. The clients, too, pay something, for the assistance is not entirely free. Three kinds of payments are required—a retaining fee of twenty-five cents (a necessary protection against frivolous claims), the court fees, and a commission of ten *per cent.* on all sums recovered in excess of five dollars. These payments are not always insisted upon, for when they would cause hardship, the office is said to “advance” them.

The exaction of these small charges is part of the general policy of the Society to keep the charitable nature of the work as far in the background as possible, and to secure

the general atmosphere of an ordinary law office. Cases are undertaken, as a general thing, without regard to the character of the applicant, but wholly on their legal merit. Charitable persons and societies daily send worthy people to the Society, but the offices are open to all who desire to apply. There are only two limitations—the client must be unable to pay a lawyer and must have a valid cause of action which affords reasonable assurance of success. When a case is undertaken, every effort is made to maintain between the office and the client the relationship which would exist if the client paid for the work. This is as it should be, for in fact the work is paid for, although the client pays but a small part.

The work of the Society includes all the steps required in the ordinary practice of the law. In many cases, advice or the drawing up of formal papers, is all that the clients need. Whenever necessary, cases are carried to actual trial and judgment even in the highest courts. In a surprisingly large number of cases, however, the Society accomplishes its end simply by informing the person against whom there is a claim, that the Society is interested in the claim. The changed situation which this interference brings about is continually illustrated in a striking manner. After an employé has made many unsuccessful efforts to collect wages from an employer, and has met with excuse after excuse, or has been paid only what the employer felt inclined, the Society will take up the case and write for information. It is remarkable in how many cases a check is received by return mail.

With the exception of negligence cases and cases dealing with divorce and separation, the work of the Society extends to all branches of the law. Negligence cases are

taken so readily by reputable lawyers on the basis of a contingent fee, that the Society has found it wise to refuse to take them except under special circumstances. The reason for the exception in the case of separation and divorce is, however, somewhat different. Obviously the unsettling of domestic relations which would result from free aid to indignant wives and wrathful husbands would be rather less charitable than the work of the Society aims to be. This interesting limitation does not extend to cases in which it is necessary to secure support for abandoned wives or children. All other classes of civil cases are undertaken, from pensions, for the collection of which there is a Washington connection, to crusades against installment sharks. Such an extent of practice takes the attorneys of the Society into all the courts, from the lowest municipal court to the Court of Appeal and to the Federal courts.

The collection of wages is the largest branch of the Society's work. They are recovered from all classes of the community. The manager of a "Coney Island show" has been compelled to pay his "houtchie couthie" dancer. When a woman of wealth and social prominence had refused to pay her maid for some frivolous reason, the Society forced her lawyer to explain to her that the law would not allow contracts to be broken for such reasons. Last summer two miners came from the Pennsylvania coal fields to New York to collect their wages from a coal company recently very much before the public eye. After being repeatedly turned away from the offices of the company, they came to the Legal Aid Society. They had their money within two weeks.

A most useful provision of the New York Code allows the arrest under some circumstances of an employer who does not pay the wages of a woman. A mere suggestion of the existence of the statute is usually sufficient to induce prompt payment. At times, however, more refractory individuals are

found. A rather amusing case was that of a lawyer who refused to pay his stenographer. Having all of his property in his wife's name, he felt himself secure. When his attention was called to this provision as to arrest, his face assumed the smile of a man who knows all about the law. "I'll get out on bail," he said. He was in Ludlow Street jail for three days before he became convinced that bail was not allowed in such cases, and decided to permit his wife to pay the stenographer.

Another large class of cases are those against insurance companies. Not many of these are for the collection of the insurance money. The companies apparently adjust such claims without the beneficiaries calling in an attorney. Where, however, there has been an innocent breach of warranty, particularly as to age, and the policy has been cancelled, many difficulties arise. The man who has paid money out honestly for many years only to discover that he is to get nothing in return, has a natural feeling that he ought to get his money back. The agent of the company glibly, or brusquely, tries to explain that the law will give him nothing, and ends with a definite refusal to pay. When the company is seen by an attorney from the Legal Aid Society, its attitude is entirely changed. The claim agent smiles most genially and becomes very happy to avoid suit by a return of the premiums. A typical case of this sort was that of an Irishman who had kept up a permanent disability policy for five years. Upon taking out the policy he had said that he had no definite information as to his age, but that to the best of his knowledge and belief he was fifty-one years old. When he was injured in an accident, the company sent to their agent in Ireland to see if he could get definite information as to the man's age. The agent did find old census reports and church records which proved that there had been a mis-statement of several years. The company thereupon refused to pay the

insurance money or to return the premiums. The man tried for several years to get the company to repay the premiums, but without success. Within ten days after the Society took hold of the case, he had his money.

Cases of a similar nature arise with great frequency against benefit associations. Many of these companies also have representatives in Ireland to verify statements as to the age of members. In many cases, strangely enough, these representatives, for some reason, are not asked to make their investigations until after the member has made large payments. At the present time the Society has several suits pending against benefit associations for the return of premiums and assessments. It sometimes occurs that these associations, in order to escape the payment of benefit money, expel a member when he or his wife or some member of his family seems about to die. The Society sometimes takes proceedings to compel the reinstatement of the member, and sometimes effects a good compromise with the association for the payment of a sum of money. A case of the latter kind was the following. A man had been sick, and certain sums were due him as benefit money. His society heard that his wife was dangerously ill. They refused to pay the sick benefit money due the member. He consulted a lawyer who wrote to the association for information. The man was thereupon expelled for "unfraternal" conduct in asking legal advice against the society. The Legal Aid Society later had little difficulty in getting a good settlement covering not only the sick benefit money, but also a large part of the money which should have been due upon the death of the wife.

The Seaman's Branch of the Society is doing very remarkable work. It is in fact accomplishing what it was hoped that the United States Shipping Commissioner would do. The attorney in charge of this branch is becoming in a degree the recognized arbitrator of the port of New York. To him are con-

stantly referred the difficulties which arise between masters and seamen. The ship companies realize his unprejudiced position, and they respect his decision because they know, that he is prepared to go to court to enforce it. In this last respect, his readiness to go to court to enforce what he thinks is just, he has an advantage over the Shipping Commissioner which has allowed him to succeed where the latter has failed. In protecting the sailors on land, in breaking up the old board-house gangs, and in putting a stop to the notorious practices of the crimps, this branch of the society has met with most satisfactory success.

A great part of the work of the Society is in the Surrogate's Court, in getting guardians, executors and administrators appointed, in forcing others to file an accounting, in securing legacies, and in other work of this nature. One of the most difficult cases with which the Society has had to deal was this. A girl who had just come of age applied for assistance in recovering a legacy which had been left her when a child, and of which her father had been appointed guardian. He had not filed an accounting, and the daughter thought that he had squandered the money on drink. For several years his family had not been living with him because of his habits. Two daughters supported the mother by working in an insane asylum, and more recently in a laundry. The girl was exceedingly good looking, with much refinement in her face and manner.

The story of the father was pitiful. He was an old, gray-haired man, with a face that except for its weakness of feature, was very good. He said that it was true that he had used his daughter's money. He had felt that what was hers was his. He could not resist the appeals of his wife, and although he knew that it was wrong, whenever he had no other money he would give her five or ten dollars of the daughter's money. His present repentance could not repair the effects of his

past weakness. He had absolutely nothing. The clothes which he wore he was buying at one dollar per week. They still belonged to the installment firm. He earned from three to sixteen dollars per week in a glass works. There was only one chance of paying her the money. He had had his life insured in her favor for the amount he owed her. He was old, feeble and care-worn, and would soon die. Then she would get the money. The one aim of his life was to keep up the premiums on the insurance. There were two men on his bond as guardian, but they were poor men, who would be ruined if they had to pay for him. He would do anything in sacrificing himself to save them.

It was, indeed, a difficult case. The attorney finally decided to have the old man file his accounting, so that if at any time either surety had any money, the Society could get it for the girl. It did not seem wise for a charitable society to throw the sureties into greater distress than that of the girl. The old man came to the Society for advice as to the drawing up of the accounting, so that one attorney was in the unusual position of conducting an action for both parties.

A case more pleasant to contemplate was that of an old man who had inherited five hundred dollars. A friend of his, a lawyer, undertook to get the money for him. The executor would not pay, and fraudulently used up the estate. The old lawyer in proceeding against the executor managed to get the case in an inextricable tangle. When the case came to the Society, the old lawyer, after countless attempts to explain how matters stood, exclaimed in desperation, "You must begin *devo novo*." And this the Society did with success by going against a surety company which had all the time been on the bond of the insolvent executor.

The cases to secure support for deserted wives and children furnish many interesting studies in human nature. A woman who recently came into the office said: "My hus-

band has two wives, and I want to find out which one I am." A remarkable feature of this sort of case is the surprisingly good feeling which exists between the two or more women who have been victimized. It is not at all infrequent for two women to come into the office together, each holding the other's hand, and for one of them to say, "My husband is living with her, and we want to know what we can do about it." Not long ago, while the Society was trying to straighten out the difficulties of two wives, a letter was received from a third, who lived in New Haven, Conn., in which she expressed the earnest desire that the other two come to pay her a visit. "We would have so much to talk about," she said.

A woman came into the office one afternoon, and told this story: About a year before she had been married in England, and her husband had come to this country to prepare a home for her. About a month before, as the result of a letter from him she had come over to join him. Her husband had met her at the steamer—apparently with joy. (As they entered his home, they were met by a woman, whom her husband described as his housekeeper. He introduced his wife to her as his sister. The wife at once corrected this. "Oh, no, you are not his wife," exclaimed the other woman; "I am his wife.")

In telling about the case, the little English woman did not seem to object seriously to the housekeeper's living with her husband. But her husband, who kept a Turkish bath, was in the habit of bathing the other woman. Then she would bathe him. The wife said she "couldn't stand for that." The Society took the case under advisement. The very next day, by a curious coincident, the husband, of his own accord, came in and begged the aid of the Society in getting rid of his wife. He told about the same story, saying that he had got his wife over here, and now did not know what to do with her. When the Society had him locked up he said, "And

I thought this was a free country."

A very delightful case, one that showed the better side of life, was that of an Irish woman who was the wife of a drunkard. She was a quiet little woman, with a singularly soft voice and a gentle manner. She was penniless. In reply to a letter, the husband came into the office, drunk. Apparently he had no redeeming feature. He insisted in his maudlin way that his wife had deserted a good home. To get rid of him, it was almost necessary to kick him out of the office. When told about the interview, his wife said in her quiet way, "Yes, it was too bad that he drank, for he was a splendid husband when he was sober, and one of the best machinists in New York. Even now, drinking as he was, his employer allowed him to work at his job whenever he was sober enough." The attorney in charge told her that the Society would be glad to get support for her, and that he had no doubt but that they could do it.

"But suppose that he doesn't pay when the court orders him to?"

"Oh, he'll pay, all right—or go to jail."

"They don't treat them very well when they put them in jail, do they? And he has a weak constitution, particularly since he has been drinking so much."

No, she did not think that she wanted him to go to jail. She would do the best she could, take in washing, scrub floors, or do anything rather than have him go to jail. The attorney remonstrated, but she was firm. She refused positively, if quietly. And curiously enough, she was right. She got her husband's employer to pay her his wages, she got her husband to decrease his drinking, and now she seems actually happy in living with him again.

One of the most spectacular pieces of work that the Legal Aid Society has ever done was the crusade conducted against the installment dealers. Their practices caused widespread injustice and distress among the poor. This case will illustrate the nature of the transac-

tions carried on. An Italian on the East Side had built up a prosperous shoe business, in a small way. An installment dealer approached him with the assurance that he could not maintain his position in the world unless he had a gold watch. The Italian insisted that he did not want the watch, but finally gave in, being persuaded that after he signed the installment contract he could pay at his convenience. The price of the watch was \$45; it was worth almost nothing. After \$42 had been paid, the installment dealer sued on the contract for \$20 more. Upon the day when the case was to be tried, the dealer had the Italian engaged in conversation on the outside of the court room while the case was being called. He was then told that it had been adjourned to a day later than in reality it had been. Of course, he was not present at the trial, and the case went against him. Judgment was entered, and a body execution issued. The Italian was thrown into jail, and forced to pay \$26 in addition to the \$42 he had already paid on the watch. The Society has had the judgment reopened, and is now endeavoring to have the installment dealer indicted for perjury in swearing that there were \$20 due him.

Several of the city marshals were in the pay of the installment dealers. When a man who bought property on an installment contract was sick in bed or in great distress because of the death of his wife or a child, a marshal would be sent around by the installment dealer to demand more money, on a threat of carrying the man off to jail. Sometimes, even when the price had already been paid, a marshal by a judicious use of his badge could get more. The Society became thoroughly interested in breaking up such practices. Charges were brought against several of the marshals, public hearings were held before Mayor Low, and the dismissal of the marshals was secured. Furthermore, at the instigation of the Society, the district attorney has had a number of the installment dealers

and several of the marshals indicted for perjury. An ultimate result of the crusade was that the rules in regard to body executions have been so changed in the recent Municipal Court Act, that now it is much more difficult for the installment dealers to make use of arrest as an aid in extorting money on their installment contracts.

One of the most important aspects of the work of the New York Legal Aid Society is the protection which its mere existence affords. Attention has already been called to the frequency of the cases in which it is necessary only to inform a man of the intervention of the Society in order to protect a client. Doubtless in many cases injustice is prevented by the fear that the Society may be called. As the knowledge of the existence of the Society and of its purposes becomes more widespread, this effect must increase in proportion. The poor are oppressed in many cases because of their supposed helplessness, and their inability to secure legal advice. The only way in which this evil can be met is by such a society as the New York Legal Aid Society.

There is, moreover, a deep and far-reaching

social significance in this aspect of the work. The dissatisfaction with the government which often exists among the poor is due in a certain degree to the difficulty which the poor man finds in setting the law in motion, in getting the law on his side. The only phase of the law which is revealed to him is that which allows vicious men to oppress him. The poor man is, therefore, often against the law because the law is against him. It is not enough for a man's protection that laws exist. He must be able to call them into effective operation. Unless the laws are called into effective operation for the benefit of the poorer classes they cannot be expected to develop the regard and respect for the enforcement of the law which is essential to good citizenship.

Viewed in this connection, the work of the New York Legal Aid Society is of broader consequence than would appear on the surface. It actually brings it about that the poor man has the aid of the law at his command. In this respect the New York Legal Aid Society is developing the sounder and better citizenship so essential to American institutions.

O'CONNELL'S LAST CASE.

BY JOHN DE MORGAN.

DANIEL O'Connell, lovingly known and spoken of as the "Great Irish Liberator," had a record at the bar which has never been excelled. He was almost unvaryingly successful; he never undertook a case without feeling that he could throw his whole soul into it and plead as though he were the accused instead of the defender. He lived at a time when to be arrested meant conviction, when but little justice and scant mercy were shown to an accused. The government did not hesitate to openly pack the jury, and often the

counsel for the defendant had to offer a bigger bribe to obtain even a show of justice.

"The Crown has promised to protect you in your tenancy," said a barrister pointing to the foreman of a jury, a tenant farmer, "but the defendant will protect you and stock your farm in addition." And though such open offers of reward were not often made, nevertheless secretly the jury had the chance to weigh which verdict would pay the best.

So that when Daniel O'Connell was accused of using unfair means to procure ver-

dicts he was only fighting fire with fire, and placing the defence as near on a level with the prosecution as was possible.

There was another reason why O'Connell fought as he did; the most trivial offence was punished by long transportation or

on the occasion of the trial of the so-called Doneraile conspirators.

An unpopular Irish justice of the peace had been murdered, and in the investigation the Crown professed to have unearthed a conspiracy to kill a number of oppressive local



DANIEL O'CONNELL.

death, in fact, as one judge declared on the bench, it "was cheaper for the government to hang a man than to keep him in prison." O'Connell was strongly opposed to the death penalty for any crime.

O'Connell's last appearance in court was

magnates. One hundred and fifty persons were indicted, and were to be tried in three batches of fifty each.

In the defence of the first batch O'Connell was not engaged, and they were all convicted and sentenced, lads of fifteen and old men of

seventy, to be hanged within the week. The remaining prisoners and their friends, seized with panic, sent an urgent messenger from Cork to Derrynane, ninety miles away, to urge O'Connell to hasten to the rescue.

There was not a moment to spare, as the presiding judge had refused to delay the opening of the trial of the second batch one hour. He declared that his time was more precious than the lives of a few accused conspirators, and so the trial must proceed. O'Connell, traveling in a light conveyance, with relays of horses, and scarcely stopping for rest or food, traversed the exceedingly wretched Kerry roads at the highest speed, and at length arrived in the court house square, his horse dropping dead between the shafts as he descended. Thousands hailed him with wild shouts, "He's come! He's come!"

Amid a frantic uproar of cheers, the great lawyer entered the court room, where the Solicitor-General was already addressing the jury. The Crown prosecutor turned white, and so did the faces of the accused, but for a different reason; the one saw defeat, the prisoners saw life and liberty before them instead of an ignominious death.

O'Connell at once bowed to the judges—there were three of them on the bench—and apologized for not appearing in wig and gown; he also asked for permission to refresh himself in court, as he had not eaten for several hours. A bowl of bread and milk was brought, and as he ate, a young barrister on either side of him poured into his ear what had been done already, and how the case stood.

It was a strange scene. The Crown was represented by the aristocratic, well-groomed Solicitor-General, slim, tall and graceful, while O'Connell, big, massive, almost slovenly looking, munched his bread and drank his milk. Not a word escaped him, and fre-

quently he interrupted the learned Crown counsellor by shouting, his mouth filled with bread and milk, "That is not law!"

Sometimes he had to argue his point, but in nearly every case the judges had to admit very reluctantly that he was right and the Solicitor-General wrong.

But when he rose to cross-examine the witnesses he proved how successful he could be. They told, or tried to tell, the same story upon which the first batch had been convicted, but O'Connell so badgered, tripped and terrified them that their evidence went hopelessly to pieces and some even confessed that they knew nothing about the case.

It was late at night when the case was given to the jury and the judges ordered that no food, nor even a drink of water or a light, should be allowed the jury until a verdict was reached. All night, in the darkness of the jury-room the case was discussed; morning came and no decision was reached; the foreman asked for breakfast, but his request was refused; day merged into night, and the starved jurors again faced the blackness of their room, scarcely better than a prison cell, until on the following morning they announced that a verdict was impossible, for they could not agree. The accused were not tried again, for O'Connell secured the acquittal of the third batch, and so the government discharged them and commuted the sentence of the unfortunates who had been first tried and sentenced to death, to transportation to the penal colony of Van Dieman's Land.

One of the jurors almost hysterically addressed O'Connell: "Wisha, God knows 'tis little I thought of meeting you, Counsellor O'Connell! May the good Lord save me from you in the future!"

That was the last case ever undertaken by O'Connell. He had earned his rest, for he had proved his power.

MEDIAEVAL TRAMPS.

AS far as occasional glimpses allow us to judge, the mediæval tramp was as like in character and conduct to the tramp of the present day as ever were father and son to each other.

The history of vagrancy in earlier times is frequently a history of social oppression, by which the laborer is driven to lead a wandering life; the history of begging is from first to last a history of craft on the part of the beggar, and of credulity on the part of his supporters. From the fragments of laws dealing with vagrancy that have come to us from Anglo-Saxon times we can infer that it was then a recognized evil. The most ancient of these is an enactment of Hlothære, who was king of Kent from 673 to 685. It makes the host responsible for the misdeeds of his guest, who no doubt would frequently be a fugitive from justice, a runaway slave, or a highway robber.

Private hospitality was necessarily much resorted to by honest and dishonest, poor and rich alike, at a time when inns were few, workhouses non-existent, and monasteries—which to some extent supplied the place of both—were at distances too great to be covered by a day's journey. And no doubt, under cover of hospitality, all kinds of enemies of society could be harbored by their accomplices, and aided to escape justice. To check this Hlothære's law enacts that "If a man entertains a stranger for three nights at his own home, a chapman, or any other that has come over the march, and then feed him with his own food, and he then do harm to any man's let the man bring the other to justice, or do justice to him."

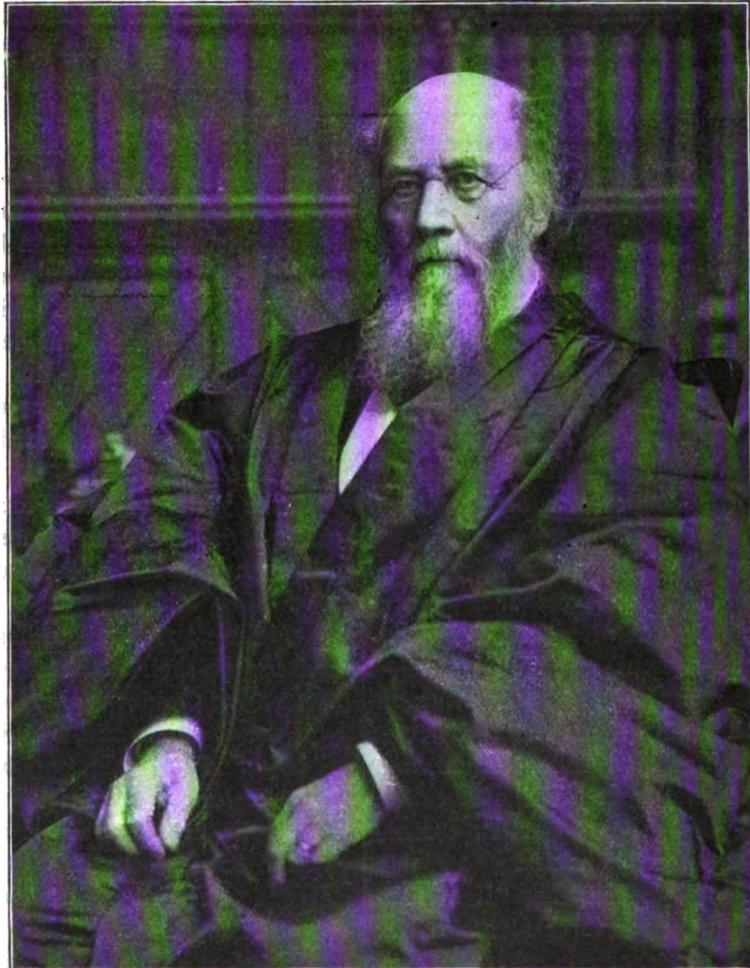
Under the later Anglo-Saxon kings we find numerous regulations aimed against "lordless and wandering" men. On the other hand, the Church inculcated charity and mercy, and the duty of hospitality.

During the period succeeding the Norman conquest the legal status of the lowest stratum of society improved. But lawlessness, violence, and disorder were terribly rife. The fearful oppressions endured by the people at the hands of the barons in the reigns of Henry and Stephen, are vividly depicted in the Anglo-Saxon Chronicles, and are too well known to need repetition here. When the Black Death carried off a third of the inhabitants of Europe, England included, the free laborers, who had by that time become pretty numerous, found themselves masters of the situation owing to the scarcity of labor, and they made such good use of their advantage that the "Statute of Laborers" was passed to compel them to work for the old wages. One of its clauses made it penal to give alms.

In the Vision of Piers Ploughman, written about 1362, are descriptions of the struggling cottager and the sneaking beggar.

In the Middle Ages "Poor Scholars" thought it no disgrace to beg for the means of defraying their expenses of the journey to Oxford and Cambridge, and of their maintenance there. Even still, begging students are to be found in Spain, and perhaps in some other European countries. But the Oxonian of the present day would doubtless be startled to read that his predecessors were regularly licensed by the University to beg from the townspeople.

It is often said that the dissolution of the monasteries in the reign of Henry the Eighth was the origin of begging and vagrancy in England. But from the statutes, as well as from the allusions of contemporary writers, it is evident that this is a complete error. Henry the Eighth tried hard to stamp out the pest of beggars, and is believed to have hung no fewer than three-score and twelve thousand (72,000.)



STEPHEN J. FIELD.

A CENTURY OF FEDERAL JUDICATURE.

VII.

BY VAN VECHTEN VEEDER.

AFTER serving as a justice of the Supreme Court of the United States Supreme Court for thirty-four years and seven months, thereby surpassing all previous records of service on that bench, Justice Field terminated by resignation a continuous judicial career of more than forty years' duration. Carried westward in the great movement of 1849, his unusual professional abilities soon attracted attention, and in 1857 he took his seat on the bench of the Supreme Court of California. The difficulties of the position at that time can hardly be overestimated. The common law was not acknowledged as a whole; the civil law as then recognized had been adulterated by the Spanish-Mexican codes. In the feverish pursuit of gold, contracts were made without deliberation or formality, and the early legislation was equally careless and ill-advised. Consequently, mineral and land grants were in chaos. The heterogeneous aggregation of people which made up the early population of the State was little calculated to facilitate the establishment of law and order. It was in such a school that Justice Field demonstrated his independence, fearlessness and judicial capacity. Under conditions which were surely unique, he discharged his duties without fear or favor. The Terry episode was only one of several occasions on which he was in danger of bodily harm. His judicial work during this period displays a high order of judicial capacity. In many of the problems which confronted him there were no precedents; in others he was forced to decide between the conflicting claims of two widely different systems of law. The situation therefore demanded original thinking, extensive learning, not only in the common

law, but also in the civil law and its various corruptions, power to analyze, sift and select principles, and to assimilate them with the prevailing jurisprudence. To these requirements Justice Field's vigorous intellect was entirely equal, whether in developing new law or in reforming the laws then in operation.

Such were the characteristics which he brought to the Supreme Court of the United States in 1863. While he was in no sense a specialist, his work in this court is perhaps most conspicuous in the domain of constitutional law; and it is with reference to his labors in this department that a few additional considerations suggest themselves. Justice Field was independent to a fault; he was extremely tenacious of his individual views. None of his colleagues was so often in dissent; none wrote so many separate concurring opinions. The considerations which usually induce a judge to sacrifice his personal views, where no vital principle is involved, did not appeal to Justice Field; like Justice Bradley, he believed in dissent. And through such influences it has come about that conflict of opinion among the justices, which was regarded as exceptional during Chief Justice Marshall's time, has been continued. It is perhaps inevitable that there should be considerable conflict of opinion in constitutional questions, although the old idea that such differences necessarily arise out of the political affiliations of the judges has been thoroughly exploded. In Justice Field's case, at all events, dissent was inevitable. Coming to the bench when the nation was exerting all its power to suppress a great civil war, and holding the views he held upon the powers of the national government and

the rights of individuals, no other course was open to him. In most cases the difference was one of principle, as to which there could be no compromise.

Justice Field, was, then, no mere obstructionist. Without asserting that his course was entirely consistent, its guiding principle is plain. He was a strenuous defender of the civil rights of personal security and private property—the inalienable rights of life, liberty and the pursuit of happiness, in time of war as well as in peace, and against the aggressions of all power, whether State or national; while, with respect to the political powers of the national government, especially when not involved with questions of private right, he was a strict constructionist. These views at once brought him into conflict with the majority of his colleagues, and into disfavor with the prevailing public sentiment. But he was the last man to be influenced in the performance of his duty as he understood it by any such considerations. As far as I am aware, he referred to them only once in his judicial opinions. In concluding his powerful dissenting opinion in *Knox v. Lee*, 12 Wall. 457, he said:

"In the discussions which have attended this subject of legal tenders there has been at times what seemed to me to be a covert intimation that opposition to the measure in question was the expression of a spirit not altogether favorable to the cause in the interest of which that measure was adopted. All such intimations I repel with all the energy I can express. I do not yield to anyone in honoring and reverencing the noble and patriotic men who were in the councils of the nation during the terrible struggle with the Rebellion. To them belong the greatest of all glories in our history—that of having saved the Union, and that of having emancipated a race. For these results they will be remembered and honored so long as the English language is spoken or read among men. But I do not admit that a blind ap-

proval of every measure which they may have thought essential to put down the Rebellion is any evidence of loyalty to the country. The only loyalty which I can admit consists in obedience to the Constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a right to command. So thought our Great Master when he said to his disciples: 'If ye love me, keep my commandments.'"

The record of Justice Field's judicial service is made up of one thousand and forty-two opinions: six hundred and twenty in the Supreme Court of the United States, fifty-seven in the United States Circuit Court, and three hundred and sixty-five in the Supreme Court of California. From such vast labors a few leading cases may be cited in substantiation of the foregoing characterization.

Justice Field's guiding principle was the protection of individual rights of personal security and private property. In his view, these rights were closely related. "If," he said in the *Sinking Fund Cases*, "contracts are not observed, no property will in the end be respected; and all history shows that the rights of persons are unsafe when property is insecure. Protection to one goes with protection to the other, and there can be neither prosperity nor progress where this foundation of all just government is unsettled." And there was in his theory this corollary, that these inalienable rights must be secured equally and impartially to all.

His general attitude and tendency toward individual rights is indicated in the difference of opinion between Justice Bradley and himself in *Ex parte Wall*, 107 U. S. 265. Compare, to the same effect, his dissenting opinion in *Munn v. Illinois*, 94 U. S. 113, with Justice Bradley's dissenting opinion in *Chicago, etc., Railroad Company v. Minnesota*, 134 U. S. 418. His views of individual liberty were most definitely formulated in

cases arising out of the various war measures adopted by national and State governments. In *Beckwith v. Bean*, 98 U. S. 266, he said, in dissenting from the judgment of the court: "The doctrine sometimes advanced by men, with more zeal than wisdom, that whenever war exists in one part of the country, the constitutional guaranties of personal liberty and of the rights of property are suspended everywhere, has no foundation in the principles of the common law, the teachings of our ancestors, or the language of the Constitution, and is at variance with every just notion of a free government. Our system of civil polity is not such a rickety and ill-jointed structure that when one part is disturbed the whole is thrown into confusion and jostled to its foundation. The fact that rebellion existed in one portion of the country could not have the effect of superseding or suspending the laws and Constitution in a loyal portion widely separated from it. . . . A claim to exemption from the restraints of the law is always made in support of arbitrary power whenever unforeseen exigencies arise in the affairs of government. It is inconvenient; it causes delay; it takes time to furnish to committing magistrates evidence which, in a country where personal liberty is valued and guarded by constitutional guaranties, would justify the detention of the suspected; and, therefore, in such exigencies, say the advocates of the exercise of arbitrary power, the evidence should not be required. A doctrine more dangerous than this to free institutions could not be suggested by the wit of man. . . . 'All the ancient, honest, juridical principles and institutions of England,' says Burke,—and it is our glory that we inherit them,—'are so many clogs to check and retard the headlong course of violence and oppression. They were invented for this one good purpose, that what was not just should not be convenient.' Whoever, therefore, favors their subversion or suspension, except when, in the presence

of actual invasion or insurrection, the laws are silent, is consciously or unconsciously an enemy to the Republic."

He enforced similar views in *Cummings v. Missouri*, 4 Wall. 277, where, in delivering the judgment of the court, he said that "the theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." And in the contemporaneous case of *Garland*, 4 Wall. 333, where the question was, not as to the power of Congress to prescribe qualifications, but whether that power had been exercised as a means for the infliction of punishment, against the prohibition of the constitution, he held, by a similar course of reasoning, that this result could not be accomplished indirectly by a State under the form of creating qualifications. See, also, *Dent v. West Virginia*, 129 U. S. 114.

No more vigorous (and, in many minds, conclusive) defense of civil rights can be found in the reports than his dissenting opinion in the oleomargarine case of *Powell v. Pennsylvania*, 127 U. S. 678. The doctrine asserted in that judgment, he maintained, "is nothing less than the competency of the legislature to prescribe out of different articles of healthy and nutritious food, what shall be manufactured and sold within its limits, and what shall not be thus manufactured and sold. I have always supposed that the gift of life was accompanied with the right to seek and produce food, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others. I have supposed that the right to take all measures for the support of life, which are

innocent in themselves, is an element of that freedom which every American citizen claims as his birthright. . . . By 'liberty,' as thus used, is meant something more than freedom from physical restraint or imprisonment. It means freedom not merely to go wherever one may choose, but to do such acts as he may judge best for his interest and not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment. . . . With the gift of life there necessarily goes to every one the right to do all such acts, and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor. The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by force of legislative or constitutional enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men. The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no State can give and no State can take away except in punishment for crime. It is involved in the right to pursue one's happiness. . . . The answer made to all this reasoning, and this decision is, that the act of Pennsylvania was passed in the exercise of its police power; meaning by that term its power to provide for the health of the people of the State. Undoubtedly, this power of a State extends to all regulations affecting not only the health, but the good order, morals, and safety of society; but a law does not necessarily fall under the class of police regulations because it is passed under the pretence of such regulation, as in this case, by a false title, purporting to protect the health and prevent the adulteration of dairy prod-

ucts, and fraud in the sale thereof. It must have in its provisions some relation to the end to be accomplished. If that which is forbidden is not injurious to the health or morals of the people, if it does not disturb their peace or menace their safety, it derives no validity by calling it a police or health law. Whatever name it may receive, it is nothing less than an unwarranted interference with the rights and the liberties of the citizen."

Nor were the safeguards established by the Constitution to be impaired by the substitution of other safeguards enacted by the legislature, nor frittered away by subtle construction. This is made plain by his dissent in *Brown v. Walker*, 161 U. S. 591, where the court held that legislative immunity from prosecution was a valid substitute for the constitutional privilege of declining to incriminate one's self. "The constitutional safeguards for security and liberty cannot be thus dealt with. They must stand as the Constitution has devised them. They cannot be set aside and replaced by something else on the ground that the substitute will probably answer the same purpose." In the "granger" case of *Munn v. Illinois*, 94 U. S. 113, he declared that the judgment of the court that "it is within the competency of a State to fix the compensation which an individual may receive for the use of his own property in his private business," was subversive of the rights of private property, and in conflict with the authorities cited in its support. "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature." "The doctrine of the State court that no one is deprived of his property, within the meaning of the constitutional inhibition, so long as he retains its title and possession, and the

doctrine of this court, that whenever one's property is used in such a manner as to affect the community at large it becomes by that fact clothed with a public interest, and ceases to be *juris privati* only, appears to me to destroy, for all useful purposes, the efficacy of the constitutional guaranty. All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, it does not merit the encomiums it has received."

No considerations of State sovereignty were conclusive in his mind when the civil rights of the individual were at stake. He therefore dissented from the majority of the court in *Louisiana v. Jumel*, 107 U. S. 728, where recourse was denied to the creditors of a State on its repudiated obligations. "It would puzzle the wit of man," he said, "to find anywhere in the legislation of the world a more perfect assurance of the fixed purpose of a State to keep faith with her creditors, or of a pledge of a portion of her revenues for their payment, or of the submission of her officers to the compulsory process of the judicial tribunals to carry out her engagements;" and he dissented from the conclusion of the majority that the constitutional prohibition against the impairment of the obligation of contracts was of no efficacy against repudiation by the State, and asserted his purpose of continuing his protest "until the prohibition inserted in the Constitution as a barrier against the agrarian and despoiling spirit, which both precedes and follows a breach of public faith, is restored to its original vigor." "If a State contracts to do certain things, and in order that they may be performed, subjects her officers to the control of the courts, and makes their refusal to carry out her pledges a felony, it cannot be justly

contended that her reserved rights are at all invaded if her officers are judicially commanded to do what she says they shall do. . . . If the State is above the Constitution of the United States; if the protection of that instrument does not extend to her engagements with individuals; if her power is as absolute as the Parliament of England; if the theory of the Federal Constitution, that it binds States as well as individuals, is unsound; if it is not, as it declares itself to be, the supreme law of the land,—then my position falls; but otherwise there is no answer to it—at least none that I have been able to see." See also his dissent in *Antoni v. Greenhow*, 107 U. S. 784. He had the satisfaction of having these views adopted in part in the subsequent Virginia Coupon Cases.

Justice Field believed in the equality of all men before the law. This is the fundamental conception of his great dissenting opinion in the Slaughterhouse Cases, 16 Wall. 36. In that case he contended that the war amendments were intended for whites as well as blacks; that they conferred upon all alike, if born in the United States or naturalized, citizenship in the United States. He did not question the power of the States over all matters of internal concern, nor did he seek to impair in any way the exercise of any authority which the States had theretofore exercised over their internal affairs. But he insisted that in the exercise of the powers of the State there should be no unjust discrimination against any classes or persons by giving to some rights and privileges denied to others in like condition. In other words, he insisted that in the exercise of the police powers the rule of equality should prevail.

"This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restric-

tions than such as are imposed equally upon all others of the same age, sex and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. . . . That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal and impartial laws."

Throughout the discussion of these amendments—in *Strander v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, 100 *ib.* 315; *Ex parte Virginia*, 100 *ib.* 339; *Neal v. Delaware*, 103 *ib.* 370—he protested against what he considered the artificial views of the majority of the court. "To afford equality of protection to all persons by its laws," he said in *Neal v. Delaware*, "does not require the State to permit all persons to participate equally in the administration of those laws, or to hold its offices, or to discharge the trusts of government. Equal protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the amendment, when its courts are open to them on the same terms as to others, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty and the pursuit of happiness, which do not equally affect others; when they are liable to no other nor greater burdens or charges than such as are laid upon others,

and when no different nor greater punishment is enforced against them for a violation of the laws."

In *Ex parte Virginia* he makes plain the fundamental distinction between civil and political rights:

"The amendment secures to all persons their civil rights upon the same terms; but it leaves political rights, or such as arise from the form of government and its administration, as they stood previous to its adoption. It has no more reference to them than it has to social rights and duties, which do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals. In the consideration of questions growing out of these amendments, much confusion has arisen from a failure to distinguish between the civil and the political rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends upon fitness, to be adjudged by those whom society has clothed with the elective authority. The Thirteenth and Fourteenth Amendments were designed to secure the civil rights of all persons, of every race, color and condition; but they left to the States to determine to whom the possession of political powers should be entrusted."

This great principle of equality, in his opinion, was not the special privilege of citizens of the United States. Although he had delivered the opinion of the court sustaining the Chinese Exclusion Act, he denied the power of Congress to deport from the country persons lawfully domiciled therein, by its

consent, and engaged in the ordinary pursuits of life. "Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guarantees for the protection of their persons and property which are secured to native-born citizens. The moment any human being from a country at peace with us comes within the jurisdiction of the United States, and with their consent, . . . he becomes subject to all their laws, is amenable to their punishment and entitled to their protection. Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens. They differ from citizens only in that they cannot vote or hold any public office. As men having one common humanity, they are protected by all the guaranties of the Constitution. To hold that they are subject to any different law or are less protected in any particular than other persons, is in my judgment, to ignore the teachings of our history, the practice of one government, and the language of our Constitution." *Fong Yue Ling v. United States*, 149 U. S. 698.

Justice Field's most elaborate statement of his views with respect to the powers of the national government will be found in the *Legal Tender Cases*, *Knox v. Lee*, 12 Wall. 457, and *Juillard v. Greenman*, 110 U. S. 421. His dissenting opinions in these cases constitute the most profound and exhaustive presentation ever made of the minority view of this much-discussed subject. The fact that his dire predictions have not been realized does not impair the force of his objection to the recognition of this power of taking property from one person and giving it to another.

"As there are unchangeable principles of right and morality, without which society would be impossible, and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice,

upon the existence of which all constitutional government is founded, and without which government would be an intolerable and hateful tyranny. . . . I know that the measure, the validity of which I have called in question, was passed in the midst of a gigantic rebellion, when even the bravest hearts sometimes doubted the safety of the Republic, and that the patriotic men who adopted it did so under the conviction that it would increase the ability of the government to obtain funds and supplies, and thus advance the national cause. Were I to be governed by my appreciation of the character of those men, instead of my views of the requirements of the Constitution, I should readily assent to the views of the majority of the court. But, sitting as a judicial officer, and bound to compare every law enacted by Congress with the greater law enacted by the people, and being unable to reconcile the measure in question with that fundamental law, I cannot hesitate to pronounce it as being, in my judgment, unconstitutional and void." *Knox v. Lee*, *supra*.

The relation between Federal and State governments was exhaustively discussed in *Ex parte Clarke*, 100 U. S. 404, and in *Boyd v. Nebraska*, 143 U. S. 135. The former case established the concurrent authority of the national and State governments over Congressional elections. In Justice Field's opinion no such advance had ever before been made toward the conversion of our Federal system into a consolidated and centralized government. "The act of Congress asserts a power inconsistent with, and destructive of, the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty, is essential to that independence. If the Federal government can punish a violation of the laws of the State, it may punish obedience to

them, and graduate the punishment according to its own judgment of their propriety and wisdom. . . . However large the powers conferred upon the government formed by the Constitution, and however numerous its restraints, the right to enforce their own laws by such sanctions as they may deem appropriate is left, where it was originally, with the States."

In *Boyd v. Nebraska* he denied the jurisdiction of the court to determine a disputed question concerning the right to the governorship of a State. "The national government's powers of interfering with the administration of the affairs of the State, and the officers through whom they are conducted, extends only so far as may be necessary to secure to it a republican form of government and protect it against invasion, and also against domestic violence, on the application of its legislature, or of its executive when that body cannot be convened. Except as required for these purposes, it can no more interfere with the qualification and installation of the State officers than a foreign government. And all attempts at interference with them in those respects by the executive, legislative or judicial departments of the general government are, in my judgment, so many invasions upon the reserved rights of the States, and assaults upon their constitutional autonomy." See, also *Barbier v. Connelly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 *ib.* 703; *Hayes v. Missouri*, 120 *ib.* 68; *Missouri Pacific Railroad Company v. Humes*, 115 *ib.* 512.

Moreover, Justice Field believed in the strict construction of the powers conceded to the national government. His course with respect to the confiscation acts of 1861 affords a good illustration of his point of view. In the case of *Miller v. United States*, 11 Wall. 268, in which he dissented from the judgment of the court, he did not deny the right of the United States, at its option, to treat the inhabitants of the Confeder-

ate States engaging in rebellion as public enemies, and to apply to them all the harsh measures justified by the rules of war, or to prosecute them in the ordinary modes of criminal procedure for treason. But the question was, which course had Congress authorized? Legislation founded on the war power was subject to no limitation except the law of nations, while legislation founded on the municipal power of the government and directed against criminals was subject to all the limitations prescribed by the Constitution for the protection of the citizen against hasty and indiscriminate accusation, and which insure to him when accused a speedy and public trial. Having reached the conclusion that the legislation in question was enacted in the exercise of the municipal power, he held, therefore, that a proceeding *in rem* for the confiscation of the property of parties charged with certain overt acts of treason could not be constitutionally maintained without the previous conviction of the parties for the offenses alleged. While he was unable to secure the adoption of this view, he succeeded in subsequent cases (*Windsor v. McVeigh*, 93 U. S. 274; *Conrad v. Waples*, 96 U. S. 279; *Burbank v. Conrad*, 96 U. S. 291) in rigidly confining the operation of these acts within the letter of the law.

On the other hand, in *Coleman v. Tennessee*, 97 U. S. 509, and *Dow v. Johnson*, 100 U. S. 158, he extended the utmost protection to the army in the enemy's country. "The question is," he said in the latter case, "what is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home and in time of peace is es-

sential to the preservation of liberty."

And in *Tarble's Case*, 13 Wall. 397, where a state commissioner sought to inquire, by writ of *habeas corpus*, into the validity of enlistments in the military service of the United States, he wrote the opinion of the court denying the jurisdiction of the State tribunals. "This limitation upon the power of State tribunals and State officers furnishes no ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression."

To the foregoing statement of Justice Field's uniform tendency toward a strict construction of the constitutional powers of the national government, one conspicuous reservation must be made. He participated with Justices Bradley and Miller in establishing on broad lines the Federal supremacy over interstate commerce.

The position that interstate commerce as such is solely a national matter, but that nevertheless there is nothing to prevent the States, in the exercise of their reserved powers, from enacting laws which Congress might enact in the exercise of its exclusive power over such commerce, has resolved many of the doubts in which the subject had been involved. As an adjunct to this theory, these judges, in a line of cases commencing with Justice Field's opinion in *Welton v. Missouri*, 91 U. S. 275, formulated and applied the constitutional doctrine that the absence of Congressional regulations as to matters national in their nature must be taken to be an indication of its will that there should be no State regulations, while over certain other subjects, such as pilots, the silence of Congress has not such effect. Some criticisms to which this doctrine has been

subjected will be discussed in connection with Justice Bradley's opinions.

In the domain of corporation law Justice Field delivered many opinions which have exercised wide influence. His opinions with respect to land, water and mining claims, and in relation to public bonds, have also received much consideration in other jurisdictions. In the ordinary subjects of civil jurisdiction his services were perhaps most useful in the law of torts. His opinion in the celebrated Nitro-Glycerine Case, 15 Wall. 335, and in *Little v. Hackett*, 116 U. S. 366, *Chicago, Milwaukee and St. Paul Railroad Company v. Ross*, 112 U. S. 377 and *Baltimore and Ohio Railroad Company v. Baugh*, upon various aspects of the law of negligence, may be cited as illustrations. And this brief consideration of his vast labors may well conclude with reference to his dignified exposition to the reciprocal relations of bench and bar in the case of *Bradley v. Fisher*, 13 Wall. 335.

The following are Justice Field's leading cases:

Constitutional Law:

Civil Rights in General: *Ex parte Garland*, 4 Wall. 333; *Dent v. West Virginia*, 129 U. S. 114; *Carlisle v. United States*, 16 *ib.* 147; *Beckwith v. Bean*, 98 *ib.* 266 (*diss.*); *Osborne v. United States*, 91 U. S. 474; *Brown v. Walker*, 161 *ib.* 591 (*diss.*); *Knote v. United States*, 95 *ib.* 154; *Fong Yue Ting v. United States*, 149 *ib.* 698; *Cummings v. Missouri*, 4 Wall. 277.

Fourteenth and Fifteenth Amendments: Slaughterhouse cases, 16 Wall. 36 (*diss.*); *Bartemeyer v. Iowa*, 18 *ib.* 129; *Strauder v. West Virginia*, 100 U. S. 303 (*diss.*); *Neal v. Delaware*, 103 *ib.* 370 (*diss.*); *Barbier v. Connelly*, 113 *ib.* 27; *Missouri Pacific R.R. Co. v. Humes*, 115 *ib.* 512; *Hayes v. Missouri*, 120 *ib.* 68; *Soon King v. Crowley*, 113 *ib.* 678; *Ex parte Wall*, 107 *ib.* 265 (*diss.*); *Powell v. Pennsylvania*, 127 *ib.* 678 (*diss.*).

Relations between State and Federal Governments: *Louisiana v. Jumel*, 107 U. S. 711 (*diss.*); *Ex parte Virginia*, 100 *ib.* 339 (*diss.*); *Virginia v. Rives*, 100 *ib.* 315 (*diss.*); *Ex parte Siebold*, 100 *ib.* 404 (*diss.*); *The Tarble Case*, 13 Wall. 397; *Boyd v. Nebraska*, 143 U. S. 135 (*diss.*).

Legal Tender: *Knox v. Lee*, 12 Wall. 457 (*diss.*); *Juillard v. Greenman*, 110 U. S. 421 (*diss.*).

Confiscation Cases: *Miller v. United States*, 11 Wall. 268 (*diss.*); *Windsor v. McVeigh*, 93 U. S. 274; *Conrad v. Wafles*, 96 *ib.* 279; *Burbank v. Conrad*, *ib.* 291.

De facto powers of the Confederate States: *Bruffy v. Williams*, 96 U. S. 176.

Protection to army in enemy's country: *Coleman v. Tennessee*, 97 U. S. 509; *Dow v. Johnson*, 100 *ib.* 158.

Protection of sealed matter in mails: *Ex parte Jackson*, 96 U. S. 727.

Taxation: State Tax on Foreign Held Bonds, 15 Wall. 300; Sinking Fund Cases, 99 U. S. 700; Central Pacific R.R. Co. v. California, 162 *ib.* 91 (*diss.*); Pollock v. Farmers Loan and Trust Company, 157 *ib.* 429.

Inter-State Commerce: Welton v. Missouri, 91 U. S. 275; County of Mobile v. Kimball, 102 *ib.* 691; Gloucester Ferry Company v. Pennsylvania, 114 *ib.* 196; Sherlock v. Alling, 93 *ib.* 99; Escanaba v. Chicago, 107 *ib.* 678; Miller v. Mayor of New York, 109 *ib.* 385; Cardwell v. American Bridge Co., 113 *ib.* 205; Huse v. Glover, 119 *ib.* 543; Bowman v. Chicago, etc., R. R. Co., 125 *ib.* 465; Nashville, etc., R. R. Co. v. Alabama, 128 *ib.* 96; O'Neill v. Vermont, 144 *ib.* 323 (*diss.*); Geer v. Connecticut, 161 *ib.* 519 (*diss.*).

Contract clause: Spring Valley Water Works v. Schottler, 110 *ib.* 347; Butchers Union Company v. Crescent City Company, 111 *ib.* 746 (*diss.*).

Miscellaneous Constitutional Cases: Chæ Ching Ping, 130 U. S. 581 (Chinese exclusion act); Chew Heong v. United States, 112 U. S. 536 (*diss.*) (judicial power under treaties); Railroad Commission Case, 116 *ib.* 307 (*diss.*) (obligation of contracts); Munn v. Illinois, 94 *ib.* 113 (*diss.*) (granger case); Pennoyer v. Neff, 95 *ib.* 714 (State proceedings against non-resident debtors); Fort Leavenworth Railroad Company v. Lowe, 114 *ib.* 523 (Federal jurisdiction over State lands used for national purposes); McAllister v. United States, 141 *ib.* 174 (*diss.*) (President's power of removal).

Corporations: Paul v. Virginia, 8 Wall. 168; Marsh v. Fulton Company, 10 *ib.* 678; Tomlinson v. Jessup, 15 *ib.* 454; Delaware R. Tax Case, 18 Wall. 206; Board of Commissioners v. Lucas, 93 U. S. 108; Pensacola Telegraph Company v. Western Union Telegraph Company, 96 *ib.* 14; Pacific Railroad Company v. U. S., 120 *ib.* 227; Wardell v. Union Pacific Railroad Company, 103 *ib.* 651; Minot v. Philadelphia, etc., Railroad Company, 18 Wall. 206; United States v. New Orleans, 98 U. S. 381; Broughton v. Pensacola, 93 *ib.* 266.

Land, water and mining claims: Smelting Company

v. Kemp, 104 U. S. 636; Steel v. Smelting Company, 106 *ib.* 447; Jennison v. Kirk, 98 *ib.* 453; Atchinson v. Peterson, 20 Wall. 507; Basey v. Gallagher, 20 *ib.* 670; Wright v. Roseberry, 121 U. S. 488.

Public bonds: Pillsbury v. Louisiana, 105 U. S. 278; Hartman v. Greenhow, 102 *ib.* 672; United States v. New Orleans, 98 *ib.* 381; Broughton v. Pensacola, 93 *ib.* 266.

Admiralty and Miscellaneous: United States v. Rodgers, 150 U. S. 249; The Atlanta, 3 Wall. 425; The Moses Taylor, 4 *ib.* 411; The Siren, 7 *ib.* 152; Ross v. McIntyre, 140 U. S. 453; Maynard v. Hill, 125 *ib.* 190; Oscanyan v. Arms Co., 103 *ib.* 261; Illinois Central Railroad Company v. Illinois, 146 *ib.* 387; State of Iowa v. State of Illinois, 147 *ib.* 1.

Torts: Chicago, Milwaukee and St. Paul Railroad Company v. Ross, 112 U. S. 377; Baltimore and Ohio Railroad Company v. Baugh; Little v. Hackett, 116 *ib.* 366; The Nitro-Glycerine Case, 15 Wall. 524; Bradley v. Fisher, 13 *ib.* 335.

United States Circuit Court cases: United States v. Greathouse (ch.), 4 Sawyer 457; United States v. Knowles, 4 *ib.* 517; The Eureka Case, 4 *ib.* 302; United States v. Smiley, 6 *ib.* 640; Hardy v. Harbin, 4 *ib.* 536; Hall v. Unger, 4 *ib.* 672; Montgomery v. Bevans, 1 *ib.* 653; United States v. Flint, 4 *ib.* 42; Norton v. Meader, 4 *ib.* 603; Galpin v. Page, 3 *ib.* 93; County of San Mateo v. Southern Pacific Railroad Company, 8 Sawyer 238; Santa Clara Railroad Tax Case, 9 *ib.* 165; Giant Powder Company v. Powder Company, 6 *ib.* 508; Eureka Mining Case, 3 *ib.* 302; Ah Kow v. Nuan, 5 *ib.* 552; Ah Fong, 3 *ib.* 144; *In re* The Pueblo Case, 4 *ib.* 553; Charge to Grand Jury, 2 *ib.* 667.

California Supreme Court cases: *Ex parte* Newman, 9 Cal. 502; Perry v. Washbourn, 20 *ib.* 318; Cornwall v. Culver, 16 *ib.* 429; Biddle-Boggs v. Merced Mining Company, 14 *ib.* 373; Moore v. Wilkinson, 13 *ib.* 478; McCracken v. San Francisco, 16 *ib.* 591; McMillan v. Richards, 9 *ib.* 365; Moore v. Smaw, 17 *ib.* 199.



CRIMINAL PROCEDURE IN JEWISH COURTS.

By JULIUS H. GREENSTONE.

IN the early days of the Jewish commonwealth, there were no regular sessions of the courts. Whenever occasion required it, the court assembled and disposed of the cases at hand. Ezra and his contemporaries, recognizing the defects of such a system, appointed Mondays and Thursdays as court days. The sessions usually lasted until noon, but occasionally were continued until evening. A criminal case was never adjudged after sunset.

According to the Jewish system of jurisprudence, trial for a crime could be instituted at the instance of the injured party, or, as was commonly the case, at the instance of two witnesses. "At the mouth of two witnesses or at the mouth of three witnesses shall the matter be established" (Deut. XIX 15). There is no trace in the Jewish law of the existence of an official prosecutor. The confession of the accused was not admitted in evidence, for "no man can make himself out guilty." This principle the Rabbis applied to all criminal cases.

There was no preliminary examination of the defendant or of the witnesses. The trial began when the witnesses appeared before the court and delivered their testimony. If, however, further evidence was necessary to establish the crime, the culprit was imprisoned and the case deferred until the evidence was brought forth.

A trial involving capital punishment was conducted with great solemnity. The judges were conscious of the heavy responsibility resting upon them, and they pictured to their imaginations a sword threatening them from above and Gehenna yawning at their feet. The members of the court assembled in the court-room early in the morning and took their seats which were arranged in a semi-circle, so that they could see each other, and

so that all could face the witnesses. Two scribes were present, one seated on the right of the judges and the other on the left, one recording the votes and the arguments for acquittal and the other those for conviction. It is probable that the scribes also recorded the accusation as declared by the witnesses, although no mention is made of this in the Talmud. In front of the judges sat three rows of disciples, all learned in the law and eligible to the judgeship whenever a vacancy occurred. Each row consisted of twenty-three, the same as the number constituting the court. The culprit and the witnesses were conspicuously placed where they could face the whole court.

In the trial of all cases, criminal and civil, every man was presumed to be innocent until the contrary was proved. Hence, neither the judges nor the witnesses were sworn before entering their respective offices. Still, before being examined, the witnesses were earnestly exhorted and warned to speak only of what they saw or heard. The formula of this exhortation, as given in the Talmud (Sanhedrin 37a), was as follows:

"Perhaps your conviction of the prisoner's guilt is founded upon probability, circumstantial proof or hearsay; perhaps you are influenced by persons whom you regard as trustworthy and reputable; perhaps you are not aware that you will be submitted to a rigorous examination. Know ye that criminal cases are not like civil cases. In civil cases a man may atone for his guilt by paying an adequate sum of money, but in criminal cases the blood of the innocently condemned and of all his possible descendants, to the end of all generations, falls on the heads of the witnesses. Thus we find in the case of Cain, that God said to him, 'The voice of thy brother's bloods cry out unto me' (Gen.

IV. 10), not blood, but *bloods*, to teach us that by killing his brother Abel, Cain became guilty of shedding the blood, not only of his victim, but of all his possible progeny. God first created Adam alone, in order to teach us that he who causes the destruction of one life is as though he had destroyed a world, and he who saves a single life is as though he saved the whole world. You must not, however, on account of these considerations be deterred from testifying to what you actually saw, for it is written, 'And a witness, whether he hath seen or known of it, if he do not tell it, he shall bear his iniquity' (Lev. V. 1.) Nor need you scruple to become the instrument of this man's death, for it is written "In the destruction of the wicked there is joy' (Prov. IX. 10.)"

After this solemn exhortation, the examination of the witnesses was commenced. If their testimony agreed in all important details, and no protest was raised against the eligibility of any of them, and no other witnesses came to confute the first or to prove them guilty of collusion, the deliberations of the judges commenced. The defendant was first encouragingly addressed by the court in the following words: "If thou hast not committed the alleged crime, thou needst not fear." While his testimony against himself was not regarded, due attention was given to any argument he might offer in his defence. Until the accused was duly tried and convicted, he was in the eyes of the law regarded as innocent, and the burden of proof rested entirely upon the prosecutors or the witnesses.

Then the court began the discussion. If all agreed for an acquittal, the case was immediately disposed of and the culprit set free. Strange as it may seem, the unanimous verdict of guilty found on the day of trial had also the effect of an acquittal. If there was a difference of opinion among the judges, each one, beginning with the youngest, pronounced his decision and the arguments upon

which he based it, and the scribes carefully recorded them. As soon as all had expressed their opinions, the votes were counted and announced. A majority of one was sufficient for acquittal, but for conviction a majority of at least two was necessary. If two or more of the judges, holding the same opinion, advanced the same arguments for their opinions, although each one derived his from a different Scriptural passage, they had only one vote. If no majority for acquittal could be obtained on the same day, the court adjourned until the next day and the prisoner was led back to his cell. The judges ate but little food and were not permitted to drink any wine during the remainder of the day. Either by themselves or in company with their colleagues, the judges would spend the day and the night in deliberation and discussion over the case. Each one felt the grave responsibility resting upon his shoulders, and with sincerity and earnestness tried to find arguments in defence of the accused. On the next morning, the judges rose very early, and without partaking of any food returned to their seats in the court-room, and each one restated his opinion and the reasons for it. Any one who had the preceding day expressed himself for conviction might change his judgment and offer his reasons for such a change, but he who voted for acquittal was not permitted to revise his opinion. If no verdict could be obtained, for instance, when there were twelve for conviction and eleven for acquittal, two additional judges were added from the first row of disciples. If a majority of two against the defendant was then obtained, he was convicted, and if not, the process of increasing the number of judges by twos continued until the requisite majority was obtained, or until their number reached seventy-one. If after reaching that number, there were still thirty-six for conviction and thirty-five for acquittal, the case was reargued until one of those who were for conviction changed his opinion in

favor of the defendant. Should they, however, all remain determined in their decisions, the court adjourned and the prisoner was discharged.

After the deliberations and the counting of the votes, the verdict was pronounced by the chief of the Sanhedrin in the presence of the accused. If the verdict was for acquittal he was at once discharged, if for conviction, he was immediately led to execution. A verdict for acquittal could under no circumstances be reversed, while one for conviction might be reversed by the same court.

The execution took place before sunset of the day on which sentence was pronounced. It was considered unnecessary torture to keep the culprit in prison when there was no more hope for his release. The place of execution was at a considerable distance from the court-room, usually outside of the city limits. The judges remained in their seats, still thinking over the case, endeavoring to find some argument by which the convict might be saved. A flag-bearer was stationed at the gate, and at some distance from him was a horseman, ready at any signal from the flag-bearer to stop the execution. The convict was then led forth from the court-house, accompanied by two scholars, and a herald, marching in front of them, loudly proclaiming the name of the convict, his crime, when and where committed, the names of the witnesses, concluding with the remark that any one who knew aught in favor of the criminal should come forth and testify before the court. If any favorable testimony was produced, or if any of the judges who were still sitting in the court-room discovered an error in the judgment, the flag-bearer was ordered to give the signal and the horseman hastened to bring the

convict before the court, and a new trial was commenced. Even if the convict himself wished to return to the court, claiming to have bethought himself of an argument in his defence, without asking him for the argument, the two scholars conducted him back to the court. A second time he was permitted to come back, but the third time he was permitted to return only if the two scholars who accompanied him considered his arguments to be of some weight.

When they arrived within ten cubits of the place of execution, the convict was exhorted to make a confession of his sins (*Vidui*). If he was an ignorant man and did not know how to confess, he was told to repeat the following short formula: "May my death be an atonement for all my sins." A cup of wine mixed with olibanum, usually prepared by the noble women of Jerusalem, was then administered to him, which was intended to stupefy him and make him unconscious of the pain and shame that awaited him. When at a distance of four cubits from the scaffold, he was stripped of almost all his clothes (a woman was executed in her shirt), and was thus led to execution. The witnesses who caused the execution were also the executioners (*Deut. XVII. 7.*)

The body of the convict was buried soon after the execution (*Deut. XXI. 23.*) It was not interred in the family burial-ground, but in a cemetery especially prepared for that purpose. The relatives wore no sign of mourning, and manifested their resignation to the decree of justice by cordially greeting the judges and the witnesses. The property of the executed criminal was not confiscated, and all the laws of heredity were applicable here as elsewhere.

A FOREIGN COURT OF JUSTICE.

CAPETOWN is a quiet place. There is a marked absence of formality about its institutions—a matter which is quickly noticed by a lawyer in respect of the administration of the law. There is no pomp or formalism in the courts, but at the same time the procedure is distinguished by a quiet gravity and a common-sense that recommend it to the practical-minded man.

The presiding judge takes his seat in a court-room arranged after the manner of courts all the world over, but fitted and appointed in a very plain manner. Painted wood is the material used in all parts of the court, and there are no curtains or hangings in any part. Facing the judge are two long benches and desks, and midway at the back of the second bench is a space inclosed for the accused. The legal practitioners occupy the two benches, and there are no bars or railings to separate them from those on trial. When the prisoners enter their pen, they seem to be standing amongst the lawyers. A couple of policemen stand by the pen. The prisoners are brought in through a side door, which door permits access to the lawyers. Advocates do not wear wigs, but they are robed and banded; coming through the side doorway, robes and bands serve the useful purpose of distinguishing their wearers from the prisoners.

The judge, wearing robe and bands, but wigless, enters the court attended by the registrar and the sheriff. He takes his seat to the bow of a tipstaff clad in evening dress and bearing a wand. There is no declaration of the opening of the court, the first words uttered being those of the Crown prosecutor when he announces that he has been appointed to prosecute for the Crown. He then states what case he wishes to be taken, reading from a printed calendar which sets out specifically the facts and particulars. Here

is an example of how an entry on the calendar runs: No. 13. Prisoner's name, Jokwe Uggo; crime, theft; date of committal, 18.8.02; days in custody pending trial, 58; bailed or not, No; district, Capetown; witnesses—1, Cekio Makya; 2, Stewart Magali; 3, Gongalowanona Luisipie; 4, Jossa; 5, W. Inglis (Dete.). The prisoner is then brought in, and, the indictment being read over to him and explained through an interpreter if the accused be unable to speak English, he is asked to plead to it. On a plea of "not guilty" he is then asked to listen to the names of the jurymen, and to object to any if he may care to do so. Proceeding, the registrar who has acted so far then calls over the jurors, nine in number, drawing the names from a ballot-box. When the nine men are in the jury-box, the prisoner is asked if he is willing to be tried by them. On his assent, the jurymen stand up together, and the registrar administers the oath to well and truly try according to the evidence, to them in a body, raising up his hand with the thumb and first and second fingers erect, which motion is followed by the jurymen. This exhibition of the thumb and two digits takes the place of kissing the Bible. When the jurymen sit down, the registrar gives them in a few words the crime with which the prisoner is charged, and relapses into his seat. Immediately the Crown prosecutor calls the first witness, whose examination and cross-examination proceeds in the usual way. There is no opening address by the Crown prosecutor. When it is mentioned that there are no Courts of Quarter Sessions in Cape Colony, but that all cases committed by the magistrates come before a Supreme Court judge, it can be seen that procedure becomes simplified in order to economize time. Another matter which tends to economize time is the practice of continuing the same jury through-

out several cases, when the accused express themselves satisfied. When the same jury hear several cases, they are resworn in each case. As jury men are paid, there does not seem to be any discontent expressed at the prevailing practice. In the large majority of cases the prisoner is undefended by counsel, and he conducts his own defense. The judge, a native of the colony, a most careful and painstaking man and a good lawyer, takes an active part in the trial, and freely asks questions, especially when the prisoner is undefended. He gives every just assistance to the prisoner, and in his summing up, short and clear, he estimates the value of the evidence and leaves the matter in the jury's hands; when the jury have agreed on their verdict, which they usually do without leaving the box, they stand up and the foreman announces it. Save in exceptional cases, the sentence is at once given, and it seems to be severe in most cases. In one case in which two black men were found guilty of cattle stealing, they were sentenced to long terms of imprisonment and a flogging.

A prisoner may voluntarily give evidence on oath in his own behalf, when he is subject to cross-examination, but he may confine himself to a statement from the dock. As an example of the elasticity of the procedure, and to show how a judge will assist an accused person to defend himself, the following may be given. In a case in which a man was charged with obtaining money under false pretences, when the jury were considering their verdict, one of the jurymen stated that he wished to ask the accused one question, stating its substance. The judge informed the jurymen that the prisoner could not answer any questions, unless he voluntarily became a witness. But he went on to say that the prisoner could make any statement he might like on the subject-matter of the question. Acting on the principle that a nod is as good as a wink to a blind horse, the accused

made a statement substantially answering the jurymen's question.

One of the most noticeable things in a criminal trial, when the accused and the witnesses are unable to speak English, is the prominent part that the interpreter takes. He for the time being is the court, the whole court, and nothing but the court. A marvellous boy is the youth who acts as Kaffir interpreter. He is a white boy, and he lets himself loose in his work. Standing by the witness-box, he eyes the animated ace of spades that steps into it, and, speaking volubly in the native tongue, he raises his hand as an example to the witness to be sworn. He himself is first sworn to truly interpret. Each question of the Crown prosecutor is translated to the witness, and the answer given in English to the court—in the first person. Occasionally the accused volubly bursts out in language not to be understood of the white spectator, at hearing some remark of the witness. At once the interpreter turns on him and reproves him, at the same time waving his arms and gesticulating in what must be taken to be the native fashion. No explanation nor translation of this passage of arms is given to the court, but the interpreter turns to the witness and proceeds with the case. In cross-examination by the prisoner the interpreter also acts in the reverse manner. When the evidence is concluded, the interpreter moves from the witness-box to the side of the dock, and then, translating the words of the accused, he addresses the jury on his behalf. In almost every case an interpreter for Kaffir or Cape Dutch is necessary, which means a delay in the hearing. Perhaps it is that the slowness of the hearing, on account of the necessity for interpretation, has made the actual work in the courts more leisurely than we know it in Great Britain or Australia. The fact is that it is more leisurely, and practice seems to be less exacting, and to demand less effort than in the countries mentioned above. Roman-

Dutch law is more academic than English law, and its study is more classical than that to which English and Australian lawyers are accustomed. The atmosphere of antiquity is conducive to quiet, and there is a certain amount of unreality in trying to apply the law which was suitable to a state of society

under a polity long since passed away, to one under a living system which is almost diametrically opposed to that which has gone. The leisure of the scholar's library seems to have found its way into the lawyer's court.—
The Law Times.

A FABLE OF A WAXEN SEAL.

BY HARRY SHELMIER HOPPER.

A RICH uncle made a will, in which he gave a favorite nephew, George, the income of a hundred thousand dollars for life and disposed of the principal as follows: "Upon the decease of my nephew, it is my will that the principal sum of one hundred thousand dollars shall be paid to such person or persons as my said nephew shall by a last will and testament duly signed and sealed, will and direct: and in default of said last will and testament, I give said sum to the National Home for Infirm and Homeless Cats and Dogs."

George was a good citizen, and upon his uncle's death married. He led a virtuous life of industrious years, and died leaving a wife and six children.

George was not the most methodical man about papers and documents.

One day his wife suggested to him that he ought to make a new will so that she and the children would be provided for in certain ways which she explained, and he wrote off a paper and signed it, leaving it for his wife to look at. Later she thought she would examine it. She did not find it in his desk and got a candle to look in a closet where he kept some of his papers. At last she found it and read it, holding the candle in one hand and the will in the other. As she turned to the last page a drop of candle

grease dropped upon the paper—very near to her husband's signature. As none of the writing was injured by the drops of grease, she put the will away, and the next day George placed it among his valuable documents.

When he died, a question arose as to the disposition of the hundred thousand dollars. His will gave it to his wife and children, but the Trustees of the Cat and Dog Home claimed that the will was inoperative as to this fund, because it was not "signed and sealed," as required by the uncle's original condition.

After much litigation and review and appeal, the courts finally decided that the drop of wax beside the signature on George's will was a sufficient seal in the eyes of the law, and the wife and children got the money.

Hæc fabula docet, that a Seal is a relic of antiquity and has outlived its usefulness: that those people are wise in their day and generation who have abolished seals as part of the execution of written papers and that the people of those States who still adhere to the common law seal, are groping in pitiable darkness in which a fortune is sometimes saved by a drop of candle wax and sometimes cast to the dogs by the absence of a seal.

WRONG WITHOUT REMEDY: A LEGAL SATIRE.

III.

THREAT OF RECEIVERSHIP.

By WALLACE McCAMANT.

ONE morning as Anderson picked up the *Globe-Democrat* his eye was attracted to an item in the paper referring to the forest fires in Eastern Minnesota. Next day he saw that these fires had swept several small towns out of existence, and it occurred to Anderson to go to Minneapolis and look after his stock in the Provident Fire Insurance Company. Arrived in Minneapolis, he hunted up the officials of the company and courteously requested some information from them as to the condition of the company's business and the extent of its losses in the recent fires. This information he secured and he learned thereby that the company had sustained quite substantial losses; he also found that there had been many cases where on policies recently written the company had neglected to reinsure a portion of the risk with other underwriters as was usual in insurance circles. The officials explained this by saying they had been exceptionally busy and had been shorthanded because of the recent illness of their president and the absence of a number of useful men on vacation trips. The result had been that the Provident Fire Insurance Company had lost considerably more money in the recent fires than other companies with the same volume of business. It was Anderson's candid opinion that the company was still abundantly solvent, but he saw a chance to advance a contrary contention. He learned that the company had been obliged to borrow a large sum of money and to pledge its securities in order to obtain the credit. He also found that the president's salary was \$10,000 a year and the manager's \$6,000, and that both president and manager were mem-

bers of the board of directors. In these facts he saw his opportunity.

A day or two later each member of the board received a letter protesting that the salaries of these officials were excessive, and demanding that the corporation bring suit to compel the president to refund to the corporation all he had received over \$5,000 *per annum* and to compel the manager to pay to the company all he had received in excess of \$3,000 *per annum*. The letter criticised the management as grossly incompetent, stated that the company was threatened with insolvency and demanded that the board take such action as would put the corporation in liquidation. Each letter was signed by Hamilton Anderson. A few days later Anderson was notified by the secretary that the board declined to take the action outlined in his letter.

Anderson now prepared a complaint in his own name, joining the corporation, its president and its manager, as parties defendant. He charged that the corporation was threatened with insolvency, that if the present management continued in control the corporation would become insolvent. If, however, a receiver were appointed and the company were to go into liquidation under the control of a court, he averred that the assets would pay all the debts and leave a surplus for distribution among the stockholders. He charged a fraudulent conspiracy among the directors to absorb the income in excessive salaries paid to members of the board and set up his claim as to the salaries of the president and manager. He averred gross mismanagement in the failure of the officers to reinsure the company's risks and

averred in some detail the financial condition of the company as he had ascertained it. He alleged his ownership of stock, his recent knowledge of the facts, his demand on the directors to redress the wrongs of the corporation and their refusal to act. He prayed for the appointment of a receiver to put the company into liquidation under the control of the court and for judgment against the president and manager for the excessive sums paid them as salaries. The suit was brought on behalf of Anderson and all others similarly situated. It was entered in the Federal court, Anderson suing as a citizen of Missouri and alleging that the defendants were citizens of Minnesota. Anderson had found on inquiry that Judge McLean, who presided over the Federal court, was very much inclined to grant receiverships, that he had appointed many receivers in cases where the bar disapproved of his action, and hence the bill of complaint was filed in McLean's court.

With this bill of complaint fully prepared Anderson called on Mr. Floyd, general counsel for the insurance company, and left with him a copy of the pleading, Anderson stating he was about to bring the suit. Floyd exacted from him a promise that he would not file the papers for three days and that afternoon a meeting of the board of directors was hastily called. Mr. Floyd was present, and the president announced that the board had been convened to take action on a matter of importance which Floyd would explain.

Mr. Floyd then announced Anderson's intention to bring his suit and explained the purposes of the suit.

"Do you believe he states a good ground for the appointment of a receiver?" asked the president.

"No, I do not," said Floyd.

"Are you prepared to assure us that no receivership order will be passed?"

"No," replied the attorney, "I am not.

Judge McLean has granted a number of receiverships within the last five years in cases where the law, as I understand it, did not justify him in so doing. I may say, however, that under a recent act of Congress there is an appeal from an order in the United States Circuit Court appointing a receiver, and I think it highly improbable that the Circuit Court of Appeals would affirm an order appointing a receiver on this bill."

Here Mr. Atwood, a director and one of the large stockholders, spoke up: "I would like to ask the president and manager what would be the effect on the company's business if Judge McLean should appoint a receiver and we should reverse him on appeal. Would our business suffer pending the reversal of the receivership order?"

The manager replied: "It would destroy our business at least during the time consumed in determining the appeal; the mere suggestion of a receivership must inevitably impair our credit and our credit is our life. Competing companies and their agents would not fail to make use of the matter."

Here Mr. Atwood said: "As a business man I would not be disposed to refuse to patronize an insurance company because a receivership was asked for under circumstances that made the demand absurd. If the demand were plausibly made, it would be otherwise."

Mr. Floyd said: "This application cannot be considered absurd. The bill of complaint is drawn by a careful lawyer; it is in good form technically. The charges about excessive salary will seem reasonable to men in receipt of small incomes; in fact, Judge McLean's salary is only \$5000 a year, and I don't know how he may be impressed with these salaries attacked by Anderson. McLean is likely to regard his judicial work as more responsible and important than that of the president of this corporation.

"The Minnesota statute on the subject of receiverships provides among other things

that a receiver may be appointed to take charge of the assets of a corporation when it is insolvent or in imminent danger of insolvency. Anderson contends in his bill that this corporation is threatened with insolvency, and he makes charges of gross incompetency in the management. While the Minnesota statute is not binding on the equity side of the Federal court, it would nevertheless be some guide to the court in passing on this application. This application smacks of absurdity and blackmail only in the fact that Anderson is the owner of so small a block of stock. But his suit is brought on behalf of all others similarly situated; the stock of this corporation is much scattered, and it may well be that other stockholders would intervene and join in the prayer. They might do that from motives of blackmail or from pure crankiness. At any rate Anderson could contend that the large blocks of stock are held or controlled by the board of directors and that the mismanagement he complains of would never be attacked, if not by a small stockholder. It may well be that the failure to reinsure these risks and our consequent losses in the recent fires would be considered by Judge McLean as proof of these charges of incompetent

management."

Mr. Shields, another of the board, asked: "What is the object of this man in threatening us with this litigation?"

Floyd answered: "I am inclined to think it is an attempt to levy blackmail, but we have no evidence to that effect."

Mr. Atwood said: "If this matter affected me individually and none else, I would fight this man at any cost. I would not be held up and robbed. But we must remember that we represent a large body of stockholders, and we must look at this situation dispassionately with a view to their interest. We can probably buy this man off for a few thousand dollars and it is better to do so than wreck a business in which upwards of a million dollars of capital is embarked. I move that Mr. Floyd be empowered to buy Anderson's stock, that the treasurer be authorized to expend any sum up to \$15,000 for this purpose and that the sum paid be charged to profit and loss."

The motion was seconded and carried, and a day or two later Anderson took the train for St. Louis. He was no longer a stockholder in the Provident Fire Insurance Company, but he took with him in lieu of his stock a draft for \$12,500.

THE LAW AT SPRINGER'S CORNER.

BY GEORGE O. BLUME.

THE country court-room at Springer's Corner was filled to the door with village folk; some industrious and some idlers, but one and all eagerly asked each other: "How's Hiram coming out with Horace?" which same meant the case of Hiram Higgins v. Horace Estabrook for the alienation of the said Higgins' wife's affections. Big Nathan Smith yawned and then remarked to Eben Baxter: "How'n thunder kin a man sue

fer losin' his wife's 'fections, when the ol' woman never cared nothin' 'bout him?" "That's what gits me," rejoined Eben; "but on the other hand, ef some one should come 'long and win my Lindy's 'fections ther damage couldn't be cal'ated. I'd hev ter git out ter work an' thereby sustain errepairable injury, as Hiram calls it. But howsome'ever—" Here the conversation was cut short by the arrival of Squire Huckins, the country mag-

istrate. The town constable opened court with the customary proclamation, and invoked our Heavenly Father to save the Commonwealth, and also to preserve the health of Judge Huckins.

"The court is naow open an' ready for business," remarked his Honor, "an' Mr. Officer, clear ther court-room of loafers an' 'busybodies.' An' neighbors an' frens', I want ter say right here my decisions are given in good faith an' cordon ter my conscience, an' law, an' evidence, an' good morals arterwouds. An' I say further, that there air too much talk goin' on 'bout my rulin's, 'specially in Loring Dunn's grocery, an' unless this thing's stopt I perpose to issue a judicial proclamation agin' Brother Dunn. He sets in the same pew I do at church, but I'm mighty feered he's strayed from the teachin' in ther kittykisum. Mr. Clerk, is the case of Higgins agin' Estabrook ready fer trial?"

"Yes; but Hiram Higgins objects to you trying the case because he owes you a bill, and he thinks he won't git a fair trial."

"Wa-al, Hiram, don't be afeered of your not gittin' a square deal. I won't by any act of mine make you poorer than you air, 'cause I wouldn't stand much show of gittin' my money ef I did." (Objection overruled.)

The case has begun, and the plaintiff alleges that Horace Estabrook, not having the fear of God in his heart, but being moved and instigated by the devil contrary to the Bible, did wilfully alienate the affections of Hiram Higgins' wife from her lawful husband. Estabrook filed a general denial, and further answering says that he did not alienate the affections of Hiram Higgins' wife, because such affections never existed, (spec-

ial plea.) Hiram Higgins, plaintiff, swore that at Deacon Jones' housewarming, last fall, he caught the defendant, Estabrook, holding his wife's hands and apparently on very intimate terms together. Estabrook, who was shiftless about his appearance previously, got to greasing his hair and sprucing up to his wife in a general way, finally sending his clothes over to said Higgins' house for his wife to mend.

"I jest allus was suspicious of Estabrook, Jedge, 'cause he used ter kerry my wife's slate ter school, an' go coastin', and skatin' with her, an' he wus turrible doawn in the mouth when I won her. But now et looks ez if I'd hev to work hard'n a dern furriner."

Horace Estabrook admitted being on friendly terms with Mrs. Higgins, but denied all knowledge of any wrong doing.

Judge Huckins "lowed ez how it were a perty puzzlin' case, an' though Horace had possibly been a 'leetle' thoughtless, yit his carryin' on might a' ruined a good and law-abidin' citizen. Hiram has met with 'reparable injury, bein' 'bliged ter work hard'n he did afore, his wife's havin' lost all 'fection fer him, thereby withdrawn her support. In thet case et looks ter me ez ef Hiram Higgins wuz likely ter become a toawn charge afore long. I must give judgment for the plaintiff in the sum of two hundred dollars, an' I hope an' trust that Horace'll profit by this case an' cease meddlin' with other folk's wives."

At the next meeting between Judge Huckins and Hiram Higgins at Dunn's grocery store, law business was put aside and only business of a private nature was transacted, after which it was noticed that the Squire's generally thoughtful face had taken on a very pleasing expression.



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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.

NOTES.

IN New York State people are executed by electrocution; in the West elocution is equally popular and deadly.

PROFESSOR "What early proceeding in ouster do we find in British history?"

Student: "I don't know, sir, unless it's the case in which the snakes were ejected from Ireland."

THE police justice had been arguing with the still bibulous Thespian until his patience was exhausted.

"Guilty or not guilty, that is the question," the court said, finally.

"Y'ranner," answered the respondent, "You quote Shakespeare abominably."

CITIZEN: "How long were you out?"

Juror: "You mean 'how much?'"

Citizen: "'How much' then?"

Juror: "Eleven dollars exactly."

Citizen: "Refreshments—eh?"

Juror. "Nope—draw poker."

JUDGE JOSIAH GIVEN, the Nestor of Iowa judges, was hearing an important case recently, when at the noon adjournment the county attorney arose and requested that court adjourn until the following morning.

"I promised to take my boys to the circus this afternoon," explained the attorney.

Judge Given is almost eighty years old, but still young in many respects; and he replied:

"Well, never disappoint the boys. We'll adjourn court for a circus, but not for a ball game."

The attorney thanked the court effusively and business was suspended until the following day. That afternoon the county attorney met the judge at the circus.

"If a ball game makes me feel as young as this," said the judge, "I may have to change that ruling made this morning."

DURING the late 60's Judge Hubbard was defending some cases of damage suits against the Chicago and Northwestern Railway Company in Tama county, Iowa, and the popular sentiment was very much against all railroad companies. The jury had just returned a verdict for all the plaintiff asked and a similar case was commenced. Judge Hubbard asked for the same jury that had returned a verdict in the previous case, much to the surprise of all interested. When the time came for the argument for the defendant, the judge commenced by abusing every member of the jury in this fashion: to one of the jury whom we will call "Mr. Smith":

"And you, Mr. Smith, you old scoundrel! you landed in this county of ours without a penny, with not enough to keep soul and body together; you 'squatted' on a piece of land and nearly starved to death until this defendant railway company came along and made your property valuable and made you the rich man you are today. What would your land have been worth had it not been for this defendant railway company? And now you come into court and perjure yourself in saying you have no interest in one side or the other, that you are unprejudiced, when all you have you owe to this defendant."

In such a manner he went through the whole jury, who applied to the court for protection, but the judge of the court said if Judge Hubbard thought he could win a verdict in such a way there surely was no harm in trying it.

Imagine the astonishment when the jury returned a verdict for the defendant. Judge Hubbard remarked that after that he had no trouble in getting a verdict in Tama county, Iowa, for the railway company.

AN old Georgia magistrate, fat and usually good natured, was trying a case involving the value of a razor-back hog. Counsel for plaintiff was "Bill," a pettifogger and shyster. Counsel for the defendant was the Colonel, a lawyer of ability and dignity. The testimony closed before noon, and argument was to be heard immediately after dinner. The day was a hot one, and the squire was not fond of much indoor work—nor of work out-of-doors, either.

When the Colonel returned from dinner he was followed by a colored servant, who bore a large armful of law books. Seeing them, "Bill," determined not to be outdone in that particular preparation for battle, disappeared. In a little while he returned, followed by a negro with a wheelbarrow load of books, the most of which he had borrowed from other practitioners.

When court convened the Squire addressed himself to the Colonel.

"Colonel, do you expect to read all of those books in the argument of this case?"

The Colonel was not given to joking, but this was too good an opportunity to let slip.

"Yes, your Honor, this is a very important case in principle, although no great amount of money is involved. In simple justice to my client, I must discuss it as elaborately as if it involved many times the amount in dispute."

"Bill," said the Squire, sternly, looking at the shyster and the great pile of books the chartered negro had placed upon the table, "do you expect to read all of those books in your argument?"

"Yes, may it please your Honor," said

Bill; "this case is very important in principle, to my client as well as to the Colonel's. In justice to my client I must argue it thoroughly, and will be compelled, I am sorry to say, to read all of the books that I have brought from my office."

"H'm-m! Yes, brought from your office. Gentlemen," he continued, "what is the amount involved in this case?"

"Three dollars and a half, your Honor," they both answered at the same moment.

"Three dollars and a half!" He reached down into his capacious right trouser's pocket and fished forth a handful of silver. He counted out three dollars and a half, and slammed it down on the table.

"There," said he, "is the money. The plaintiff can take it, and the constable can pay the costs. I'm no millionaire, but I'll grub in hell, at ten cents a day, to earn three dollars and a half, before I'll sit here and listen to the reading of all those blasted books, in such weather as this."

DIGNITY and Prince Albert coats may cover a multitude of sins and much evidence of poverty. In a small western city two lawyers had been pitted against each other in what turned out to be a bitter legal controversy. One was tall, of dark complexion, with black hair and a form as straight as a mason's straight-edge. He wore a Prince Albert coat all during the trial and submitted with perfect grace to the bitter taunts of a sarcastic opponent, who never lost an opportunity to tickle the jury by an amusing reference to the "long-tailed coat." All this badinage the lawyer took with stoical good grace. He allowed the man with the curl on his upper lip to spend all his humor and witticism and never so much as effected a recognition of his words until the final argument came. He had nearly finished his address to the jury. It had been an eloquent argument and the court room was still as death as he paused in his remarks. Then he turned, and with a nod of his head toward his opponent said:

"Gentlemen of the jury, you have heard a great deal from my worthy friend concerning my long-tailed coat. I assure you that it is

not pride nor haughtiness which brings me to persist in donning it every morning. It serves an important purpose in my attire, for, gentlemen, it covers the patches on my pants,"—and turning his back to the jury he raised the coat and displayed two large brown squares, neatly sewed to his black trousers. The act brought a storm of merriment in the court room and made a hero of the man with patches on his pants.

"Who is that lovely girl?" exclaimed the witty Lord Norbury, in company with his friend Grant.

"Miss Glass," replied the learned counsel.

"Glass," reiterated the facetious judge. "I should often be intoxicated could I place such a glass to my lips."

JUDGE S—, now a leading member of the Tennessee bar, was once in partnership with a man named Jones, at the hamlet of Chickamauga, near the Georgia line.

They dealt in merchandise. They dealt in everything; even liquor, of which both were at that time rather too fond; and the home consumption of that part of the stock in trade ruinously reduced the profits, until none were visible. The business was fast going to the dogs.

S— had already read enough law to know a thing or two about partnerships. He demanded a dissolution. Jones refused to dissolve. S— started for the county seat in high dudgeon, announcing his intention to file a bill to dissolve the partnership and have a receiver appointed to wind up the business.

He had his bill prepared, and deemed it iron clad, rock ribbed and copper bottomed. He secured a fiat of injunction to stop Jones from performing, and got back to the store just after dark. The store was dark. He tried the door. The door was locked. He crawled through a window, which he finally succeeded in raising, after it had raised his temper a good deal, and when fairly inside struck a match. Then he struck an attitude. The store was as empty as vacant space in mid air.

S— looked around in utmost bewilder-

ment. Something white, lying in the middle of the floor, attracted his attention. He picked it up. It was a note. He opened it. It was from Jones. He read:

Lew:—You have gone to town to file a bill to wind up this business. Well, I have wound it up. I have filed a cross bill. I have taken what little truck there was left, and crossed the line into Georgia. Good bye, Lew.

Bob.

The men are fast friends now, and often laugh about their early troubles.

In some parts of England an old custom, whose origin has not been discovered, still lives. The right to allow cattle to graze on the roadside is a valuable one in many parts of Warwickshire and Dorsetshire, because the grass is kept in good condition and constantly enriched until it is as fine as any to be found on the lawns of the mansions nearby. In some parts there is a strip of grass four or five feet wide by the roadside, and it is this strip which often yields a revenue to the parish.

At an old inn in the parish of Warton, in Warwickshire, an auction is held each October for the sale of the grazing rights on the roadside of the village, and the sale, which for at least two hundred years has been the annual event which makes life in Warton interesting, is conducted by the road surveyor under regulations laid down in an Act of Parliament. Five lots are let for the year at each auction sale, and a tallow candle is used as a part of the ceremony. The sale takes place at night and a candle is divided into five lengths, each half an inch in length, these pieces represent the five lots, and as soon as the first piece is lighted the sale begins. The road surveyor proceeds to describe the lot. The company show not the slightest disposition to bid for the herbage until the candle light is dying out. Then the competition is remarkably brisk, and at the last flicker of flame the lot is knocked down. The second piece is lighted and so on until the five lengths of candle have been burned and the five lots let for the ensuing year.

THERE was once an English lawyer (says "E. M." in a sketch of Lord Watson in *The Law Times*), who, after years of tasting the sweets of life, placed them in this order: "I would rather," he said, "go to church than go to the play. I would rather go to the play than go shooting. I would rather argue before Lord Watson than go to church."

Lord Watson was once pursuing the Socratic method with counsel in a case in which the question was what constituted "molesting." "I think," said Lord Bramwell, slyly, "the House quite understands now the meaning of molesting a man in his business." It is worth noting, however, that President Grevy regarded it as one of the best attributes of the English Bench that the judges condescended to argue cases with the counsel engaged. French judges never interrupt, and as a consequence frequently get erroneous impressions. A counsel who knew Lord Watson once ventured to complain to him, in private, of his too frequent interruptions of counsel: "Eh! mon," said Lord Watson—he retained his broad Scotch to the last—"ye should no complain of that, for I never interrupt a fool."

FROM the *Pall Mall Gazette*: A young man was taking an oath in a county court. "What," said the judge, "was the last thing the usher said to you?" "Kiss the Book," said the witness. "Then why didn't you?" "I did." "No, sir, you did not; I saw you kiss your thumb." "I beg pardon, my l— sir, it was an accident." "Young man, if you go about kissing things by accident, you'll get into trouble."

A BILL has been introduced in the House of Lords which authorizes the substitution, in the system of land registration in Scotland, of the photo-zincographic method of copying deeds for the present method of transcribing by hand. "The new process of reproducing deeds," says *The Law Times*, "consists in photographing each writ on a zinc plate which is treated with acid so as to leave in relief the portions intended to be

printed, the zinc plate being then used like an ordinary lithographic stone, and as many copies as my be wanted printed off. Among the merits claimed for the system are that it will yield absolute facsimiles, and not mere transcripts; that it will enable plans annexed to deeds to be reproduced; that it will be possible to furnish each county with a copy of the record applicable to it; that it will render unnecessary the laborious work of collating; and that it will facilitate the giving of extracts, all at an additional cost of only some £3000 annually. The innovation has a suggestion of modernity which may be distasteful to the conservative conveyancer, but, if it be carried out with the requisite precautions, it should greatly enhance the efficiency of the Scottish system of land registration, whose perfection Sir George MacKenzie, more than two hundred years ago, regarded as a special mark of the divine favor bestowed on Scotland."

"SIGMA," writing in *Blackwood's Magazine* for June, tells the following amusing incident in a visit of Lord Brougham to Harrow on a speech day as one of the guests of the Headmaster. "He passed on to the Headmaster's house, where, with the *élite* of the visitors, he was bidden to lunch. There, however, his self-esteem encountered a rude shock, for the policeman stationed at the door to keep off 'loafers' and other undesirable company, sternly asked the dilapidated-looking old person his business. 'I am invited here to lunch,' growled out the indignant guest. 'Gammon!' curtly responded the guardian of the peace. 'I am Lord Brougham!' was the furious rejoinder; 'let me pass!' 'Bah!' contemptuously retorted the bobby, 'yer wants me to believe that, do yer? Move on!' At this critical juncture the old Lord, inarticulate with rage, was fortunately espied by another eminent guest, who, taking in the situation at a glance, succeeded in allaying the suspicions of the policeman."

SIR FREDERICK POLLOCK's Prefaces to the *Revised Reports* are always piquant. In the

latest of them he is found challenging what he terms Lord Campbell's "dogma of the House of Lords' judicial infallibility," which he declares has been confirmed in our time "without any pretence of serious consideration," and there is this much truth in the assertion, that Lords Cranworth, Wensleydale, and Chelmsford seem, in *Beamish v. Beamish*, to have accepted the dogma on Lord Campbell's authority, and Lord Halsbury, again, on their authority. But it has not passed without protest. Lord St. Leonards was strongly of opinion that though the House could not reverse its decision in a particular case, it was not bound by a rule of law which it might lay down if it should subsequently find reason to differ from that rule; it possessed, he contended, like every court of justice, an inherent power to correct an error into which it may have fallen, and Lord Loughborough held a similar view. Lord Brougham treated it as a *vexata quæstio*, and so did Lord Kingsdown. The doctrine does not apply to the privy council, as Lord Cairns emphatically stated; and it is contrary, so Sir Frederick Pollock declares, to the practice of every other court of last resort in the world. Certainly it is a startling proposition that the highest tribunal in the land, because it has once made a mistake, is to persevere in its error for all time. Lord Halsbury finds a justification of the "dogma" in the maxim, *Interest reipublicæ ut sit finis litium*; but may there not be an even higher obligation—an interest more vital to the State—that justice should be administered?—*The Law Journal*.

THE first statute on the subject of tobacco-growing was passed in 1660 (12 Car. 2, c. 34), and prohibited the planting of tobacco in England and Ireland under the penalty of forfeiture of the crop and a fine of 40s. for every rood so planted. The leading motive of this legislation is stated to be the encouragement of our American colonies, which then enjoyed a practical monopoly in the supply of tobacco to this country. The Act does not seem to have effected its purpose, and in 1663 a further statute was passed (15

Car. 2, c. 7) increasing the penalty from 40s to £10 for every rood planted with tobacco in England and Ireland. Next came a statute, passed in 1779 (19 Geo. 3, c. 35), withdrawing the prohibition of tobacco-growing as regards Ireland, provided the crop should be exported only to Great Britain, on the preamble that "it is of the greatest importance to the strength and security of these kingdoms that every attention and encouragement should be given to such of the produce and manufacture of the kingdom of Ireland as do not materially interfere with the commercial interests of Great Britain." Just about this time the Scottish farmers, in view of the high price of tobacco due to the American War, conceived the idea of endeavoring to raise tobacco crops, and we learn from a volume of contemporary "Memoirs" that many thousand acres were planted with tobacco. The speculation failed, however, on account of a combination of legal and climatic obstacles. A very bad season ruined the plants, and the Crown lawyers of the day intervened in the interests of the revenue. No doubt the prohibitive statutes of Charles II. applied only to England and Ireland, but the authorities took the view that laws relating to colonial matters were, by force of the Union, rendered of equal application in Scotland. To set the matter at rest, another Act was passed in the session 1781-82 (22 Geo. 3, c. 73), entitled an "Act to explain 12 Car. 2, c. 34, and to permit the use and removal of tobacco, the growth of Scotland, into England for a limited time under certain restrictions."

In 1831 the last Act on the subject was passed—*viz.*, 1 & 2 Will. 4, c. 13, which repealed the exemption conferred on Ireland by 19 Geo. 3, c. 35, and revived in that country the original prohibiting statutes of Charles II. At the present moment, accordingly, it is illegal in England, Scotland and Ireland alike to grow tobacco, except for scientific or medical purposes, which the seventeenth-century legislators favored to the extent of allowing ground not exceeding half a pole to be planted with tobacco for these purposes exclusively—*The Law Times*.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

A COMMENTARY ON THE LAW OF MINES. By *Wilson I. Snyder*. Chicago: T. H. Flood & Co. 1902. Two volumes. (ci+xxvi+1464 pp.)

This is a work with both scholarly and practical qualities. The scholarly features are more obvious in the early parts, where the author treats of the doctrine of regalian ownership of mines under the English system of law and under other systems, ancient and modern, and then passes to early English and Continental customs, and the history of American statutes. Yet the author's wide investigation and his independence in both expression and thought are evident throughout the whole treatise.

Unfortunately, the lawyer in general practice cannot be expected to read so many pages, even though they are the work of a skilled specialist and embody many doctrines of great interest. It is almost useless, therefore, to call attention to the passages wherein the general practitioner might well take exceptional pleasure, namely, the historical parts already mentioned, the definitions of mining (secs. 131-148), of citizenship (secs. 241-256), of lode and vein (secs. 279-289), the discussions of water rights (secs. 329-332, 1050-1062), of apex rights (secs. 795-806, 821-874), of surface support (secs. 1016-1033), and of mining partnerships (secs. 1500-1581.)

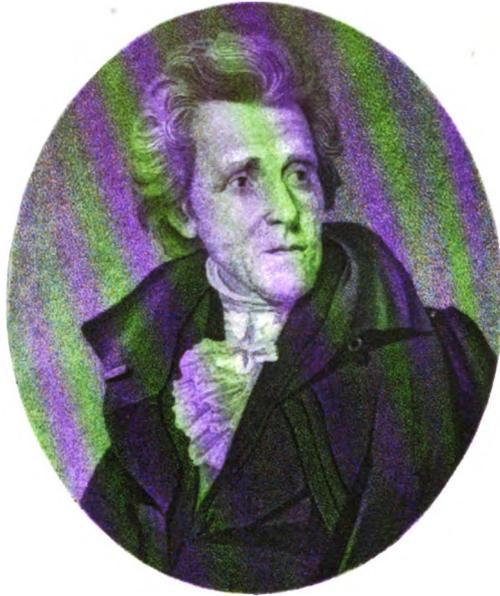
The specialist will wish to read the whole of this book, hardly omitting the appendices of statutes and forms; but he may be thankful to be told in advance that the treat-

ment of the apex cases is peculiarly independent and strong.

A TREATISE ON COMMERCIAL PAPER AND THE NEGOTIABLE INSTRUMENTS LAW. By *James W. Eaton* and *Frank B. Gilbert*. Albany: Matthew Bender. 1903. (xciii+767 pp.)

The greater part of this volume consists of a treatise of moderate fulness, with annotations that cite and quote numerous cases, especially recent decisions of American courts. Appendices present the English Bills of Exchange Act and the American Negotiable Instruments Law, with notes showing the numbers attached to the sections of the statute in the several States, and with references to the body of the treatise.

As the volume is of moderate size, and is confined chiefly to plain statements of familiar law, it obviously does not attempt to be anything more than an accurate and convenient tool. Yet it is not a mere paraphrase of older works. That the authors have done thinking of their own is indicated, for example, in the foot-note on p. 83, where, in commenting upon the section of the Negotiable Instruments Law which provides that "where . . . a person adds to his signature words indicating that he signs for . . . a principal . . . he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, . . . without disclosing his principal, does not exempt him from personal responsibility," the authors question the propriety of the inference, sometimes drawn, that when there is no authorization the person assuming to be the agent of a principal whom he names as the maker of the instrument, is to be held upon the instrument itself, and is not to be held simply by a fictitious warranty or some similar form of responsibility, and they say: "The section seems to state the general rule of law as heretofore understood. Personal liability does not necessarily mean responsibility on the instrument."



Andrew " Jackson

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ANDREW JACKSON AS A LAWYER.

By EUGENE L. DIDIER.

ANDREW JACKSON as an Indian fighter, Andrew Jackson as the hero of New Orleans, Andrew Jackson as the seventh President of the United States, fills a prominent place in American history; but Andrew Jackson as a lawyer is scarcely known to the present generation; yet it was as a lawyer that he began his remarkable career, a career almost unparalleled in the history of the United States. The child of poor Scotch-Irish immigrants, his father dying before he was born, Andrew Jackson began life under circumstances which did not seem to offer any promise of future distinction. A boy in years, a man in resolution, a hero that was to be, he threw himself, with youthful enthusiasm, into the American struggle for independence, and after a brief but thrilling experience, he found himself, at the age of fifteen, alone in the world, his father, mother, and brothers dead, left to his own guidance at the most critical period of his life—left, like Byron,

“Too young such loss to know,
Lord of himself, that heritage of woe.”

Andrew Jackson's heritage was very different from that of the young lord of Newstead Abbey. The American youth inherited no title, no worldly goods, no ancestral home. But taking into consideration the environment of the two, the time, place and circumstances of their lives, fortune treated Jackson better than she did Byron.

After spending two or three years in idleness, the young man's better nature prevailed, he determined to study law, and he set out on horseback to find a preceptor; no easy matter in those early days in the backwoods of North Carolina. He was eighteen years old when he entered the office of Spruce McKay, at Salisbury, N. C., as a law student. The old box of a house, built of shingles, which was Judge McKay's law office, is, or was, still standing within the memory of men yet living. Tradition says that during the two years that Andrew Jackson studied law at Salisbury, he was the “most roaring, game-cocking, horse-racing, card-playing, mischievous fellow” that ever lived in that quaint old town. “He did not trouble the law books much—he was more in the stable than in the office;” he also indulged in foot races, a sport in which his long limbs made him *facile princeps*. But, in spite of all these sports and pastimes, he was licensed to practise law in North Carolina two years after he began his studies. Behold, then, the future hero of New Orleans and President of the United States, a full-fledged lawyer, standing six feet two in his stockings,—slender, vigorous, manly; with eyes of dark blue, whose fearless expression, look of keen intelligence, commanding presence, all gave assurance of a born leader of men. He possessed two qualities not often found united in the same person—daring and prudence. He was an ardent lover of his country, for whose liberties he had fought and suffered,

and was to be the victor over her only enemy among the nations of the world. He was all his life the most American of Americans—the Declaration of Independence on horseback, “the Fourth of July incarnate.”

At twenty, Alexander the Great set out to conquer the world. His sword was his weapon, hope his guide, courage his capital. At twenty, Andrew Jackson set out to conquer a place for himself in the world; he had little education, a small stock of law, nothing from fortune; but he had the strength of youth, a heart that knew no fear, a soul of honor, and the resolution never to turn back until success crowned his efforts.

While the present State of Tennessee formed the western boundary of North Carolina, Jackson's friend, John McNairy, was appointed judge of the Superior Court for this western circuit. Our young lawyer was appointed solicitor, or public prosecutor, for the same district; another friend was made clerk of the court, and three or four others determined to join the party; and in the summer of 1788 the whole cavalcade, judge, solicitor, clerk and lawyers, left Morgantown, on the western frontier of North Carolina, and wended their way through the mountains to Jonesboro, Tennessee. Having rested there a few days, the party started for Nashville, where they arrived after incredible hardships, and passing through dangers from savage beasts and no less savage Indians.

When Andrew Jackson plunged into the wilds of Tennessee, he was astonished to find a large accumulation of law business awaiting him. A court house and jail were the first buildings erected in the western settlements of America, and it may be interesting to give a description of the early court house in Tennessee in which Andrew Jackson began to practise law. It was a log house, eighteen feet square, scantily furnished with benches, table and bar. This was a superior sort of building compared with the majority of court houses in the western country, in

which Andrew Jackson practised law for ten years, and laid the foundation of his fame and fortune. He arrived in West Tennessee at a fortunate time for securing a large and profitable business. The principal law business in those early days was collecting debts, and he soon showed that he was the right man in the right place, for he was perfectly fearless in issuing and in serving writs. All of the merchants in Nashville had bad debts, which they put into his hands to collect, and he performed the business with a promptness that established his reputation as a lawyer. Within a month after his arrival in Nashville, he had issued seventy summonses to delinquent debtors. After this auspicious beginning, he soon acquired an extensive practice. The law records of Tennessee show that he attended every court of the State. At the April term of the court held at Nashville, in 1790, in a docket of one hundred and fifty-five cases, Jackson was counsel in seventy-two. In the four terms of 1794, there were three hundred and ninety-seven cases before the same court, in two hundred and twenty-eight of which Jackson was counsel. The courts were held at places so distant that half of his time must have been spent on horseback, traveling from place to place, in peril of his life from the Indians. He had many narrow escapes from the savages, and slept often in the forest, in danger from the wild beasts which infested the country. On one occasion, when he had to make a journey between Nashville and Jonesboro, he reached the place of meeting after the rest of the party had started. Obtaining a guide, he set out in pursuit, rode all night, and at day-break reached the camp-fire, but his friends had left. Continuing the journey, he discovered Indian tracks in the road, and, with his knowledge of woodcraft, he saw that the savages outnumbered the whites, and that the foe were only a short distance ahead. The guide declined to go further, and Jackson determined to save his friends, or perish in

the attempt. He soon came to a spot where the Indians had left the road and taken to the woods, their object being to get ahead of the whites, and ambush them. He pushed on and reached his friends before dark. They were encamped on the bank of a deep, half-frozen river. As soon as he told the news, the party resumed the march. All that night and the next day they continued the journey, not daring to stop, until at sunset of the second day they reached the cabins of a company of hunters, of whom they asked shelter for the night. This was churlishly refused, and they continued their march in a storm of wind and snow. At length they thought they might encamp. Jackson, who had not closed his eyes for two days and a half, wrapped himself in his blanket, and slept until morning. When he woke, he found himself buried in six inches of snow. The pursuing Indians continued on the trail, came up to the huts of the inhospitable hunters, all of whom they murdered. Satisfied with this bloody deed, they pursued Jackson's party no longer.

This was one of many stirring adventures encountered by Andrew Jackson when practicing law in the pioneer days of Tennessee. Historians give a graphic description of the perils that beset the early settlers of that beautiful region: "While some planted corn, others had to watch against the skulking foe. When the girls went blackberrying, a guard invariably turned out to escort them. If a man went to the spring to drink, another stood on the watch with his rifle cocked by his side. Whenever four or five men were assembled at a spring, or elsewhere, they held their guns in their hands, and stood, not face to face, as they conversed, but with their backs turned to each other, all facing different ways, watching for a lurking or a creeping Indian." It was almost as dangerous to practise law among the rough, quarrelsome, free-fighting backwoodsmen, as it was to pass from the shelter of the block-house on account of the savages. Jackson was the

man for the time and place; brave, fearless, bold, he was as ready with the pistol as with the tongue. His knowledge of the intricacies of the law was small compared with the equipment necessary to the modern lawyer, but it was sufficient for his purpose. Although he was not deeply read in law books, he was a deep student of human nature, and he possessed a keen insight into the motives of men. His position as prosecuting attorney arrayed against him all the rascals in Tennessee. Outlaws skulking in the woods were as dangerous as lurking savages. "Personal difficulties" were frequent between the fearless State's Attorney and the criminals whom he prosecuted with relentless energy. It was Jackson's personal bravery in such encounters that gave him his early influence in the western country. He did not follow the wise advice of the foolish Polonius, but he was quick to enter quarrels.

Early Tennessee lawyers were well paid for their services, and deserved to be, for such dangerous work. For an ordinary suit, they received sometimes a square mile of land. It was in this way that Jackson laid the foundation of the large fortune that he acquired. When Tennessee was admitted into the Union, in 1796, he was already a large landowner, and within ten years of his residence in the State he owned 50,000 acres. As an evidence of the position of Jackson, it may be mentioned that he was a prominent member of the convention which framed the Constitution in preparation for the admission of Tennessee as a State. He and Judge McNairy were appointed the delegates from Davidson County to draft the Constitution. He took an important part in this convention, as he did in every position which he occupied, in State or national affairs, civil or military. When Tennessee was admitted into the Union in June, 1796, Andrew Jackson was elected its first representative in the Congress of the United States. He traveled on horseback the seven hundred and seventy-

five miles, from Nashville to Philadelphia. He arrived in the latter city about the first of December, soon after the country had gone through the agony of its first contested election, which resulted in placing John Adams in the White House, with Thomas Jefferson as Vice-President. In the National House of Representatives Andrew Jackson was the sole representative of Tennessee, which now has ten members. It is a matter of record that Andrew Jackson voted against the address to President Washington, because he did not approve of Jay's treaty, and did not sympathize with England against France, did not approve of the Administration for its apparent indifference to the Indian massacres in Tennessee. Little did Jackson, or any person, then dream that in less than twenty years the obscure member from Tennessee would be only less popular than Washington himself.

Andrew Jackson gave such satisfaction to the people of Tennessee as a member of the Lower House that, when a vacancy occurred in 1797, he was appointed United States Senator. But the slow, dignified body, which the Senate then was, did not suit the active, ardent, energetic young Senator from Tennessee, and he resigned his seat in April, 1798, after serving only the half of one session. It was during this short experience in the Senate that he became acquainted with Aaron Burr, and it is supposed that it was in the society of that polished and accomplished gentleman that he acquired something of that exquisite courtesy which afterward distinguished him.

Andrew Jackson was too important a man to be allowed to enjoy for long the retirement of private life, and soon after his resignation from the United States Senate he was elected one of the judges of the Supreme Court of Tennessee, a position which he occupied for six years, holding courts at Nashville, Knoxville, Jonesboro and other places. As no records of the decisions of the court

were kept at that time, none of Judge Jackson's opinions are in existence, and he is never quoted, or referred to, as an authority, by the present bar of Tennessee. But there comes down the century a tradition that he presided over the court with dignity, and that his decisions were brief, unlearned, sometimes ungrammatical, but generally right. As an evidence of Jackson's fearlessness as a judge, the following incident is given. In the fall of 1803, while he was traveling from Nashville to hold court at Jonesboro, he was informed by a friend that his enemies were getting ready to mob him on his arrival at the latter town. He was suffering at the time from intermittent fever, and was so weak that he could scarcely sit his horse. But when he heard of this threat all his indomitable energy was aroused, and putting spurs to his horse, he reached Jonesboro before sunset. Burning with fever, he lay down on a bed at the tavern, and while in this suffering state a friend came in and told him that Colonel Harrison and a regiment of men were in front of the tavern threatening to tar and feather him; and his friend advised him to lock the door of his room. At this, Jackson rose up, threw his door wide open, and said, with that peculiar emphasis which won him many battles without fighting: "Give my compliments to Colonel Harrison, and tell him my door is open to receive him and his regiment when they choose to wait upon me, and that I hope the Colonel's chivalry will induce him to *lead his men*, and not follow them." The "regiment" thought better of their purpose, while Judge Jackson recovered from his fever, and held his court as usual, unmolested. Upon another occasion, the notorious outlaw, Russell Bean, was summoned to appear in court to answer the charge of causing the death of his youngest child, by cutting off its ears, declaring that the child was not his, and that he maimed it so to "know it from his own." He refused to appear to answer the charge, and a

sheriff's posse was sent after him. He took refuge in the top of a tree, armed with a rifle. His reply to the sheriff's summons was a threat to shoot the first man who came within range. Knowing the desperate character of the outlaw, no one dared to venture within range of his deadly rifle. When the condition of affairs was reported to Jackson, who was on the bench, he cried, "Summon me." When the court took a recess for dinner, Jackson was summoned accordingly. Bean, being told that Judge Jackson was coming to arrest him, surrendered immediately, saying he knew Jackson would shoot him if he didn't.

Andrew Jackson was the Prince Rupert of the backwoods, in the Senate, at the bar and on the hustings. He spoke tersely, vigorously, to the point. He practised Demosthenes' idea of eloquence—action, action, action. Quick, sudden, determined in his opinions, his heart, soul and mind all combined in his conclusions. To think and to do was one to him. He was as impatient at delay in law and in war as was Ivanhoe, on his sick bed in the castle of Front de Boeuf. Like Job's war horse, he scented the battle from afar. His resolution and daring made him a natural born leader at the bar, as he was afterward in war. His splendid energy made him irresistible in court as in the camp. With him there was no such word as fail. Difficulties disappeared before his overmastering activity as snow before the sun.

He did many things which the superior refinement of the present day would condemn, and which no man now occupying his position in public life could do and retain his popularity. For instance: a Governor of Tennessee and a judge of the Supreme Court engaging in a personal encounter with pistols, on the highway, is something which would be regarded at the present time as a gross violation of public decency, but at the beginning of the nineteenth century—in the "good old times"—such an affair took place

between Governor Sevier and Judge Jackson. But that Jackson, in spite of his escapades, was an acceptable judge to the people of Tennessee is shown by the fact that, while he was still on the bench, a county in the State was named after him. The name of Jackson occurs on the map of the United States next in the number of times to that of Washington, which exceeds Jackson by eight only. After six years' experience on the bench Jackson resigned.

Few men, even in the United States, have lived so full and active a life as Andrew Jackson: He was a lawyer, district attorney, judge, member of Congress and United States Senator before he was thirty-one. He was not an educated man, not a well-informed man, not a man of any literary pretensions. In his active and energetic life, he had little time or taste for reading and study. His knowledge of history, ancient and modern, was very limited. His books were men; human nature his study, and few men have ever lived who knew men better than Andrew Jackson. An American among Americans, he knew his countrymen thoroughly. It has been said of him that he raised himself in the profession of all others the least suited to his genius, at a time of life when men of real merit are only preparing themselves for local distinction, to the office of attorney-general and judge. One who had studied his life carefully said that Jackson never read but one literary work through ("The Vicar of Wakefield"); that he was ignorant of the law, history, science and literature. He read nothing but newspapers, which are, in some respects, the best, and in others, the worst of all reading. In Jackson's time, newspapers were not so newsy as they are now, when the paper of today contains the history of the whole world of yesterday. It has been asserted by one who knew Jackson intimately that he did not believe the world was round. Indeed, he was one of the most ignorant men that ever reached a commanding posi-

tion in the world. But he was a man of mettle; the man never lived that he was afraid to meet. He was a fighting man, a man of action, a man of war, a man who never turned his back on friend or foe. From his boyhood he had to fight his way in the world; he fought his way through the wilderness to reach his future home in Tennessee; there he fought with wild beasts and Indians. As prosecuting solicitor, he had to fight his way sometimes over the prostrate forms of criminals and outlaws in order to serve a writ, to defend a client or to eject a trespasser.

Andrew Jackson was, in some respects, the ideal American from the backwoods; a hard-swearing, free-fighting, pistol-shooting, horse-racing, honest, clean-handed, frank, fearless, truthful specimen of the *genus homo*. He was the first self-made man among the Presidents of the United States, followed in the Presidency by Lincoln, Johnson, Grant and other self-made men, succeeding the old line of Presidents of patrician pretensions. Unlike Falstaff, Jackson was not witty himself, but, like the renowned Sir John, he was the cause of wit and humor in other men. As Thomas Wentworth Higginson has pointed out, it was under him that a serious people first found out that it knew how to laugh. The once famous "Jack Downing," who has been pronounced Mark Twain, Hosea Bigelow and Artemus Ward in one, was the first American humorist. The stern and inflexible Jackson enjoyed in his grim way the humor of "Jack Downing," whose *Letters* he read while he smoked his pipe.

In writing of Andrew Jackson it is impossible to avoid mentioning his greatest contemporary and bitterest rival, the gallant, chivalrous, passionate and patriotic Henry Clay. Both born in humble life, both lawyers, both left their native State to seek their fortune in the then far West; both succeeded in making their mark in their profession, and both abandoned the law before they had reached the highest honors of the most en-

grossing of pursuits, the one to win distinction in politics, the other as a soldier, both to meet in the great field of politics, as the leaders of their party, both possessed of a personal magnetism which carried their followers wherever they led; both were ambitious, but one only—and he was not more worthy than the other—reached the height of political honor. Clay was the greater statesman, Jackson the greater politician. He swayed men as he wished. He was as magnanimous as he was magnetic, and, although he was a good hater, his warm and generous heart was easily moved to forgive and forget and let bygones be bygones. A memorable instance was the case of Thomas H. Benton. After one of the deadliest feuds in the annals of Tennessee, Jackson and Benton were reconciled, and became, not only political, but warm personal friends. Benton became Jackson's confidential adviser, and was offered the highest marks of his favor.

Henry Clay was a natural born orator; he studied in no schools; he neither knew nor cared anything about Cicero's scholastic *Treatise on Oratory*; he practised none of the tricks of the rhetoricians; he was the pupil of no debating class. His youth and early manhood were passed in Virginia, where he had received inspiration from the glorious men of the Revolution. It was the golden age of American patriotism. The present age of commercialism, with its deadly paralyzing power of money, was unknown and undreamed of. In that high school of patriotism, Henry Clay had drunk deeply, and he became the exponent of the American system of politics. Admitted to the bar of Virginia, he sought a newer field of ambition in Kentucky, to which young State he carried a brave heart, a chivalrous soul, a high honor, a tall, slender, graceful figure. His magnificent genius broke forth with incomparable splendor upon Kentucky, upon the United States, upon the world. It was Henry Clay more than any other man who made the

United States respected abroad. It was Henry Clay who hurled defiance in the teeth of a mighty nation, and proclaimed the famous sentiment, "Free Trade and Sailors' Rights," that a sailor on the deck of an American ship was on sacred ground,—that the flag which floated over that ship was an ægis protecting him.

In examining the life of Andrew Jackson one fact stands out most prominent,—the fact that he was successful in everything he undertook; appointed solicitor for the wild region of Middle Tennessee, when he was only twenty-one years old, he succeeded in his difficult and dangerous work, in which many an older man with less courage and determination might have failed. His vigorous prosecution of desperate offenders gave him a great prominence in the community, and brought him other legal business. His many personal "difficulties" were a help rather than a hindrance to the young lawyer in his profession, and, as has been already shown, he was one of the most distinguished men in Tennessee when it was admitted into the Union, and that was only eight years after he arrived in the State, a raw, uncouth, unknown young man, who knew little law and no literature.

During the six years that he sat on the bench—1798 to 1804—he devoted his time, labor, energy and will power to the duties of the office, to the neglect of his health and estate. Thomas H. Benton bears cordial and deliberate testimony to the extraordinary character of Jackson's mind, declaring that he possessed a rare judgment, with a rapid and almost intuitive perception, followed by an instant and decisive action.

He went from the judge's bench to the counter of a country store, and the more interesting occupation of stock raising. From these pursuits he was called in 1813 to his true vocation, the life of a soldier, for Jackson was a natural born leader of men in battle, as Clay was a leader of men in the

forum. Jackson's early life as a strenuous solicitor and fighting lawyer had made him a masterful man,—a man of ready resources, of dauntless courage and of inflexible will. His duties as prosecuting attorney necessarily placed him in the front of the wild, semi-civilized life of early Tennessee life which preceded the admission of the State into the Union.

We have followed the picturesque career of Jackson as a lawyer, as a judge, and as a man. With his public life as a soldier and statesman—as general and President—we have nothing to do. Unlike Alexander the Great, Andrew Jackson was satisfied with what he had done, for his long list of successes exceeded his ambition. No American before him had exercised, or wished to exercise the great power that he wielded. No man had been so idolized. No man had triumphed over his enemies so completely as he had. He did more than any man to prevent Henry Clay from reaching the object of his ambition—the Presidency. He saw Calhoun driven into retirement, when he had one foot on the Presidential ladder. He saw the Bank of the United States destroyed, and its president die of a broken heart. He retired to his well-earned repose, at the age of seventy, after ruling eight years, his popularity undiminished, and still the recognized leader of his party. He enjoyed the satisfaction—unique in the public life of the United States—of the setting sun being more honored than the rising sun. It was a marvellous tribute to the great and lasting popularity of the Hero of New Orleans, a popularity which never declined during his lifetime, and is exceeded by that of no other American hero.

As a lawyer, Andrew Jackson was suited to the time and place when and where he practised; but, as his friend and biographer, Amos Kendall, says, he was not made for what is called a first-rate lawyer. His mode of reasoning would not permit him to seek for

justice amid a labyrinth of technicalities and special pleading. Yet few, if any, exceeded him in seizing on the strong points of a case, and with vigor and clearness applying to them the great principles of law. As a lawyer, in criminal prosecutions, the case of his client always became his own, and he was considered one of the most eloquent and effective among his contemporaries. As a judge, his opinions were always clear, short and to the point, aiming at justice without the affectation of eloquence, or of superior learning. His retirement from the bench, continues Kendall, gratified only those who feared his justice, while it was deeply regretted by a large majority of the community.

Aaron Burr, who was a rare judge of men, describes Jackson, in his *Journal*, as "once a lawyer, then a judge, and now a planter, a man of intelligence; and one of those frank, prompt, ardent souls whom I love to meet." Burr was the first to mention Jackson as a suitable candidate for the Presidency as early as 1815. In a letter to his son-in-law, Governor Alston, Burr wrote: "Nothing is wanting but a respectable nomination before the proclamation of the Virginia caucus, and Jackson's success is inevitable. He is on the way to Washington. If you should have any confidential friend among the members of Congress from your State, charge him to caution Jackson against the perfidious caresses with which he will be overwhelmed at Washington." It was too late to act upon this suggestion at that time; but the seed was

planted which grew and spread over the whole country.

Andrew Jackson died on the 8th of June, 1845, and a few weeks afterward, on the 27th of June, George Bancroft delivered, at Washington, a eulogy on the illustrious dead, in which he characterized him as the lodestar of the American people, declaring that no man in private life so possessed the hearts of all around him; that no public man of the country ever returned to private life with such an abiding mastery over the affections of the people; no man with truer instinct received American ideas; no man expressed them so completely, or so boldly, or so sincerely; he united personal courage and moral courage beyond any man of whom history keeps the record. Not danger, not an army in battle array, not wounds, not widespread clamor, not age, not the anguish of disease could impair in the least degree the vigor of his steadfast mind. The heroes of antiquity would have contemplated with awe the unmatched hardihood of his character; and Napoleon, had he possessed his disinterested will, could never have been vanquished. Jackson never was vanquished. He was always fortunate. He conquered the wilderness; he conquered the savage; he conquered the bravest veterans trained on the battle fields of Europe; he conquered everywhere in statesmanship; and when death came to get the mastery over him, he turned that last enemy aside as tranquilly as he had done the feeblest of his adversaries, and passed from earth in the triumphant consciousness of immortality.



THE JURYMAN.

By L. G. SMITH.

An ancient seer, well versed in lore,
Oft burned the midnight oil, to pore
O'er musty tomes, both dry and deep,
Through darksome hours when honest men should sleep,

Till wearied brain at last refused
To yield the force so long abused,
And this wise seer then found at length
His erstwhile studious hours had sapped his strength.

He sought a surgeon of repute,
And, bowing knee in deep salute:
"Kind sir, I scarce can leave my bed;
Remove," prayed he, "this megrim from my head."

The surgeon shaved his patient's crown.
"Alas, sir," said he, with a frown,
"Your brains, alack, I clearly see,
I must remove by help of surgery.

"But have no fear, for this I swear,
I'll in a week return them there,
As fresh and strong as brains may be,
By this same wondrous power of surgery."

The patient left, nor more, I ween,
For weeks was by that surgeon seen.
By missive then, the surgeon said:
"Thy brains are ready, sir. Bring back thine head."

The man ycleped the seer, replied:
"To see thee, sir, I fain have tried;
But civic duties press their claims,
Where I am hampered not by loss of brains.

"As member of the jury, sir, I wot,
Thou knowest for the nonce I need them not;
But when this sitting of the court be o'er,
Thou mayest replace them where they were before."

A SOLUTION OF THE LABOR PROBLEM.

BY HARRY EARL MONTGOMERY.

WHATEVER the merits of a strike or a lock-out may be, the contending parties have no right, moral or legal, to inflict injury on any innocent party. And as the public is injured as a result of every strike or lock-out of any magnitude, the public has the right to be protected. There are three parties to every labor controversy,—the employer, the employed and the public. The public can and should be protected. But how? By preventing strikes and lock-outs, provided it can be done without taking away the rights of the employer and the employed.

The principle of arbitration is being urged to take the place of strikes and lock-outs. Voluntary arbitration cannot be relied upon by the public for protection. Strikes are so frequent as to show the ineffectiveness of this remedy. Compulsory arbitration is strongly, vehemently, and passionately opposed by both the employer and the employed. The labor union says that compulsory arbitration would mean that working men would be reduced to slaves,—by being compelled to work for the hours and the wage determined by the arbitrators, thereby depriving the men of the liberty of contract; while the capitalist asserts that compulsory arbitration might mean to him the closing of his business and the ruin of his fortune, by the arbitrators deciding that he must pay wages in amount beyond what his business could afford. Both positions are based on sound reasons. Compulsory arbitration might mean all that the capitalists and the unions claim. Such being the case, the public has no right to require such a method of settlement, except as a last resort. Then how can the public be protected? By adopting a plan of arbitration lying just half-way between these extremes.

As strikes and lock-outs are generally local,

that is, located within the boundaries of the State, and as conditions vary among the different States, requiring different treatment, a national act would be less satisfying in its results than would a State law.

A board of mediation composed of three members should be appointed by the governor. One of them should be an employer or selected from some association representing employers of labor, one of them should be selected from some labor organization and not an employer of labor, the third should be appointed upon the recommendation of the other two, provided that if the two appointed do not agree on the third man at the expiration of thirty days, he should be appointed by the governor. One should be appointed to serve for three years, one for two years, and one for one year. At the expiration of the term for which each member is selected, his successor should be appointed to serve for the term of three years.

Whenever any controversy or difference, not involving questions which may be the subject of a suit at law or a bill in equity, exists between the employés and their employer, if at the time he employs not less than twenty-five persons in the same general line of business, in any city or town in the State, the board should, as soon as practicable thereafter, visit the locality of the dispute and make careful inquiry into the cause thereof, obtain personal interviews with the parties, hear their stories, offer suggestions which look generally to a conference, advise the respective parties what, if anything, ought to be done or submitted to by either or both to adjust their dispute.

The employer who fears a strike and the employé who dreads a lock-out will be likely to advise the board of any threatened difficulty. And with the assistance of a news-

paper clipping bureau, the board will be furnished with adequate information as to the existence of labor controversies.

This commission would represent the public in all controversies. It should aim to bring the contending parties together and to try by mediation to effect a settlement of the difficulties. The primary cause of labor troubles, and one that serves to widen the breach between the employer and the employé, is their ignorance of each other. As a rule, neither party seems to appreciate the importance of studying each other's interests and conditions, to the end that each may contribute to their common welfare and the success of the industry with which they are identified. Sitting around the same table; listening to each other's arguments; endeavoring to see each other's standpoint and to understand each other's reasons; learning to give as well as to take; holding opinions firmly, but expressing them moderately; keeping the mind open to conviction; desiring to come to a sound and fair conclusion, will have the effect of promoting mutual good feeling, confidence and sympathy. It will have the tendency to bring the unions into the position of allies, instead of that of fierce competitors; it will remove misunderstandings, and coming to know each other better, suspicions will fade away and the employer and the employé will learn to respect and to trust each other. Enmity and distrust must first disappear, and the common ground of perfect understanding by each of the true position of the other must be reached, before a proper relation can be established and a satisfactory agreement be adopted.

As its name implies, the office of the Commission should be solely that of offering suggestions. If the parties in difference cannot come to an agreement, the Commission should suggest the advisability of appointing arbitrators to adjust the matters in dispute. If each party to a controversy

believes that his position is fair, neither should object to the matter being presented to a disinterested party or parties to determine the merits of the case and to make the award. Arbitration entered into in good faith on the part of both parties, must result in a peaceful solution of the difficulty — and the party to the dispute having justice on his side will have no cause for alarm. If the parties should fail to come to an agreement, and should refuse, after a reasonable time, to submit their differences to arbitration, or if a strike or a lock-out occurs, the Commission should bring the matter to the attention of the Industrial Court.

An Industrial Court should be organized under the judicial system of the State. It should be a movable court, holding its sessions in the court house located nearest to the place where the controversy arose. It should be presided over by three judges to be elected by the people. Upon the adoption of this plan, one judge should be elected to serve for six years, one to serve for four years, and one to serve for two years. At the expiration of the term for which each judge is elected, his successor should be elected to serve for the term of six years.

The powers of this Court should include the right to hear, try and determine all controversies arising between the employer and their employés, not cognizable by the State courts, and to settle and adjudicate the same upon their merits. Cases should be brought before the Court by the filing of a certificate by the Board of Conciliation or by either of the parties in dispute showing the nature of the controversy and the fact that a strike or a lock-out has been commenced, or that the contending parties, after due notice, have failed to settle their differences or to refer the subject of dispute to arbitration.

The Court should sit in the full light of publicity, aided by experts. The employer, the employed and the Board of Mediation, may appear by attorney, subpoena witnesses

and compel the production of all books and papers necessary for the trial of the controversy. The Court should not be bound by the hard-and-fast rules of evidence as prevail in our civil courts. Great latitude of procedure should be allowed, so as to enable the Court to arrive at a conclusion not only just but politic, as in many cases of dispute strict justice might become oppressive to one or the other of the parties, or might fail to protect the public interests involved in the controversy.

The Court should be empowered to decide, upon investigation, what shall be the minimum wage and the maximum work-day for the parties before the Court. After the Court obtains exact knowledge of the amount of wealth produced by the employer and the employé within a given time, it would not be a very difficult matter to decide how much of the wealth should go to labor in the form of wages and how much should go to capital in the form of profits.

The Court should approximate the true value of labor as measured by its productive power, being governed by the prevailing rates in the labor market. Questions of the same nature are decided by railroads and gas commissions, when they fix rates and charges, and the decision should be based on similar principles.

The Court should leave the employer free to employ labor, if he so desires. It should leave the laborer free to work or not, as he may desire. But it would say to the employer, you must pay the wage determined, or you must cease to employ labor. If you disobey, you will be in contempt of court and be liable to a fine or imprisonment. And it should say to the employé, you must work for the wage determined or you must seek employment elsewhere and not interfere with the men who are willing to work on the terms set forth in the award.

When the Industrial Court fixes a minimum wage in a dispute between the em-

ployer and the employés, it necessarily bases its decision upon a certain quantity and quality of work, which should be fully set forth in its decree. The decision of the Industrial Court should merely establish that the employer in question shall not pay less wages than the sum named for work of the prescribed quantity and quality. Its decision should not preclude an inquiry by the ordinary courts into the question of the workman's compliance or non-compliance with the quantity or quality of the work stated. If the employé sues the employer in a court of law for the minimum wage, he must prove that his work in quantity and quality is equal to that prescribed by the decree of the Industrial Court; if his work be inferior in these respects, he should only recover a smaller sum of wages. If the employer is prosecuted in the ordinary courts upon the charge of paying less than the minimum wage to his employés, the government must prove, not only the payment of less than the minimum wage, but also that the work performed by the employés was equal to the standard prescribed by the Industrial Court: and if the Government fails to prove these facts, the accused employer should be found not guilty. These provisions protect the employer from the injustice of being compelled by law to pay standard wages for work below the standard, and renders the law of the Industrial Court just and equitable.

In the course of any trial or investigation, the Industrial Court should make all such suggestions and do all such things as appear to the judges to be right and proper to be made or done for securing a fair and amicable settlement of the industrial dispute; and upon an agreement being reached by the parties in difference, the Court should enter its decree according to the terms of settlement.

The decision of the Court should be binding for from one to two years. The progress of industry, necessarily causes inequalities. Prices change. The wages of any given

period may after a time have a more or a less value as a purchasing power. The earnings of the employer may increase so that he ought to pay higher wages. His earnings may decrease to a point where he must pay less or go out of business. The rate, established today, may be fair and satisfactory to both parties; but in a short time, may become unfair and unsatisfactory. Wages and profits are changing relatively to each other all the time, so a decision binding longer than two years might work injustice.

An appeal to the Court should act as a stay of all proceedings whatsoever in the dispute; no employer should close his works or dismiss his workers, and no employé should strike against his employer, on pain of being treated in contempt of court and subject to fine or imprisonment.

The awards of the Industrial Court should not be set aside for any informality, or challenged, appealed from, reviewed, quashed or called in question by any tribunal whatever.

Voluntary arbitration is the most rational, reasonable and civilized plan for the settlement of labor troubles. To bring about a condition where all differences between the employer and the employed shall be settled by a conference of the parties in interest, or be voluntarily referred to disinterested parties for decision, is the one and only ob-

ject of this plan. The fear of compulsory arbitration, represented by the Industrial Court, would be a constant menace to both employer and employé. Neither party, ordinarily, would dare to have the Industrial Court adjust their differences and render a judgment, which would be enforced by fine or imprisonment. And rather than submit to such a tribunal both sides would gladly consent to privately settle or to voluntarily arbitrate their differences.

The adoption of this plan would secure:

1. The peaceful settlement of labor troubles.

2. The adoption of trade agreement which would settle the main points of interest to employer and employé, and would provide for permanent boards of conciliation and the submission of all their controversies to arbitration.

3. The fostering of stable and kindly relations between the employer and the employed.

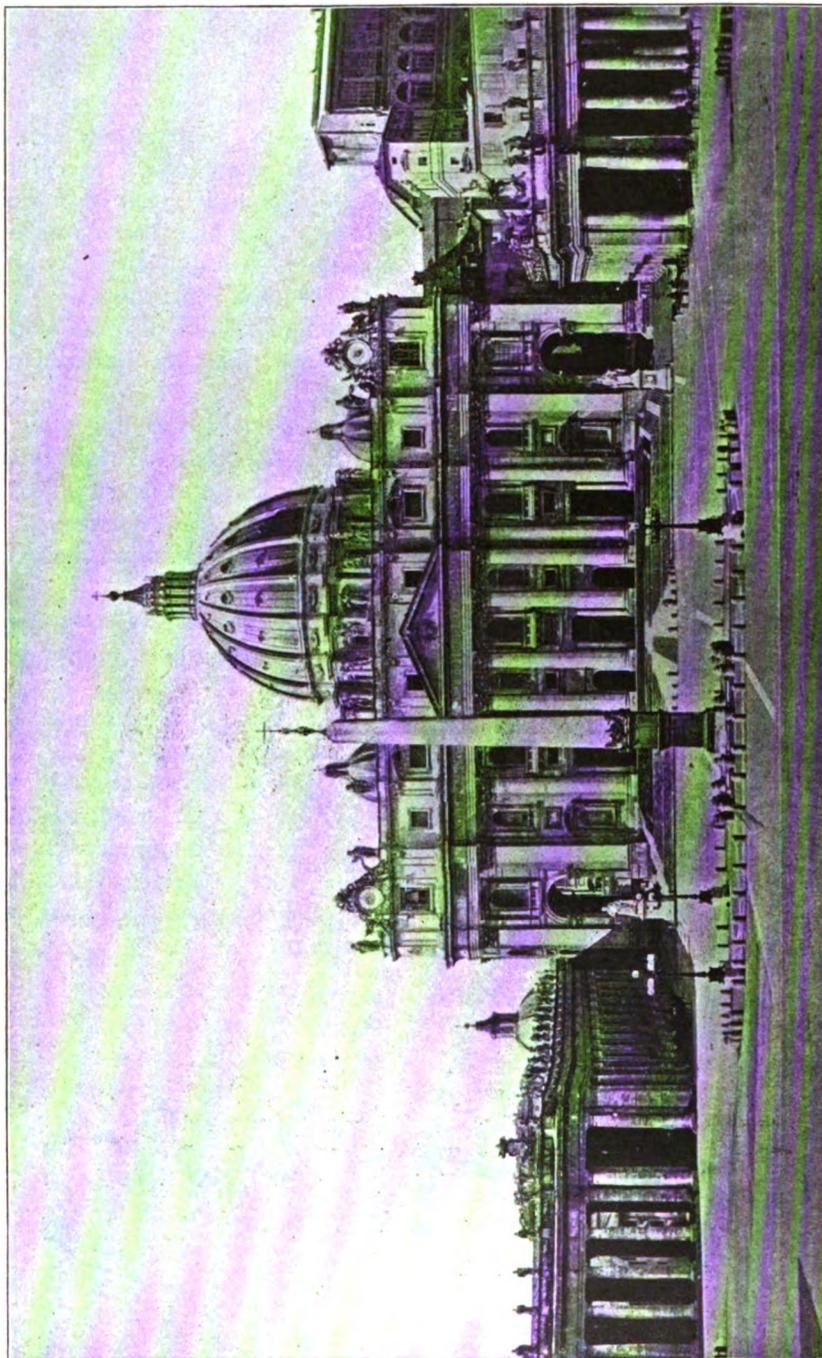
4. The end of strikes, boycotts, lock-outs and industrial warfare.

5. The prevention of waste, the reduction of friction, and the stoppage of industry.

6. The end of injunctions, based on insufficient or political grounds.

7. To the public, adequate and complete protection.





ST. PETER'S.

THE ELECTION AND CORONATION OF A POPE.

BY JOHN DEMORGAN.

NEARLY a generation has passed since Cardinal Pecci, archbishop of Perugia, was elected Pope by the vote of forty-five members of the College of Cardinals, and ascended the papal throne, assuming the name and title of Leo XIII.

The late Pope was born in March, 1810, and his active life, his piety, his strong encyclicals which commanded the attention of the entire world and proved his masterly ability as a statesman, as well as a divine, combined with his steadfast belief in the Roman Church as a civilizing and spiritual power made him stand out prominently as one of the most remarkable men of the last century.

When only thirty-three years old, he was selected, by Pope Gregory, to fill one of the most important positions in the church, that of papal nuncio to Brussels.

Descended from an old patrician family, Gioacchino Pecci, inherited the aristocratic principles of his fathers, but his early life being spent among the poor in the village of Carpineto, in Central Italy, he learned the lessons of democracy, and in his life has tried to harmonize the two extremes.

He studied at the Collegio Romano, graduated in law and theology, and became a favorite with Pope Gregory XVI., who named him a prelate of his household. Had not Gregory died, Pecci would have been cardinal in 1846, but it was not until 1853 that Pius IX. saw fit to confer on him the cardinal's hat.

Pius IX. died in 1878, and on the eighteenth of February the conclave of cardinals convened; and on the twentieth, Cardinal Pecci, archbishop of Perugia, received forty-five votes, and was declared Pope.

For over twenty-five years he was

the head of the Roman Catholic Church, wielding supreme power over 250,000,000 followers of that faith, having more authority and commanding more willing obedience than any monarch in the world. Anything relating to the election and coronation of his successor must be of interest to the entire community of nations and of more than passing importance to the Christian world.

The election of the Pope was vested in the College of Cardinals by a decree of Pope Nicholas II. in 1059. Prior to that date the Pope was elected by the bishops, priests and people of the Roman Catholic Church. Kings and rulers often interfered in the election, and Nicholas took steps to prevent any such scandal in the future.

In the College of Cardinals provision was made for the representation of all the ancient electoral bodies, the cardinal-bishops representing the bishops of the Roman synod, the cardinal-priests, the parish clergy, and the cardinal-deacons, the heads of the popular electoral districts of the city. The College consists, when at its full strength, of seventy members, *vis.*: six bishops, fifty priests and fourteen deacons. It is very seldom, however, that the College is full, for the Pope is usually too good a politician not to leave a number of vacancies to be filled in case of a special emergency.

Ten days after the death of the Pope the College of Cardinals is convened to elect his successor. The cardinals are shut up, in what is called "the conclave," the entrance to the building being walled up, preventing all communication with the outer world, until the election shall have been effected. An election requires a two-thirds vote of the entire college.

Twice a day, during the conclave, each

cardinal deposits, in a chalice on the altar, the name of his candidate. If the requisite number of votes are not found for anyone, the papers are burned, on the top of the church, the smoke of the burning ballots being a signal to the people outside that no election has taken place. This act is called the "scrutiny." If votes are added to those already given for one candidate, so as to

Cardinals may be either bishops, priests or deacons, but only a bishop can be crowned Pope, though even a deacon is eligible for election.

Should a deacon be elected Pope, the cardinal-dean, by virtue of his office the acting Pope, who is at the present time Prince Louis Oreglia di Santo Stefano, bishop of Ostia and Velletri, summons the Pope-elect



GARDEN OF THE VATICAN AND ST. PETER'S.

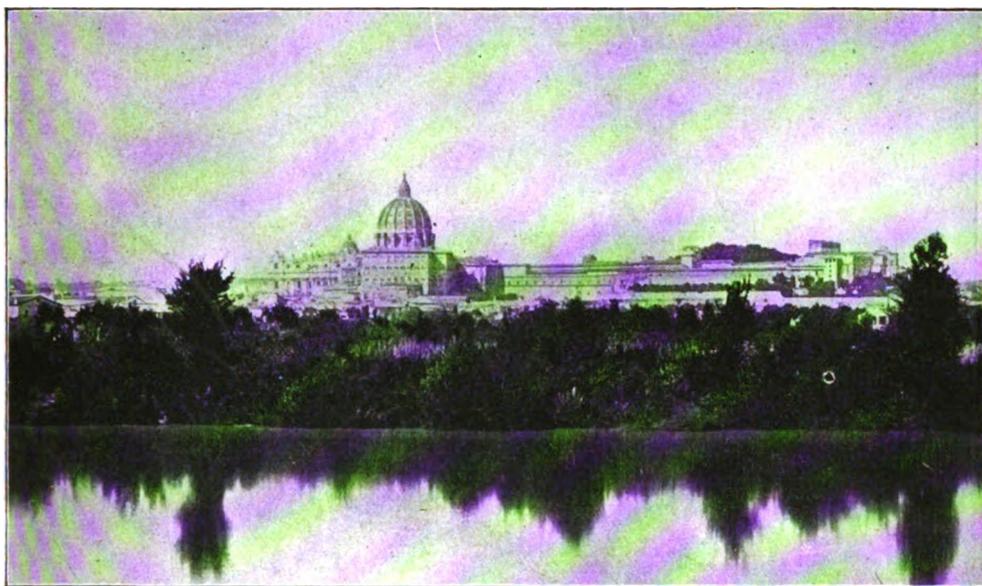
make the requisite majority, it is said to be an election by "access." If the cardinals of two parties unite and elect a Pope, it is called an "election by compromise," and, if, by a manifest desire of the people, a cardinal is elected by acclamation, the election is said to be by "inspiration." The predecessor of Leo XIII. (Pope Pius IX.) was elected by "inspiration."

to the Sistine Chapel, in the Vatican, where he will give him priest's orders, and consecrate him bishop, observing the canonical intervals. If the Pope-elect is a priest, he is at once consecrated bishop by the cardinal-dean. This consecration takes place in the Sistine Chapel, one of the most beautiful ecclesiastical buildings in the world. It is in this chapel that some of the finest specimens

of the work of Michael Angelo are to be found. Pope Julius II. commanded the artist to paint the ceiling with his own hand, and though the command was repugnant, the work was done and has been hidden from the world ever since. Michael Angelo, the greatest painter of any age, was but a mere slave, for after doing this magnificent work, he was sent to superintend the quarrying of stone in the marble quarries. Treated no better than a laborer, this genius bore all with Christian humility.

gold and silver keys, emblems of his superior position in the church.

The diocesan church of the bishop is called "the mother and head of all the churches of the city and the world," because it stands on the first ground ever given for a Christian church. The palace and Church of St. John Lateran stand on the site of the splendid palace of Plantius Lateranus, which was confiscated in the year 66 A. D., and afterwards given to the Christians by the Emperor Constantine.



ST. PETER'S AND THE VATICAN FROM THE TIBER.

After the College of Cardinals has met in conclave and elected a successor to Saint Peter, the ceremony of enthronement has to be commenced. It is necessary that he shall be declared Bishop of Rome.

A notice is sent him to be present in the Church of St. John Lateran, in order that he may be inducted into the See. It is then, as senior bishop, or the direct successor of St. Peter, whom Catholics believe to have been the first bishop of Rome, he receives the

The church was originally dedicated to the Savior, but Lucius II., who rebuilt it in the twelfth century, dedicated it to St. John the Baptist. In the piazza of the church stands the sacred relic, called the "*scala santa*," or holy staircase, which is said to have been the very stairway in the house of Pontius Pilate, and which was used by Jesus on his way to judgment.

The newly inducted bishop goes each morning, prior to his coronation as sover-

eign pontiff, to the balcony over the portico of St. John Lateran, and blesses the city and the world. No more fitting place could be found for this benediction, for from the Lateran palace have issued decrees which, in their far-reaching influence, made thrones tremble and princes acknowledge the power of the church. In it five ecumenical councils of the church have been held.

be present, the General of the Church, the Sacred College, and the Princes Colona and Orsini, who are the hereditary princes-assistants, at the papal throne. In this procession the temporal sovereignty, as well as the spiritual supremacy of the Pope is recognized.

On this occasion the Pope is dressed in



BASILICA OF ST. PETER—INTERIOR

The coronation of the pontiff is one which no nation of the world can outdo in splendor and pageantry, and yet every act is symbolic and intended to teach some doctrine of the Church.

On the day of the coronation the Pope goes in procession to the Sistine Chapel, attended by the secret chamberlain, the chamberlains of honor, the chaplains, the representatives of such nations as desire to

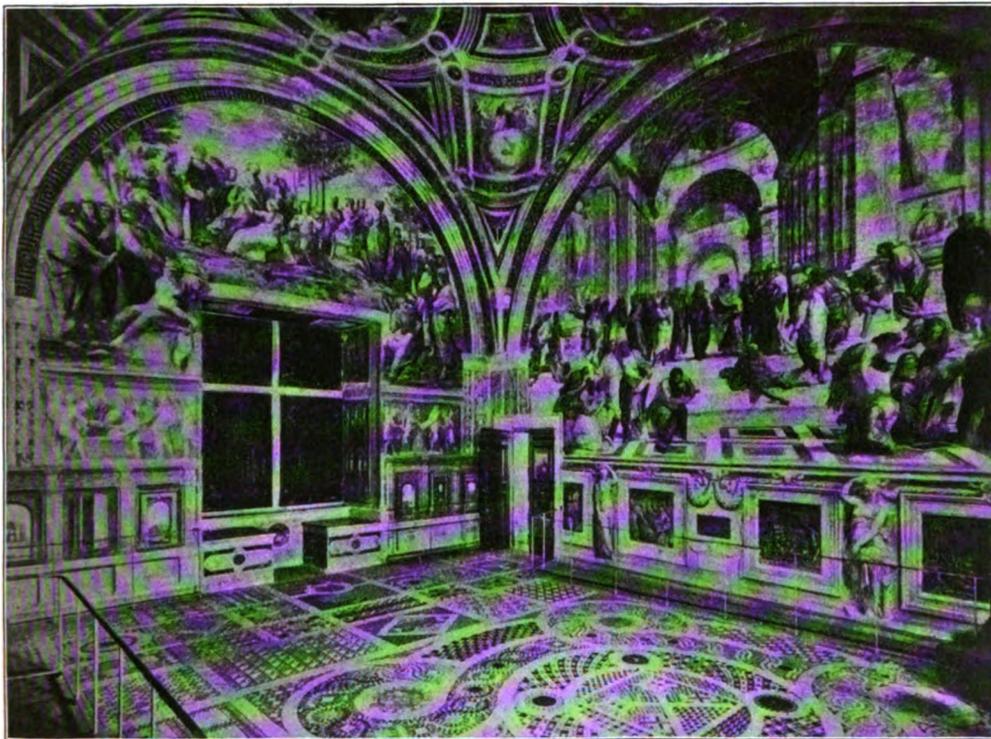
white, save the red satin mozetta, hood and shoes.

As the procession reaches the door of the Sistine Chapel the cardinal-deacons give the new Pope the papal ornaments. The first master of ceremonies girds "the falda of taffetas," under the rochet, which is a kind of surplice, with tight-fitting sleeves, made of fine lawn or lace, and puts the red satin biretta on his head. The Pope then enters

the chapel, receiving homage from the cardinals, who rise and make profound bows to him.

As he enters, the first cardinal-deacon raises the red biretta and the second cardinal-deacon fits him with one of white silk. The red satin mozetta is removed, and the Pope is indued with the *amice*, a linen collar reaching over the shoulders, the *alb*, *girdle*, *stole* and a *cope* of red and gold. The first

new robes, the consistorial advocates, the secret chamberlains, the referendary prelates, bishops, archbishops and patriarchs. Then follow the chaplains bearing the triple crown, and the official mitre, preceding the cardinal-deacons, cardinal-priests and cardinal-bishops, the conservators of the Roman people, and then the newly-elected Pope on lofty throne surrounded by the Knights of St. Peter.



VATICAN—SALON DELLA SIGNATURA

cardinal-deacon then places the splendid mitre of gold, adorned with precious gems, on his head.

That is the signal for seven acolytes, bearing seven candelabras, to start in a new procession, followed by an apostolic sub-deacon carrying the triple cross. Immediately following the cross come the "Pope's gentlemen," walking in pairs, the court officials in

This procession descends into the vast basilica of St. Peter. In the portico, near the holy door, there is a most magnificent throne, round which are stools for the cardinals, a balustrade enclosing them. It is at this place that the canons and priests of St. Peter's come to kiss the cross, on the front of the Pope's shoe, thus acknowledging by an act of humility that the Pope is sover-

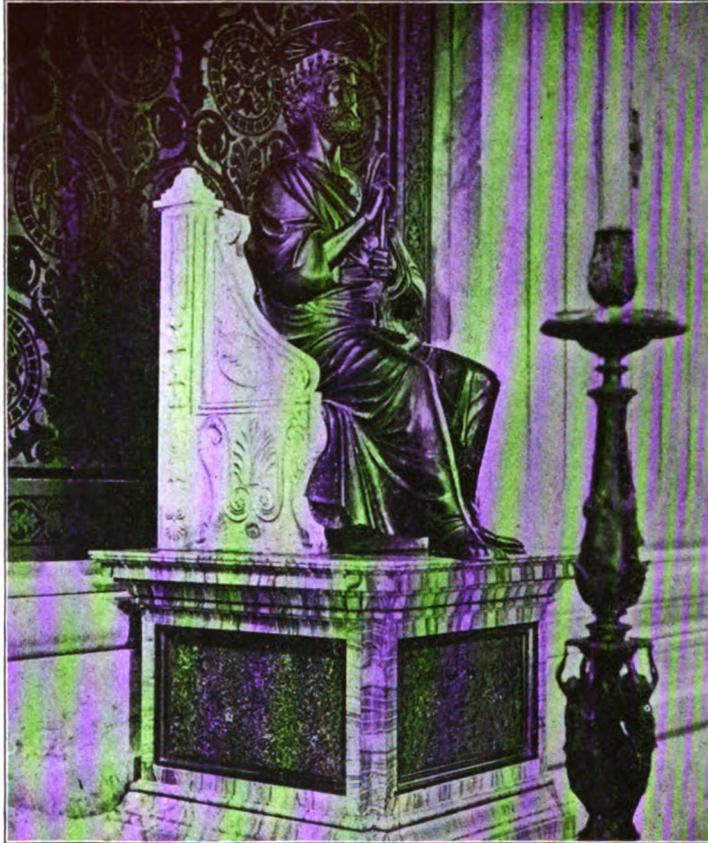
eign ruler, though governing under the authority of religion, as signified by the cross.

This ceremony over, the Pope proceeds towards the high altar, the people shouting: "*Evviva il Papa Re!*" ("Long live the Pope-King!")

Another stop is made at the throne in the Gregorian Chapel to allow the ambassadors

first apostolic benediction. The devout greet him with cries of loyalty and joy. The cardinals, prelates and bishops put on their white copes, while canons chant suitable anthems in the choir.

The pontiff now washes his hands four times, and the gay-colored vesture is changed for white, the emblem of purity.



STATUE OF ST. PETER, IN THE BASILICA OF ST. PETER.

of the nations represented, and the hereditary princes-assistant, to take their places, while cardinals, in scarlet, and prelates in purple, do their homage. The cardinals kiss the pontiff's ring, the prelates the cross upon the ends of the stole, which rest on his knees.

From this throne the Pope imparts his

The whole act is symbolic, for it shows that with clean hands and a pure heart he is able to go to the altar. On his way to the altar, his raiment, glittering with gems and bright jewels, the master of ceremonies goes before him and holds before his eyes a huge salver on which are miniature castles, palaces and objects of worldly splendor, cunningly made

of flax. Half-way to the altar the master sets fire to the castles, and as they consume he chants:

“Behold, Most Holy Father, how the glory of this world passeth away!”

On the high altar are seven candles

bishop-assistant; on his left is the cardinal-deacon of the Evangel; behind him are two cardinal-deacon assistants.

When the confession is ended, the dean of the Rota brings his mitre to the two cardinal-deacon assistants, who place it on the



VATICAN—SISTINE CHAPEL.

lighted, one behind the cross and three on each side. As the Pope reaches the steps of the altar he makes a short prayer, and rising, says, in a loud voice:

“I will go unto the altar of God.”

On his right stand the cardinal-dean, as

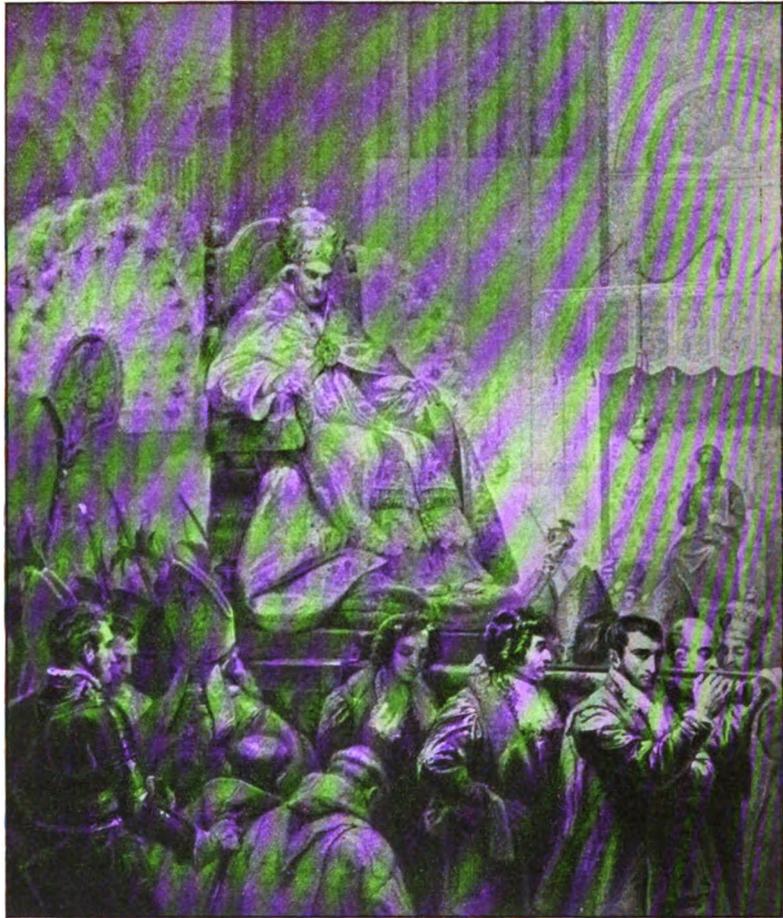
pontiff's head and lead him to the throne, while three cardinal-priests intone the prayers. The Pope then descends and his mitre is borne away, the first cardinal-deacon assists the second to invest him with the sacred pall, saying:

"Receive the sacred pall, the plentitude of the holy pontifical office, in honor of the Lord God Omnipotent, of the most glorious Virgin, His mother, of the blessed apostles Peter and Paul, and of the holy Roman Church."

The cardinal-deacon then fixes the three

three times. The Pope ascends the throne, cardinals take off their mitres and bow before him. They are followed by the clergy in their respective ranks and robed in their ceremonial vestments.

The pontiff takes off his mitre, and, going to the altar, chants the "Introit, Kyrie" and



POPE LEO XII. IN ST. PETER'S.

purple crosses of the pall with diamond clasps. The Pope mounts to the altar, palled, but without mitre, kisses the altar and the Book of the Evangel, puts incense in the censer and waves it before the altar. His assistants then put on his mitre and one of his cardinals swings the censer before him

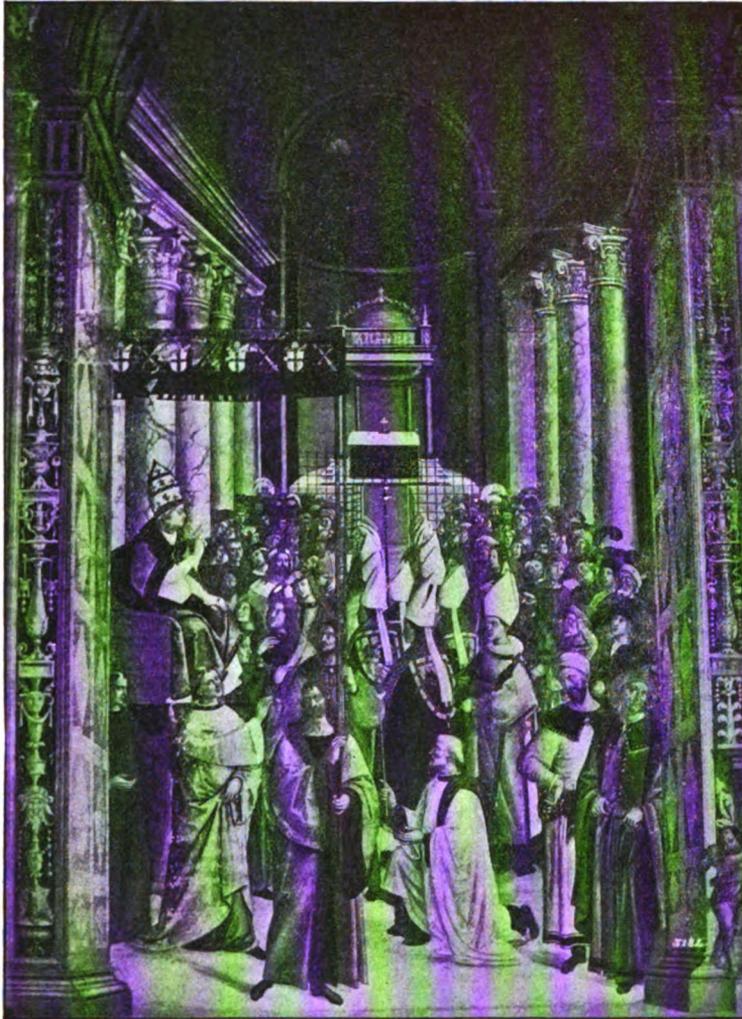
the first words of "*Gloria in Excelsis Deo*," sitting on the throne until the angels' song is sung. This reached, the cardinal-deacon descends to the Confessional of Peter under the high altar, passing through the way of the hundred ever-burning lamps with the apostolic sub-deacons, the auditors of the Rita,

and the consistorial advocates in pure white copes on purple almuces. Before the shrine of Peter, the first cardinal-deacon chants:

"Give ear, O Christ."

The others respond:

the high altar the Epistle is chanted by a Latin sub-deacon and afterwards by a Greek sub-deacon. The gradual is sung by the choir, the Gospel is chanted in Latin and then in Greek, after which the Pope is car-



CORONATION OF POPE PIUS II

"To our Lord, the Supreme Pontiff of the Church, as decreed by God."

This is repeated three times, and then they chant:

"O Savior of the World, help him!"

This is followed by the Litany of the Saints, chanted by a Latin sub-deacon. On

ried, on the shoulders of twelve porters, dressed in scarlet, to the highest throne. The cardinal-archbishop of St. Peter's, with two canons of the same church, offer the Pope a purse of white damask, which contains twenty-five gold coins. This they ask him to accept as a *honorarium* for a mass

well sung. He takes it, but hands it to those who have chanted the Gospel in Latin and Greek, but they do not keep the money, but in turn give it to the boys in vermillion and white lace, who have borne the trains of the cardinals.

His Holiness is carried on his throne to the Balcony of Benediction, accompanied by his court and surrounded by the representatives of the people of Rome. Around his

“Receive this tiara, adorned with three crowns, and know thyself to be the father of princes and kings, the ruler of the world, and on earth the vicar of Jesus Christ our Savior.”

The Pope repeats three times the apostolic benediction and blesses the faithful of the city and the world. Then he retires to the Vatican. At the Sistine Chapel he is divested of his pontifical ornaments, and the first



ST. JOHN LATERAN.

throne men, garbed in red, beat the perfumed air with great fans made of peacock feathers.

On arriving at the balcony, the two first cardinal-deacons assist the Pope to mount a new throne erected in the middle of the balcony, the papal choir chanting and singing anthems all the time. The mitre is taken from the head of the Pope and in its place he receives the triple crown, the first cardinal-deacon saying:

cardinal-deacon on behalf of the Sacred College makes him the time-honored compliment:

“Ad multos annos.”

The Pope signs the roll of sovereign pontiffs in the *Salon della Signatura*, in the Vatican, and the ceremonial is over, the Pope being left, for the first time, alone, fatigued, weary and almost exhausted.

It was thought that when Leo XIII. was invested the world had seen, for the last

time, the coronation of a Pope with all the grandeur of ancient times, but Leo expressed the desire that his successor should enjoy all the pomp and glory of an elaborate ceremonial, and it is well known that the Acting Pope Cardinal Prince Oreglia is a great believer in precedents, while Cardinals Rampolla and Gotti consider the elaborate ceremonial necessary to show to the world that the successor of St. Peter oc-

cupies the most exalted position on earth.

The election and coronation of a Pope is of the greatest interest to the world at large, for in all nations Catholics who acknowledge the Pope as their sovereign head possess great and increasing influence. Leo XIII. was a progressive and democratic pontiff, and the whole civilized world hopes that his successor will be a worthy follower of his example.

WRONG WITHOUT REMEDY: A LEGAL SATIRE.

IV.

THE FREEZE-OUT.

By WALLACE McCAMANT.

ONE day while sitting in the lobby of the Hotel West at Minneapolis, Anderson was accosted by Huston, an acquaintance of his from Portland, Ore. They chatted a few minutes on general subjects and finally Huston asked Anderson if he knew of anyone who had forty thousand dollars to invest in a gilt-edged proposition. Anderson giving him some encouragement, he said he had been retained by the owners of the Golden Rod mine in Josephine County, Oregon, to secure them additional capital. This mine, Huston explained, had been discovered by Parsons and McAllister, two farmers residing in the vicinity, and after making the location they had given an interest in the mine to Barker, a merchant in Grant's Pass, in consideration of advances made by the latter for its development. The mine had proved unexpectedly rich. It produced free milling ore which assayed at eight dollars a ton and which could be mined and milled for three dollars a ton. They had developed the mine sufficiently to show up ore bodies adequate to run a fifty-stamp mill for ten years. They had installed a five-stamp mill and the mine

was earning now five hundred dollars a month over and above all expenses.

In order to accomplish this development work and install the mill Parsons and McAllister had been obliged to mortgage their farms, and Barker had run so heavily in debt as to well nigh exhaust his credit. It would take them some time to work out from the income of the mine, and in the meantime they thought it desirable to put a fifty-stamp mill on the property. They were satisfied that with a fifty-stamp mill the mine would net at least five thousand dollars a month, and they were willing to convey the property to a corporation for the purpose of securing forty thousand dollars to put in this new plant. To show their good faith, they were willing that the investors of the forty thousand dollars should hold fifty-one *per cent.* of the stock and name the board of directors, they turning in the mine in payment for forty-nine *per cent.* of the stock.

Anderson agreed to think the matter over, and a few days later his expert was on the train *en route* to Oregon to investigate the mine. The report was that the property was

as represented and that with a fifty-stamp mill the mine would produce upward of five thousand dollars a month *net*.

The proposition looked too good to be true, and Anderson hesitated whether to embark in it. He was suspicious of those gilt-edged offers. He learned, however, that Oregon capital was slow to invest in mines, that so many swindles had been perpetrated in floating and wrecking mining corporations that it was difficult in Oregon to get capital to take up a perfectly legitimate proposition. Oregon, moreover, he recalled was not a populous State, and its people did not have large sums of idle capital awaiting investment. Anderson finally notified Huston he would accept the proposition on condition that the property was turned over to a Missouri corporation formed for the purpose, in which he was to have fifty-one *per cent.* of the stock. This was acceded to, the corporation was formed, the mine was conveyed to it in payment for forty-nine *per cent.* of the stock, and Anderson turned in his forty thousand dollars in payment for fifty-one *per cent.* of the stock. Anderson named the board of directors, and kept them subject absolutely to his control. The installation of the fifty-stamp mill was begun and the forty thousand dollars was consumed before the work was completed. It was found necessary to borrow ten thousand dollars additional, and by a unanimous vote of the stockholders the board was authorized to mortgage the property for this purpose. Anderson arranged to secure the loan and the mill was finally completed.

Much to the surprise of Parsons, McAllister and Barker, the mill was now shut down, and all they could learn in response to their inquiries on the subject was that the board deemed it inexpedient at present to operate the property. Anderson finally permitted himself to be put on record to this extent: it would cost a couple of thousand dollars to purchase the tools, food and other supplies

necessary to the operation of the mine if it was to supply a fifty-stamp mill. Large additional sums would have to be expended in enlarging the mess house and quarters for the men. Anderson was unwilling to advance these moneys and preferred in any event to await the issuance of a patent to the property from the United States Land Office before investing any further money. He added that the rainy season was still on, the roads, which never were first-class, were now exceedingly muddy, and in fact well nigh impassable. This made it difficult to freight in supplies, and Anderson preferred not to operate the property for the present.

Matters ran along for six months; the minority stockholders began to be pressed by their creditors. They called upon and consulted Mr. Huston, their attorney, at Portland. He asked whether there was any money in the corporation's treasury. He was told there was none. He then asked who were the officers of the corporation and learned that they all resided in Missouri, and that the company had no managing agent in Oregon. Mr. Huston told them that if they had any remedy, they must seek it in the courts of Missouri; he called their attention to the well-settled rule of corporate law that the control of all questions of policy was vested in the board of directors. He told them it was at least doubtful whether any court would issue a mandatory injunction requiring these directors to raise the necessary funds and again run the mine. Thompson in section 4443 of his *Commentaries on Corporations* expressly states the rule to be that such injunctions will not be granted by the courts. Huston added that while there was probably some limitation on the principle that the directors were entitled to determine whether the business should run, the courts would certainly refuse to interfere unless a clear showing was made of a fraudulent and oppressive use of their power by the directors. He reminded them that it was

expensive to conduct litigation two thousand miles away from home. He suggested the sale of their stock. This they tried to do, but the property was now encumbered with a mortgage on which the interest was delinquent, the mine was shut down and they could give no assurance as to when operations would be resumed and dividends paid. They met with no success. Huston expressed much indignation at what he believed to be a cold-blooded attempt to freeze his clients out of the corporation, and he reproached himself for having interested Anderson in the property. But his ingenuity could not devise any practicable remedy.

Several months later Anderson sent an emissary into the country, who picked up this minority stock for ten thousand dollars. Anderson was now the owner of all the stock, and he immediately started up the mine and the mill. In three months' time the mortgage was paid off and the mine was producing at a rate sufficient to pay five thousand dollars a month in dividends, besides an additional sum for development work and maintenance.

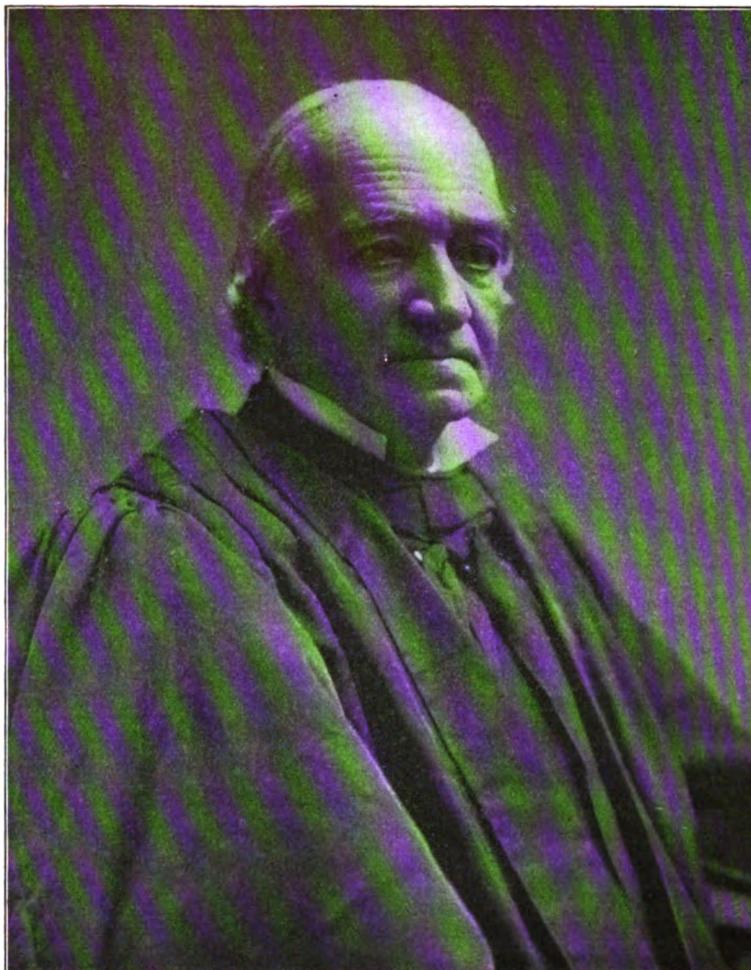
Anderson concluded he would visit the mine. His arrival in Grant's Pass was noted in the paper, and a few days later the story of the manner in which he had secured the mine was published. Parsons met him one day near the property and gave him such a tirade of abuse as he had never had before in his life. The company was sued by a miner, whose leg had been blown off in a blast, as he charged, through the company's negligence. On his return to St. Louis Anderson learned that a Josephine County jury had given a verdict against the company in the personal injury case in the sum of eleven thousand dollars. While in Portland Huston and two or three of his other acquaintances declined to speak to him.

Anderson soliloquized thus: "My schemes in St. Louis, Seattle and Minneapolis have been successful and have cost me nothing in

standing; but this Oregon trouble is public property and the story is likely to be told on me anywhere and any time. That mine is worth ten times its cost; it makes me a rich man; but I'm rather sorry I went into it. Corporate frauds perpetrated by majorities become public property, and fasten odium on the perpetrators; blackmail levied by minorities is kept quiet, and those successful in its levy lose nothing thereby. My operations in the future will be directed to the use of minority stock only."

Anderson had long been of the opinion that it was unprofitable and unnecessary for capital to have the ill will of the community in which its operations were carried on, and he accordingly set to work to gain the good will of the public in the neighborhood of the mine.

He directed the expenditure of some thousands of dollars in the improvement of the country roads in the vicinity. He constructed a church and guaranteed half the preacher's salary for the first five years. He spent several thousand dollars in improving the quarters of his employes at the mine and directed liberality in the purchase of supplies for the mess house. It was soon remarked that Anderson's employes were better housed and fed than any other miners in the district. He next provided them with a small library, billiard and pool tables and card rooms. Once a month Anderson provided the men with a smoker at his expense, and they were privileged to invite their friends. Men soon began to say that Anderson was not a bad fellow after all. They found it convenient to forget the manner in which he had acquired the property, and with a considerable party at any rate Anderson could no longer be said to be unpopular. It is true that two or three months' income was consumed in this manner, but Anderson concluded that the money was well invested. His property was more secure and he was in a position where he had an even chance in the courts.



JOSEPH P. BRADLEY.

A CENTURY OF FEDERAL JUDICATURE.

VIII.

BY VAN VECHTEN VEEDER.

IN extent and variety of learning, both within and beyond the limits of jurisprudence in its widest sense, Justice Bradley easily surpassed all his colleagues. His vast acquirements were valuable not alone in enabling him to participate with distinction in those branches of the court's work which lie outside the limits of ordinary experience, but also in giving breadth to all his judicial work. For, with all his learning, his mind was essentially practical; he was master, not the servant, of his learning; he combined with it strong convictions, great energy and business capacity. In their specific application to judicial work his intellectual grasp and unusual mental resources manifested themselves in those essential characteristics of judicial excellence: keenness of apprehension, acute analysis, thorough-going logic and power of lucid exposition. Coming to the bench without previous judicial experience, his powers had nevertheless been fully developed by wide experience at the bar, and he was well equipped for his great task. Within three months after his confirmation he delivered his great opinion in the Slaughterhouse Case, 1 Woods 21. And throughout his whole judicial service his opinions, nearly five hundred in number (from *Bischoff v. Wetherell*, 9 Wall. 812, to *Butler v. Easton*, 141 U. S. 240), and extending through sixty-seven volumes of reports, display remarkable evenness and uniformity in quality. Although he was fifty-seven years of age when appointed, there was no falling off with age; his opinion in the ejectment suit of *Baeder v. Jennings*, 40 Fed. Rep. 199, when he was in his seventy-seventh year, is as acute and thorough as anything he ever did.

Justice Bradley's extensive acquirements

enabled him to participate fully in the varied work of the court, but there were some subjects in which he took especial interests, and as to which his legal equipment and habits of mind gave his efforts especial value. Conspicuous among these branches were constitutional law, patent law and admiralty, in all of which he rendered services of permanent value. Constitutional questions enlisted his feelings as well as his intellect. He held strong convictions with respect to the construction and application of Federal powers, and the principle of nationality found in him at all times a sturdy champion. In patent law it is said by those whose opinions are entitled to weight that he has never been surpassed. By reason of his eminent scientific attainments and his habits of patient investigation, he comprehended the true philosophy of patent law and mastered every branch of the arts to which he was called upon to apply it. The maritime law was particularly congenial to his tastes; its broad and liberal rules and freedom from technicalities appealed to his mental temperament, and its historical associations with foreign systems of jurisprudence brought into play his store of legal learning.

Justice Bradley's merits as a judge are obvious to all students of the law. He had some limitations which, although not so obvious as his merits, appear frequently enough in his work to enter into a proper estimate of his judicial services. I venture to assert that these limitations are confined almost altogether to his opinions on constitutional questions, where his ardent feelings seem occasionally to outrun good taste, if not sound judgment. His dissenting opinion in *Knox v. Lee*, for instance, would seem to overstep

the proper bounds of judicial dignity; its style is more suited for an argument at the bar. This, however, is a small matter. A more important consideration is the suggestion that his touch was not as sure in this class of cases as in many others. In his determination to give a case the benefit of his own independent thought, it has seemed to many that he often failed to give due consideration to the judgment of others. He was also fond of concurring in a conclusion by an independent course of reasoning; and, most obvious of all, was his habit of following lines of thought and reasoning unnecessary to the determination of the issue. See, for instance, *Hans v. Virginia*, 134 U. S. 1.

But with all the shortcomings that may be reasonably attributed to him, and irrespective of his intellectual attainments, Justice Bradley was a man of whom any profession might be proud. Never did abuse fall so far short of its mark as in attempting to impeach his integrity in the performance of a disagreeable but unavoidable duty. And the integrity of his character was enforced by a genuine simplicity and modesty which only the finest natures attain. Writing to an intimate friend who had congratulated him upon his appointment to the bench, he said: "As to my elevation to the bench, the words of Coleridge keep coming to my mind:

'It sounds like stories from the land of spirits
If any man obtains that which he merits,
Or any merit that which he obtains.'

And I ask myself, does not that indeed apply to me? Am I not really one that hath obtained that which he doth not merit?"

Turning now to his work as found in the law reports, the keynote of his constitutional views may be found in *Ex parte Siebold*, 100 U. S. 371, where he formulated the doctrine of the concurrent powers of

national and State governments over Congressional elections. "The greatest difficulty in coming to a just conclusion," he said in the course of that opinion, "arises from mistaken notions with regard to the relations which subsist between the State and national governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised toward this government in reference to the preservation of our liberties than is proper to be exercised toward the State governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and the State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other."

To the same effect is his vigorous concurring opinion in *Knox v. Lee*, 12 Wall.

457, on the legal tender question. "The Constitution of the United States establishes a government, and not a league, compact or partnership. It was constituted by the people. It is called a government. . . . The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. . . . Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the government of the United States has express authority . . . to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted, and vindicating its authority and existence. . . . But it is said, why not borrow money in the ordinary way? The answer is, the legislative department, being the nation itself, speaking by its representatives, has a choice of methods and is the master of its own discretion. . . . In time of war or public danger, Congress, representing the sovereign power, by its right of eminent domain, may authorize the President to take private property for the public use and give government certificates therefor. . . . Can the poor man's cattle, and horses, and cows, be thus taken by the government when the public exigency requires it, and cannot the rich man's bonds and notes be in like manner taken to reach the same end? . . . There are times when the exigencies of the State rightly absorb all subordinate considerations of private interest, convenience or feeling; and at such times the temporary though compulsory acceptance by a private creditor of the government credit, in lieu of his debtor's obligation to

pay, is one of the slightest forms in which the necessary burdens of society can be sustained. Instead of being a violation of such obligation, it merely subjects it to one of those conditions under which it is held and enjoyed."

The great question involved in that controversy is one on which intellects will always differ. The power of the government to protect and defend itself, and the right of the individual to his property, are two fundamental principles of constitutional law which here conflict. It has already been pointed out that in such a conflict Justice Bradley seemed more alive to the necessities of the government, while Justice Field was invariably on the side of individual rights.

In no respect did Justice Bradley carry his national views so far as in the construction of the commerce clause of the Constitution. He was the moving spirit in establishing the Federal supremacy to which reference was made in connection with Justice Field. It is only necessary to recall such leading cases as *Transportation Company v. Parkersburg*, 107 U. S. 702; *Brown v. Houston*, 114 *ib.* 622; *Walling v. Michigan*, 116 *ib.* 406; *Coe v. Erroll*, 116 *ib.* 517; *Robbins v. Shelby County*, 120 *ib.* 489, and *Leloup v. Port of Mobile*, 127 *ib.* 640, to appreciate his influence on this great subject. The views which he enforced have been criticised as an extravagant judicial expansion of the constitutional provision, resulting in the suppression, to a great extent, of the police power of the States. It is said that while the court upholds as a mere judicial theory the police power of the States in the preservation of the lives, the health and the morals of the people, it nevertheless practically sacrifices this power of self-preservation to the power to trade and barter. But Justice Bradley's view commended itself, in the main, to the majority of his colleagues, and still prevails. He, at all events, dissented from all retrograde steps (*Pullman Palace Car Company v.*

Pennsylvania, 141 U. S. 101; *Maine v. Grand Trunk Railway Company*, 142 *ib.* 217), and maintained to the end his strong convictions with respect to the necessity of national control over commerce. In his opinion on circuit in the Arthur Kill Bridge Case, only three years before his death, he carried his doctrine to what seems to many an unwarranted extreme.

Yet Justice Bradley rendered some conspicuous services in defence of the rights of the States. Throughout the controversy arising out of the repudiation of State bonds he adhered to the letter of the Eleventh Amendment. In the Virginia Coupon Cases, 114 U. S. 270, where the majority of the court held that immunity from suit did not exempt a State from the operation of the constitutional provision with respect to the impairment of the obligation of contracts, Justice Bradley dissented on the ground that the proceedings there in issue were virtually suits against the State of Virginia to compel specific performance of her agreement to receive coupons in payment of taxes. However just such proceedings might seem in the abstract, they were repugnant to the Eleventh Amendment, which was "not intended as a mere formula of words, to be slurred over by subtle methods of interpretation, so as to give it a literal compliance, without regarding its substantial meaning and purpose." With respect to the assertion of the majority opinion that it was not the State but the government which declined to receive the coupons, and that if recourse were denied, the citizen would be without redress against unconstitutional acts of the State, he said:

"Whenever his life, liberty or property is threatened, assailed or invaded by unconstitutional acts, or by an attempt to exercise unconstitutional laws, he may defend himself in every proper way, by *habeas corpus*, by defence to prosecutions, by actions brought on his own behalf, by injunction, by *mandamus*.

Any one of these modes of redress, suitable to his case, is open to him. A citizen cannot, in any way, be harassed, injured or destroyed by unconstitutional laws without having some legal means of resistance or redress. But this is where the State or its officers move against *him*. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the State into a fulfilment of its contracts. The one is an indefeasible right, a right which cannot be taken away; the other is never a right, but may or may not be conceded by the State; and, if conceded, may be conceded on such terms as the State chooses to impose."

And in *Hans v. Virginia*, 143 U. S. 1, where he delivered the opinion of the court dismissing a direct suit against the State, he said: "The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the Legislature, and not the courts, is the judge) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the Legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause."

In *Chicago, etc., Railroad Company v. Minnesota*, 134 U. S. 418, the majority of the court held that while a grant to the directors of a railroad company of the right to regulate rates of fare does not prevent the State from declaring subsequently through general law that all rates of fare should be reasonable, yet a State cannot prescribe unreasonable rates, and the judiciary are the final judges of what are reasonable rates; and

if the Legislature fixed rates unreasonable in the judgment of the court, the act was in contravention of the Fourteenth Amendment. Justice Bradley took the position that since the Legislature had power to fix the rates to be charged for public service, it must determine whether a specific rate is reasonable. The question was essentially administrative, and beyond the province of the courts. On any other view the hands of the State would be tied in respect to subjects under the police power. The power to do what another considers reasonable is no power at all, and thus the whole theory on which the right of the State to regulate public charges is based was disregarded.

In the domain of civil rights, Justice Bradley's ablest effort was his dissenting opinion in the *Slaughterhouse Cases*, 16 Wall. 36. Justice Bradley did not question the power of the States over all matters of internal concern; nor did he assert that the Fourteenth Amendment gave any such power to the national government. With that part of Justice Miller's opinion which has most impressed the public mind, Justice Bradley was, therefore, in full accord. But the point of departure from the majority view with him, as with Justice Field, was upon the question of equal rights. He admitted that if the measure was in its operation well suited to protect the health of the community, it was constitutional; but he denied that the act was designed to protect the health of the people of New Orleans. He deemed it rather a law establishing a monopoly of an important industry, without an iota of public expediency to recommend it. As such it was an unjust discrimination, and gave to some persons rights and privileges denied to others in like condition. The measure therefore abridged not only the privileges and immunities arising out of the Constitution itself, but also all those fundamental rights of person and property usually secured in all

free countries. The war amendments declare that there is a citizenship of the United States, and they were designed to protect the rights which appertain to that citizenship from encroachment by the States. One of the most valuable of these rights is the right to carry on any trade or occupation, hampered only by reasonable regulations. To deprive a person by legislative enactment of his right to pursue a particular trade is, therefore, not only an interference with his right as a citizen of the United States, but also deprives him of his liberty and property without due process of law. "The mischief to be remedied was not merely slavery and its incidents and consequences, but that spirit of insubordination to the national government, which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure and led to much unequal legislation. The amendment was an attempt to give voice to that strong national yearning for that time and that condition of things in which American citizenship should be a sure guarantee of safety, and in which every citizen of the United States might stand erect in every portion of its soil in the full enjoyment of every right and privilege belonging to free men, without fear of violence or molestation."

In the subsequent case of *Bartemeyer v. Iowa*, 18 Wall. 129, he re-stated his views with admirable precision: "By that portion of the Fourteenth Amendment by which no State may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty, or property without due process of law, it has now become the fundamental law of this country that life, liberty, and property (which include 'the pursuit of happiness') are sacred rights, which the Constitution of the United States guarantees to its humblest

citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law. The monopoly created by the legislature of Louisiana, which was under consideration in the Slaughterhouse Cases, was, in my judgment, legislation of this sort and obnoxious to this objection. But police regulations, intended for the preservation of the public health and the public order, are of an entirely different character. So much of the Louisiana law as partook of that character was never objected to. It was the unconscionable monopoly, of which the police regulation was a mere pretext, that was deemed by the dissenting members of the court an invasion of the right of the citizen to pursue his lawful calling. A claim of right to pursue an unlawful calling stands on very different grounds, occupying the same platform as does a claim of right to disregard license laws and to usurp public franchises. It is greatly to be regretted, as it seems to me, that this distinction was lost sight of (as I think it was) in the decision of the court referred to."

In the Civil Rights Cases, 109 U. S. 3, on the other hand, he held, in opposition to Mr. Justice Harlan's powerful dissent, that the denial of equal public accommodations imposed no badge of servitude upon persons, within the meaning of the Thirteenth Amendment; and that the Federal legislation authorized by the Fourteenth Amendment is not direct legislation on matters respecting which the States are prohibited from making and enforcing certain laws and doing certain acts, but corrective legislation, such as may be necessary or proper for counteracting or redressing the effect of such laws or acts.

The reports contain many illustrations of Justice Bradley's devotion to individual liberty. Whenever the rights of the individual were demonstrated, he was firmly opposed to any impairment thereof, however slight.

"Illegitimate and unconstitutional practices," he said in *Boyd v. United States*, 116 U. S. 616, "get their first footing by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and liberal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance." See, also, *Campbell v. Holt*, 115 U. S. 620, and *Davidson v. New Orleans*, 96 *ib.* 97.

Justice Bradley's decisions in patent law exercised the very highest authority and contributed materially to the development of the patent system. In *Atlantic Works v. Brady*, 107 U. S. 192, he stated the true philosophy of the subject. "The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head-workmen is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of these laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation

of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

Within the limits thus defined he believed in the liberal administration of the patent laws. In his great opinion in the fat acid case (*Tilghman v. Proctor*, 102 U. S. 77) he demonstrated that the true spirit and intent of the patent law was to secure to the inventor of a new application of a principle to effect a useful purpose, a monopoly of the application of the principle, instead of limiting him to the special means set forth in his application. By a series of well-known decisions on the law of re-issues he revolutionized the former practice, and removed a stigma from the patent system. *Railway Company v. Sayles*, 97 U. S. 554; *Powder Company v. Powder Works*, 98 *ib.* 126; *Miller v. Brass Company*, 104 *ib.* 350; *James v. Campbell*, 104 *ib.* 356; *Mahu v. Harwood*, 117 *ib.* 354. In these cases he demonstrated that the true construction of the patent law authorized no alteration in the specification of an existing patent, unless made promptly and for the purpose of correcting a *bona fide* mistake inadvertently committed, such as a court of chancery, in cases within its jurisdiction, would correct. This ended the practice of re-issuing patents in the hands of speculators to cover inventions made by subsequent inventors and not contemplated by the original patentee.

In the great contest over the telephone patent (126 U. S. 1) he dissented from the

majority, in a characteristic opinion, on the ground that Daniel Drawbaugh had anticipated Bell's invention. Drawbaugh certainly had the principle, he contended, and accomplished the result. "We do not question Mr. Bell's merits. He appreciated the importance of the invention, and brought it before the public in such a manner as to attract to it the attention of the scientific world. His professional experience and attainments enabled him to see, at a glance, that it was one of the greatest discoveries of the century. Drawbaugh was a different sort of man. He did not see it in this halo of light. . . . He was only a plain mechanic; somewhat better instructed than most ordinary mechanics; a man of more reading, of better intelligence. But he looked upon what he had made more as a curiosity than as a matter of financial, scientific, or public importance. . . . It is perfectly natural for the world to take the part of the man who has already achieved eminence. No patriotic Briton could believe that anybody but Watt could produce an improvement in the steam engine. . . . We do not wish to say a word depreciatory of Mr. Bell. He was original, if not first. He preconceived the principle on which the result must be obtained, by that forecast which is acquired from scientific knowledge, as Leverrier did the place of the unknown planet; but in this, as in the actual production of the thing, he was, according to the great preponderance of the evidence, anticipated by a man of far humbler pretensions. A common astronomer, by carefully sweeping the sky, might have been first in discovering the planet Neptune; whilst no one but a Leverrier, or an Adams, could have ascertained its existence and position by calculation."

In the important branch of maritime law, also, Justice Bradley is a widely recognized authority. With respect to marine insurance (*Insurance Company v. Dunham*, 11 Wall. 1), to collisions (*The Belgenland v. Jensen*, 114

U. S. 355, to salvage (*Cope v. Vallette Dry Dock Company*, 119 *ib.* 625), to liens (*The Lattowanna*, 21 Wall. 558), and particularly with respect to the limited liability of ship owners (*Norwich Company v. Wright*, 13 *ib.* 104; *Place v. Norwich Company*, 118 U. S. 468; *The North Star*, 106 *ib.* 17; *The Scotland*, 105 *ib.* 24; *Butler v. Boston Steamship Company*, 130 *ib.* 527; *The Great Western*, 118 *ib.* 526), he rendered contributions of permanent value. His admirable method in the discussion of admiralty questions may be illustrated by his exposition of the general maritime law, in *The Lattowanna* 21 Wall. 558:

"It is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each State only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analagous case. It is the basis of all the State laws; but it is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or

in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. . . . But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. . . . Each State adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it, and without such voluntary adoption it would not be law. And thus it happens that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world."

Limited space precludes an adequate notice of Justice Bradley's work in the ordinary civil jurisdiction of the court. Mention of his faultless opinion in *Railroad Company v. Lockwood*, 17 Wall. 357, on limitation of liability by common carriers; *Baeder v. Jennings*, 40 Fed. Rep. 199, on ejectment; *Patch v. White*, 117 U. S. 210, and *Bowen v. Chase*, 94 *ib.* 813, on wills; *Casey v. Cavaroc*, 96 *ib.* 469, on bailments; and *Harkness v. Russell*, 118 U. S. 663, on sales, will suffice to indicate the variety and extent of his distinguished labors.

Justice Bradley's principal opinions are the following:
 Constitutional law: *Knox v. Lee*, 12 Wall. 457; *Virginia Coupon Cases*, 114 U. S. 270 (*diss.*); *Hans v. Virginia*, 134 *ib.* 1; *McGahey v. Virginia*, 135 *ib.* 662; *United States v. Black*, 128 *ib.* 40; *Burgess v. Seligman*, 107 *ib.* 20; *Thompson v. Whitman*, 18 Wall, 457; *Mormon Church v. United States*, 136 U. S. 1; *Sinking Fund Cases*, 99 *ib.* 700 (*diss.*); *Beer Company v. Massachusetts*, 97 *ib.* 25; *Chicago, etc., Railroad Company v. Minnesota*, 134 *ib.* 418 (*diss.*)

Civil rights: *Civil Rights Cases*, 109 U. S., 3; *Slaughterhouse Cases*, 1 Woods 21; 16 Wall. 36 (*diss.*); *Bartmeyer v. Iowa*, 18 Wall. 129; *Boyd v. United States*, 116 U. S. 616; *ex parte Parks*, 93 *ib.* 18; *ex parte Siebold*, 100 *ib.* 371; *ex parte Clark*, 100 *ib.* 400; *Missouri v. Lewis*, 101 *ib.* 22; *ex parte Curtis*, 106 *ib.* 371 (*diss.*); *Pierce v. Carskadon*, 16 Wall. 234 (*diss.*); *United States v. Cruikshank*, 1 Woods 308; *ex parte Wall*, 107 U. S. 265; *Campbell v. Holt*, 115 *ib.* 620 (*diss.*); *Blyew v. United States*, 13 Wall. 581 (*diss.*)

Commerce clause: *Leloup v. Port of Mobile*, 127 U. S. 640; *Pullman Company v. Pennsylvania*, 141 *ib.* 101 (*diss.*); *Transportation Company v. Parkersburg*, 107 *ib.* 702; *Wabash Railway Company v. Illinois*, 118 *ib.* 557; *Brown v. Houston*, 114 *ib.* 622; *Walling v. Michigan*, 116 *ib.* 406; *Coe v. Erroll*, 116 *ib.* 517; *Robbins v. Shelby County*, 120 *ib.* 489; *Philadelphia and Southern Steamship Company v. Pennsylvania*, 122 *ib.* 326; *Willamette Bridge Company v. Hatch*, 125 *ib.* 1; *Crutcher v. Kentucky*, 141 *ib.* 47; *Railroad Company v. Maryland*, 21 Wall. 456.

Patents and copyright: *Atlantic Works v. Brady*, 107 U. S. 192; *Tilgham v. Proctor*, 102 *ib.* 707; *Powder Company v. Powder Works*, 98 *ib.* 126; *Mahu v. Harwood*, 112 *ib.* 354; *Miller v. Brass Company*, 104 *ib.* 350; *James v. Campbell*, 104 *ib.* 356; *Railway Company v. Sayles*, 97 *ib.* 554; *The Telephone Cases*, 126 *ib.* 2 (*diss.*); *Baker v. Selden*, 101 *ib.* 99.

Admiralty: *The Lattowanna*, 21 Wall. 558; *Insurance Company v. Dunham*, 11 *ib.* 1; *Norwich Company v. Wright*, 13 *ib.* 104; *Place v. Norwich Company*, 118 U. S. 468; *The North Star*, 106 *ib.* 17; *The Scotland*, 105 *ib.* 24; *Butler v. Boston Steamship Company*, 130 *ib.* 527; *The Great Western*, 118 *ib.* 526; *Providence Steamship Company v. Hill Manufacturing Company*, 109 *ib.* 578; *The Belgenland v. Jensen*, 114 *ib.* 355; *Cope v. Vallette Dry Dock Company*, 119 *ib.* 625.

Contracts: *Casey v. Cavaroc*, 96 U. S. 469; *Harkness v. Russell*, 118 *ib.* 663; *Insurance Company v. Davis*, 95 *ib.* 425; *Hanover v. Doane*, 12 Wall. 342; *New York Life Insurance Company v. Statham*, 93 U. S. 24; *United States v. Behan*, 110 *ib.* 338.

Miscellaneous: *Railroad Company v. Lockwood*, 17 Wall. 357 (exemption from liability for negligence); *Baeder v. Jennings*, 40 Fed. Rep. 199 (ejectment); *Patch v. White*, 117 U. S. 210; *Bowen v. Chase*, 94 *ib.* 813 (wills); *Stewart v. Sonneborn*, 98 *ib.* 187 (*diss.*) (torts); *Hardin v. Jordan*, 140 *ib.* 371 (property); *Dainese v. Hale*, 91 *ib.* 13 (consuls); *Hall v. Lanning*, 91 *ib.* 160 (partnership); *Lake Superior and Mississippi Railroad Company v. United States*, 93 *ib.* 442 (railway grant); *Gaines v. Fuentes*, 92 *ib.* 10 (*diss.*); *Claffin v. Houseman*, 93 *ib.* 130 (courts); *In re Nielsen*, 131 *ib.* 176.



SOME IOWA JUSTICE.

BY JAMES S. WOODHOUSE.

IT was an ouster proceeding in Iowa, before a country squire. Because one of the justices in the township was plaintiff, the case had to be carried over muddy roads to the rich old Irish farmer's house. The party found a hearty welcome, and, while dinner was cooking for the country friends and city lawyers, the official set down the title of the case after the one which had been docketed eleven months before.

"The furst thing to be done," said the squire, as he settled down in an easy chair behind the sitting room centre table, "is fur the plaintiff, Mister Krall, to furnish a cost bond."

Thereat the city attorney who was prosecuting the case arose and started to speak.

"Now, look here, youse moight jus' as wall sit down, fur phat I say goes in this court. Ain't thot right, Mister Sadelick?"

"That's right," said the defending attorney.

"Now if the court please——" started the plaintiff's lawyer.

"Yez moight jus' as well sat down fur——"

"But, your honor, we'll have to pay the costs anyway, according to the statute."

"Well, I don't know about thot, but if Mr. Krall says he will poy if he gets beat or looses, why—well, will yez poy, Mister Krall?"

An affirmative answer satisfied the judge, and he called forth, "Projuice yer evidence." The defendant attempted to introduce evidence to show that the rent had all been paid up to the present time, and of course the plaintiff's lawyer objected.

"Now, yez moight jus' as wall sit down

again, fur the man can show if he has paid his rint."

"But, your honor," protested the lawyer, "it is immaterial. We are not asking for any rent. All we want is possession."

"Wall, now, yez can have possession, but not unless I know that the rint ain't paid."

"But, your honor——"

"Now, yez moight jus' as wall sit down. I want to know if he has paid his rint, anyway. Proceed with the case."

"And, phat's that yez say? Thot te plaintiff's horses ate up the hay in the defindant's barn? Now, sure, Mister Krall, yez ought to pay the poor man for his hay."

"But," put in the lawyer, "that is not an issue of this case. The evidence is immaterial in regard to this ouster proceedings."

"Now yez sit down. I want to know whose horses ate thot hay, and if Mr. Krall's did, the defindant is entoitled to rint to the extent of the damage."

And the plaintiff's lawyer, almost in a frenzy over his fruitless efforts to conduct the case along lines of law, sat down in disgust while his opponent, who was agreeing with the judge, was holding his sides because of laughter.

"Sure and I'll foind," said the judge, when all the evidence was in, "that the plaintiff, Mr. Krall over there, can have possession of the house and the barn three weeks from today—can yez get out by thot time, Mister Renter? All roight; three weeks from today, but upon me soul, I still think Mister Krall oughter pay for that hoy."

OVER THE GOVERNOR'S VETO.

BY DOUGLAS MALLOCH.

IT happened a number of years ago, and the time is enough remote and the people most interested enough removed from the public eye to permit me to tell the tale. It is a task I have long desired to undertake; not because I think I can do it so well, but because I had a hand in the affair myself, and desire, if the story is told at all, that it be told rightly. What I may set down here may not be as smoothly written nor as embellished with adjectives and such as it would be if it had been written by one of these chaps who make the writing of yarns a business. A more clever man, I suppose, would not put down things just as they occurred or words just as they were spoken, but would group them together and touch them out as an artist works with paints and canvas. I have not the skill to do that; but the story, I hope, will contain in sincerity what it lacks in fine language.

I am one of those men who have been honored by being made a member of the House of Representatives of this great commonwealth, but so honored far enough back to now be forgotten. Even when I was at Lansing I never made the welkin ring to any great extent; and a man in the Legislature who does not make the welkin ring every few days and say sensational things to the other side of the House for the newspapers to put big type over, need not expect to be long in the minds of the people after he has laid in his supply of stationery and started for home in the spring after final adjournment.

I suppose this story really begins with the morning I walked into the executive office and found the Governor looking down Michigan avenue and puffing a cigar furiously. Whenever the Governor puffed he puffed furiously, whether he was puffing a cigar, puff-

ing his way up the capitol steps or puffing himself in the Detroit newspapers. The Governor was mad about something, I could see that. I think I would have escaped, but the Governor caught sight of me, and, nodding me to a chair, began:

"I have been hoping all the morning that some honest man would come in here. I'm going to be frank with you, for I think you are one of the honest men in this Legislature. I want to talk to you about this bill of Senator Rivers'. I am not going to be a bit bashful about telling you what I think about it. I think it is a fool bill. Read what the papers say about it. Ask any man who isn't interested in it what he thinks about it and what the people up his way think about it, and you will find them of one opinion."

"I didn't think the bill was of so much importance," I ventured to say.

"Any bill is of importance," said the Governor, "when the people of this State get to talking about it. I can't see it would cut such an awful figure myself, but the people think it will, and that amounts to the same thing. If that bill passes this Legislature every man who votes for it signs his own death warrant politically. It wouldn't be so bad, if that was all, but they will take the party in this State with them."

I began to see what the Governor was driving at, and why the Governor was mad.

"As you know," continued the Governor, "that bill has already passed the Senate. It is now up to you people in the House to say what happens to it. I have just got a wire from the Speaker that his sister is sick and he can't get down here before Wednesday. I figured on the Speaker's help in killing this bill in the House. Well, he won't be here. Now, all I have to say is that if you want to do me and the party and the State a service,

you'll never let that bill get through. You are a friend of mine, and I want to tell you it isn't the Rivers bill you're voting on in the House, remember, but the future of your party in this State, for it is the little things the people have the habit of getting worked up about."

I must confess I had not put a great deal of thought on Rivers' bill. I thought there would be time enough to do that when it reached final passage. I am afraid even now I did not do the Governor nor the bill justice, for I contented myself with voting against the bill on its final passage; but that did not avail me much, for the bill passed Senate and House and was sent to the Governor.

What happened in the executive chamber was expected—by me, at least. The bill came back with the Governor's veto and a message giving the Governor's objections to its passage. This discussed at length the merits of the bill, and the Governor assailed it rather vigorously, as vicious and unwise. There is no need—nor would it be wise, perhaps—to discuss the provisions of the measure. I did not myself look upon it as a matter of great importance. I am confident that the subsequent fight over the attempt to pass the bill over the Governor's veto would never have occurred had not Senator Rivers been the father of the bill.

The Governor and the Senator represented two different factions in the party politics of the State. These factions pulled together fairly well at the polls or wherever the success of the party, as a party, was at stake. Each realized its dependence on the other. A permanent rupture would mean oblivion for both.

In the nominating conventions, in the Legislature, even in local politics, the Governor's friends and the "Rivers crowd" were more inclined to show their hands. In the last State convention the Governor had had the votes to win; but the Rivers crowd believed that now its star was in the ascend-

ancy. The Governor had made some mistakes; his friends had said some unwise things—and in politics a man is held responsible for the antics of any fools that choose to follow him. An enemy can hurt him; but a fool friend can do him more damage in a minute than an enemy may hope to cause him in a month.

When the Governor vetoed the Rivers bill, he did it because he thought its passage would hurt party success in the State. But Senator Rivers took it to be a personal slap. I do not think he had a large idea of the bill's importance himself; but he had a large opinion of his own. He had heard there was some talk against the bill in the State, and he did not like the part assigned to him in this little political tableau in which the Governor stepped in and killed the measure and thereby won applause.

The Rivers men claimed to be in control of House and Senate, and the Senator decided to make the Legislature show its hand. When the bill came back to the Senate, with the Governor's veto attached, for reconsideration, Senator Rivers had it tabled until such time as he could find his strength. If a careful survey of the field led him to believe he could force its passage by a two-thirds vote he intended to do it. He was sure of the Senate; but of the House he was not so sure.

It was ten days later before the Senator called up his bill, and in the meantime it had become the most talked-of measure under consideration. It did not take the old-time members long to find out which way the pendulum was swinging and to climb into the Rivers band wagon. I had no third-term aspirations or appropriation bills worrying me, and I decided to stick with the Governor. The chief executive knew also which way the battle was going. He wrote the names of twenty-six Senators who would vote for the Rivers bill on the back of an envelope for me.

One day I found him in his office walking

forth and back and rubbing his brown hands together.

"Rivers can never muster a two-thirds vote in the House. I have a few friends left over there that he can't scare into line. And the Speaker will be back any day now; you know he has a lot of influence."

It was natural that the Governor should take a large amount of interest in the Speaker; for did not the Speaker take a large amount of interest in the Governor's daughter? Some of the wives of legislators spending the winter at the capitol, having nothing else better to do, had even prematurely announced the engagement of the two young people a few times. The Governor, I thought, rather approved of the idea of a match; and, as far as I might observe, the Governor's daughter did not seem to offer much objection to it.

The twenty-six Senators the Governor had picked to vote with Rivers did so, and one besides. The Speaker came down the same day from Grand Rapids with the news that his sister's critical illness was over and she was out of danger. I am afraid the members did not feel the sympathetic interest in the Speaker's sister that they professed; for the Rivers bill was the all-absorbing topic.

The Speaker had no more than reached Lansing when the Governor sent for him. I was with the Governor at the time and would have left, but he bade me stay. I shall never forget the conversation that followed. The Governor gave the younger man a firm hand-clasp when the Speaker entered. Before he had released it he slapped him upon the shoulder and holding him at arms' length, looked him straight in the eye.

"Jim," he asked, "you are a friend of mine?"

There was a note of anxiety in the Governor's voice that was new to us who had never known anything but his self-confident manner. In these last few days friends had been slipping away from him, and I think

there was a little loneliness in his heart when he spoke those words. There was no tremor in the young man's voice or alteration in his gaze as he replied:

"Better, perhaps, than you are yourself."

The Governor seated himself again and motioned the Speaker to a chair. "My boy," he said, "if there is anything at any time I can do for you, I want you to let me know."

"Governor," the younger man replied, "as you know, I have been at the bedside of a sick sister, and it has set me thinking. She is the only person in the world that I may call by a dearer name than friend. I have many things to make me contented—a good law practice and some political prospects, for instance. But, after all, they are not much. Do you know if I should lose this dear sister of mine—God forbid—I would be without a soul to care for me? I have been thinking—I have—well, I have been thinking that I would like to marry your daughter."

A happy smile passed quickly over the Governor's face. "I would be glad to have Grace marry any good man she set her heart on," he said, "so long as he was one of my friends."

"But I sent for you," the Governor went on, "to speak to you particularly about this Rivers bill. You know that it has passed the Senate and will be reconsidered in the House today."

"I read so in the morning papers."

"Well, this thing has developed into a scrap between Rivers and me, through no fault of mine. Rivers says he is going to put his friends on record. I am just as ready to put mine there. When the bill comes up to-day I hope you will not dodge voting on it."

"I won't, Governor."

"You will vote against it, of course?"

"I am sorry, but that is something I cannot do."

The Governor's hands gripped his chair, and his face turned pale.

"You—cannot—do?" he repeated in surprise.

The moment of silence that followed was painful to both men—the one throwing his life's happiness away for what he believed to be right, the other wounded with cruelest wound man may know—the stab of a friend.

"Governor," said the Speaker, trying to speak gently, "I would vote neither for nor against this bill, for the reasons that make Senator Rivers advocate it at this time and make you oppose it. He is urging it for no other reason than that he wishes to do it over your objections. There were men who voted for the bill in the Senate and there will be men who will vote for it in the House who will not vote for it in that spirit at all. They will vote for it because they think it is right."

"You have been out in the State a little," said the Governor, "and you know how the people feel about it."

"Yes, I do know," the Speaker said, "but the people do not know always what they do want or what is good for them."

"Suppose the Rivers bill is a good bill, is it so urgent it should be passed at this session? Most of us had thought it a rather unimportant matter."

"Very few people—surely not Senator Rivers—realize its importance. It may be that in five years the Rivers bill, should it pass, will be repealed or so amended its best friends would hardly recognize it. But it is the entering wedge for a class of legislation of which this State stands in need."

"You are determined to vote for this bill?" asked the Governor after a pause.

"I cannot vote against it for the simple reason that it is unpopular while I recognize it to be right," the Speaker replied.

"Then," said the Governor, "it is hardly necessary to continue the interview."

The hint was too broad to be mistaken, and the Speaker withdrew.

I have heard men go into excited raptures

telling their sensation watching the tide of battle on historic fields; I have even seen them get into a frenzy describing some great sporting event they have witnessed. But to me there is nothing so thrilling as those battles of ballots and brains and eloquence that are fought out on the floors of our Congress and our State Legislatures. There is no great plain there for the crushing sweep of legions or the fierce charges of maddened infantry. In the arena of a law-making body men come together in mortal combat, and each man must look out for himself as best he may.

There was a feeling of intense excitement in the House the afternoon that the Rivers bill came up for a vote. Two or three timid members, whose consciences would not allow them to vote against the bill and whose constituents would not allow them to vote for it, had absented themselves, but eighty-eight members responded to the roll-call. When the roll-call began on the Rivers bill almost every man seized the long printed slips bearing the members' names and began checking them off as they voted. The first man voted for the bill, the next two against it. Then it stood five for and three against. As the vote proceeded the Rivers forces gained strength as man after man "climbed into the band wagon."

When my name was called I voted against the bill, but I continued to check the names off nervously, counting the vote as I went on. It was very close. The bill requiring sixty-seven votes to pass it over the Governor's objections—two-thirds of the members-elect. When the bottom of the slip had been reached I almost leaped from my chair in my excitement.

The vote stood: Ayes, 66; nays, 21. Then the voice of the clerk of the House was heard demanding the last vote:

"Speaker."

"Aye," came the answer quietly and firmly.

That evening the Speaker's messenger

brought me a note asking me to come to the Speaker's room. I found the presiding officer of the House pacing nervously up and down.

"You heard the conversation in the Governor's office the other day," he said. "Read that."

He handed me a note. It was on the Governor's stationery and in the Governor's handwriting. It read:

"Dear Sir:—I had hoped that your suddenly developed opposition to me might not have enough effect to make a serious breach between us. Fate, and yourself at a critical moment, have willed otherwise. We had some conversation, you will recollect, in regard to my daughter. This note, I presume, is unnecessary; for I trust you will see how utterly impossible is the alliance you suggested. In fact, I forbid it, and have so informed my daughter."

"I trust," the Speaker said, when I looked up, "that you will respect the confidence. You see it is all ended."

"No, I don't see," I said.

"What do you mean?" he asked, pausing in his walk.

"Nothing or something," I replied. "That is according to what the girl says when you see her; for I think you had better see her."

Then I went away. The House and Senate adjourned Friday over Sunday. Friday afternoon the Speaker's messenger brought me a note. It was from the Speaker and simply said:

"Stick near the Governor tomorrow."

Next day I stuck near the Governor. At a little after five o'clock, while we were smoking in the executive office, his secretary handed him a telegram. As the Governor read it, he frowned, but the frown was put to flight by a smile, as he handed me the yellow paper.

The message was from Grand Rapids and was timed 4.48 p. m. It read:

"Jim and I were married at four. There are three of us—Jim, and you, and I--and Jim and I are two-thirds. Will you forgive us?
GRACE."

FOSTERAGE.

By JOSEPH M. SULLIVAN.

THE custom of fosterage had existed among the Irish from very ancient times. The evolution of the clan, tribe and state in primitive Ireland shows that fosterage is of very ancient origin. Briefly defined, fosterage was the custom of letting out children of families of rank to women who looked after their care, nursing and education. In the early days of Ireland no lady of rank thought of giving suck to her child or children. This duty was discharged by the wife of a farmer or grazier on the chief's demesne, and the after-bonds which con-

nected the young chief to his foster-mother and the members of her family were of a most strong and most loving character. This custom was not confined to the wealthy and powerful, but was a common practice with all classes. The reasons for the practice of this custom are not quite clear, but the associations which it necessarily entailed had a powerful effect in cementing the ties of friendship between the chief and members of the clan.

Aside from the legal aspect of this custom, the relations arising from the practice of fos-

terage were considered most sacred, and ties of friendship were thus established which neither time nor adversity could efface.

The laws governing fosterage were drawn with great particularity; the price of nursing and education, the instruction of children, the conditions upon which they could be returned before the end of pupilage, were subjects of very careful consideration. Heavy penalties were imposed upon foster-parents for failure to teach their foster-children studies or branches of trades and occupations which were suitable to the child's rank. The foster-parent, during fosterage, was liable for all torts and injuries inflicted by his foster-child, and also was entitled to pecuniary compensation for any injury done his foster-child.

A fosterage of a peculiar kind, called literary fosterage, was practised by the *ollahms* (professors). These professors taught children the necessary branches of education for compensation or no compensation, according to the station in life of the foster-child. They also took a limited number of pupils into a kind of fosterage combined with pupilage, adopted them into their families, and so thoroughly infatuated them with the profession they were being prepared for that the original family ties of those pupils became almost totally effaced.

Children, as a rule, were not let out to fosterage until they were about one year old.

Fosterage ended upon the happening of three events, namely, death, selection and crime. Selection in the above case meant marriage, and the age of selection for boys was reached at the end of seventeen years, and for girls at the end of fourteen years.

A foster-parent in old age could demand support from his foster-children, provided he was in want and had no children of his own.

Fosterage provided the victuals to be served to foster-children according to their rank, as, for example, the sons of kings and chieftains received food of a better quality than that served to children whose parents were of an inferior rank. The practice of fosterage and gossiprede among the ancient tribes of Ireland was prohibited in 1367 by the famous Seatnus of Kilkenny.

We see traces of fosterage in the sacrament of baptism as it is administered in the Roman Catholic Church. Every child when baptized must have two sponsors, a male and a female, commonly called a godfather and godmother. They are under a moral obligation to support their godchildren in case of a failure to do so by the child's own parents. A sponsor cannot stand for more than one child a year. This provision is made so that the sponsor can realize his burden, and not add to it. Thus we see a primitive custom of ancient times still practised though in a modified form, at the present day.



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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.

NOTES.

AN interesting programme has been arranged for the twenty-sixth annual meeting of the American Bar Association which is to be held at Hot Springs, Virginia, on August 26th, 27th and 28th. Besides the President's address, by Francis Rawle, Esq., of Philadelphia, and the annual address by Hon. Le Baron B. Colt, of Rhode Island, United States Circuit Judge, there will be papers read by Sir Frederick Pollock, of London, and William A. Glasgow, Jr., of Roanoke, Virginia. The Section of Legal Education will hear, besides the address of Professor George W. Kirchway, Dean of the Columbia Law School, a paper by Professor James Brown Scott, of the same school, on "The Place of International Law in Legal Education," and a paper on "Examinations for the Bar," by Professor Samuel Williston, of the Harvard Law School; Hon. Simeon E. Baldwin, of the Yale Law School, will deliver an address before the Association of American Law Schools, on "The Study of Elementary Law a Necessary Step in Legal Education," and Professor William S. Curtis, of the St. Louis Law School, will read a paper on "Examination in Law Schools"; and at the sessions of the Section of Patent, Trade Mark and Copyright Law the speakers will be Edmund Wetmore, Esq., of New York, Robert H. Parkinson, Esq., of Chicago, M. B. Philipp, Esq., of New York, and J. Nota McGill, of Washington.

A WITNESS for the government had been erroneously given a discharge as a juror instead of a witness, and when he presented the discharge to the marshal, who pays the money, the marshal, not recognizing him as one of the jurors, said to him:

"So you are a juror, are you?"

"No, sir, I'm a Swede," replied the witness.

SOME years before the Civil War, when this country was almost a wilderness, and when there was no town of Denton in Texas, district court was held in a place called Old Alton, in Denton county. John C. McCoy of Kentucky was prosecuting attorney, and Gustavus Adolphus Everetts, of Illinois, was attorney for defendant. Charge, theft of a saddle. The jury found the defendant guilty. Everetts immediately filed a motion for new trial, whereupon court adjourned for dinner. Resuming labor, Everetts presented his motion, backed by an able legal argument, during which now and then the defendant interrupted by pulling at his coat-tail and finally said, "Stop it; they'll whip me agin." During recess the sheriff had anticipated final judgment by inflicting the punishment.

LAWYER A— had a very precocious little girl whose chief fault was telling rather extravagant stories. Her mother had tried to break her of this habit, and, in some measure, had succeeded. But one day the child came running into the house in great excitement, exclaiming, "O, mamma, I just saw a lion in the street!"

"Why, Bessie," returned her mother, "you know you did not see a lion. That is one of your naughty stories. And you promised me

you would not tell any more. Now go right to your room and ask God to forgive you for breaking your word, and for telling an untruth."

Very crest-fallen and with head hanging down Bessie left the room. She soon returned, however, with a triumphant air.

"Did you do as I told you?" asked her mother.

"Yes'm," answered Bessie, and God said, 'Don't mention it, child, I thought it was a lion myself when I first saw it.'"

FORMER MAYOR W. H. QUICK, of Sioux City, Iowa, besides being a first-rate lawyer, is a witty one as well. Recently a lady called at Mr. Quick's office and told the lawyer that she was looking for the best lawyer in Sioux City to get her a divorce. "I am the ablest and best lawyer in this city and can get the divorce for you," replied the ex-mayor. "But I must have some sort of proof," retorted the client, "that you are what you claim to be." "Proof," said Mr. Quick, "you need not prove it, I admit it." Mr. Quick got the job.

THE following act was passed at the last session of the Kansas legislature, and is to be found in Sessions' Acts, 1903, p. 113:

Regulating the use of automobiles.

An Act in relation to automobiles and motor vehicles, regulating their speed and operations on the public highways in this State, providing for their proper equipment, and providing penalties for the violation thereof.

Be it enacted by the Legislature of the State of Kansas; Section 1. That the term "automobile" and "motor vehicle" as used in this Act shall be construed to include all types and grades of motor vehicles propelled by electricity, steam, gasoline, or other source of energy, commonly known as automobiles, motor vehicles, or horseless carriages, using the public highways, and not running on rails or tracks. Nothing in this section shall be construed as in any way preventing, obstructing, impeding, embarrassing, or in any other manner or form infringing upon the prerogative of any political

chauffeur to run an automobilious band wagon at any rate he sees fit, compatible with the safety of the occupants thereof; provided, however, that no less than ten nor more than twenty ropes be allowed at all times to trail behind this vehicle when in motion, in order to permit those who have been so fortunate as to escape with their political lives an opportunity to be dragged to death; and provided, further, that whenever a mangled and bleeding political corpse implores for mercy the driver of the vehicle shall, in accordance with the provisions of this bill, "throw out the life-line."

"AND so you were playing poker for money?" said the western judge to the prisoner at the bar.

"No, sir; we were playing for chips."

"Well, it's all the same. You got your chips cashed for money at the end of the game, I suppose."

"No, sir."

"Why, how was that?"

"At the end of the game I didn't have any chips, your Honor."

"You're discharged."

SOME years ago, when Colonel William P. Hepburn was active in the practice of law in Southwestern Iowa, Hon. Smith McPherson, now United States District Judge, was also in the same period an active practitioner. If Colonel Hepburn excelled in one particular more than another, it was that of cross-examination of a witness.

On one occasion during the heated trial of a cause, which had been brought for the wrongful levy of an attachment upon a stock of nursery trees, a material question of fact in the case was, *when* the ground froze in the November at the time of the levy of the attachment and whether it remained frozen without thawing during the entire winter. That fact proven was fatal to the case of the client represented by Colonel Hepburn and Judge McPherson. To maintain that fact, opposing counsel introduced as a witness Deacon X., a ruling elder of the Presbyterian Church in the community, whose reputation

and character could not be in any manner impeached and who was considered a man of the strictest probity and honesty.

Deacon X., on direct examination, testified positively that the ground was frozen solid on November 26th, and remained frozen all winter. Colonel Hepburn and Judge McPherson were completely routed in their minds by this testimony, but without showing a disturbing ripple on the surface, Hepburn addressed himself for cross-examination to the witness. After leading the witness to repeat the testimony and make it positive and convincing, Colonel Hepburn said:

"Deacon X., how do you fix with such certainty the exact day when the ground became frozen?"

"I always keep a diary," the Deacon replied.

"Have you that diary with you?" asked the Colonel.

The Deacon responded in the affirmative, produced the diary, and, turning to November 26th passed it over for examination, without reading.

Colonel Hepburn, after reading the entry to himself, asked the witness:

"This entry you made on November 26th, did, you, Deacon?"

"Oh, yes, yes!" replied the Deacon.

"You have made no change in it since that day?" the Colonel asked.

"None whatever," the Deacon replied with considerable earnestness.

Thereupon Colonel Hepburn returned the diary to the Deacon and asked him to read that entry to the jury, and the Deacon without discovering the situation until later, said:

"This is the entry in my diary (reading), November 26th. Ground froze up and staid froze all winter."

The effect can be better imagined than described. Colonel Hepburn maintained his reputation as a cross-examiner and his client won the case, and the Deacon was forever after that known in that community as "the man who kept the diary."

ROMANCES often come to light in dry-

looking law cases, but it is seldom that so much romance and picturesqueness is written into a case as in one which has just been taken to the Iowa Supreme Court. A statement of an appeal, just filed in that court, in the case of *Brier v. Davis*, gives the facts in the following novel manner:

"At the time of the transaction shown by this record, Mr. Brier, Sr., was about seventy-seven years of age. He lived on a farm near the Missouri line, which belonged to his wife, and with them lived his son, the appellee, and an old-maid daughter. In his youth the old gentleman had been a miller in a water-power mill. To be such in those days was to be the principal citizen in the neighborhood of the mill. He lived so near the Missouri line that he had not learned that small water-power mills had ceased to be of value for any purposes, except to artists and pigeons, and so in his declining years his heart fondly turned to again being a miller in a water-power mill. He was never a giant intellectually, and his more than three-score and ten years bore heavily upon him at and prior to the time when he first met Mt. Vernon Davis.

"Mr. Brier, Sr., was a pious old gentleman, who delighted in singing hymns, was weak and honest and presumed every one else to be so. His children, the appellee and the old maid, were living proofs of the rule that 'like begets like.'

"Mt. Vernon Davis, on the other hand, was an astute business man, who had at one time been a farmer, but who had in later years taken to shaving notes and loaning money. In this business he had foreclosed a mortgage on and came into possession of a picturesque ruin, once known as a mill, situated at Central City, Iowa.

"The ways of Providence were such that the old gentleman from the Missouri line was brought in contact with the astute Mr. Davis from Mt. Vernon. In a business transaction in which the mill changed hands, the little farm down on the Missouri line became mortgaged and the old gentleman Brier and his old-maid daughter became ten-

ants of the ruin known as 'The Mill.'"

Mr. Brier in his petition alleges that Mt. Vernon Davis got the best of his father. The jury found that he did it to the extent of \$2000, from which finding this appeal is taken.

But, you must admit," said the masculine end of the controversy, "that woman is the weaker vessel."

"I'll admit nothing of the sort," rejoined the contrary female. "The mere fact that she seldom has to be bailed out is proof to the contrary."—*Exchange*.

IN Dr. John Hall's time it was the custom in his church to use the old-fashioned simple hymns (says *The Canadian Law Review*), and the singing was congregational. On one occasion William M. Evarts discovered E. Delafield Smith, then corporation counsel of New York City, singing with all his heart, and whispered to his friend: "Why, there is Smith singing, 'I want to be an angel.' I knew he wanted to be district attorney, but I didn't know he wanted to be an angel." The remark was repeated to Mr. Smith, and quick as a flash came the retort: "No, I have never mentioned the matter to Evarts, knowing he had no influence in that direction."

JUSTICE GAYNOR of the Supreme Court of New York has a reputation for dry sayings not altogether devoid of humor, and two which are going the rounds among lawyers are these:

A petition for an injunction, based upon somewhat doubtful assertions of fact, recently came before the justice. After considering the affidavit of the petitioner, he remarked: "In this case an injunction will not lie, even if the relator does."

Under circumstances somewhat similar, an attorney sought to discredit statements contained in an affidavit.

"But counsel should remember," observed Judge Gaynor, "that the truth sometimes will out, even in an affidavit."—*New York Times*.

ACCORDING to one of the unwritten laws of the Constitution, the President of the Republic may not leave French territory while the Chambers are in session. One reason for this rule undoubtedly is to be found in the fact that the President is not merely an ornamental functionary, but an active participant in various departments of Government; for example, he usually presides at Cabinet Councils, and in this and other ways brings his influence effectually to bear on matters of State. The rule, moreover, reminds us that for a brief period in our own history the Sovereign could not leave the British isles without the consent of Parliament. This prohibition, contained in the Act of Settlement, was aimed at possible entanglements arising out of the Hanoverian connection; it was, however, very short-lived, being repealed in the first year of the reign of George I., "whose frequent journeys to Hanover," says Hallam, "were an abuse of the graciousness with which the Parliament consented to annul the restriction."—*The Law Times*.

IN a recent Quain lecture, Mr. John Macdonell traversed a very wide and interesting field—judicial procedure in Athens, in later Rome, in the mediæval Church Courts under the canon law, and in modern Germany. Such a comparative survey leaves on the mind an impression of much, and often striking, similarity in the midst of dissimilarity. For example, what could present a closer or more curious parallel in the growth of equity than the Roman prætors' formulas modifying the old *actiones legis* and our English Chancellors' jurisdiction supplementing the old common-law writs. The very dissimilarity is interesting because it shows how each system of judicial procedure reflects the idiosyncrasies of national temperament. In democratic Athens the procedure was popular: the jury system ran through it all. It was the city that administered justice, just as it was the city which governed itself and made treaties. In Rome the conservative bias of the Roman mind, its strict adherence to technicality and form, gave a peculiar rig-

idity to its system of procedure. In the ecclesiastical Courts, again, the inclination of the canonists to casuistry finds expression in niceties of pleading, in "triplications" and "quadruplications" to which—however little inclined to own it—the common lawyers of England owed their "rejoinders," "rebutters," and "surrebutters." In Germany the national set towards autocratic officialism gives the judge a control over the proceedings in an action strange to English lawyers. There is many a valuable hint for the practitioner in such a review as Dr. Macdonell's. Those familiar with the Attic orators will remember how at certain points in their speeches they paused—and the water clock which marked their time allowance was stopped, too—to call on the officer of the Court to read the evidence. Every allegation in those Athenian openings had to be buttressed by proof on the spot. If counsel in England had to do this we should have been spared the Master of the Rolls' recent criticism of a certain K. C.'s conduct of his case.—*The Law Journal*.

AN Irish legal journal (says *The Law Times*), suggests a point which was not discussed before Mr. Justice Farwell in *Attorney-General v. Trustees of the British Museum*, but which, if it had been raised, would have been of considerable constitutional interest. The claim of the Crown to recover the gold ornaments in question was based on the common law doctrine of treasure trove. The right of the Crown appears to depend on the motive with which the articles were originally disposed of—namely, the concealment of them in ancient times. It was proved to the satisfaction of Mr. Justice Farwell that the date of the articles was some period from 300 B. C. to 700 A. D. The most probable date, however, was something between 200 A. D. and 300 A. D., and it would not have been a very violent inference of fact that they were hidden then or some hundreds of years later. In any event, they were hidden long before the English common law became applicable to Ireland—whether that can

be considered as having taken place at the time of the conquest of Ireland by Henry II., in the reign of Henry VIII., or in that of James I. At the trial of the action the attention of the plaintiff seemed to be directed to the proof of the hiding of the articles in ancient times, or of facts from which that fact could be reasonably inferred. But if the common law had no application to Ireland at the time of the concealment, it would seem that another question required discussion—namely, whether the establishment of the common law in Ireland was retrospective, and, if so, in respect of what length of time.

As regards treasure trove (says *The Law Journal*), the writers of authority agree that the right of the Crown extends to gold and silver found hidden in the earth or other private place, but not to articles which have been lost or abandoned, and that, in Blackstone's words, "a man that scatters his property into the sea or upon the surface of the earth, is construed to have absolutely abandoned his property." Thus it is only when the owner has concealed the treasure with the intention of reclaiming it when the opportunity arises, that the Crown can assert its privilege against a finder. The position of the articles claimed by the Crown, when they were discovered, strongly suggested the inference that they had been intentionally hidden away for security, and to rebut this inference the authorities of the British Museum could only suggest that they had been thrown into the sea, which was supposed then to have covered the spot in question, as a votive offering by some Irish sea king to some Irish sea god at some period between 300 B. C. and 700 A. D. But there was no evidence that the sea flowed over that spot within the period during which the treasure could have been in existence; it was not certain that there ever was an Irish sea god, or, if there had been one, that any Irish chief ever made offerings to him; and the case for the defendants was dismissed as consisting of "fanciful suggestions more suited to the poem of a Celtic bard than to the prose of an English law reporter."

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

THE ELEMENTS OF THE LAW OF NEGOTIABLE INSTRUMENTS. By *John W. Daniel* and *Chas. A. Douglass*. New York: Baker, Voorhis and Company. 1903. Buckram. (xxi+418 pp.)

This volume, intended for the use of students and of instructors in law schools, is based in part upon *Daniel on Negotiable Instruments* and in part upon lectures delivered by Mr. Douglass in the Law Department of Georgetown University. In general, the order of the larger treatise is followed, although certain changes are to be noted; as, for example, the discussion in the present volume of "Presentment for Acceptance, and Acceptance," and of "Presentment for Payment" is in Book IV, "Fixing Liability to Pay the Instrument," while in *Daniel on Negotiable Instruments* the same subjects are to be found in Book III, "The Negotiation of the Instrument." Book VI in the larger work is omitted altogether from the smaller. The text of the New York Negotiable Instruments Act (with references to similar acts in twenty-one other States and Territories) is given in an appendix.

For the reason that we expect shortly to print in these columns an adequate review of the last edition of *Daniel on Negotiable Instruments*, we refrain from saying of the present volume more than that the work of condensation is well done.

THE LAW OF INTERPLEADER. By *Roderick James MacLennan*. Toronto: The Carswell Company. 1901. (xxx+464 pp.)

This is a praiseworthy piece of worth, covering the law of England, Ireland, Canada, Australia, and America. The American cases constitute the great body of the cita-

tions. An appendix gives the interpleader statutes of all the States and Territories, and also of England, Ireland, Scotland, the British colonies, and Japan.

THE AMERICAN STATE REPORTS. Volume 89.

Containing the cases of general interest and authority decided in the courts of last resort of the several States. Selected, reported, and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1903. (1052 pp.)

The eighty-ninth volume of this useful series of reports draws its cases from 130 Alabama, 136 California, 28 Colorado, 42 Florida, 196 Illinois, 94 Maryland, 127 Michigan, 80, 85 Minnesota, 79 Mississippi, 166 Missouri, 62 Nebraska, 171 New York, 130 North Carolina, 62 South Carolina, and 107 Tennessee. The range of subjects dealt with in the notes is wide, the longer notes in the present volume being those on Estoppel of a Tenant to Deny His Landlord's Title, The Common-Law Powers of Guardians, What Constitutes a Testamentary Writing, The Effects of the Consolidation of Corporations, The Right of Privacy—When and How It May Be Enforced, Admissibility of Evidence of Threats in Prosecutions for Homicide, and Party-walls.

THE LAW AND PRACTICE RELATING TO REFEREES, REFERENCES AND ARBITRATION. By *L. L. Boyce*. Albany, N. Y.: Matthew Bender. 1903. Law sheep, \$4.50. (xiii+456 pp.)

This manual treats of the powers and duties of referees and arbitrators under the Code of Civil Procedure and Statutes of the State of New York, and contains references of the latest decisions. A full set of forms, given in the Appendix, adds materially to the practical value of the book. Like other similar volumes—two of them by the same author—dealing with special subjects under the New York practice, which have been published recently by the same publisher, the present treatise will be of value to New York lawyers as a book of ready reference.



James Clark

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RUFUS CHOATE.

By JOSEPH B. MOORS.

RUFUS CHOATE, the most brilliant and perhaps the most learned man of his time, lived only fifty-nine years. It is sad to feel that this man, whose marked individuality made him so prominent in his day, is now comparatively little known to the present generation. Indeed, one is often impressed by the completeness with which the great men of each generation fade from the memory of generations which follow. In these few pages it will, however, be impossible to bring Rufus Choate before you more than in a brief and rather fragmentary way, but I shall try to give you a picture of the man with a few incidents of his life gathered from various sources, largely from persons still living who knew him well.

In the preparation of this paper I have enjoyed meeting and feel under great obligations to some of his friends and contemporaries now in advanced life who have given me the opportunity to jot down from their lips their pleasant memories of Mr. Choate.

He is said to have been a man of great personal beauty in his youth. Whipple says of him: "Even in his younger days he was an Apollo with a slouch; still he was the most beautiful young man I ever saw."

Later in life his friends say of him that no one could ever come into his presence without being impressed by it. He used himself to say of his own photographs: "They are ugly as the devil but very like me." Some one once said that he was originally intended for an inhabitant of Jupiter, but the

Earth caught him in its passage and hauled him in.

His head was finely formed and was covered with a profusion of dark, wavy hair, through which he would run his slender white fingers when talking or speaking.

His face was rendered gaunt and haggard by his intense manner and by his long hours of labor both by day and by night. His dark, deep-set eyes gave him an unusual expression never to be forgotten by those of us who were accustomed to see him. Although the lines and furrows in his face grew deeper and more marked after he was fifty years of age, they never made him look like an old man. Just as Napoleon was said to be able to withdraw the lustre from his eyes at will, so Mr. Choate seemed to have the power when intensely interested of withdrawing all color from his cheeks.

Although he was always neat, Mr. Choate showed his disregard for his personal appearance by wearing several top coats of different colors at one time. These coats he would often remove one by one after rising to speak in court. During the cold season he also appeared in the street with his neck encased in a red silk handkerchief. He usually walked with his head bent forward, apparently unconscious of what was going on around him.

He was a person of much sweetness and kindness of manner and one who treated others, particularly the younger men of his profession with whom he was brought in

contact, with great consideration and courtesy.

Mr. Choate's habit was to rise at five o'clock, spend a while over his books, and then take a long walk before breakfast, reaching his office promptly at nine. Regardless of his health he would work there frequently until late in the evening, when he would return to his home without in the meantime having taken any food. When he was told that his constitution would suffer if he continued to overwork himself, he replied that he had long since abandoned the constitution and was now relying solely on the by-laws. His vigorous frame, however, enabled him to do a vast amount of work without injury, and, excepting for periodical suffering from sickheadaches, Mr. Choate's general health was good.

When not deeply engaged with some classic or perhaps some studious question of law, he was playful in his manner and ready with some remark that was either witty or mirthful. He would relieve the tedium of a dry and uninteresting case at its trial by his ineffable humor.

When the Whig party was no more, he joined in urging the election of Buchanan by making just one campaign speech at Lowell. Benjamin F. Butler presided and the hall was, of course, crowded. While Mr. Choate was speaking the floor began to settle. Butler, fearing a stampede, told the audience to remain quiet while he went to discover if there was any cause for alarm. As he passed Choate on his return, he said in an undertone: "We shall all be in hell in five minutes." He then addressed the audience and assured them that there was no immediate danger if they would disperse quietly. He added that the post of danger was just under the platform and that he and those with him would be the last to leave the hall. After the crowd had safely escaped and Choate and Butler were passing down the aisle at the rear of the procession, Choate

inquiringly remarked: "Brother Butler, you really didn't mean to insinuate, did you, that we should both go to the same place?"

Though no one loved fun more heartily than Mr. Choate, it is said of him that he never laughed aloud. Still his wit and humor were rendered all the more effective from his habitually sad expression.

It is said that while Dr. Webster, the murderer of Parkman, was lying in jail, Mr. Choate met an eminent clergyman who was strongly inclined to believe that Webster was innocent of the crime with which he was charged. Mr. Choate, who had previously looked into the case carefully, had good reason to know better. One day when he met this clergyman who visited Dr. Webster frequently in jail. Choate inquired: "How do you find the object of your pastoral care?" "Well," was the reply, "I always find him in." Mr. Choate at once answered: "It will not be long before you will find him out."

He was known by his associates at the bar and elsewhere for his rapid but illegible hand writing. It was a puzzle to everyone who undertook to read it. A story is told of Mr. Choate in connection with Chief Justice Shaw of the Supreme Bench, for whom Choate had great reverence. He asked the judge for the continuance of a case, as he was to be engaged elsewhere. Judge Shaw thereupon suggested that he should write out a brief and send it to him. Mr. Choate replied with his peculiar twist of the mouth: "I write well, your honor, but very slowly."

Much of his best work has unfortunately been lost to the world in consequence of the inability of anyone to decipher his indescribable handwriting.

He was very fond of his home life and the quiet of his library. Among his books were many rare editions, but he was especially rich in the ancient classics. His library, which was shelved to the ceiling, occupied the entire second story of his residence. His books seemed to lure him into good humor when

he reached his home with his nerves shattered after a long trial in court. He said that under these conditions even a half hour of reading a favorite author cheered and restored his mind. His sentences when speaking before an audience seemed to refuse to end. A new illustration or variation would strike him before he could come to a pause. Still, notwithstanding that his style was singularly involved, and that his sentences would grow into paragraphs, there was no want of clearness either in thought or expression. They are said to be the longest sentences ever written, and were not infrequently two and even three pages long. Someone humorously remarked that they seemed like life sentences.

Although it has been said of his mental clearness that there was never such a boy, or later such a young man in college as Rufus Choate, it was not entirely his natural ability which won for him his subsequent brilliant career. His extensive reading, coupled with a most retentive memory, made him rich in literary acquisitions which were closely interwoven in his mind with an extensive legal learning. His exhaustless literary resources were such that among the members of the bar it was said, "he touched nothing that he did not adorn." It is also stated of him that in his career at the bar he at first amused and then stunned his competitors. In spite of his abundance of learning, both classical and legal, and his readiness of expression, he had, however, singularly enough, a certain distrust of his own powers, and he was apt to be doubtful beforehand whether he would succeed in what he was going to undertake. He had also a brooding apprehension while doing his most absorbing work that his faculties might fail him. He knew that his nervous organization was fine and delicate, and that it was not as carefully husbanded by him as it might be.

He found great pleasure in reading Latin and Greek, but in the early part of his life,

with the exception of English, he had little fondness for modern languages. In the latter part of his life, however, he felt that German would so enlarge his literary scope that he became an excellent German scholar, and also learned to read other European languages with some facility. He read with a system, for he had little faith in desultory reading. He said it was a waste of time. A friend of mine who knew him well told me once that it was Mr. Choate's practice to commit to memory a verse of poetry every day.

He read while at his meals; if he had a carriage to take him to his office he covered the seats with books which he devoured on the way; wherever he journeyed he crowded his trunk with books. In fact, every pleasure was irksome to him unless he could have recourse to his favorite literature. Even at two o'clock at night he would frequently be at work in his library.

We now come to speak of him as a lawyer.

As Gibbon listened to Burke with delight, so the younger members of the Suffolk Bar sought every opportunity to hear Mr. Choate when it was known that he was to address a jury.

It was with great success that he defended criminals. Also in his treatment of civil cases, whether for the defendant or the plaintiff, he was generally successful. Among leading lawyers at the Suffolk Bar he was regarded as the most formidable opponent whom they met in court. A distinguished lawyer, now living, who tried a certain case against Mr. Choate, tells me that the latter stated, speaking of his case, that it was the weakest he had ever undertaken; but this same lawyer adds, Mr. Choate won it all the same.

At one time it came to be said of Mr. Choate that no one defended by him for crime was ever convicted. His powers of persuasion were such that jurymen were led

unconsciously to sympathize so strongly with him that they would sometimes shield the guilty. One of the causes of Mr. Choate's success was that he frequently declined cases in which he felt there was not an adequate defence. At the same time, as I have said, his ability to influence and sway the minds of other men has never been surpassed.

It is well known that he declined to defend Dr. Webster at the trial of the famous Parkman-Webster case. He told the friends of the latter that all he would undertake to obtain was a verdict of manslaughter, but, as Mr. Webster's friends preferred to take their chances of an acquittal they thereby lost the assistance of Rufus Choate. I well remember that many people thought at the time that Judge Shaw was not warranted from the evidence in this case in making his charge to the jury so adverse as he did to Webster. In fact, this distinguished judge was openly censured, but when Webster finally confessed his guilt, Judge Shaw's position was more solidly established than ever before.

When Mr. Choate defended criminals, he did so with the conscientious belief that, while the State had secured competent council to conduct the prosecution, a criminal was equally entitled to a careful and able defence.

Mr. Choate was known at the bar for an unrivalled facility of speech. He was never at a loss for a word. His thoughts seemed to move with the rapidity of lightning, and no one surpassed him in quickness of retort.

Other persons say that he read everything, understood everything, and remembered everything.

At trials he was proverbial for his genial and affable manners which never deserted him upon any occasion except when dealing with a recalcitrant or what he believed to be a dishonest witness.

He seemed to have a faculty of mind read-

ing, particularly when the mind happened to be that of a jurymen. It is stated that in one of his cases when he was confident of the innocence of his client who was charged with a crime he argued for five hours, determined to bring a single jurymen to take his view of the case. By watching closely the expression of this man's face he knew just when he had come over to his side, and until then he continued his plea directed to this one jurymen.

In another case it is related that a jurymen, who had been one of twelve to decide five cases at one term of the court all in favor of Mr. Choate's clients, remarked at the end: "How strange it is that Mr. Choate is always on the right side."

As he was constantly using his pen when engaged at trials, he evidently committed everything to memory more readily by having first written it down.

When in court he felt that success was a duty and his success was phenomenal. He seemed to take as much interest in the smallest cases that came to him as in the largest and those promising the largest fees. When he was defending a case in which only a second-hand harness was involved, the opposing council had ridiculed the harness as being only second-hand. "I admit, gentlemen of the jury," said Mr. Choate in reply, "that this harness has none of the gloss and glitter that take the eye of the vulgar crowd, but I appeal to you as intelligent jurymen, acquainted with the ordinary affairs of life, whether it is not a safe, sound, substantial, suitable, second-rate, second-hand harness."

The Smith will case, one of the most conspicuous in which Mr. Choate was engaged, was tried at Northampton in the summer of 1847. This case was never, I believe, reported, and the incidents connected with it rest largely as traditions among the people in Northampton. The case briefly was this:

A very old and very wealthy man had by his will left a large fortune disinheriting his

heirs. To break this will an action was brought by the latter. The case came up on appeal from the probate judge, who had allowed the will. Daniel Webster was engaged as senior council for the executors and was opposed to Mr. Choate, who was acting for the heirs.

spent most of his time at the window, apparently much more interested in some steers in the back yard. As he had then a farm at Marshfield in the management of which he took great pride, it was natural that he should be interested in such animals. The younger lawyers finally adjourned the inter-

Aug. 11. Boston
 My dear Mr. Dan. R.
 I am sorry to miss
 you, yet glad that you
 can't find so cool a spot
 of stimulants as the
 middle of the unplanted sea.
 I hope the will will
 be immortal & that it is
 "Kine to my remains"
 Take things easy - but, by
 to be, so do not let eyes
 which within a week
 are influenced otherwise
 have a reform but
 Aff. & warmly yours
 R. Choate

A LETTER OF RUFUS CHOATE.

The morning of the day previous to the trial, Mr. Webster arrived in Northampton and was taken in the afternoon into a room in the rear of a hotel by his associates that they might prepare for the hearing upon the following day. Mr. Webster seemed to be paying little attention to what was said, but

view and left the hotel, feeling that they had drawn a *mighty* man but one who would be of little assistance at the trial. After they had left, Mr. Webster took his hat and sauntered through the town and inquired of someone if he could tell him where a Mr. Phelps lived. Webster called at the house and was

delighted to find that Mrs. Phelps was the daughter of Theophilus Parsons, who had been Chief Justice of the State, and who, though the chief of hypochondriacs, Judge Story considered to be a "judge without an equal." Mrs. Phelps felt highly honored to receive a visit from so distinguished a person as Daniel Webster. Mr. Webster accepted her invitation to stay to tea, and after supper he asked if he might see her son, Theophilus Parsons Phelps. It appeared that this son, who was one of the witnesses to the Smith will, had the year previous to its execution been pronounced insane, and had even attempted to take his own life. Mrs. Parsons told Webster that her son never saw anyone. Mr. Webster replied that he wished to talk with him for a few minutes and promised that no harm should come of it. After he had succeeded in having the young man brought in, Mr. Webster asked him a few questions, and thanking him, he then bade the family good-night and returned to his hotel.

When the trial came up Mr. Choate made out at the several hearings what was believed to be a strong case for the heirs. He thought that this young Phelps was unfitted to have been one of the "three competent witnesses" required under the statute, and he relied, not only upon his belief that Mr. Webster would not dare to produce him, but, if he did, that he (Mr. Choate) could break him down on cross-examination. The plaintiffs having concluded, Mr. Webster arose and said that he had but a single witness to examine and called upon young Phelps. The latter was asked to state the circumstances connected with his signature as witness to the will. He did so with absolute clearness, and Mr. Choate in cross-examination was unable to shake his testimony. Mr. Webster then quoted an opinion of the grandfather of the young man, given nearly fifty years before, to the effect that a witness to the signature of the testator to a will must be

able to state clearly to the jury all the facts relating to his connection therewith, and that a witness able to do this could not be impeached.

Mr. Choate then made one of his most brilliant pleas in which he argued at great length that a person whose mind was unbalanced was not a competent witness to a will, and stated that the witness had inherited delusions from his grandfather, Theophilus Parsons. It was believed at the time that the jury was so fascinated by Mr. Choate's oratory that it would have rendered a verdict in his favor had not the venerable Judge Wilde, who presided at the trial, in his charge to the jury kept their minds directed to the simple opinion given by Judge Parsons, and thus led them to see how nearly they had escaped giving an impulsive, if not a foolish, verdict. It is said that Mr. Webster had absolute confidence in his case after that evening with Mrs. Phelps and her son, and the result proved that he was right.

Mr. Choate's success as an orator or an advocate was due in a good measure to his exceedingly attractive voice. With him passed away a man whose impassioned manner as a lawyer when in court was strangely in contrast with the quiet and perhaps prosaic methods in vogue among the later members of the bar.

With all his peculiarities nothing could ever be detected in him, even when passions were raging the fiercest, that had the least taint of any jealousy, meanness, or any unworthy feeling. The impression anyone naturally gets in looking over his whole life and after making careful inquiries of his contemporaries is that he ranked among the purest and most generous men in his profession. He was simple in his tastes and had an artlessness of character united with a heart of courage.

He is said never to have made a charge upon his books until late in life, when he

formed a partnership in his business. Perhaps this custom of carrying his accounts in his head will explain his having left a comparatively small estate.

Mr. Choate had little taste for public life. He did, however, take Webster's chair in the Senate when that gentleman was confirmed as a member of William H. Harrison's cabinet. There is, however, but little doubt that Choate's success while in Washington was not as marked as he had hoped. At any rate he declined, after a service of six years, to remain longer in Congress either in the lower House or in the Senate, and successively refused the offer of Law Lecturer at Harvard, made illustrious by the previous service of Judge Story and a nomination to the Supreme Court in our own State, and he also declined a nomination to the Supreme Bench at Washington.

Mr. Choate was a firm believer in what is popularly known as Protection, and had an idea that wages were increased and the condition of the working classes improved by this restrictive system.

During the free-soil days I was among the audience in Faneuil Hall when Mr. Choate made a speech in which he remarked that the Constitution was a collection of glittering generalities. In that same speech he offered a slight to Charles Francis Adams, which some of you may remember. After Mr. Choate had been speaking with great respect of John Adams, and had been extravagant in his praises of John Quincy Adams, he remarked, "Alas! the last of the Adamses." This scathing slight to so prominent a man as Mr. Charles Francis Adams made a lasting impression upon all who heard it.

Mr. Choate is said to have attended Unitarian services during his younger years, but he was afterwards attracted by the personality of Dr. Adams, of the Essex Street Church, who was an earnest defender of the Calvinistic faith. However, I do not find in any of Rufus Choate's utterances or writings

that he ever took a controversial side in religious matters. Just as John Milton never shared the bigoted whims of the Puritans, so Mr. Choate was able to take broad theological views. Although he was a devout man, at times a swear word was not uncommon with him when no other seemed to meet the emergency, or rise to the dignity of the occasion. No doubt Mr. Choate was also attracted to Dr. Adams, as they were alike in their pro-slavery views. The former argued that from a constitutional point of view Massachusetts had no right to touch the subject of slavery. A friend of mine, now eighty-five years of age, says that Choate's "devotion to the Constitution was akin to idolatry."

The following is the conclusion of his speech in Faneuil Hall, which states distinctly his opinion in this matter:

"Is it not possible that a part of what they call the aggressive spirit of slavery may be a reaction against our own aggression? May it not be that in this recrimination of the sections, and in the judgment of history there may be blows to take as well as blows to give? That great man [Daniel Webster] could see and he dared to admit the errors of both sections. In those errors, in the very hate and this very dread which the new party would organize, he saw the supreme danger to his country. To correct those errors, to allay that dread, to turn that hate to love, was the sublime aim of his last and noblest labor. I am looking out," he said, "not for my own security or safety, for I am looking out for no fragment on which to float away from the wreck, if wreck there must be, but for the good of the whole and the preservation of all. I speak today for the Union. Hear me for my cause. Mr. Webster could not have abandoned himself, he never saw an hour in which he could have any more abandoned himself to this gloomy enterprise of sectionalism than Washington could have done it stooping

from the pathos and grandeur and parental love of his farewell address; than the Leader of Israel could have done it as he stood at the last hour on Pisga and surveyed in vision the widespread tents of the kindred tribes rejoicing together in the peace and in the light of their nation's God. Oh for one hour of such a life and all are not yet lost." This extract from one of his speeches gives us an example of Mr. Choate's oratory; his admiration for Mr. Webster and his views on slavery.

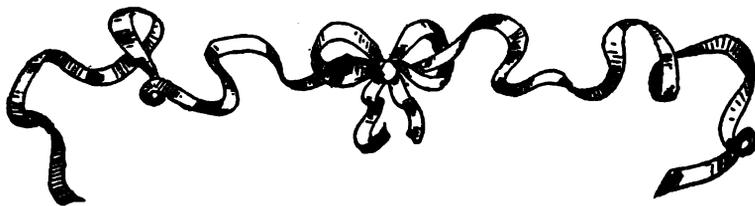
I shall never forget the impression made upon me more than forty years ago when Mr. Everett delivered his eulogy upon Rufus Choate. It was in part as follows:

"There was no one who united to the same extent profound legal learning with a boundless range of reading, reasoning powers of the highest order, and an imagination which rose on a bold and easy wing to the highest heavens of invention. With such gifts and such attainments he placed himself as a matter of course, not merely at the head of jurists and advocates, but of the public speakers of the country. After hearing him at the Bar, in the Senate, or on the academic or popular platform, you felt that you had heard the best that could be said in either place." Mr. Everett also said that Choate's eulogy on Daniel Webster at Dartmouth

College had never been equalled by any performance of that kind in this country. He might have added with truth, "or in any other country." Mr. Everett continued: "It is only on fitting occasions, when great principles are to be vindicated and solemn truths told; when some moral or political Waterloo or Solferino is to be fought, that he puts on the entire panoply of his gorgeous rhetoric. It is then that his majestic sentences swell to the dimensions of his thought; that you hear afar off the awful roar of his rifled ordnance; and when he has stormed the heights and broken the centre, and trampled the squares, and turned the staggering wings of the adversary, that he sounds his imperial clarion along the whole line of battle and moves forward with all his hosts in one overwhelming charge."

It is difficult to determine whether Mr. Choate was more attached to his home life and his books or to his profession. At any rate, he passed the greater part of his life in the practice of the law and lost his life in its service. His death was due to his continuous and exhausting labors.

Although Rufus Choate, when he died, as I have said, was not an old man, he lived a long life when measured by the number of hours out of the twenty-four that he devoted to his books and to his profession.



IS A HORSE LICENSED TO KICK ?

Flett *vs.* Coulter, H. C. of J., Ontario.

By J. B. MACKENZIE.

Baiting of men, 'tis held—incense
Much as it will, prompt e'en to blows—
For an assault is no defence;
Simply in mitigation goes.

May the deserving, patient horse,
As unconceded Season's gift,
Against a plager, then, with force,
The limber hoof of dudgeon lift,

Yet the appraiser, Law, absolve
Its owner from attaching wrong;
Who feels no care on him devolve,
To him no duty to belong,

Governed by which he should have saved
The vexer's bones from detriment;
So circumspectly have behaved
As to ward off the accident?

(It lawfully upon the spot,
Which here 'twould seem was not the case,
Fault could not home to him be brought,
Action would he not have to face;

Unless before it did not lose
(*The dog, we know, may have one bite,*¹)
A chance its faculty to use,
And wreaked by hindward lunge, its spite.)

How find the clue if one so hurt,
Who, on such owner makes a claim—
His rights would openly assert;
And fix him with vicarious blame,

¹ Jones *v.* Owen, 24 L. T. R. 587.

Has from a jury won the salve
 Of money for some random kick;
 But evil and advantage halve
 The verdict—so his bubble prick

Of comfort; 'scapes the finding chill
 That he did, through his act conduce
 Of negligence, to his own ill;
 The beast impel to break the truce,

And utter its malign retort:
 A menace real to success
 In happily getting from the Court,
 To which he looked for it, redress?

Now whether he must lower his flag—
 Abide without a remedy;
 Having collided with the snag
 Of this fell incongruity;

And the result defendant clears,
 Leaving his gathered pile intact,
 (Though plaintiff might not, from his years,
 Have power from his rights to detract:¹)

Or that reprisal-making brute
 Was led its privilege to exceed,
 Judgment to follow in the suit
 May tell us, when its lines we read.

¹ Plaintiff was twelve years old.



LAWS GOVERNING CIVIL MALPRACTICE IN THE MIDDLE AGES.¹

By CHARLES GREENE CUMSTON, M. D.

THE question of civil malpractice is of interest to both the medical and legal professions, and of recent years many rather unusual cases, involving medical liability have been tried in various courts of the United States. That the physician and surgeon have been held liable for their actions by the courts of justice is as old as law, and it occurred to the writer that publishing a few scattered notes he had made on the history of this subject might not be without interest, although he must concede that the question consigned in the following pages is only superficially discussed.

Among the Egyptians the law punished very fully any too imprudent or audacious physician, and in the seventh volume of his *Histoire de la Legislation*, de Pastoret says that "General rules had been established for the treatment of patients. These were the result of carefully-made observations which were guarded by the priests in books that were so respected that they were solemnly carried in the processions taking place on days of public fête. An absolute prohibition did not exist preventing the physician from applying a new truth, but if far from obtaining the salutary effects that he expected to procure he caused the death of his patient, he was obliged to pay his tribute for the misfortune or the boldness of having sacrificed the life of a citizen, by being beheaded. On the other hand, he was never liable to a patient confided to his care when he followed the rules laid down in the Sacred Books."

The same authority says that the Greeks also admitted medical liability, and Tourdes quotes an example related by Plutarch of a certain physician of Ephesus, by name Glaucus, who, having left his patient to go to the

theatre, was condemned by Alexander to be put to the cross because the patient, having imprudently eaten during his absence, died.

In Roman law the principle of medical liability was admitted, and this is proof positive since it is so formally stated in the old texts. This can easily be understood since at Rome anyone could practise medicine who so wished, and generally speaking, the slaves practised the healing art, which was a source of large income for their masters. These physicians, or perhaps it were better said empirical practitioners, had no other end than the gain of money, and there was, consequently, a double motive for making them liable for mistakes committed in the exercise of their practice. On the one hand, there was no guarantee offered by a diploma attesting to serious studies and a certain science, while on the other, there was a complete lack of devotion and scientific disinterestedness.

A physician who gave his services to a patient was responsible to the master, if the latter were a slave, and he fell under the jurisdiction of a suit *lege Aquilia* or under the application of suit for the hire of labor. The first clause of the law *Aquilia* covered in point of fact those cases where another's slave had been killed without right. It was quite sufficient that a slave had been mortally wounded. The physician who, after having operated upon a slave, abandoned the after-care and allowed him to die was at fault according to the terms of the law which ran as follows: "*Præterea si medicus qui servum tuum secuit, dereliquerit curationem, atque ob id mortuus fuerit servus, culpæ reus est.*" (*Instit. Liv. IV., tit. III., Section VI.*)

There was also error on the part of a physician who by ignorance killed his patient

¹ Read by invitation at the Annual Meeting of the Massachusetts Medico-Legal Society, June 9, 1903.

by administering a medicine *mal à propos*, as the following text shows: "*Imperitia quæ culpæ admuneratur; veluti si medicus ideo servum tuum occiderit quod cum male secuerit aut perperam ei medicamentum dederit.*" (*Instit. Liv. IV., tit. III., Section VII.*)

Wounds which were not fatal but which were sufficiently serious to be damaging to the master of the slave were comprised in the third clause of the law Aquilia. The direct application of the law Aquilia was only allowed when the detriment resulting was caused *corpore corpori*, for example, when it was applied to a physician who had wounded or killed a slave by the performance of an operation upon the latter. But it was not applicable to the one who had only been the cause of the detriment and who had not caused it by his proper body, as for example, a physician who had prescribed a medicine *mal à propos*. In this case the Jurisconsults gave the application of the law, that is to say, introduced by interpretation following the example of that of the law and procuring by the manner in which it was drawn up by the prætor, the same results.

According to Accarias, the professional services of a physician could become the object of a hire of labor when it was a question of a slave, and Proculus declared that a physician who had badly cared for a slave could be sued either *ex lege Aquilia*, or *ex locato*. The following is the exact text: "*Proculus ait si medicus servum imperite secuerit, vel ex locato vel ex Lege Aquilia competere actionem.*" (*D. Liv. IX., tit. II., 7, Section 8.*)

The direct application of the law Aquilia could not be applied to a physician when the victim was a free man, and Ulpian says that "a man has not the right of ownership of his limbs." Now, in order to obtain a direct application of the law Aquilia it was necessary that the person injured should have also his patrimony involved. But a free man who had become the victim of errors committed

by a physician could have the direct application of the law Aquilia accorded by the prætor who procured the same effects, excepting in that which concerned the pecuniary reparation of the injury. In the latter case, the value of human personality was not considered. The reparation could only include the tort resulting from expenses involved for the cure, from incapacity to work and, lastly, the funeral expenses.

Now, although the texts are perfectly affirmative regarding the admission of the principle of medical liability in Rome, it is more difficult to say whether or not it was frequently applied, and it would appear that the contrary was more likely the case if one considers with what violent indignation Pliny affirmed that in Rome a physician enjoyed the most complete impunity as he states in the twenty-ninth Book of his Natural History as follows: "*Nulla præterea lex, quæ puniat incitiam; capitale nullum exemplum vindictæ. Discunt periculis nostris, et experimenta per mortes agunt: medicoque tantum hominem occidisse impunitas summa est. Quin immo transit convicium et intemperantia culpatur: utroque qui perire arguuntur.*"

The Roman laws were not, however, as severe as Montesquieu has upheld in his immortal work entitled *Esprit des Lois*, in which he says that "the people were desirous of having physicians punished for their negligence or their ignorance. In this case they condemned a physician who occupied a certain social position to exile, while death was the sentence applied to the one occupying a lower social condition." This great writer committed an error, for the law to which he makes allusion (*D. Liv. 3*): "*Ad legem Corneliam de Sicariis . . .*" did not punish negligence, ignorance or lack of attention, but the crime, the grave mistake committed with the criminal intention of producing death.

Medical liability was rigorously followed out in the ancient Germanic law to such an

extent that before undertaking the cure of a patient the physician was obliged to give a security in order to guarantee the indemnity in case he was unsuccessful. A physician who, while bleeding a free man, wounded him, was liable to pay his family a compensation of one hundred and fifty ducats in gold. In case of the death of the patient, the physician became the property of the family, who could use its right of vengeance as it saw fit. "*Si quis medicus dum fleotomiam exercet, ingenuum debilitaverit, CL solidos coactus exolvat; si vero servum hujusmodi servum restituat (in lege Ervigiana post exolvat leguntur: si vero mortuus fuerit propinquus continuo tradendus est ut quod de eo facere voluerint habeant potestatem.)*"

A physician could not bleed a free woman unless her husband or some of her near relations were present, because the law said: "*Difficillium non est sub tali occasione ludibrium interdum ad crescat.*"

In Beugnot's addition to the *Assises de Jerusalem* will be found many important remarks regarding the liability of physicians in the Middle Ages.¹ A physician called to attend a serf, and by his ignorance caused the death of his patient was condemned to pay the value of the serf and was obliged to leave the city, and I here quote an interesting paragraph:

"C'il avient par aucune mésaventure que je naffre un mien serf ou serve, ou aucune autre personne le naffre, et je i amène un meige et celui meige s'accorde o mei a pris noumé et me dit au tier jor, puisqu'il ot bien veu la plaie, que bien le garct sans faille; et il aveint puisque il le tailla malement ou por ce que ne deveit être taillé et il le tailla et porce il mourret et porce que il deveit tailler la plaie par la levure et l'apos-

tème donc et il le tailla de travers et por ce mourut: la raison juge et commande en ci a juger que celui meige doit amender le serf ou la serve par droit tant comme il valait au jour qu'il fut naffré, ou tant comme i'acheta celui de qui il estait car ce est dreit et raison par l'assise. Et deit la cort celui meige congeer de la vile ou it fist cele mauvaise megerie."

According to this text the physician after having seen the wound, promised to cure the patient, but following a badly conducted operation which resulted in the death of the patient, the physician was declared liable for this unfortunate occurrence. The text then goes on so as to cover those cases in which a wound became gangrenous because the physician did not give the patient daily attendance, and it declares the former liable for this accident. In the same way it holds the physician liable for any imprudence committed by the patient because he did not indicate in what ways the patient should care for himself. And lastly, the text speaks of damages due in case the victim was a serf. The physician after having promised to cure him, employed bad drugs and did not succeed in his object. The patient was maimed forever. The physician was obliged to take the serf for himself and to pay to his master the sum that the serf had cost him. In case the physician could not pay the entire sum, he was obliged to leave the serf with his master and only pay "*celui serf ou cele serve caura de mains por ce qu'il est mahaignes par sa coulpe.*"

When the victim was a free man, the liability of the physician was very much greater. If it were a question of simple wounds or of bad treatment, which did not cause death, not only the physician had no right to demand any fee, but he had his right hand cut off. In case of death of the patient the physician was condemned to the gallows: "*Mais se il avet se mahaign fait a un crestien ou a une crestienne, la raison juge qu'il det perdre le poing destre et ne det plus estre*

¹. The ideal type of feudal law is that so graphically depicted in the works which pass under the title of the *Assises de Jerusalem*, and which profess to describe the usages of the curious product of the Crusades, the Latin kingdoms of Palestine.

damages por tant que ce il avet rien pris de celui por le meger si est tenu dou rendre par droit. . . . Et se celui miege avet anci malement mege come est dit dessus aucun franc home ou aucune franche femme et elle en moret la raison juge que celui meige det estre pendus et . . . it a det estre dou seignor par droit."

The text adds that before being put to death the physician should be taken through the streets of the city in order to serve as an example to his colleagues.

It happened, that on account of fear regarding their liability, physicians refused their services to patients, or, if they gave them, they demanded a guarantee releasing them from any responsibility should the case terminate unfavorably. Guillaume de Tyr tells us that Amaury I., feeling that his strength was leaving him, demanded medicines from some Syrian physicians. These they refused, and he was only able to obtain them from the Latin physicians after he had given his promise that they need not be disturbed, no matter what issue the disease might take.

In the ancient French laws, the liability of physicians and surgeons was distinctly held. Denizart established a hierarchic difference between physicians and surgeons and declared that the latter were subordinate to physicians. He admitted the liability of surgeons and declared them held for tort toward those they might maim by their ignorance, and attributes to physicians the power of examining the facts of the case in order to ascertain whether the surgeon was reprehensible or not. He goes on to say that: "When a surgeon has conducted the case according to the rules of his art, he should be paid for his operations and for his care and dressings, although the patient may not have been cured, even if one was obliged at a later date to do an amputation of some fractured limb, the cure of which the surgeon had undertaken."

Efforts were made in France by Charles VI., Henry IV., Charles VII. and Louis XIV. to formulate laws to control the practice of surgery, but these were apparently only partially successful. It is not without some interest, perhaps, to add that, so far as I have been able to discover, Henry IV. of France was the first to create what would at the present time be called a medico-legal expert. These experts were selected from among the most capable surgeons. It is also positive that about the middle of the sixteenth century certain cities appointed what might be termed expert surgeons, for the purpose of examining the wounds of patients seriously injured and to see that the attending surgeon treated the case properly; for otherwise the patient could bring suit for tort should it be shown that there had been malpractice. That this is a fact will be found from the following quotation that I make from the Treatise on Surgery by Felix Wurtz, a noted surgeon of Basel, whose fame was widespread at about 1560:

"Un Chirurgien ne doit point permettre a un chacun de voir, ou mettre la main aux blessures de ses patiens, ce que meantmoins plusieurs ont accoustumé de faire. Ce n'est pas que je veuille blasmer la coutume de phisieurs Villes bien policées, ou les Magistrats font ordinairement visiter une fois, ou deux, toutes les blessures considerables, par les Chirurgiens jurez: ou contraire, je soustient qu'elle est extremement necessaire et qu'elle se devoit establir par tout, enfin que si quelque un est mal pensé ainsi qu'il arrive assez souvent, il en puisse faire ses plaintes à la Justice."

The mistakes committed in the rules of practice should be appreciated by men engaged in that profession, and Denizart quotes a judgment which acquitted a surgeon who was accused of having given bad treatment, only after having heard the testimony of expert surgeons. The case was as follows: A surgeon sued a patient, who had a broken

arm, for the payment of his fee. The arm had either been set badly or too early, and having been inconsiderately moved by the patient, gangrene appeared. The patient refused to pay the bill. The court then ordered some expert surgeons to examine the question as to how the accused had acted, and if the operation and his dressings were in conformity to the rules of his art. After having heard the declarations made by both the surgeon and the patient, they returned a verdict in favor of the surgeon, and as a final consequence the court ordered the patient to pay the surgeon's fees. This same writer mentions another case where the surgeon was sued in the criminal court and was condemned to pay fifteen thousand pounds damage and interest, because the ignorance of the surgeon was proven by the findings of the experts called in on the case.

Charondas, a well-known lawyer who flourished in the middle of the sixteenth century, said that a surgeon was liable for accidents which might occur to his patients if they came from his mistake. He mentions a case of a surgeon who was taking care of a patient afflicted with a venereal ulcer, but an accident occurred during the treatment which caused the death of the patient. For this mishap, the surgeon was brought to justice as having been the cause of the death. Charondas during the trial held that since neither deceit nor ignorance on the part of the surgeon could be shown in the treatment employed for the cure of the ulcer that the surgeon could not be held responsible for the accident which occurred later.

Papon, a well-known judge who lived during the regency of Catharine de Medicis, says that although a patient may die, the physician should not be held liable unless he was found ignorant or too hardy in his treatment and that consequently a legal examination should be held in order to ascertain the true circumstances of the case, and if the

physician is found to have committed a mistake he should be punished by the courts. This same author then relates the case of a physician who gave to a patient a potion which was either capable of killing him or saving him in a very short time, and the patient died from its effects. The physician was, however, easily acquitted, but he was admonished by the court never to repeat the same treatment again under penalty of being severely punished.

Jean Duret, a physician of some note, who lived during the last half of the sixteenth century, declared that a physician was liable if he showed himself an idiot in both the theory and practice, or if he showed himself too audacious, and Raymond de l'Eglise upheld that a physician was liable not only for his temerity and his neglect of a patient, but also for his ignorance as well. Brillouin, whose classical dictionary was published in 1711, also upheld that physicians were liable for their acts. He based his opinion on Papon and another writer, who declared that a physician was liable either for a slight mistake or for a very slight mistake, and he relates several judgments in which the principle of medical liability is upheld.

The public was far better protected against nostrums and quacks a few hundreds years ago than it is at the present time, as will be seen from the following. In the reign of Edward VI., Grigg, a poulterer in Surrey, was put in the pillory at Croydon and again in Southwark, for cheating people out of their money by pretending to cure them by charms, or by looking at them, or by casting their water. Many other quacks have, at various times, been subjected to punishment. Anthony was punished for his *Aurum Potabile*; Arthur Dee for advertising medicines to cure all diseases; Foster for selling a powder for the cure of chlorosis; Tenant, a urine caster, who sold pills at six pounds apiece; Aires, for selling purging sugar plums;

Hunt, for putting up bills for the cure of diseases in the streets. The Council in the reign of James I. dispatched a warrant to the Magistrates of the city of London, to arrest all reputed empirics, and cause them to be examined by the Censors of the Royal College of Physicians. Several were arrested and acknowledged their ignorance. In the reign of King William, a certain Fairfax was fined and imprisoned for injuring persons by his *Aqua Coelestis*, while in Stow's Chronicle it is recorded that a water caster was punished for exercising his quackery. He was set on horseback, with his face to the horse's tail, which he held in his hand, with a collar of urinals about his neck, led by the hangman through the city, and was whipped, branded and then banished.

The old French jurisprudence felt some hesitation in pronouncing for or against medical liability, and Merlin believed that suits brought against physicians were rarely successful. He mentions a number of judgments which acquitted the physician. The Parliament of Paris in 1696 gave the following judgment in one case, the Court saying: "That surgeons are not liable for their remedies as long as they have showed no evidence

of ignorance or rashness in their practice." And in summing up the case on which the Court had rendered judgment, the advocate general, Portail, said: "There is only one case where suit can be brought against the medical profession, and that is when deceit has been practised, in which case it is a true crime."

In 1596, the children of a surgeon who had wounded a patient while bleeding him, were condemned to pay one hundred and fifty pounds damages by the Parliament of Bordeaux, and in another case a surgeon was condemned, because he cut a child for stone in the bladder without the advice of a physician, to pay damages amounting to sixty pounds, with the injunction of the Court never in the future to cut another patient for stone without the consent of some physician who was approved by and who had been received by the Faculty of Medicine.

Many other cases could be cited, but I think from what has been said in this short paper that medical liability has been sustained by all the courts of former times. The question of criminal malpractice I have entirely left aside, hoping at a future date to discuss the history of this important subject.

OUGHT CHURCH PROPERTY TO BE TAXED ?

BY DUANE MOWRY.

THE taxation of church property is not a new question. And it is not the purpose of this article to discuss the question exhaustively, but to submit some considerations which show, or tend to show, that the question which entitles this paper should be answered in the affirmative.

And first: What is a tax? Briefly stated, it is a pecuniary burden imposed for the support of government; it is an enforced proportional contribution of persons and prop-

erty, levied by the authority of the State for the support of government, and for all public needs and purposes.¹ Not only are taxes the enforced proportional contributions for governmental support and use taken from the substance of the people, but also the arbitrary exactions of the government within constitutional limits, and to the making and enforcing of which the assent of the people,

¹ *Bouvier's Law Dictionary*, Title "Tax." See also Cooley on Taxation.

individually, is not required.¹ In a more restricted sense, taxes are revenue collected from the people for objects in which they are interested, and contributed for things useful, and conducive to their welfare.²

Mr. Blackwell discusses the general subject of taxes and taxation in a luminous manner, and maintains that taxes are imposed by the legislative power of a State to raise money for public purposes, and can be levied for public purposes only, and that the taxpayer, according to the theory of our system, receives a just compensation in the benefits conferred by the government, in the proper application of the tax.³

Now, the objects of taxation have been well and succinctly stated by Dr. Gregory in his work on Political Economy. He says the purposes for which taxes may be legitimately taken are: (1) Public administration, including the legislative and judicial functions, and the general administration by the executive officers of the government. (2) Public safety, to be secured by police or military power against foreign or domestic foes. (3) Public improvements for the general welfare, by public works. (4) Public intelligence, to be promoted by public schools, public libraries, scientific investigations, and scientific and art collections. (5) Public charities, or the care of the poor and the unfortunate or afflicted classes.—the insane, the imbecile, the deaf mutes and the blind.⁴ The same writer argues that the right of government to levy taxes is supposed to rest upon the duty of each citizen to contribute for the common safety and for the promotion of public order and well-being.⁵

¹ Desty on Taxation, sec. 1.

² Desty on Taxation, sec. 1.

³ Blackwell on Tax Titles, pp. 1 and 2. See also *Rapalje and Lawrence's Law Dictionary*, Titles: "Tax" and "Taxation."

⁴ Gregory's *A New Political Economy*, pp. 341 and 432.

⁵ *Id.* p. 342.

Passing for the present the further consideration of a tax, let us consider another question suggested by the discussion, *vis.*, the subject of exemption from the payment of taxes. Exemption from taxation is a privilege not enjoyed by others; a private law in derogation of a common right. It is held to be contrary to the first principles of civil liberty and natural justice, and to the spirit of the constitution and laws, that one citizen should enjoy privileges and advantages denied to all others under like circumstances, or to be subjected to losses, damages, suits or action, from which all others, under like circumstances, are exempted.⁶

Mr. Sterne, in his excellent work on the Constitutional History and Political Development of the United States, says: "Exemptions from taxation have been a fruitful source of mischief."⁷

In the foregoing is presented most respectable authority of the injustice and mischievousness of exemption laws. Now, the Church seeks the protection of government in the enjoyment of the same rights and benefits guaranteed to individuals, such as the protection afforded by the fire and police departments. Why, then, should the Church be granted immunity from taxation when it secures the very advantages which the taxpayers provide? Why should it be willing to receive, yet unwilling to give? There is something strangely inconsistent with this practice and the admitted professions of the Church.

It is obvious from what has been already said that a tax is a burden having an exact and certain money value, which is never willingly assumed by those on whom it is imposed; that it is, in a sense, the price of living under human governments; that this burden is permitted and borne by the individual be-

⁶ Desty on Taxation, p. 122.

⁷ Sterne's *Constitutional History of the United States*, p. 261.

cause his interests as a member of society imperatively demand it, and because, also, he is impotent to successfully resist it or overcome it. It is equally plain that the Church, by which is meant the aggregate religious influence of the country, is not one of the legitimate objects for which taxes can be levied. This is apparent because it performs no office which is recognized by the constitution or the laws, and it is an institution not essential to the maintenance of public order or good society. It is not the agent of the State, is not controlled by it, and is not supposed to have any direct interest in common with it, but is maintained for the special private ends of the various religious organizations. The work of the Church is local, not general; its influence is limited, not widespread and universal.¹

Exemptions from taxation of church property involves a union of Church and State, which is at variance with the fundamental principle of our government. The infidel, for example, believes in no church, believes its influence is hurtful, yet is brought face to face with the unpleasant fact, unpleasant and disagreeable to him at least, that the government is a partner in the very influence which his own conscience and judgment condemns as vicious and detrimental. And if he is a taxpayer, he is obliged to contribute out of his holdings to the keeping up of the vicious relation. The policy of exemption promotes the accumulation of great wealth to be held in mortmain by never-dying corporations, independent of the State, not accountable to it, possibly subject to foreign control, and which may be used against the best interests of the public. The danger from foreign intervention is not regarded as imminent or serious. It is not, however, a good omen, in a free country, to see vast wealth under the control of religious bodies, and costly edifices, erected for religious services, are not financial

¹ See also *Johnson's Universal Cyclopedia*, Title: "Taxation."

triumphs of which the true lovers of suffering humanity can be justly proud.

Church property should be taxed because not to tax it, a portion of the community is favored at the expense of others not interested. According to the census of 1890, slightly less than one-third of the population of the United States are communicants or members of churches or religious denominations. Undoubtedly, this percentage does not represent the full number of persons that are willing to, and do, contribute to the support of religious services, voluntarily. But what shall be said of that class who are compelled, through the process of public taxation, to contribute to the support of religious work and service, involuntarily? Why should the atheist be required to pay taxes in order that others may go to church? And especially, what right have others to compel it, through the governmental machine? Why should members of any of the financially weaker religious denominations, too poor to have church buildings, be required to contribute to the regular support of religious services in the gorgeous structures of their wealthier brothers? Where is the justice of such a system? Is not this system rank oppression?

If the foregoing contentions are maintainable, there is no warrant, in ethics or reason, why the Church should not bear its share of the burden of government. It is no answer to this claim that the Church is not a money-making institution; that it contributes to the good morals and good order of the social state. As to the latter claim, there are many good citizens who sincerely deny it, and certainly, *they* ought not to be required to contribute to that which their own judgment and conscience repudiates. It is possible, too, that a large contingent of the population prefer to contribute of their means to works of benevolence, charity or education, in some other manner than that indicated or outlined

by the various church organizations of the country. If their means are diverted into other channels, and certainly an increased tax caused by exemption of church property, is such a diversion, then the voluntary act of this class of persons is made impossible, either in whole or in part,—to the extent of payments extorted by the strong arm of the law for taxes.

A cogent reason for the taxation of church property is offered by the Church itself. It is the great and cardinal tenet of the Church that it shall look for its material aid and support from the *voluntary* offerings and contributions of its members and friends. It has already appeared in this discussion that a public tax is an *involuntary* contribution of persons and property for the support of government. A considerable number of these involuntary contributions are made by persons and property who would never, voluntarily, contribute anything to the support of the work of the various religious denominations of this country. It has also appeared in this discussion that the Church is not such an organization as will justify the government in recognizing it as entitled to any public consideration, for it performs no public office under the constitution and the laws. How, then, it is asked, can the churches justify their consent to immunity from a governmental tax, unless they are willing to justify a hypocritical and wholly defenceless position? It is not denied that a Church tax, or offering, in theory, is a purely voluntary matter. How, then, can the idea of free-will offerings be reconciled with the idea of enforced contributions from taxpayers of all classes? How, for instance, can the church conscience rest content and accept the dollars of those who pay them under protest? How can the men of God believe they are doing God's holy service when they take from their less fortunate neighbors the substance which is given unwillingly, and is given, *solely*, to avoid greater financial loss.

if the payment is refused? Where is the righteousness of such action? Is not such an attitude one of rank hypocrisy?

It has been urged that the taxation of church property involves the practical annihilation of many worthy church organizations. This may be so. It is beyond the province of this paper to consider that. If, however, the taxation of church property should prove the weapon of its destruction, the day of its death can hardly come too soon, and furnishes another potent argument in favor of the contention of this paper.

That church property ought to be taxed, can be briefly summarized:

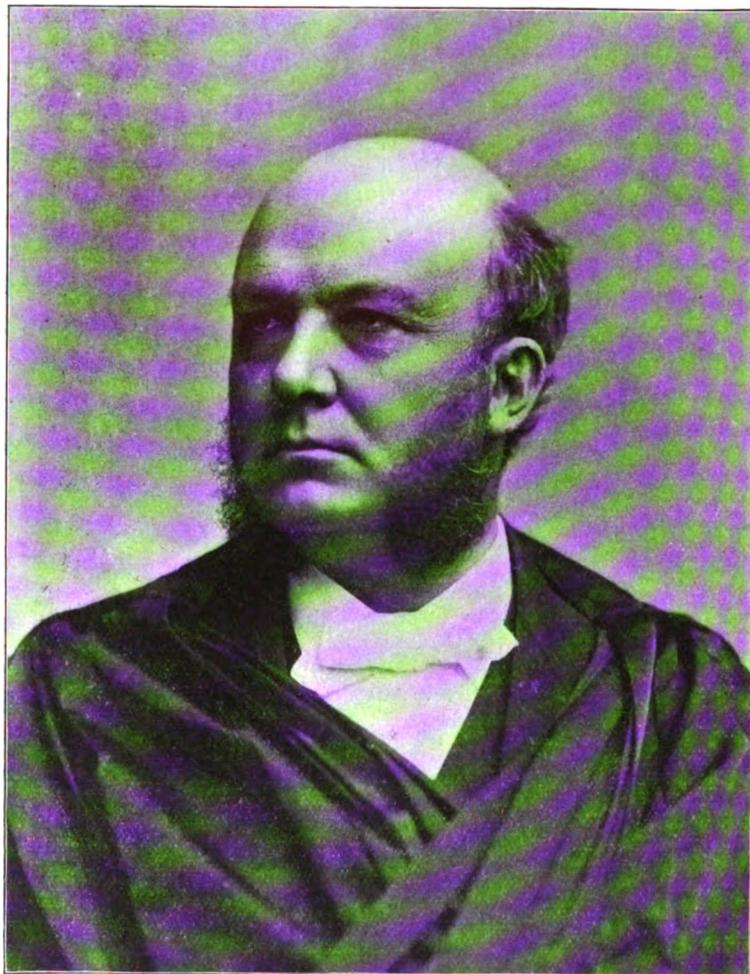
First: Because the Church performs no public office nor function known to the laws of the land which entitles it to immunity therefrom.

Second: Because the policy of exemption from taxation of church property involves a union of Church and State at variance with the fundamental principles of our government and wholly un-American.

Third: Because such exemptions are inequitable, in that they favor a portion of the community, statistics showing that about one-third of the population being church members or communicants, only, at the expense of others not interested.

Fourth: Because the policy of exemption of church property from taxation involves a liability to the accumulation of great wealth, to be held in mortmain by never-dying corporations, independent of the State, and which may be used against the best interests of the public.

Fifth: Because the exemption of church property from taxation is wholly inconsistent with, and totally opposed to, the cardinal idea of Church, *viz.*, that all means contributed for its support, as well as all efforts in its behalf, shall be given freely and voluntarily, a tax imposed by government never being given, voluntarily, in the sense in which church offerings are contributed.



HORACE GRAY.

A CENTURY OF FEDERAL JUDICATURE.

IX.

BY VAN VECHTEN VEEDER.

THROUGH a remarkable judicial career of nearly forty years' duration Justice Gray maintained the highest ideals of public justice. In 1854, three years after his admission to the bar, he was appointed reporter of the decisions of the Supreme Court of Massachusetts, a position which had been dignified by the services of lawyers of such recognized capacity and learning as Cushing, Pickering and Metcalf. Justice Gray's seven years' service in this position undoubtedly contributed materially to his judicial equipment in giving him that remarkable knowledge of cases and precedents for which he was justly famed. In 1864 he was appointed an associate justice of the court, and nine years later was advanced to the chief justiceship. In 1881, after seventeen years' distinguished service in the highest court of his native State, he was appointed to the Supreme Court of the United States, where he served with indefatigable industry for twenty-one years. The successful discharge of the duties of such conspicuous stations through so many years, necessarily implies a high order of mental ability and thorough professional equipment, and the value of Justice Gray's judicial labors has always been fully appreciated. But he was not a legal genius, and his conspicuous but plainly circumscribed powers are readily defined. He was not an original thinker like Marshall, nor in the sense in which that designation may be applied to his successor, Mr. Justice Holmes. In his mental characteristics he bore to a lawyer like Benjamin R. Curtis, or to his colleague, Justice Miller, a relation similar to that which Story bore to Marshall. He dealt, mainly, not with the creations of his own mind, but with the thought of others. One

may look in vain through his work for any distinctly original contributions to jurisprudence—any simple, subtle and illuminating statement of its difficult problems. He had not that intuitive insight into legal principles which enabled a genius like Lord Cairns to follow without reflecting upon the rule. His forte lay in the indefatigable industry and research with which he levied upon the stores of existing knowledge, and in his accurate and logical arrangement and presentation of vast accumulations of material with reference to the issue involved. Before he became a lawyer he was an accomplished naturalist, and in his legal work he habitually employed the inductive methods of natural science. He was a case lawyer in the highest sense of that term; he reached a conclusion, not so much through the luminous and suggestive inferences of his own mind, but rather by collecting, analyzing, sifting and weighing all the arguments that had ever been brought to bear upon a subject. In the exercise of this inductive and historical method Justice Gray has seldom been equalled. It may be doubted whether his information was as well fused as Lord Bowen's. Some of his opinions (*e. g.*, Opinion of the Justices on Money Bills, 126 Mass. 557—an advisory opinion,) would seem to exceed in wealth of historical illustration the necessities of the occasion. However admirable as an argument or as an historical disquisition, it is doubtful whether such elaborate displays of research are desirable in judicial opinions. Aside from these considerations, however, his work merits unqualified praise. His work is more accurate and his material more thoroughly digested than Story's. He did not pad his

opinions with long quotations from other cases; he took the trouble to master his references, and was therefore able to state their scope and effect with brevity and precision.

There is much to be said for the opinion that such mental characteristics as Justice Gray's are more likely, in the long run, to conduce to the safe and satisfactory administration of justice than brilliant and original thinking. At all events Justice Gray brought to the court some conservative habits of mind that cannot be too highly esteemed. As became a judge imbued with the traditions of the Supreme Court of Massachusetts, his first solicitude was for the force and authority of the court's judgment. Although a man of strong convictions, he was without pride of personal opinion; whenever, as rarely happened, he dissented from the judgment of the court, it was because of a conflict of opinion with respect to fundamental principles. Moreover, he always confined himself rigidly to the real issues involved. His opinions are entirely free from *dicta*; and they are, as the most impressive judicial utterances always are, absolutely impersonal. Justice Gray exemplified the highest sense of judicial dignity. If he was occasionally somewhat austere in his ideas of judicial decorum, his scrupulous adherence to his conviction that a judge should keep aloof from politics was wholly commendable.

The variety and extent of Justice Gray's contributions to the reports, both State and Federal, is very great. At the outset of his judicial career he took an active part in the congenial labor of formulating the views of the court; he required no long novitiate to develop his powers. His opinion in *Tyler v. Pomeroy*, 8 Allen 480, on the lawfulness of acts done under color of military authority in time of war, which he delivered within a few months after taking his seat upon the Massachusetts bench, displays all his characteristics fully developed. In the State court

he had exercised a very powerful influence over the court's determinations in questions of constitutional law. In the Supreme Court of the United States his influence in such cases was less controlling; many of his most conspicuous opinions relating to controversies which had long been discussed, and the main outlines of which had been established by former decisions of the court. His opinions in *Juillard v. Greenman*, 110 U. S. 425, on the subject of legal tenders, in *Leisy v. Hardin*, 135 U. S. 100, on the commerce clause, and in *Fong Yue Ting v. United States*, 149 U. S. 698, with respect to Chinese exclusion, may be cited as illustrations. Yet he delivered many very able opinions in this great branch of the court's jurisdiction. In *Head v. Amoskeag Manufacturing Company*, 113 U. S. 9, he expounded the meaning of due process of law as established by the Fourteenth Amendment; in *Huntington v. Attrill*, 146 U. S. 657, he defined the faith and credit to which State judgments were entitled; in *Cole v. La Grange*, 113 U. S. 1, he denied the right of Legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take property without the owner's consent for any but a public use; in *Elk v. Wilkins*, 94 U. S. 123, he defined the status of the Indian tribes. Justice Gray was a strong Federalist. His opinions, from the *Arlington Case*, 106 U. S. 196, to the *Insular Cases* of recent date, uphold the broadest construction of the powers of the national government. His opinion in *Juillard v. Greenman*, 110 U. S. 425, upholding the power of Congress to make the Treasury notes of the United States legal tender, in payment of private debts, in time of peace as well as in time of war, placed the capstone upon the summit of national power.

Justice Gray's opinions cover a wide range of subjects. His contributions to admiralty and prize law and to the general law of wills are, perhaps, most conspicuous. *Ralli v. Troop*, 157 U. S. 386, on general average;

The John G. Stevens, 170 *ib.* 113, on collisions; *The J. E. Rumbel*, 148 *ib.* 1, on liens; and *The Glide*, 167 *ib.* 606, *Workman v. Mayor of New York*, 179 *ib.* 552, and *United States v. Rodgers*, 150 *ib.* 249, on various phases of maritime jurisdiction, are among his most important cases in admiralty. *The Parquette Habana*, 175 U. S. 677, is one of his far-reaching decisions on the subject of prize. In both the State and Federal courts he gave much attention to the difficult subject of conflict of laws, and to criminal law. *Lamar v. Micon*, 112 U. S. 452; *Ross v. Ross*, 129 Mass. 243, and *Commonwealth v. Lane*, 113 *ib.* 458, may be cited as illustrations of the former. *Hilton v. Guyot*, 159 U. S., 113, with respect to the validity and effect of foreign judgments, may also be mentioned in this general connection. In criminal law his most elaborate opinion was given in *Sparf v. United States*, 156 U. S. 51, on the long-mooted question of the respective provinces of court and jury in trials for crime. A comparison of his opinion in this case with Justice Curtis' exposition of the same question in *United States v. Morris*, brings out very clearly a marked contrast in mental characteristics and methods.¹

¹ The following are Justice Gray's leading opinions :

Constitutional law: *Juillard v. Greenman*, 110 U. S. 425; *Huntington v. Attrill*, 146 *ib.* 657; *Head v. Amoskeag Company*, 113 *ib.* 9; *Cole v. La Grange* 113 *ib.* 1; *Elk v. Wilkins*, 94 *ib.* 123; *Capital Traction Company v. Hof*, 174 *ib.* 1; *Logan v. United States*, 144 *ib.* 263; *United States v. Wong Kim Ark*, 169 *ib.* 649; *St. Louis and San Francisco Railroad Company v. Mathews*, 165 *ib.* 1; *Fong Yue Ting v. United States*, 149 *ib.* 698; *Van Brocklin v. Tennessee*, 117 *ib.* 151; *Leisy v. Hardin*, 135 *ib.* 100 (*diss.*); *Pullman Company v. Pennsylvania*, 141 *ib.* 18; *Arlington Case*, 106 *ib.* 196 (*diss.*); *Healey v. Donoghue*, 116 *ib.* 1; *Illinois Central Railroad Company v. Illinois*, 163 *ib.* 142; *New Orleans Waterworks Company v. Sugar Refining Company*, 125 *ib.* 18.

Admiralty and prize: *Ralli v. Troop*, 157 U. S. 386; *The John G. Stevens*, 170 *ib.* 113; *The Glide*, 167 *ib.* 606; *United States v. Rodgers*, 150 *ib.* 249; *Workman v. Mayor of New York*, 179 *ib.* 552; *The J. E. Rumbel*, 148 *ib.* 1; *The Parquette Habana*, 175 *ib.* 677.

Wills: *Jones v. Habersham*, 107 U. S. 174; *MacArthur v. Scott*, 113 *ib.* 340; *Gibbons v. Mahon*, 136 *ib.* 549.

Contracts: *Nossington v. Wright*, 155 U. S. 188; *Campania la Flechea v. Franer*, 168 *ib.* 104; *Waterman*

v. Mackenzie, 138 *ib.* 252; *Central Transportation Company v. Pullman Company*, 139 *ib.* 34; *Dushane v. Benedict*, 120 *ib.* 630; *Warner v. Texas & Pacific Railroad Company*, 164 *ib.* 48; *Primrose & Western Union Telegraph Company*, 154 *ib.* 1.

Criminal law: *Sparf v. United States*, 156 U. S. 5, (*diss.*); *United States v. Sauges*, 144 *ib.* 310; *Ex parte Wilson*, 114 *ib.* 417.

Miscellaneous: *Hilton v. Guyot*, 159 U. S. 113 (foreign judgments); *Viterbo v. Freidlander*, 120 *ib.* 707 (civil law of landlord and tenant); *Lamar v. Micon*, 112 *ib.* 452 (conflict of laws); *Liverpool Steam Company v. Phoenix Insurance Company*, 129 *ib.* 397 (common carriers); *Phoenix Insurance Company v. Erie Transportation Company*, 117 *ib.* 312 (*ib.*); *In re Sawyer*, 124 *ib.* 200 (equity jurisdiction); *Lake Shore and Michigan Southern Railroad Company v. Prentice*, 147 *ib.* 101 (damages); *Smith v. Whitney*, 116 *ib.* 167 (courts martial); *Wisconsin v. Pelican Insurance Company*, 127 *ib.* 265 (original jurisdiction of Supreme Court); *Jones v. United States*, 137 *ib.* 202 (Federal jurisdiction); *Meehan v. Valentine*, 145 *ib.* 611 (partnership); *Pennsylvania Railroad Company v. Locomotive Truck Company*, 110 *ib.* 490 (patent); *St. Louis, etc. Railroad Company v. Terre Haute, etc. Railroad Company*, 145 *ib.* 393 (lease); *Northern Pacific Railway Company v. Washington Territory*, 142 *ib.* 492 (railways); *Union Pacific Railway Company v. Botsford*, 141 *ib.* 250 (trial); *Hartford Fire Insurance Company v. Railroad Company*, 175 *ib.* 91 (general jurisprudence.)

In the Supreme Court of Massachusetts:

Constitutional law: *Briggs v. Light Boats*, 11 Allen 157; *Opinion of the Justice on Money Bills*, 126 Mass. 557; *Foster v. Foster*, 129 *ib.* 559; *Tyler v. Pomeroy*, 8 Allen, 480; *Kershaw v. Kelsey*, 100 Mass. 56.

Criminal law: *Commonwealth v. Macloon*, 101 Mass. 1; *Commonwealth v. Burke*, 105 *ib.* 376; *Partidge v. Hood*, 120 *ib.* 408.

Conflict of laws: *Ross v. Ross*, 129 Mass. 243; *Commonwealth v. Lane*, 113 *ib.* 458; *Milliken v. Pratt*, 125 *ib.* 374.

Wills: *Waters v. Stickney*, 12 Allen 1; *Chase v. Kittredge*, 11 *ib.* 49; *Jackson v. Phillips*, 14 *ib.* 539.

Equity: *Howe v. Nickerson*, 14 Allen 400; *Attorney General v. Tudor Ice Company*, 104 Mass. 239.

Municipal Corporations: *Hill v. City of Boston*, 122 Mass. 344; *Stone v. Charlestown*, 114 *ib.* 214.

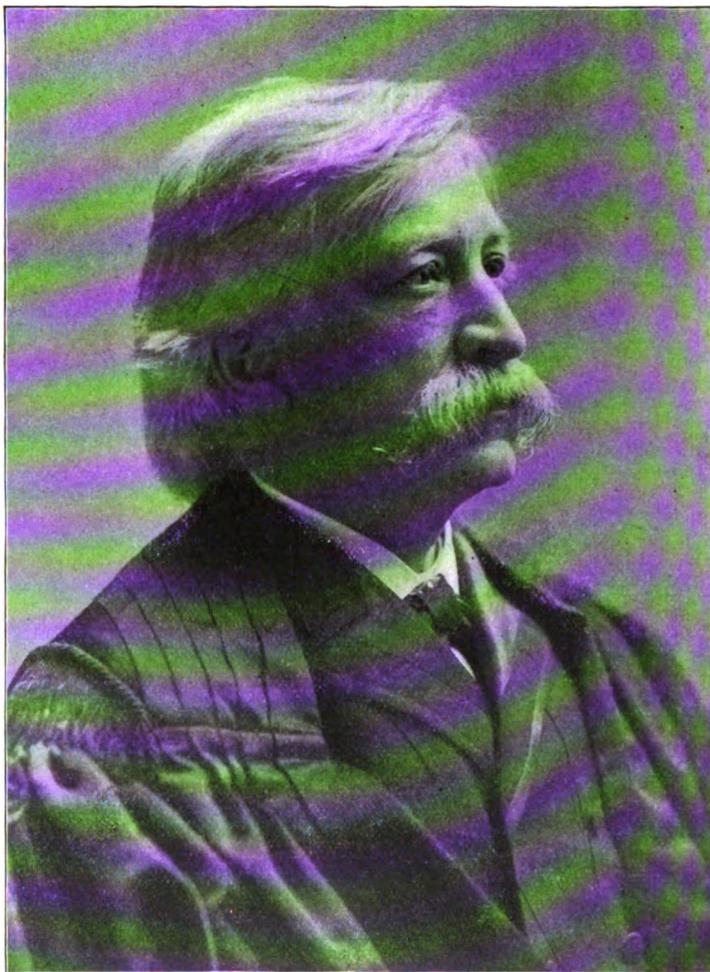
Covenants: *Bronson v. Coffin*, 108 Mass. 175; *Russ v. Alpaugh*, 118 *ib.* 369.

Miscellaneous: *Kennedy v. Doyle*, 10 Allen 161 (evidences); *Locke v. Lewis*, 124 Mass. 1 (partnership); *Gilmore v. Driscoll*, 122 *ib.* 199 (tests); *Osborne v. Morgan*, 130 *ib.* 102 (*ib.*); *Exchange Bank v. Rice*, 98 *ib.* 288 (bills of exchange); *Haskell v. New Bedford*, 108 *ib.* 208 (nuisance change); *Davis v. Railroad Company*, 131 *ib.* 258 (*ultra vires*); *Kimball v. Ætna Insurance Company*, 9 Allen 540 (insurance); *Boston v. Richardson*, 13 *ib.* 146 (ancient grants).

In the course of the foregoing sketch occasional reference has been made to Mr. Justice Harlan; it would be impossible to undertake an intelligent consideration of the work of the court during the past twenty-five years

without taking into account his conspicuous services. But it is not within the scope of this article, nor, indeed, would it be within the bounds of propriety, to estimate the services of the present justices, whose careers

194; *Pollock v. Farmers Loan and Trust Company*, 157 *ib.* 429; 158 *ib.* 601; *Boyd v. Thayer*, 143 *ib.* 135; *In re Cooper*, *ib.* 494; *Union Pacific Railway Company v. Chicago, Rock Island and Pacific Railroad Company*, 163 *ib.* 564; *Roehm v. Horst*, 178 *ib.* 15; *The Carlos F. Roses*, 177 *ib.* 655; *Cole v. Cunningham*, 135 *ib.* 107; *Baiz*, petitioner, 135 *ib.* 403; *Downes v. Bidwell*, 182 *ib.* 246; *Western Union Telegraph Company v. State of*



MR. CHIEF JUSTICE FULLER.

are still in the making. The following lists will give a fairly accurate idea of the character and extent of their labors.

MR. CHIEF JUSTICE FULLER:

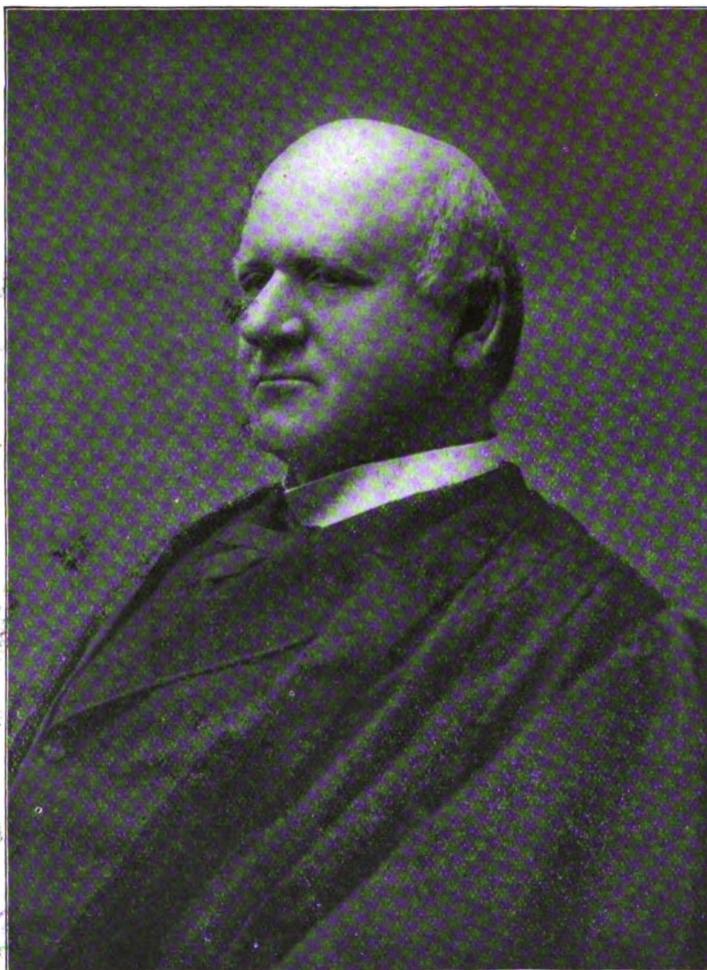
Leisy v. Hardin, 135 U. S. 100; *The Chinese Deportation Cases* 149 *ib.* 698; *United States v. E. C. Knight Company*, 156 *ib.* 1; *Field v. Clark*, 143 *ib.* 649; *In re Rapier*, 143 *ib.* 110; *Hilton v. Guyot*, 159 *ib.* 113; *McPeerson v. Blacker*, 146 *ib.* 1; *Sanford v. Poe*, 165 *ib.*

Pennsylvania, 128 *ib.* 39; *Menendez v. Holt*, 128 *ib.* 514; *Bank of Washington v. Hume*, 128 *ib.* 195; *Reynes v. Dumont*, 130 *ib.* 354; *Moore v. Crawford*, 130 *ib.* 122; *Inman v. South Carolina Railroad Company*, 129 *ib.* 128; *Stoutenburgh v. Hennick*, 129 *ib.* 141; *United States v. Wong Kim Ark*, 169 *ib.* 649; *Ornelas v. Ruiz*, 161 *ib.* 503; *Duncan v. Missouri*, 152 *ib.* 347; *Petit v. Minnesota*, 177 *ib.* 164; *The Pedro*, 175 *ib.* 354; *Plumley v. Massachusetts*, 155 *ib.* 146; *Central Pacific Railroad Company v. State of California*, 162 *ib.* 91; *Taylor v. Beckham*, 178 *ib.* 548.

MR. JUSTICE HARLAN:

The Civil Rights Cases, 109 U. S. 3; *Sparf v. United States*, 156 *ib.* 1; *State of Louisiana v. Jumel*, 107 *ib.* 711; *Hurtado v. State of California*, 110 *ib.* 538; *Field v. Clark*, 143 *ib.* 649; *Cownes v. Bidwell*, 182 *ib.* 246; *Neal v. State of Delaware*, 103 *ib.* 370; *Leisy v. Hardin*, 135 *ib.* 100; *Powell v. State of Pennsylvania*, 127 *ib.* 678; *O'Neill v. State of Vermont*, 144 *ib.* 323; *Davis v. United States*, 160 *ib.* 469; *Pullman Company v. State*

People v. Roberts, 171 *ib.* 658; *Connecticut Insurance Company v. Lathrop*, 111 *ib.* 612; *Delaware, etc. Railroad Company v. Converse*, 139 *ib.* 469; *New York Central Railroad Company v. Troloff*, 100 *ib.* 24; *United States v. Stanford*, 161 *ib.* 412; *United States v. Union Pacific Railway Company*, 159 *ib.* 1; *Patterson v. State of Kentucky*, 97 *ib.* 501; *Robb v. Connolly*, 111 *ib.* 625; *Connolly v. Union Sewer Pipe Company*, 184 *ib.* 540; *Taylor v. Beckham*, 178 *ib.* 548; *State of Min-*



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of Pennsylvania; *Beard v. United States*, 158 *ib.* 550; *Covington Turnpike Company v. Sanford*, 164 *ib.* 578; *Plumley v. State of Massachusetts*, 155 *ib.* 461; *Ex parte Terry*, 128 *ib.* 289; *United States v. E. C. Knight Company*, 156 *ib.* 1; *Interstate Commerce Commission v. Brinison*, 154 *ib.* 447; *Bate Refrigerating Company v. Sulzberger*, 157 *ib.* 1; *Mugler v. State of Kansas*, 123 *ib.* 623; *Maxwell v. Dow*, 176 *ib.* 581; *Pollock v. Farmers Loan and Trust Company*, 158 *ib.* 60; *Ex parte Royall*, 117 *ib.* 240; *Antoni v. Greenhow*, 107 *ib.* 769;

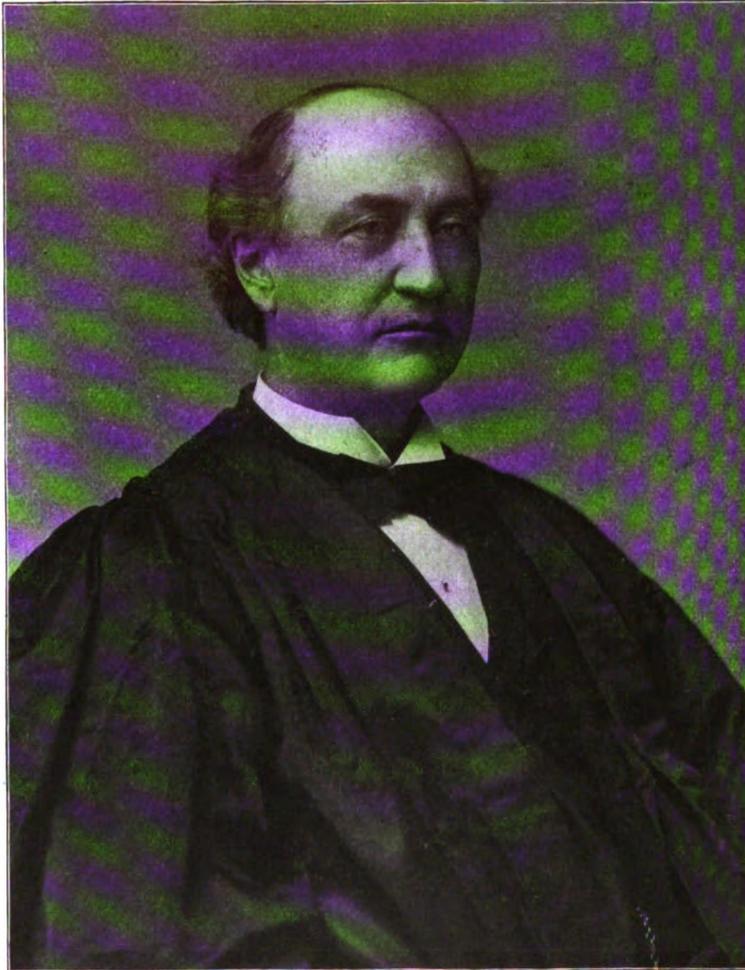
nesota v. Barber, 136 *ib.* 313; *United States v. St. Clair*, 154 *ib.* 134; *Hough v. Texas and Pacific Railroad Company*, 100 *ib.* 213; *Guy v. Baltimore*, 100 *ib.* 434; *Kirtland v. Hotchkiss*, *ib.* 491; *Railroad Company v. National Bank*, 102 *ib.* 14; *Hopt v. Utah*, 110 *ib.* 574; *New Orleans Gas Company v. Louisiana Light Company*, 115 *ib.* 650; *New Orleans Waterworks Company v. Rivers*, 115 *ib.* 650; *Aldrich v. Chemical National Bank*, 176 *ib.* 618; *Spalding v. Vilas*, 161 *ib.* 483; *Lake Shore and Michigan Southern Railroad Company v*

State of Ohio, 165 *ib.* 365; Kirby *v.* United States, 174 *ib.* 47; Atchinson, Topeka and Sante Fe Railroad Company *v.* Mathews, 174 *ib.* 96; Scranton *v.* Wheeler, 163 *ib.* 703; Western Union Telegraph Company *v.* Taggart, 163 *ib.* 1; Beckwith *v.* Bear, 98 *ib.* 266; Elk *v.* Wilkins, 94 U. S. 123; Chew Heong *v.* United States, 112 *ib.* 536; Bowman *v.* Chicago and North Western Railway Company, 125 *ib.* 465; United States *v.* State of Texas, 143 *ib.* 621; McAllister *v.* United States, 141 *ib.*

Insurance Company, 169 *ib.* 139; French *v.* Asphalt Company, 181 *ib.* 324; Fairbanks *v.* United States, 181 *ib.* 283; State of Illinois *v.* Illinois Central Railroad Company, 33 Federal Reporter, 730; Farmers Loan and Trust Company *v.* Chicago, *etc.* Railway Company, 39 *ib.* 143; Arthur *v.* Oaks, 63 *ib.* 310.

MR. JUSTICE BREWER:

Reagan *v.* Farmers Loan and Trust Company, 154



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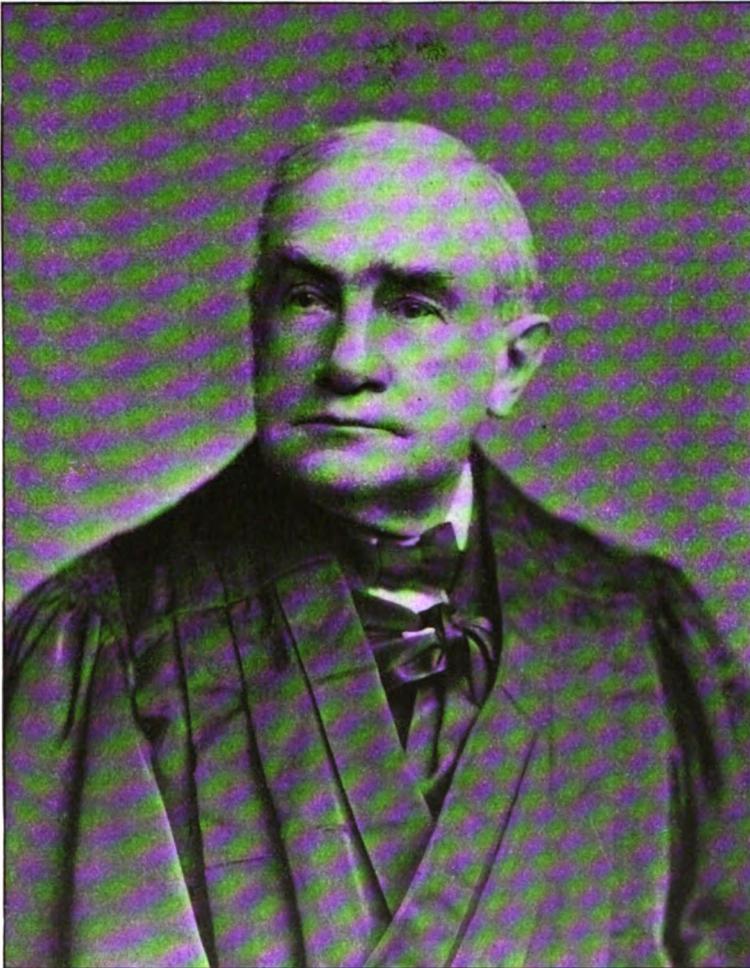
174; Ford *v.* Surget, 97 *ib.* 564; Baldwin *v.* Franks, 120 *ib.* 678; Stone *v.* Farmers Loan and Trust Company, 116 *ib.* 307; *Ex parte* Ayers, 123 *ib.* 443; Clark *v.* Bever, 139 *ib.* 96; Thompson *v.* Utah, 170 *ib.* 343; City of Brenham *v.* German American Bank, 144 *ib.* 173; Smyth *v.* Ames, 169 *ib.* 466; Gibson *v.* Mississippi, 162 *ib.* 565; Cook *v.* United States, 138 *ib.* 157; Thompson *v.* Missouri, 171 *ib.* 380; Norwood *v.* Baker, 172 *ib.* 269; Hennington *v.* Georgia, 163 *ib.* 299; Ritter *v.* Mutual Life

U. S. 362; The Chinese Deportation Cases, 149 *ib.* 698; Stearns *v.* State of Minnesota, 179 *ib.* 11; Budd *v.* State of New York, 143 *ib.* 517; *In re* Debs, 158 *ib.* 564; Monongahela Navigation Company *v.* United States, 148 *ib.* 312; Baltimore *v.* Ohio Railroad Company *v.* Bough, 149 *ib.* 368; Leisy *v.* Hardin, 135 *ib.* 100; O'Neill *v.* State of Vermont, 144-323; Austin *v.* State of Tennessee, 179 *ib.* 343; Barden *v.* Northern Pacific Railroad Company, 154 *ib.* 288; Gulf, Colorado and

San Francisco Railway Company *v.* Ellis, 165 *ib.* 150; St. Louis *v.* Western Union Telegraph Company, 148 *ib.* 92; Brown *v.* State of New Jersey, 175 *ib.* 172; L'Hote *v.* New Orleans, 277 *ib.* 587; McCullough *v.* Commonwealth of Virginia, 172 *ib.* 102; Blake *v.* McClung, 176 *ib.* 59; Atchinson, Topeka and Sante Fe Railroad Company *v.* Mathews, 174 *ib.* 96; Trinity Church *v.* United States, 143 *ib.* 457; Hollins *v.* Coal Company, 150 *ib.* 371; Fong Yue Ting *v.* United States,

well Land Grant Company, 26 *ib.* 118; State *v.* Walruff, 26 *ib.* 178; McElroy *v.* Kansas City, 21 *ib.* 257; Howard *v.* Denver and Rio Grande Railway, 26 *ib.* 837.

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149 *ib.* 698; Union Pacific Railway Company *v.* Botsford, 141 *ib.* 250; United States *v.* Rio Grande Company, 174 *ib.* 690; Fairbanks *v.* United States, 181 *ib.* 283; Cotting *v.* Kansas City Stock Yards, 183 *ib.* 79; Angle *v.* Chicago, *etc.* Railroad Company, 151 *ib.* 11; Lowndes *v.* Huntington, 153 *ib.* 1; Louisville and Nashville Railroad Company *v.* Eubank, 184 *ib.* 27.

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pany, 161 *ib.* 646; *The Maine v. Williams*, 152 *ib.* 122; *Constable v. National Steamship Company*, 154 *ib.* 51; *The Corsair*, 145 *ib.* 335; *Ridson Locomotive Works v. Ridart*, 158 *ib.* 68; *Holmes v. Hurst*, 174 *ib.* 85; *Holden, v. Handy*, 169 *ib.* 366; *Pollock v. Farmers Loan and Trust Company*, 158 *ib.* 601; *Tucker v. Alexandroff*, 183 *ib.* 424.

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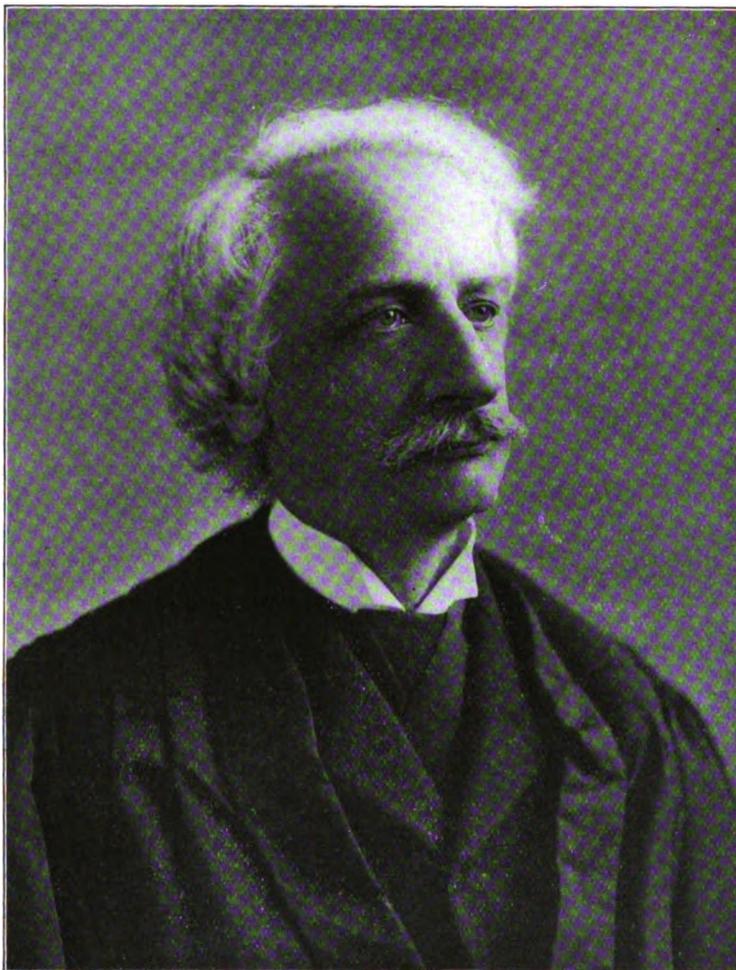
264; *The Alberta*, 23 *ib.* 807; *Phillipps v. Detroit*, 4 Banning and Arden, 347; *Ex parte Byers*, 32 Federal Reporter 404; *Brush Electric Company* 43 *ib.* 533; *Saginaw Gas Light Company, v. Saginaw*, 28 *ib.* 529; *Navigation Company v. Insurance Company*, 26 *ib.* 596.

MR. JUSTICE SHIRAS:

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v. State of Ohio, 165 *ib.* 365; 173 *ib.* 285; *The Irrawaddy*, 171 *ib.* 192; *The Carlos F. Roses*, 177 *ib.* 655; *The Adula*, 176 *ib.* 361; Baltimore and Ohio Railroad Company *v.* Voigt, 176 *ib.* 498; Plummer *v.* Coler, 178 *ib.* 115; Illinois Central Railroad Company *v.* State of Illinois, 146 *ib.* 387; Scranton *v.* Wheeler, 163 *ib.* 703; Westinghouse *v.* Boyden Power Brake Company, 170 *ib.* 574; Brass *v.* North Dakota, 153 *ib.*

429; 158 *ib.* 601. *The Pedro*, 175 *ib.* 354; Workman *v.* Mayor of New York, 179 *ib.* 552; United States *v.* Trans-Missouri Freight Association, 166 *ib.* 290; Stearns *v.* State of Minnesota, 179 *ib.* 223; Ralli *v.* Troop, 157 *ib.* 386; Ohio Oil Company *v.* State of Indiana, 177 *ib.* 212; Merrill *v.* National Bank, 173 *ib.* 131; Geer *v.* State of Connecticut, 161 *ib.* 519; Union Pacific Railway Company *v.* Wyler, 158 *ib.* 285; Downes *v.* Bid



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391; Hollinger *v.* Davis, 146 *ib.* 314; Lewis *v.* United States, 146 *ib.* 370; French *v.* Asphalt Company, 181 *ib.* 324; Northern Assurance Company *v.* Grand View Building Association, 183 *ib.* 308; Wilson *v.* Nelson, 183 *ib.* 191; Missouri *v.* Illinois, 180 *ib.* 208.

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well, 182 *ib.* 246; Dooley *v.* United States, 182 *ib.* 222; *The Kensington*, 183 *ib.* 263; Freeport Water Company *v.* Freeport City, 180 *ib.* 587.

MR. JUSTICE PECKHAM:

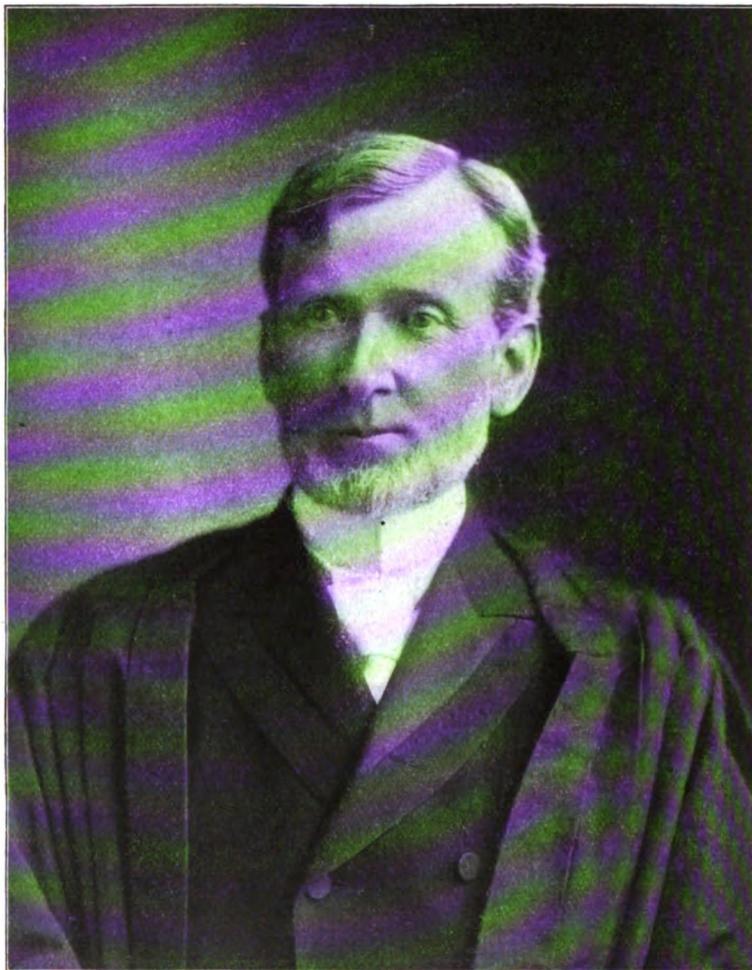
Addyston Pipe and Steel Company *v.* United States, 175 U. S. 211; United States *v.* Trans-Missouri Freight Association, 166 *ib.* 290; United States *v.* Joint Traffic Association, 171 *ib.* 505; Maxwell *v.* Dow, 176 *ib.* 58; Houston and Texas Railway Company *v.* State of Texas, 177 *ib.* 66; Hop-

kins *v.* United States, 171 *ib.* 578; Lake Shore and Michigan Southern Railway Company *v.* Smith, 173 *ib.* 684; McMullen *v.* Hoffman, 174 *ib.* 639; Fallbrook Irrigation District *v.* Bradley, 164 *ib.* 112; Western Union Telegraph Company *v.* James, 162 *ib.* 65; United States *v.* Realty Company, 163 *ib.* 427; Parsons *v.* United States, 167 *ib.* 323; Throckworton *v.* Holt, 180 *ib.* 552; United States *v.* Gettysburg Electric Railway, 160 *ib.* 668; City of Detroit *v.* Detroit Citizens Street

pany, 111 *ib.* 390; Kennedy *v.* Elevated Railroad Company, 145 *ib.* 288; People *v.* Richards, 108 *ib.* 137; Holmes *v.* Gilman, 138 *ib.* 369.

MR. JUSTICE MCKENNA:

Delima *v.* Bidwell, 182 U. S. 1; Freeport Water Company *v.* Freeport City, 180 *ib.* 587; Pirie *v.* Chicago Title and Trust Company, 182 *ib.* 438; Connolly *v.* Union Sewer Pipe Company, 184 *ib.* 540; *In re Con-*



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Railway Company, 184 *ib.* 368; Louisville and Nashville Railroad Company *v.* Eubank, 184 *ib.* 27.

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pany, 178 *ib.* 421; Chicago, Rock Island and Pacific Railroad Company *v.* Zerneck, 183 *ib.* 582; Magoun *v.* Illinois Trust and Savings Bank, 170 *ib.* 283; Chicago, Rock Island and Pacific Railway Company *v.* Sturm, 174 *ib.* 71c.

In conclusion, some statistics with respect to the fifty-seven lawyers who have served as justices of this court¹ may be of interest.

¹ From 1789 to 1900.

The average age of the justices at the time of appointment was fifty-two years. Twenty-nine justices were between fifty and sixty years of age at the time of their appointment; fourteen were between forty and fifty. Only four justices were under forty: Story, the youngest, was thirty-two; William Johnson, thirty-three; Washington, thirty-six, and Iredell, thirty-nine. Since Story's appointment, a period of over ninety years, only nine appointees have been under fifty: Campbell and Curtis, forty-two; Harlan and McLean, forty-four; Wayne, forty-five; Miller, forty-six; Davis and Field, forty-seven, and White, forty-nine. On the other hand, seven justices ascended the bench at the age of sixty or more: Hunt and Lamar, at sixty-three; Blatchford and Strong, at sixty-two; Jackson, at sixty-one, and Duvall and Shiras, at sixty.

The average length of service is not quite sixteen years. Twenty justices served less than ten years; twelve between ten and twenty years; eighteen above twenty years. Of the thirteen justices who served twenty-five years or more, six served less than thirty years; those who served thirty years or more were: Field, Marshall and Story, thirty-four years; Wayne and McLean, thirty-two; Washington, thirty-one, and William Johnson, thirty. Fifteen justices terminated their service by resignation.

The enactment of the usual age limit of seventy years would have deprived the court of the services of many of its most eminent judges. Twenty-two justices served while over seventy years of age; five of these at eighty or more. Taney's service terminated when he was eighty-seven, Duvall's at eighty-five, Field's at eighty-one, and Marshall's and Nelson's at eighty.

Forty justices were college graduates. Thirty-three had prior judicial experience, seven of them in United States courts. Of those who had enjoyed prior judicial experience, nine had also served in both legislative

and executive positions, while thirteen others had either legislative or executive experience. Nineteen justices who had no prior judicial experience had served in either legislative or executive offices. Only three justices, Miller, Bradley and Shiras, had no prior experience in legislative, executive or judicial office.

The fifty-seven judges came from twenty-four States; the thirteen original States contributed forty-four of them. Twenty-three were appointed from the Middle Atlantic States, seven from New England, fifteen from the South, and twelve from the West. With the shifting of population the geographical distribution of the judges has changed. States which were sure of representation in former times are now unrepresented, while other States which are almost certain to be turned to now have only lately been considered. North Carolina and South Carolina early ceased to figure. Virginia, which sometimes had two members, has been unrepresented since the death of Daniel in 1860. It is worthy of note that both Mississippi and Louisiana obtained their first recognition in recent years. New York has contributed more justices than any other State, seven justices having been appointed from that State. Pennsylvania, Virginia and Ohio come next with five each; Maryland and Massachusetts follow with four each. Only three States have had two members at one time; Virginia, Maryland and Ohio each had an associate justice during the service of one of its citizens as chief justice. No State has always been represented. The nearest approach to continuous representation is made by New York, the only breaks being from Jay's resignation in 1795 to the appointment of Livingstone in 1806, and from the death of Blatchford in 1893 to the appointment of Mr. Justice Peckham in 1896.

THE END.

SOME SINGULAR WILLS.

ALMOST daily we may notice paragraphs detailing bequests of more or less extraordinary nature, and latterly this country would appear to have been more prolific than other regions of singular wills. The late Lord Newborough made the following curious provision in his will. He gave most explicit directions that, after a certain period elapses, his body is to be exhumed and re-interred in Bardsey Island. This island, it will be remembered, lies to the north of Cardigan Bay, and is reputed to have had no fewer than 20,000 saints buried in its soil.

Quite recently, too, Henry Eberle, of Frankfort, left an estate valued at twenty-five thousand dollars to be expended in the erection of a monument over his grave. His will was executed in 1869, and gives minute instructions as to the monument. Three shares of the cemetery stock are bequeathed to the Cemetery Company, the income upon which is to maintain the monument in good repair.

A far more extraordinary will than either of the above was, however, made by Solomon Sanborn, of Medford, Mass., who was a hatter by trade. He left his body to Professor Agassiz and Dr. O. W. Holmes, to be by them prepared in the most skilful and scientific manner known to anatomical art, and placed in the anatomical museum of Harvard College. Two drumheads were to be made of his skin. Upon one was to be inscribed Alexander Pope's "Universal Prayer," on the other the "Declaration of Independence"; and then they were to be presented to the testator's distinguished friend, the drummer of Cohasset. This presentation was subject to the condition that on the 17th of June, at sunrise, every year, the drummer should beat "on the drumheads at the foot of Bunker Hill the spirit-stirring strains of 'Yankee Doodle.'"

Another American, who died recently, reflects in his will that he was shunned by his relatives, "who cannot, now that I am dying, do too much for my comfort." But Dr. Wagner takes on these relations a ghastly revenge. To his brother, Napoleon Bonaparte, he bequeathed his left arm and hand; to another brother, George Washington, his right arm and hand; and to others his legs, nose, ears, *etc.* Further the testator leaves a thousand dollars for the dismembering of his body.

Among other testators who have displayed this remarkable tendency to leave legacies in the form of portions of their bodily frame in its entire condition, may be instanced Dr. Ellerby and Jeremy Bentham.

The will of Dr. Ellerby, who died in London, in 1827, contained the following bequests: "I bequeath my heart to Mr. W., anatomist; my lungs to Mr. R., and my brain to Mr. F., in order that they may preserve them from decomposition; and I do further declare that if these gentlemen shall fail faithfully to execute these, my last wishes, in this respect, I will come and torment them until they comply." In spite of this threat, however, the beneficiaries declined their legacies.

Jeremy Bentham, again, bequeathed his body to a hospital, with instructions that his skeleton should be prepared and cleaned, and his head preserved entire, and that he should—when thus treated—preside at the meetings of the hospital directors. Whether he was actually ever made to preside is doubtful, but it is certain that the skeleton was preserved, and may now be seen in the hospital museum. The preservation of the head was, however, blundered, and one of wax had to be substituted.

Many wills have reference to the domestic felicity, or otherwise, experienced by those

who executed them. As an example of the former, we may give the following passage from the settlement of Lady Palmerston, an ancestress of the celebrated Premier. Referring to her husband, she says, "As I have long given you my heart and tenderest affections and fondest wishes have always been yours, so is everything else that I possess; and all that I can call mine being already yours, I have nothing to give but my heartiest thanks for the care and kindness you have at any time shown me, either in sickness or in health, for which God Almighty will, I hope, reward you in a better world." Then, for "form's sake," follow several specific bequests.

A specimen of the opposite sort was the will of Mr. Rogers of Dublin. In April, 1888, Mrs. Rogers disputed her husband's will in the Dublin Probate Court, on the ground of his deficiency of testamentary capacity. The will contained the clause: "In consequence of the ill-behavior and bad conduct of my wife, I cut her off with one shilling, and she is not to have either hand, act or part in the management, supporting or educating of my children." The evidence showed that the deceased was jealous of his spouse, who at the time of the marriage was eighteen years of age, while he was eighty. The jury found a verdict establishing the will.

Henry, Earl of Stafford, again, inserted the following in his testamentary disposition: "I give to the worst of women, who is guilty of all ills—the daughter of Mr. Grammont, a Frenchman—whom I have unfortunately married, five and forty brass halfpence, which will buy her a pullet for her supper—a greater sum than her father can often make over to her—for I have known when he had neither money nor credit, for such a purchase, he being the worst of men, and his wife the worst of women in all debaucheries. Had I known their characters I would never have married their daughter, nor made myself unhappy."

Another gentleman bequeathed to the partner of his joys and sorrows his "bitter contempt for her infamous conduct," and a Colonel Nash made the subjoined provisions. He bequeathed an annuity of fifty pounds to the bell ringers of Bath Abbey, England, on the condition that they should muffle the clappers of the bells of the said Abbey, and ring them with doleful accentuation from 8 a. m. to 8 p. m. on each anniversary of his wedding day; and, during the same number of hours only, with a merry peal on the anniversary of the day which released him from domestic tyranny and wretchedness. A Mr. Luke of Rotheringham, who died in 1812, also left bell ringers legacies, though under different circumstances. His will is a most extraordinary document. He left a penny to every child who should attend his obsequies, with the result that over seven hundred youngsters were in attendance at the funeral. All the poor women in the parish were bequeathed one shilling each. The bell ringers were left half a guinea each, to "strike off one peal of grand bobs" at the exact moment the body was earthed; and seven of the oldest navvies were to have a guinea for "puddling him up" in his grave. An old woman "who had for sixteen years tucked him up in his bed," was to have one guinea. A singular endowment was made, whereby forty dozen penny loaves were to be thrown down from the parish church steeple, at noon, every Christmas Day forever.

A German bequeathed his effects to a poor man whom he intensely disliked, on condition that he always wore linen underclothes, without any additional underclothing; while John Reed, the gaslighter of the Walnut Street Theatre, Philadelphia, concluded his will thus: "My head to be separated from my body, duly macerated and prepared, then to be employed to represent the skull of Yorick in the play of 'Hamlet.'"

Stanislaus Poltmarz left the greater part

of his fortune to a Hungarian notary, forbidding him, however, to take possession until he had sung in La Scala or San Carlo opera houses the parts of Rossini's "Otello" and "Elviro" in "Somnambula." He was eighty years old when he executed the will and wrote: "I do not dispose of my wealth in this manner for the sake of being thought original; but having been present four years ago at an evening party in Vienna, I heard Mr. Lotz (the notary) sing a cavatina from each of the operas with a beautiful tenor voice, therefore I believe him likely to become an excellent artist! In any case, if the public hisses him, he can console himself easily with the three million florins which I leave him."

In 1805, Mr. Edward Hurst left a very large fortune to his only son on condition that the latter should seek out and marry a young lady, whom the father, according to his own statement, had, by acts for which he prayed forgiveness, reduced to the extremity of poverty; or, failing her, her nearest unmarried female heir. The latter, by the irony of fate, turned out to be a spinster of fifty-five, who, professing herself willing to carry out her share of the imposed duty, was duly united to the young man, who had just reached his majority.

Many valuable bequests have been made to dogs, and other domestic pets. The will of one Garland, who died in June, 1888, contained this clause: "I bequeath for my monkey, my dear and amusing Jacko, the sum of one hundred pounds *per annum*, to be employed for his sole use and benefit; to my faithful dog, Shock, and my well-beloved cat, Tib, a pension of five pounds; and desire that, in the case of the death of either of the three, the lapsed pension shall pass to the other two, to whom it shall be equally divided. On the death of all three, the sum appropriated shall become the property of my daughter Gertrude, to whom I give this

preference among my children because of the large family she has, and the difficulty she finds in bringing them up."

A Mrs. Elizabeth Hurst, in 1813, left two hundred a year to her parrot, and a Mr. Harper settled one hundred a year on his "young black cat," the interest to be paid to his housekeeper, Mrs. Hodges, as long as the cat remained alive. Dr. Christiano, of Venice, again, left sixty thousand florins for the maintenance of his three dogs, with a condition that, at their death, the sum shall be added to the funds of the University of Vienna.

An old Parisian lady bequeathed fifteen hundred a year to her butcher, whom she had never seen; while one man chalked his will on a corn-bin; and another inscribed his on a bed-post. Both the corn-bin and the bed-post are said to be filed in Doctor's Commons, London.

Perhaps the whimsical will of a Scotch gentleman, who, having two daughters, bequeathed to each her weight, not in gold, but in one pound notes, has been frequently noted. At any rate, the elder of the two was considerably lighter than her sister, for she only got fifty-one thousand, while the younger received fifty-seven thousand, five hundred and forty-four.

In conclusion, we may give the following curious clause in the testament of a New York gentleman: "I own seventy-one pairs of trousers, and I strictly enjoin my executors to hold a public sale, at which these shall be sold to the highest bidder, and the proceeds distributed to the poor of the city. I further desire that these garments shall in no way be examined or meddled with, but be disposed of as they are found at the time of my death; and no one purchaser to buy more than one pair." The sale was actually held, and the seventy-one purchasers each found in one of the pockets bank notes representing a thousand dollars.

THE CRIMINAL CODE OF THE PHILIPPINES.

BY W. F. NORRIS.

THE criminal code of the Philippines remains comparatively unaltered, crimes, their definitions and penalties being the same as during the days of Spanish supremacy. The criminal code of procedure has been modified by a general military order, issued by General Otis when Military Governor, which order, as far as it went, introduced radical changes in the procedure heretofore prevailing, by casting the burden of proof in criminal cases upon the government. Up to May 15, 1900, the date on which said order took effect, the burden was upon the defendant charged with crime to prove himself innocent. Other primary principles of our criminal law were interjected in the body of the Spanish law of criminal procedure, as, for example, permitting the accused to testify in his own behalf, exempting him from giving testimony in his own case, unless voluntarily, confronting him with the witnesses against him, and providing for a preliminary examination of parties charged with crime.

Whether the introduction of these humane provisions of our criminal law are on the whole beneficial at the present time, admits of serious doubt. The preamble to the order referred to states that to safeguard the rights of the individual and promote justice these principles shall prevail, *etc.*, but under existing conditions, and the peculiar state of society, and especially the character of the people and their previous training, it is doubtful whether substantial justice is promoted by the change. One thing is certain, that crime is not so effectually detected and punished as under the old system. A change in the procedure, however, must have been made sooner or later, and during the transition stage difficulties must be expected, which experience alone can properly adjust.

In a very large proportion of criminal

cases the accused has confessed his guilt before a justice of the peace in the preliminary examination, generally with the accompaniment of some circumstance of an extenuating character. In almost every instance however, when he appears before the Court of First Instance and an American judge, he denies everything, and when confronted with his admission before the justice denies that he ever made it, or states that he was compelled to confess, urging sometimes that torture was inflicted, including the popular punishment of the water cure, or perhaps the excuse will be that he was frightened so that he did not realize what he was saying, or any other falsehood that he may deem best calculated to secure his acquittal.

The Filipino witness is not, in my opinion, a skillful liar. I am aware that in this opinion I differ from the majority of Americans and Europeans conversant with the native character. The native has one marked advantage: he is a liar without conscience, a natural born falsifier, one who prefers falsehood to truth, or at least to whom truth or falsehood are matters of indifference, and who regards a successful lie as a piece of commendable diplomacy. To pronounce the native a skillful liar, however, is an undeserved compliment. He takes refuge in a lie as a hunted squirrel takes to a tree or a rabbit to the nearest thicket, and owing to the dialect in which he speaks, and the fact that what he says comes to the court strained through two languages, it is more difficult to detect the falsehood than in the case of the lie uttered in the English language. The very insensibility of the native to the vice of falsehood makes detection the more difficult; with the lying Filipino witness there is no confusion of face or flush of shame, no qualm of conscience to cause disquietude at telling

a lie; his brown paper visage maintains the same stolid appearance, whether words of truth or falsehood are proceeding from his lips. Recently a woman took the witness stand in behalf of her husband in a criminal case; her story was told with all appearance of candor and veracity, but in some respects contradicted the statements of preceding witnesses for the defence. The witness was presumably unaware of this, as the witnesses were excluded from the court room until called in to testify. The accused, thinking his wife might be injuring his case, finally interrupted, saying that she was sick at the time and knew nothing about the matter.

The dutiful spouse cheerfully assented to the statement, but added that she wanted to help her husband, and so came to the court to tell the story best adapted for that laudable purpose.

Certain offences under the existing code partake of the nature of personal actions which may be prosecuted and punished or not, depending on the will or whim of the individual interested. Included in the list is the offence of rape, which is prosecuted at the will of the offended party, as she is called. If at any time, or for any reason, the woman grants pardon to the offender, the prosecution ceases, whether the trial of the case has begun or not; if, after trial and conviction, such pardon be extended, the prison doors at once open and the condemned goes free. In practice, in the majority of instances, the injured party grants pardon after the accused is brought to trial; whether forgiveness is in her heart, or whether she is reluctant to appear relentless before the court, or whether the crime has been condoned through lapse of time, the offence having very different moral import in this country than in the States, is matter of doubt; but whatever the motive, forgiveness is generally granted, and the parties go from the court room sometimes to be married, and in nearly all cases none the less friends.

The accused does not always, however, escape so easily. Some time since four persons were accused as principals and abettors to the crime of rape, one of the defendants being a woman. The offended party proved obdurate, positively refusing forgiveness to any of the participants in the crime. All were found guilty; the two principal offenders, including the woman, were sentenced to terms of fourteen years, eight months and one day each, of imprisonment, the others to five and six years respectively. The convicted may serve out the entire time or may not, whether they pass a large portion of their lives in prison depending on the pleasure of a young woman, who by a word can open the prison doors to two of its inmates today, or by keeping silence close them till the year 1916.

In cases wherein the complaining witness has sustained pecuniary loss, as larceny and like offences, he may recover damages in addition to the penalty affixed by the criminal code to the crime. It is not unusual to employ private counsel to assist the Provincial Fiscal, whose particular duty it is to recover as large a measure of damages as possible. Permitting the recovery of damages in a criminal action is continued by the military order hereinbefore referred to, which contains a special clause providing for such recovery.

The civil code of procedure now in force was introduced by the Philippine Commission repealing the pre-existing Spanish code. The new code in its general features resembles that in force in most of the States. The Civil Code remains substantially unchanged, and will probably for an indefinite period continue the law of the land, probably somewhat modified to adjust it to changed political conditions. The law in certain respects could not be substantially modified without causing serious public detriment, as in the law of inheritance and like subjects, nor is there necessity for any radical modification

of the Civil Code, which is an excellent system, guarding zealously the rights of minors and orphans, and infinitely more liberal in its provisions referring to the wife and widow, and far less fruitful of litigation than the common law system prevailing in the States.

The abuses alleged to have heretofore existed under the Spanish procedure arose from the administration of and not from any defect in the law itself. The procedure being slow and tedious, the machinery of the courts cumbersome and litigation exceedingly expensive, these conditions as well as the alleged dishonesty of the Spanish judges and court officials brought reproach on the judiciary of the country. When all is considered, the costs, the "law's delays," the exactions, the uncertainty of securing justice, "the insolence of office" to which the poor suitor was subjected by court employes, it seems strange that in any but the most pressing emergency, suitors should have had the courage or will to enter an appearance before the courts.

A most iniquitous provision of the law was that referring disputed attorneys' fees to a special tribunal composed of practising lawyers of the local bar. The unfortunate client who had the temerity to dispute his lawyer's charges, no matter how exorbitant they might be, was subjected, not only to the law's delays in the prosecution of his claim, but to the insolence of office, when robbed by his attorney, on whom the law conferred the privilege of demanding whatever he pleased for his services and of collecting whatever he charged through the good offices of his brethren of the bar.

While the administration of the law under Spanish judges was unsatisfactory and in numerous instances corrupt, statements of wholesale denunciation on the part of the Filipino against the Spaniard should be received with considerable allowance, owing to the natural prejudice prevailing against the

Spanish official, by whom the native, whatever his wealth or social position among his own people, was treated with little respect.

Under the Spanish regime the Filipino received scant official recognition. He filled none but the minor offices in church or State. To a sensitive and extremely ambitious race the situation must have been exceedingly humiliating. I have been told that in the presence of a Spanish official a native was not permitted to seat himself. One former provincial governor was inclined to manifest a friendly spirit to the natives and treated them with unaccustomed affability. On one occasion a Spanish naval official, calling at the governor's office, found him seated chatting with a prominent native; the latter continued to occupy his seat after the entrance of the naval dignitary. The latter, feeling outraged at such effrontery on the part of the Filipino, expressed his sentiments in vigorous Castilian against the presumptuous native, as well as toward the civil official who permitted such presumption. After freeing his mind, he left the office, subsequently reporting the matter to Madrid, which resulted in the speedy removal of the offending governor. I am unable to vouch for the truth of this story, and am of the opinion that the treatment of the native by the Spanish official depended largely upon the individual character of the official. The incident, however, illustrates a condition of affairs radically different from that at present prevailing in the archipelago, when the Chief Justice of the Supreme Court is a native, as are three of the Philippine Commission, several of the judges of the Courts of First Instance, nearly all the Provincial Governors, all of the Provincial Fiscals and justices of the peace. Numerous other places of trust, profit and dignity are filled by Filipino officials.

The minor official places, as that of justice of the peace, is necessarily filled by natives, as it would be impractical to secure Americans for such positions. The annals of Fili-

pino jurisprudence will be replete with the peculiar proceedings of native justices. A case decided by the court since the commencement of this article illustrates the popular view concerning punishment for crime as well as what is considered the correct procedure by the native official. Fabiano, accused of homicide, before the justice pleaded guilty of the act of killing, but justified on the ground of self-defence. The first witness in the trial of the matter before the Court of First Instance, on being cautioned to tell nothing but the truth, remarked that he did not wish to testify, being a relative of the accused, as well as the complaining witness, and that one man being dead, it was not well to kill the other, and have two dead men instead of one. After thus giving his views on judicial penalty, in which he expressed the views of numerous of his fellow-countrymen, much better educated than himself, and occupying much higher social position, he proceeded with his testimony, showing that he had no knowledge of the case.

The next witness called was the one whose testimony was relied on by the prosecution, having been the principal witness in the court

below. He paralyzed the prosecution, however, by stating that his testimony before the justice was utterly untrue; that he brought a false charge against the defendant because he was angry with him for the reason that the accused would not consent to his marriage with his daughter; that Raymuldo, the alleged victim, was still living, and that he had seen him since making the false accusation. He denied that any inducement had been held out to him to withdraw his statement before the justice, but that his conscience impelled him to confess; but whether the promptings of a guilty conscience or the offer of a cariboo prompted the confession is a matter of doubt. The defendant being asked why he admitted the act of killing Raymuldo before the justice, stated that after his arrest for the alleged offence, the Presidente and justice advised him to state that he committed the deed, but that it was done in self-defence, as such story would appear more credible than a complete denial; acting on the suggestion, he went before the justice and told the story as advised by the two village functionaries as best adapted for his case before the higher court.

WRONG WITHOUT REMEDY: A LEGAL SATIRE.

V.

THE TRUST BALKED.

By WALLACE McCAMANT.

ONE day at the club at St. Louis, Anderson overheard two men from Boston talking at an adjoining table about a movement, then just starting, for the amalgamation and consolidation of all the important boot and shoe factories in the Union. Next day Anderson was on the train for New York; there he investigated the report; and satisfied himself that there was substantial

capital behind the scheme; he further learned that conferences had been held with the officers of the most important mills, the details had been threshed out, and there was every reason to expect the consolidation to materialize.

Within a few weeks thereafter Anderson became a stockholder in eleven of the largest corporations engaged in the manufacture of

boots and shoes. Four of these corporations were chartered under the laws of New York, three under those of Massachusetts, and two each under those of Rhode Island and New Jersey. All of these corporations were prosperous and the stocks were paying substantial dividends. It cost Anderson twenty thousand dollars for his holdings, but the mills owned by companies in which he was interested were among the largest in the land, and he knew that the trust could not dispense with them. On this consideration he relied for his profits.

The proposed consolidation had not become public property when Anderson had bought, and he had been careful to buy only the stock of men who had little or no knowledge on the subject of the consolidation, and who had not consented thereto. In a short time thereafter Anderson received a circular letter from the officers of each of his eleven companies, setting forth the terms of an offer which had been made for the properties of the corporation. Several of the letters stated that the scheme had already received the approval of a majority of the stockholders, and in each case it had received the approval of the board. The scheme involved an appraisal of each of the properties and a sale of it to the consolidated company; the latter company was to pay in each case the full appraised value of the plant in paid-up stock of the consolidated company, and one-half that sum in cash. The consolidated company was bonded for the raising of this cash. The recommendation of the scheme from a business standpoint was twofold: The consolidation would permit economy in production in a variety of ways and the monopoly of the product would enable the company to sell at a higher price. It was therefore not unreasonable to expect that the stock of the new company would sell at par, and if it did, the consolidation would net a handsome profit to the stockholders in the individual mills.

Anderson was duly notified of the several stockholders' meetings, and attended them all, in person or by proxy. In each case he filed with the secretary a protest against the proposed consolidation. In nine cases out of the eleven, the consolidation was voted unanimously except for Anderson's stock. In the case of one of the New Jersey corporations another stockholder besides Anderson voted "No," and Anderson a few days later bought his stock. At the meeting of the stockholders of one of the New York corporations there was considerable opposition to the sale, and the matter was postponed to a future meeting. This corporation had been more than ordinarily prosperous and many of the stockholders thought its plant should be valued more highly for this reason. The promoters of the consolidation exerted themselves busily to whip this opposition into line. They bought some of the stock outright and gave other stockholders a large cash consideration to vote in favor of the consolidation. They finally settled with all but Anderson; he refused to sell his stock at three times what it had cost him, and they decided to go ahead with the consolidation without his consent.

As each of these stockholders' meetings adjourned, Anderson brought a suit in equity against the corporation and its officers, praying that they be enjoined from selling to the new corporation. His application for a preliminary injunction came on first for hearing at Elizabeth, N. J. Anderson cited 2 Cook on Corporations, 670; *Kean v. Johnson*, 9 N. J. Eq. 401, and *Mills v. Central Railroad*, 41 N. J. Eq. 1, by which he showed that it had been settled law in New Jersey for a generation that the directors of a corporation, even where authorized by a majority vote of the stockholders, had no right as against a single dissenting stockholder to sell all the assets of a prosperous, dividend-paying corporation and put it out of business. This, he showed, was particularly true where

it was sought, as in this case, to pay a part of the purchase price in stock of the purchasing corporation.

He conceded that questions of policy in the management of the corporation belonged to the directors under the law and admitted that if the corporation were in failing circumstances or if its business was unprofitable, a majority vote of the stockholders could authorize the corporation to go into liquidation. But he contended that it was a violation of the contract on which stock subscriptions were secured to permit the board of trustees or even the majority of the stockholders to close out and dispose of all the assets and good will of a prosperous, dividend-paying corporation which was conducting the business it had been formed to carry on.

Vigorous opposition was made to this contention, and it was urged that an act of the New Jersey Legislature passed in 1895 expressly authorized such consolidation as this one. But Anderson was able to show that such legislation could not impair the obligation of contracts previously entered into, for example the contract on which stock was subscribed in corporations chartered prior to 1895, and that this had been squarely held in *Mills v. Central Railroad*, *supra*.

The defendant corporation had been chartered long prior to 1895, and therefore the consolidation act of that year was inapplicable to the case at bar. The court thought that plaintiff's authorities were in point and Anderson secured his injunction.

A Massachusetts case next came on for hearing; Anderson cited the authorities he had relied on at Elizabeth, and in addition the case of *Middlesex Railroad v. Boston Railroad*, 115 Mass. 347. When his first New York case came on for hearing Anderson cited *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54; *Copeland v. Citizens' Gas Light Company*, 61 Barb. 60, and other New York decisions. The defendant corporation had

been in business for a long period of time, and Anderson easily demonstrated that the New York statute authorizing corporate consolidation enacted in 1896 was inapplicable, as the New Jersey statute on the same subject had recently been held in a suit to which Anderson had been a party.

When his first Rhode Island case came on for hearing Anderson cited *Boston Railroad v. New York Railroad*, 13 R. I. 260. In every case the same conclusion was reached, and Anderson had the consolidation blocked by eleven injunctions, which kept eleven of the largest plants out of the trust. These plants were widely scattered, moreover, and without them the consolidated corporation would be sadly handicapped.

What should be done about it? A meeting of the promoters was called to decide.

"This man is clearly levying blackmail on us," said Mr. Dennison.

"I, for one, am not willing to be held up," said Mr. McPherson.

"Neither am I," said Mr. Walker.

"Don't decide this too hastily," said Mr. Martin, a cold-blooded, far-seeing business man. "At large expense and infinite trouble we have worked out a financial plan involving a capitalization of two hundred millions. We have mastered all the obstacles save this one. Don't let us permit our chagrin at the check this unknown man has given us to blind us to the importance of the interests at stake. Isn't it a better business proposition to surrender to this man a part of our profits rather than to lose all and be out our expenses?"

"I am in accord with Mr. Martin," said Mr. Bixby. "Let us see at what price we can buy this man's stock. What are his holdings worth?"

Pencils were produced, and they finally appraised Anderson's stock all the way from twenty-five thousand to forty thousand dollars. Mr. Martin and Mr. Davis were appointed a committee to wait on Anderson

and bargain with him. They did so, and reported at a subsequent meeting. A couple of weeks later Anderson dismissed his suits and transferred his stock. He returned to St. Louis with one hundred thousand dollars standing to his credit with the Chase Na-

tional Bank; about seventy-five thousand dollars of this sum was clear profit. He could say that he had been fighting a trust until the financial sacrifice had become too great to justify him in continuing the fight.

GLEANINGS FROM THE EIGHTEENTH CENTURY LAW REPORTS.

BY W. W. WAUGH.

THERE is much in the Law Reports of the eighteenth century which may help us to reconstruct the past and explain the present. The modern historian, however, in spite of his prodigious industry, does not often glean in the rather dreary fields of Fountainhall, Elchies, and Kilkerran, and it is hoped that a few illustrations of Scottish law, social life, and public affairs, from the pages of these worthies and the other reporters of their day may have a certain freshness and interest.

The year 1704 produced a quaint appeal by the Merchants of Kilmarnock against John Blair. This Blair was a bailie-depute of the Bailiary of Cuninghame, and alleging that the merchants' weights were false, he amerced them in great sums, extending to over 40,000 merks Scots. The merchants appealed on the grounds, among others, that their standards had been compared by Blair with those of Irvine, which were no better authority than their own, and that they were protected by the Act of Indemnity, promulgated by Queen Anne on her accession. The rapacious Blair replied that thefts were expressly excepted from the indemnity, and false weights and measures were thefts in the sense of the eighth commandment, and the Scriptures declared divers weights and false balances to be an abomination to the Lord. It came out that the fines went into Blair's

own pocket, and the Court, probably thinking that this zeal against divers weights was not entirely for the Lord's sake, decided against him.

In the year 1700 we find the Court of Session dealing with offenders who would now be dealt with in the Criminal Court. On 24th July of that year they had before them one John Corse, who had been accessory to a fraudulent alteration on a bond. We are told that "the Lords, considering that their predecessors were always in use to punish falsehoods themselves where it was not capital, therefore they sentenced him to be carried on Friday, the market-day, betwixt eleven and twelve in the forenoon by the hangman to the Tron, with a paper on his breast bearing the cause, and to have his lug nailed thereto, and to return to prison during the Lords' pleasure, which was accordingly execute."

A curious phase of Scottish urban life is disclosed in the action by the Dean of Guild of Aberdeen against Messrs. Gordon, Burnett & Skene, surgeon apothecaries there in the year 1711. The three had been fined £50 Scots each for acting as merchants, although not guild brothers in Aberdeen. Their case was hard, for they had been stented for their trade as merchants, and bore scot and lot as appeared by the collector's receipt produced, and they were willing

to enter as guild brothers, but were refused admittance. The magistrate pled that they were not bound to admit them, being entitled to refuse all except sons of actual merchants born in Aberdeen who had served an apprenticeship to a merchant. It was replied that the privilege claimed was against public policy, and that the art of pharmacy and surgery was rather a science than a mechanical trade. Few in the present day would see any sufficient answer to these pleas, but the Court held that the surgeon apothecaries were artificers, and could not act as merchants unless they ceased to act as surgeon apothecaries. There were, it appears, ancient Scots statutes forbidding the artificer to be also a merchant, and the Lords considered that to allow the two offices to be combined would stir such jealousies that "without either witchcraft or spirit of prophecy one might easily foresee what confusion, tumult, yea bloodshed, would inevitably follow thereupon."

As might be expected, the aid of the Courts had frequently to be invoked for the protection of trading and manufacturing monopolies in burghs. So late as 1808 we find G. J. Bell and J. Schank More, both familiar names in Scots legal literature, opposing one another in a case which the Bakers of Perth brought for the defence of their privileges, and it was not till 1846 that freedom of trade and manufacture was conceded by statute throughout the Scottish burghs.

The Reports often throw light on the state of subjection in which women and servants lived in the eighteenth century, and the scant consideration which they received from the law. In 1715 a man who claimed to have taken a house in Edinburgh sued the owner for possession, and brought forward a female witness to prove the agreement. This witness was objected to on the ground of her sex, female testimony being contrary to a statute of Robert the Bruce. The Court

held that this statute was not in complete desuetude, and rejected the testimony, although they admitted that custom had sanctioned female testimony, where the nature of the thing fell most properly under the cognition of women, or where there was no opportunity to have choice of witnesses. In the servant class it is well known that colliers were under special disabilities, being bound to the mine where they worked. Thus in 1748 the Laird of Hillhead pursued the Laird of Kirklee for delivery of four of his colliers. Kirklee pled that the colliers had acquired their freedom through absence for a year from the pursuer's heugh. It was answered that the absence was without consent, and the Court sustained this plea and ordered Kirklee to return the men and pay their master, perhaps we should say owner, the statutory penalty of £100 Scots for having detained them.

By a later decision the servile position of colliers was made yet worse. A laird and coalowner near Edinburgh became lessee of the coal in the lands of Edmonston and Woolmet, near his own lands, and drafted some of the colliers to these lands from his own property. The colliers objected, pleading that they were bound to the property only and if there was no coal in it they were entitled to go free. However, the court held that they were bound, not to their master's lands and the minerals therein, but to the master himself, and that if he possessed coal upon which he could employ them they were bound to work at it even though he was not owner of the surface. The date of this decision is 1769, and it is probable that it and some other cases of a similar kind which came up about that time brought about the statute of 1775. This Act abolished the serfdom of colliers who began their occupation after its date and made some provision for freeing the then existing class. This provision was, however, seldom taken advantage

of, and it was not till 1799 that "a statute of tardy humanity gave unconditional freedom to all."

In the year 1770 more liberal views prevailed when the question was discussed whether a negro slave in the service of Sir William Maxwell could be received as a witness. It appeared that slaves were mentioned as incompetent to testify in a statute of Robert the Bruce, and that the slave in question was not a Christian and could, therefore, not appropriately take the oath. To this it was replied that the slave having come to Scotland had thereby become free and that he could take an oath by his own gods. The Court adopted this contention and received him as a witness. It was pleaded in this case, but not decided, that a slave became free on landing in Scotland. This question was, however, discussed and decided in 1778, when it was held that a negro slave who had been brought from Jamaica could not be compelled by his master either to continue his services in Scotland or to go back to Jamaica to continue them there.

One hears people speak at times as if "freezing out" a business competitor was a modern invention and like many other modern inventions perfected in America and imported from there. But in 1729 we find that the Bank of Scotland had been obliged to make a temporary stoppage of payment, and the Royal Bank, then the only other chartered bank in Scotland, acquired a number of its notes and applied for letters of horning against it, hoping to bring about its extinction. The Court of Session, disliking the application of the Royal Bank as being *in emulationem* refused the diligence. The Royal Bank was successful in an appeal to the House of Lords, but before the decision was given matters had become smoother for the Bank of Scotland, and it has been spared to flourish to the present time. . . .

We are reminded by more than one case in the Reports of the disabilities which the law in the eighteenth century imposed on Roman Catholics. In 1745 an heir of entail to the estate of Carron brought an action against the heir who had become entitled to possession to have it found that the latter being a professed Papist and a Fellow in the College of Jesuits at St. Omers was incapable to succeed, and that his right had passed to the pursuer as nearest Protestant heir. The Jesuit appears to have lost the estate, for he did not take the course offered to him by the law for getting free of the disability. He would have had to purge himself of Popery by taking a formula before the Privy Council or the Presbytery of the bounds.

Mention has been made of a case early in the century where the privileges of the Guild Brethren in Aberdeen were upheld; the brethren of Glasgow in 1765 seem to have been equally jealous of their privileges, but they were less successful in asserting them. James Crosse, a freeman wright, had been employed by Daniel Miller, an un-freeman wright, to make two coffins for him. Upon a complaint the magistrates condemned Crosse to a fine of 100 merks for packing and peeling with un-freemen. The Lords suspended the conviction, holding that Crosse's action had not aided any invasion of the privileges of the Corporation of Wrights. In furnishing a coffin they held that a wright could only make the wooden part, the cutting of the cloth belonged to the tailor craft, and the preparing of the nails, screws, and handles belonged to the craft of hammermen. A work, they thought, which required the intervention of so many different crafts could not be peculiar to any one corporation.

As one would expect, the civil commotions of 1715 and 1745 gave rise to quite a crop of cases in the Reports. We learn from a case decided so late as 1767 how funds were

raised for the forces of the Pretender in 1745. John Murray of Broughton, the Secretary of the Pretender, drew bills on the tenants of land belonging to Jacobite lairds, got them accepted by the tenants, and endorsed them for value. The bills were not for payment of money, but for delivery of produce, then the usual form in which farm tenants paid their rents. Some of the bills, or precepts as they were called, were dishonored, and the holder sued Murray as drawer and endorser. The Court refused him recourse against Murray, holding that in discounting the bills he knew he was providing money for the rebel army, a practice which, of course, they did not look on with favor.

From another case we learn how loyalists who had suffered loss of property in the rebellions were compensated. The estates of the rebels were forfeited, and transferred to commissioners who issued debentures payable out of the prices of the forfeited estates when sold, equal to the amount of damage established by loyalists. Haldane of Glen-eagles and his brother received a debenture for £2502 on account of property burnt in Blackford and Auchterarder, and purchased another debenture for £1831 on account of property burnt in Crieff, Muthill, and other places. These debentures were secured on the forfeited estate of Earl Marischall. Haldane sued for payment of interest on the debentures after they had been long due, but the Court refused to award this, actuated, perhaps, by the sympathetic reaction which, after the Jacobite movement had been finally crushed, set in in favor of those who had staked and lost so much for the unsuccessful side. Some estates were restored, and Earl Marischall, if not reinvested in his, appears at least to have been awarded the surplus of the price, rather than diminish which the Court strained the law against the charges mentioned.

The action of assythment is now no more than a legal antiquity, but in 1767 we find its scope and character were the subject of much discussion in the Court. It appears that while the 100th Regiment of Foot had been fighting the French in Martinique, Captain Colin Campbell of Kilberry had killed Captain Macharg, a brother officer, in a quarrel. For this offence he was cashiered by sentence of court-martial. Captain Macharg's relatives brought an action of assythment in the Court of Session. In the defence of Captain Campbell it was pled that assythment was a proceeding for infliction of a fine and not for payment of damages, and that Captain Campbell having already been tried and punished could be liable to no further legal proceedings for the same offence. Assythment was said, apparently with reason, to have been instituted to take the place of the right of private vengeance which early law allowed to the relatives of a murdered man, and to have been regarded more as a criminal penalty than as a civil reparation. His counsel quoted Balfour's *Practicks* to the effect that assythment was paid "to the kin, hairins, and freindis in contentation of their damage and for pacifying of their rancor," and, Bankton who had laid it down that assythment was given to the wife and nearest-of-kin, "that they might be reconciled to the manslayer." Captain Macharg's relatives, however, were successful in maintaining on the other hand that assythment was an action for payment of reparation and not of a fine, and the Court remitted to the Lord Ordinary to fix the amount.

The Reports contain, as one would expect, very full accounts of the historic Douglas cause which was finally decided by the House of Lords in 1706. As is generally known it was originated by the Duke of Hamilton, who sought to prove that a youth calling himself the son of Lady Jane Douglas, and as such heir to the extensive estates of the

last Duke of Douglas, had really been adopted while an infant and was not truly the child of his reputed parents. The proof and arguments founded on it are too extensive to be outlined in the present paper. Everything connected with the litigation was on a spacious scale. The subject of the litigation included the famous castles of Douglas and Bothwell, and the valuable farms, mines, and superiorities that went with them; the proof extended to two large printed volumes each of more than a thousand pages, the hearing on the evidence occupied the House of Lords for days, and the judgment of Lord Sandwich alone required three hours for its delivery. Considering that the Court of Session had found for the Duke of Hamilton and decided that Lady Jane Douglas had purchased or adopted a child to keep the Duke out of the estates and to add to her own importance as the mother of an heir to great possessions, the confident way in which the House of Lords decided against the Duke and reversed the judgment of the Court of Session is a little surprising.

There was certainly much in the evidence to support the decision which the Court of Sessions arrived at, by a majority, against the alleged heir. Lady Jane Douglas at the time of her marriage was forty-eight years of age and her husband fifty-seven. Fellow-travelers with the lady shortly before the date given for the birth had observed no indication of the impending event. La Marre, who was said to have been the accoucheur in Paris, could not be found, and, more unfavorable still, forged letters of this La Marre had been placed among Lady Jane's papers; while it was proved that about the date given for the birth a foreign gentleman had acquired a child through the Sisters of Charity. However, all this did not much impress the House of Lords. Thus Lord Chancellor Camden, after saying that he would give his opinion with "that strictness

of impartiality to which your lordships have so just and equitable a claim," declared in his peroration, "for my part I am for sustaining the positive proof which I find weakened by nothing brought against it, and in this mind I lay my hand upon my breast and declare that in my soul and conscience I believe the appellant to be her son." Lord Mansfield spoke in a like rhetorical vein. "I have slept and worked upon the subject, considered it upon my pillow to the losing of my natural rest." He concluded in the following strain: "Nor is it possible to credit the witnesses, some of them of a sacred character, when they speak of Lady Jane's virtues, provided we can believe her to have been a woman of such abandoned principles as to make a mock of religion, a jest of the sacrament, a scoff of the most solemn oaths, and rush with a lie in her mouth and perjury in her right hand into the presence of the Judge of all who at once sees the whole heart of man and from whose all-discerning eye no secrecy can screen, before whom neither craft nor artifice can avail, nor yet the ingenuity and wit of lawyers can lessen or exculpate, on all which accounts I am for finding the appellant to be the son of Lady Jane Douglas."

In spite of the very decided opinion expressed by the House of Lords, people nowadays lean to the belief that the Court of Session was right. However that may be, the ultimate decision need not be regretted now, for the successful party to the cause, whether the son of Lady Jane Douglas or, as some suppose, the son of a French baker, filled his distinguished position with success. His descendant, the Earl of Home, possesses the estates to this day, and as the land in Scotland is already in too few hands it is well that these estates were not merged in the Dukedom of Hamilton as so nearly happened.

In the year 1781, Thomas Gladstone of

Leith, the grandfather of the late statesman, and certain other pursuers procured the interpretation by the House of Lords of a right which, if it had continued to the present time, would have been a valuable endowment for the parish of North Leith. Even 120 years ago this right had a very long history. The Church and parish of St. Cuthbert's, Edinburgh, were annexed to the Abbey of Holyrood when the latter was erected into an Abbacy in 1128. At that time, the parish and abbey lands extended to Newhaven and Leith, and the Charter of erection contained a grant of teinds of fish coming into Newhaven and Leith. This right to fish teinds passed to the parish of North Leith when it was formed in 1606, and in 1781, the House of Lords decided that the right extended even to fish brought to Leith or Newhaven which had paid teind already at the place of capture, but that it did not extend to fish brought to the ports for the purpose of being again exported from them.

Another ecclesiastical case was decided in the House of Lords about the same time, which has to the present day important consequences for the clergy of the Church of Scotland. The teind court had decided that although there was free teind in a parish they could not award a further augmentation of stipend if the legal minimum had been reached, but the House of Lords reversed this finding. Lord Thurlow, the Chancellor, in an interesting account of the law of the matter, remarked: "Much has been said of the policy of a proper provision for the clergy. A State has no business with religion as religion, but merely as a political establishment. Were I speaking as a legislator, I would say that the well-being of Scotland was deeply concerned in making a more

liberal provision for the clergy. I would have higher promotion, higher hopes, and greater preferment. It is that alone that can keep the clergy in a situation to be of use to religion. For he must be a wretch indeed whose hopes are bounded by the scanty preferment of that country." Lord Thurlow in his contempt for the poverty of Scotland and in his opinions on the motives of churchmen and their relation to the State, is typical of the Englishman of his time.

In conclusion, speaking of the Reports as a whole, one observes that they indicate the large social and legal changes which the lapse of time has brought about. Decisions relating to heritable matters, such as entails, completion of titles, and rights of ownership, exceed in number and importance all other questions put together. This, of course, arises from the fact that throughout the eighteenth century the wealth of Scotland was chiefly heritable property. There are necessarily no decisions about railways and almost none about joint stock companies. The law of reparation which now bulks so largely in our Reports, was rarely discussed, owing in part to the fact that there was then no trial by jury in civil causes with its pleasing or painful surprises. The law of vesting was simple and intelligible, which will hardly be said of it now by those who have tried to follow and reconcile the modern decisions on the subject. There is an almost entire absence of questions about trusts, will, and settlements. The explanation of this is probably that there were few investments for trusters and testators to deal with. Altogether the cases that came before the Courts indicate a society largely feudal in its organization and agricultural in its pursuits. We have traveled far since then.—*The Juridical Review.*

A DAY IN A POLICE COURT.

By JOSEPH M. SULLIVAN.

THE police court is a fertile field for the study of human nature. Here the college rowdy, the brawler, the loafer, the thimble-rigger, all meet on an equal footing. The judge has ascended a few stairs to take his accustomed seat on the bench, and the court crier announces that court is open and ready for business. The calling of cases has begun, and his Honor, in a dignified tone, remarks:

"Is this Patrick Flynn?"

"It is, sor."

"And were you drunk?"

"I think I was, sor."

"Officer McCarthy, was the prisoner ugly or boisterous?"

"No, your Honor, I found him on the City Hall steps. He was dead to the world. He was what I call silly drunk, rum drunk."

"I think, Officer McCarthy has stated the truth, your Honor. I have a bad head. I'm half fool sober, and all fool drunk. I must have been sick whin the officer found me."

"Patrick, you must stop drinking."

"Yes, your Honor, I intend to take the Blue Ribbon."

"I'll discharge you this time, but if I find you here again,—"

"Faith, you won't find me here. I shall hire a swate of rooms next time I get drunk and lock myself in."

"Timothy Houlihan," said his Honor to the next culprit, "you are charged with being drunk and disturbing the peace at Mike Fin-nigan's wake. I shall have to give you thirty days."

"Thanks," said Timothy, "this is the first

time anyone has given me anything that I can remember."

"None of your impudence, Timothy. I can make it six months just as well as not. Don't come here again. Disturbing the peace of a dead man is a serious misdemeanor."

"How can I come here when I'll be in jail?" snickered Timothy. And the clerk passed on to the next case.

"Three of these girls say they go to school regularly," remarked his Honor, as four children were about to step down. The agent of the children's society, who had arrested three as delinquents, and the other for picking up bones, took the fourth girl to one side, and said he knew the others did not go to school.

"Aren't they all together?" asked the Court.

"No, sir," answered one of the trio, "us don't belong to she."

"What? The next girl who goes to school, is that sentence correct?"

"No, sir."

"What should she have said?"

"Her ain't one of we."

"Horrors! The next try it."

"She ben't one of us three."

The justice groaned, and asked the fourth girl to repeat the sentence.

She said nothing about school, but replied, "She is not one of us."

"You are discharged," said the Court. "The others will have a chance to study in a reformatory."



A CURIOUS OLD DEED.

By THOMAS W. LLOYD.

THE curious old deed from which the following extracts are taken is recorded in the Registry of Deeds at Sunbury, Northumberland county, Pennsylvania, and is dated October 9, 1793.

Whereas, the Creator of the Earth, by parole and livery of seizin, did enfeoff the parents of mankind, to-wit, Adam and Eve, of all that certain tract of land, called and known in the planetary system, by the name of the Earth, together with, all and singular, the advantages, woods, waters, water courses, easements, liberties, privileges, and all others the appurtenances whatsoever thereunto belonging, or in anywise appertaining. To have and to hold to them the said Adam and Eve, and the heirs of their bodies lawfully to be begotten, in fee tail general, forever, as by the said feoffment, recorded by Moses, in the first chapter of his first book of records, commonly called Genesis, more fully and at large appears.

And *whereas*: the said Adam and Eve died seized of the premises aforesaid, in fee tail general, leaving issue, heirs of their bodies, to-wit, sons and daughters, who entered into the same premises and because thereof seized as tenants in common, by virtue of the donation aforesaid, and multiplied their seed upon the Earth.

And *whereas*: in process of time, the heirs of the said Adam and Eve, having become very numerous, and finding it inconvenient to remain in common as aforesaid, bethought themselves to make partition of the lands and tenements aforesaid, to and amongst themselves; and they did accordingly make such partition, and *whereas*: by virtue of the said partition, made by the heirs of said

Adam and Eve, all that certain tract of land called and known, on the general plan of the said Earth, by the name of America, parcel of the said larger tract, was allotted, and set over, into certain of the heirs aforesaid, to them and to their heirs general, in fee simple, who entered into the same and became thereof seized, as aforesaid, in their demesne as of fee, and peopled the same allotted lands in severalty, and made partition thereof, to and amongst their descendants.

And *whereas*: afterwards (now deemed in time immemorial) a certain united people, called The Six Nations of North America, heirs and descendants of the said grantees of America, became seized and, for a long time, whereof the memory of man runneth not to the contrary, had been seized, in their demesne as of fee, of and in a certain tract of country and land, in the North division of America, called and known, at present, on the general plan of said North division of America, by the name of Pennsylvania, and whereof the said United Nations, being so thereof seized, afterwards, to-wit, in the year of Our Lord seventeen hundred and sixty-eight, by their certain deed of feoffment, with livery of seizin, did grant, bargain, sell, release, enfeoff, alien, and confirm, unto Thomas Penn and Richard Penn otherwise called the Proprietaries of Pennsylvania (among other things), the country called Buffalo valley, situate on the south side of the West Branch of the Susquehanna river, parcel of said country, called Pennsylvania, to hold to them, the said Proprietaries, their heirs and assigns forever as by the same feoffment more fully appears.

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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.

NOTES.

MANY a girl who insists on a five-hundred dollar wedding is soon satisfied with a fifty-dollar divorce.

JUDGE—"Do you solemnly swear to tell the truth, the whole truth and nothing but the truth."

Witness—"I do."

Judge—"What is your occupation?"

Witness—"I am employed in the weather bureau."

Judge—"You are excused."

DEBTORS in Siam, when three months in arrears, can be seized by the creditors and compelled to work out their indebtedness. Should a debtor run away his father, his wife or his child may be held in slavery until the debt is cancelled.

IN a recent New York murder trial the defendant had been found guilty and was sentenced to death. Two Irishmen were discussing the trial and the result.

"Begorra, it's tough on Pat," said one; "he'll have to hang for it now."

"No, no," replied the other Irishman, "they don't hang the Oirish for killin' any more."

"What do they do to 'em?" inquired his friend.

"They've got an easier death now. They put 'em to death by elocution."

SOME judges profess that they have no knowledge of slang words and phrases. For instance, when a witness in a New York court used the expression, "I tumbled to it," the learned judge asked what he meant.

At an examination before Lord Mansfield, a witness exclaimed, "I was up to him." "Up to him," repeated the judge, "what do you mean by being 'up to him?'"

"Mean, my lord? Why, I was down upon him."

"Up to him and down upon him," said Mansfield. "What does this fellow mean?"

"Why, my lord, I mean, that as deep as he thought himself, I stogged him."

When the judge persisted that he did not understand what was meant, the witness exclaimed:

"Lor', what a flat you must be!"

With a merry twinkle in his eye, the judge quietly remarked to a brother judge who sat beside him: "If he had only said 'on to him,' I should have 'tumbled to him' at once."

Lord Brampton, better known as Sir Henry Hawkins, would never allow a witness to use slang. In every case the witness had to express his meaning in old-fashioned English, even though many valuable minutes were wasted in trying to make him so express himself.

WOULD you call stealing a kiss larceny?" queried the inexperienced young man.

"I suppose so," replied the married man, who was hustling from dawn to dusk to support his family.

"What is the penalty?"

"Why, I stole a kiss one time and was sentenced to hard labor for life."

THE late Judge Junkin of Perry County, Pennsylvania, who presided over one of the courts of that district, was a man possessed of high legal attainments and in addition thereto, had a brain full of hard common sense. Upon one occasion he was considering an application for a license to sell liquor to which objection had been filed on the ground that the applicant was unfit to conduct a hotel, for the reason that he drank a barrel of whiskey a year.

In rendering his decision the Judge used these words: "One day last winter this Court had occasion to drive from Berlin to New Bloomfield. The day was intensely cold and as evening drew on it grew colder. About seven o'clock we reached a small tavern on the mountain and concluded to remain there all night. The landlord met us at the door, and with hearty greetings, ushered us into a most delightfully cheerful sitting room, where a ruddy fire was glowing, which shed its warmth into every corner of the room. Our horse was taken charge of by a stable boy, and in an incredibly short time we were conducted to the dining room, where we found a table with snowy cloth and napkins, and sat down to a supper of chickens and waffles, the memory of which lingers with us yet. We spent the night between two feather beds, while warmth and ruddy light glowed from a bed of coals in an old-fashioned Franklin stove. Next morning we took a hurried survey of the premises and found everything about them in the neatest order, while cleanliness in every detail was a marked characteristic of everything about the place. That hotel was kept by the man who is now the petitioner in this application for license. The only objection urged against him is the fact that he drinks a barrel of whiskey a year. Let us consider this a little.

"The average whiskey barrel contains about forty gallons and we take it that the size of the average Perry County drink is about half a gill. In order, therefore, to consume a barrel of whiskey in a year a man would have to take about seven drinks a day. This would mean an 'eye-opener' in the

morning upon rising, a 'phlegm cutter' before breakfast, a 'back-bone stiffner' about ten o'clock, an 'appetizer' before dinner, another before supper, a 'hot toddy' along in the evening and a 'night cap' before retiring. We do not think this amount of good whiskey would hurt any man. The license is granted."

MAGISTRATE—"Rastus, I see you are here again. I believe you have been tried and convicted seven times for stealing."

Rastus—"Yes, jedge, it seems to be nuffin' but trials and temptations wid me in dis life."

JIM HAZEL was a thrifty farmer, but an exceedingly cautious man. He hauled hay to Marshall, Saline county, his nearest market, on Saturdays, and sometimes let his wagon stand on the "square" while he went around making purchases for the house.

There was a piratical cow roaming around town at her own unfettered will and she soon became acquainted with Jim's habits and knew it was dinner time when he came to town. Jim had "shooed" her away from his hay wagon until he got tired, and at last he sought legal advice. Judge Samuel Davis of the 15th Circuit Bench—then a practising attorney—was the recipient of Jim's tale of woe.

"Colonel Davis," he said, "if you drove to town every Saturday afternoon with a little jag of hay, and an old speckled cow come around and eat up the hay while you was buying molasses and things at the store what would you do to that cow?"

"Shoot her," said Davis, promptly.

"Hey?"

"You bet I would. I think I know that old cow, and if she'd come along poking her nose in my wagon I'd blow her blamed brains out too quick."

Jim wasn't entirely satisfied. He thought over the matter and concluded to pass the question up to another disciple of Blackstone. Davis' advice smacked too much of anarchy. So he consulted Samuel Boyd, an old and tried advocate.

"You chump, you, don't you know if you killed a man's cow that way you'd be guilty of a felony and they'd send you to the penitentiary?" said Boyd, indignantly.

"But Colonel Davis said to shoot her."

"He did, eh? What does he know about law I'd like to know! Never won a case in his life except by a scratch on some miserable technicality. But do as you please, Jim—kill her and go to the pen if you want to."

Jim went back to Davis and told him what Boyd had said.

"Said I didn't know anything about law, did he?" roared the Colonel. "Well, we'll see who's right. You come in next Saturday with your hay, and a gun, and if that cow gets near your wagon shoot her down! If they send you to the pen I'll go in your place! I'll teach that fellow what I don't know about the law."

"But, Colonel," protested the hay merchant, "he read me a whole lot of stuff out of the books, and said there was no getting around it."

"Read fiddlesticks!" thundered Davis. "He's dead wrong, I tell you. I know, because that old speckled heifer's mine!"

MISS SARAH DOBSON a maiden lady of fairly certain age, was suing a couple of doctors for malpractice—setting the bones of her wrist unskilfully. The case was on trial in the Macon Circuit Court before the late Judge Andrew Ellison. On direct examination the plaintiff slipped across the age question by stating she was past twenty-five. It was evident to the most indifferent observer that in order to see forty-five any more she would have to be born again. The lawyer who cross-examined for the doctors got a stubborn hold of the idea that the plaintiff's exact age was important. His name was Major B. R. Dysart, and he was a very kindly old gentleman except when witnesses tried to dodge him.

"How old did you say you were, Miss Sarah?" he asked.

"Twenty-five—past."

"How much past?"

"Oh, a few months—a year, perhaps."

"Are you 26?"

"Y-e-s, I guess so."

"Just 26? How many months over 26 are you, Miss Sarah?"

"A month or two."

"Twelve or 13?"

"Yes—12 or 13. Now, will that do you?" snappishly.

"Thirteen months past 26 would make you 27 and one month. Now, Miss Sarah, isn't it a fact you are fully 30 years old"——

"Sir!"

"—— And some more?" finished Dysart, severely. "Answer the question, Miss Sarah."

"Well, what if I am?"

"Then you are 30 years old? And a few months past, perhaps?"

"Yes—a few."

"Twelve or thirteen?" suggested Dysart, gently.

"Have it your own way, Major Dysart."

"Thirteen months past 30 would make it 31 years and one month."

"All right, if you want to insult me just 'cause I'm a defenseless woman."

"I'm not insulting you. I just want to know how old you are."

"If you were a gentleman you would know it was improper to ask a lady her age."

Dysart looked appealingly at the court. She had touched him on a sensitive point.

"I would suggest, Major," said Judge Ellison, with just a perceptible twinkle around his keen gray eyes, "that you call it 35 years *et al.* The jury will understand that."

But Dysart was determined.

"So you won't tell me your age, Miss Sarah?" he asked.

"You've had it once."

"I have?"

"Yes—the judge says 35 years is it all. That ought to satisfy you."

"Oh!"

"Is there anything else you want to know?"

"No—we'll excuse you now, Miss Sarah."

SENATOR GEORGE F. HOAR, in an extremely interesting article in the September *Scribner's*, tells the following stories, among others, of "Some Famous Judges":

Chief Justice Shaw, though very rough in his manner, was exceedingly considerate of the rights of poor and friendless persons. Sometimes persons unacquainted with the ways of the world would desire to make their own arguments, or would in some way interrupt the business of the court. The Chief Justice commonly treated them with great consideration. One amusing incident happened quite late in his life. A rather dissipated lawyer who had a case approaching on the docket, one day told his office-boy to "Go over the Supreme Court and see what in hell they are doing." The Court were hearing a very important case in which Mr. Choate was on one side and Mr. Curtis on the other. The bar and the court-room were crowded with listeners. As Mr. Curtis was in the midst of his argument, the eye of the Chief Justice caught sight of a young urchin, ten or eleven years old, with yellow trousers stuffed into his boots, and with his cap on one side of his head, gazing intently up at him. He said, "Stop a moment, Mr. Curtis." Mr. Curtis stopped and there was a profound silence as the audience saw the audacious little fellow standing entirely unconcerned. "What do you want, my boy?" said the Chief Justice. "Mr. P. told me to come over here and see what in hell you was up to," was the reply. There was a dive at the unhappy youth by three or four of the deputies in attendance, and a roar of laughter from the audience. The boy was ejected. But the gravity of the old Chief Justice was not disturbed.

In the old days, when the lawyers and judges spent the evenings of court week at the taverns on the circuit, the Chief Justice liked to get a company of lawyers about him and discourse to them. He was very well informed, indeed, on a great variety of matters, and his talk was very interesting and full of instruction. But there was no fun in it. One evening he was discoursing in his ponderous way about the vitality of seed.

He said: "I understand that they found some seed of wheat in one of the pyramids of Egypt, wrapped up in a mummy-case, where it had been probably some four thousand years at least, carried it over to England last year and planted it, and it came up and they had a very good crop."

"Of mummies, sir?" inquired old Josiah Adams, a waggish member of the bar.

"No, Mr. Adams," replied the Chief Justice, with a tone of reproof, and with great seriousness. "No, Mr. Adams, not mummies—wheat."

Adams retired from the circle in great discomfiture. He inquired of one of the other lawyers, afterward, if he supposed that the Chief Justice really believed that he thought the seed had produced mummies, and was told by his friend that he did not think there was the slightest doubt of it.

Judge Shaw, in his latter days, was revered by the people of Massachusetts as if he were a demi-god. But in his native county of Barnstable he was revered as a god. One winter, when the Supreme Court held a special session at Barnstable for the trial of a capital case, Judge Merrick, who was one of the judges, came out of the court-house just at nightfall, when the whole surface of the earth was covered with ice and slush, slipped and fell heavily, breaking three of his ribs. He was taken up and carried to his room at the hotel, and lay on the sofa waiting for the doctor to come. While the judge lay, groaning and in agony, the old janitor of the court-house, who had helped pick him up, wiped off the wet from his clothes and said to him, "Judge Merrick, how thankful you must be it was not the Chief Justice!" Poor Merrick could not help laughing, though his broken ribs were lacerating his flesh.

Chief Justice Shaw is said to have been a very dull child. The earliest indication of his gift of the masterly and unerring judgment which discerned the truth and reason of things was, however, noticed when he was a very small boy. His mother one day had a company at tea. Some hot buttered toast was on the table. When it was passed

to little Lemuel he pulled out the bottom slice, which was kept hot by the hot plate beneath and the pile of toast above. His mother reproached him quite sharply. "You must not do that Lemuel. Suppose everybody were to do that?" "Then everybody would get a bottom slice," answered the wise urchin.

Of Judge Theron Metcalf—"the most interesting and racy character among our old judges"—Senator Hoar says:

He was, so far as I know, never known to invite any of his brethren upon the Bench or of the Bar to visit him at his house, with one exception. One of the judges told me that after a hard day's work in court the judge sat in consultation till between nine and ten o'clock in the evening, and he walked away from the court-house with Judge Metcalf. The judge went along with him past the Tremont House, where my informant was staying. As they walked up School street, he said: "Why, Judge Metcalf, I didn't know you went this way. I thought you lived out on the Neck somewhere." "No, sir," said Judge Metcalf, "I live at number so-and-so Charles street, and I will say to you what I heard a man say the first night I moved into my present house. I heard a great noise in the street after midnight, and got up and put my head out the window. There was a man lying on the sidewalk struggling, and another man, who seemed to be a policeman, was on top of him holding him down. The fellow with his back to the ground said: 'Let me get up,— d— you.' The policeman answered: 'I sha'n't let you get up till you tell me what your name is and where you live.' The fellow answered, 'My name is Jerry Mahoney, — d— you, and I live at No. 54 Cambridge street, — d— you, where I'd be happy to see you, — d— you, if you dare to call.'" That was the only instance known to his judicial brethren of Judge Metcalf's inviting a friend to visit him.

He used to enliven his judgment with remarks showing a good deal of shrewd wisdom. In one case a man was indicted for

advertising a show without a license. The defendant insisted that the indictment was insufficient because it set out merely what the show purported to be, and not what it really was. On which the Judge remarked: "The indictment sets out all that is necessary, and, indeed, all that is safe. The show often falls short of the promise in the show-bill."

There was once a case before him for a field-driver who had impounded cattle under the old Massachusetts law. The case took a good many days to try, and innumerable subtle questions were raised. The Judge began his charge to the jury: "Gentlemen of the jury, a man who takes up a cow straying in a highway is a fool."

Another time there was a contest as to the value of some personal property which had been sold at auction. One side claimed that the auction sale was a fair test of the value. The other claimed that property that was sold at auction was generally sold at a sacrifice. Metcalf said to the jury: "According to my observation, things generally bring at auction all they are worth, except carpets."

Of Judge Fletcher this story is told:

A lawyer from the country told me one day that he had just been in Fletcher's office to get his opinion. While he was in the office, old Ebenezer Francis, a man said to be worth \$8,000,000, then the richest man in New England, came to consult him about a small claim against some neighbor. Fletcher interrupted his consultation with my friend and listened to Mr. Francis' story. In those days, parties could not be witnesses in their own cases. Fletcher advised his client that although he had an excellent case, the evidence at his command was not sufficient to prove it, and advised against bringing an action. Francis, who was quite avaricious, left the office with a heavy heart. When he had gone, Fletcher turned to my friend and said: "Isn't it pitiful, sir, to see an old critter, wandering about our streets, destitute of proof?"

THE Missouri Legislature is not much respected now. It seems not to have been held in any greater veneration in some parts of the State 64 years ago. A man who was looking through some old records of Macon county a short time ago found the following remarkable order, which was spread upon the records of the Macon County Court in June, 1839: "Ordered that the law passed by the Legislatures of 1838 and 1835 respecting groceries and dramshops be null and void in Macon county." It seems the Legislature had curtailed the privileges of grocers and dramshop keepers more than was to the Macon County Court's liking. In August, 1839, the court followed up the foregoing fine piece of impudence with the following order: "The law passed by the Legislature the 13th of February, 1839, respecting grand jurors is hereby rejected, and that there shall not be any compensation allowed for such service." The members of this bold tribunal were Elvan Allen, Philip Dale and Lynn Dabney. They seem to have made themselves immensely popular in the county by their revolutionary methods. At its next session, however, the Legislature served notice on them to quit the law-repealing business informing them that the State Constitution had given it an absolute monopoly of that line of industry. Sheriff Jefferson Morrow heartily concurred in and carried out all the orders of the court, and, despite his temerity, lived to be the oldest ex-sheriff in Missouri.—*Exchange*.

"AND if I should begin suit against him for breach of promise," asked Miss Passay, "and prove by numerous witnesses that he proposed to me, is there any possible way he could escape paying me damages?"

"He might," replied the attorney, thoughtfully. "He might set up a plea of insanity."

SOME of the comments in the English Press on the sentence passed upon Mme. Humbert and her husband (the other pair of culprits came off more lightly) betray a very imperfect appreciation of its nature. Five

years' *réclusion*, or solitary confinement as it is understood in France, is not only a rigorous, but a terrible penalty. Our own code offers no parallel to it, and it is probable that life sentence of penal servitude in this country would be far more easily endured. The solicitude of the prisoner *en réclusion* is all but absolute. The strictest silence is enforced. Presumably the consolations of religion—whatever they may amount to in so dreadful a situation—are not entirely withheld; otherwise the prisoner is forbidden to speak, even to his guardian. Books are denied, and (which must be almost the worst infliction of all) the most complete idleness is enforced; no employment of any description may mitigate the appalling vacancy of days, weeks, and years. Half-an-hour's exercise is allowed daily, in a hood which covers everything except the eyes. This horrible life in death may end in the tomb, but is more likely to end in the padded cell of the maniac.—*The Law Times*.

"EPHEM, s'pose de good Lawd should come down an' look inter yer eye an say, 'Ephem, what hab yo done wid all those chickens dat yer hab stole?' What would yer say?"

"Parson, I might say dat my old 'ooman cooked em, but you knows dat a man ain't bound to testify agin his wife."

OF Samuel Warren, Queen's Counsel and author of *Ten Thousand a Year*, a writer in *The Law Times* tells the following story:

An old friend of his, Davison by name, looking in upon him at his chambers, found him absorbed in the case, which, he said, took up all his time, and left him no leisure for the many social functions he ought to adorn with his presence. "We ought to dine tonight," he continued, "with Lord and Lady Lyndhurst, but I have been obliged to refuse on conscientious grounds." "Oh!" said Davison; "I am invited, too, and am going to dine with his lordship. I will mention that I have found you overwhelmed with work." "I would rather you did not

name the subject," said Warren, "as my wife has already sent an excuse to Lady Lyndhurst." "Nonsense," said Davison, "I shall be able to confirm her statement of your inability to attend." "You will oblige me by saying nothing about it. Your statement might clash with the excuse my wife has given, and I am not aware of what she wrote." But, finding that Davison was obdurate, and apparently determined to convey Warren's sense of disappointment to Lord and Lady Lyndhurst, Warren at last confessed that he was only joking, and had received no invitation to dine at his lordship's. "Neither have I," replied Davison; "I was only joking, too!" It was one of poor Warren's failings, the continual boasting of his intimacy with members of the Bench and the peerage. It was to him that the cutting remark was addressed, when, happening to say that he had been dining at the Duke of Leeds' and had been much surprised at finding no fish of any kind was served, he was told that that was easily explained, as, "no doubt, they had eaten it all upstairs!"

That he was clever admits of no question, and he could tell a story to perfection, as witness this little anecdote he gives of Mr. Justice Littledale and his stickling for form. "I recollect a case," he says, "where a client of mine had his declaration on a bill of exchange demurred to because, instead of the words 'in the year of Our Lord 1834,' he had written 'A. D. 1834.' I attended the late Mr. Justice Littledale at chambers to endeavor to get the demurrer set aside as frivolous, or leave to amend on payment of a shilling; but that punctillious, though very able and learned, judge refused to do either. 'Your client, sir,' said he, 'has committed a blunder, sir, which can be set right only on the usual terms, sir. "A. D.," sir, is neither English nor Latin, sir. It may mean anything or nothing, sir. It is plain, sir, that here is a material and traversable fact, and no date to it, sir.' Whereupon he dismissed our poor summons with costs," which he adds, came to between £7 and £8. In this way was money spent in the good old days.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

JOHN MARSHALL. LIFE, CHARACTER AND JUDICIAL SERVICES AS PORTRAYED IN THE CENTENARY AND MEMORIAL ADDRESS AND PROCEEDINGS THROUGHOUT THE UNITED STATES ON MARSHALL DAY, 1901, AND IN THE CLASSIC ORATIONS OF BINNEY, STORY, PHELPS, WAITE AND RAWLE. Compiled and edited with an Introduction by *John F. Dillon*. Illustrated with Portraits and Fac-Simile. Three Volumes. Chicago: Callaghan and Company. 1903. Cloth. (lviii+528; 565; v+522 pp.)

No more welcome volumes have come recently from the press than these edited by Judge Dillon and containing about fifty of the Marshall Day addresses. Readers of *The Green Bag* will recall that the April and May, 1901, numbers of this magazine were given over to extracts, of varying length, from some forty of these addresses; and at that time we ventured the inquiry, "whether it would be possible for the American Bar Association to publish, in a suitable volume, the Marshall Day addresses in full. . . . There could be no more fitting tribute to the memory of the Chief Justice than such a volume." This good work Judge Dillon has now accomplished, prefixing to the addresses an admirable introduction; and it is a pleasure to add that the form in which these volumes are printed is in every way excellent.

The speakers on Marshall Day—the leaders of our bench, our bar and our law faculties—had a great theme; their addresses were worthy of the occasion, and in these volumes where they are brought together we have an adequate account of the great Chief Justice and his great work. The orations of Binney, Story, Phelps, Waite and

Rawle, which, with excellent judgment, are included in these memorial volumes, are spoken of as "classic." So, indeed, they are; but so, too, for example, are the addresses of the late Justice Gray and the late Professor Thayer—to say nothing of some of the other addresses by men still living.

The illustrations include the well-known St. Memin and Inman portraits of Marshall, the Sully portrait—not an altogether satisfactory likeness, we are forced to think—W. W. Story's statue, and the homes of the Chief Justice at Oak Hill and Richmond. It is a matter of regret that among the portraits were not included the very excellent one by Jarvis—reproduced in *The Green Bag*, February, 1901—owned by the late Mr. Justice Gray, and the interesting portrait, by an unknown artist, owned by Washington and Lee University, reproduced in *The Green Bag*, May, 1901.

MANUAL OF FRENCH LAW AND COMMERCIAL INFORMATION. By *H. Cleveland Coxe*. Paris and New York. Brentano's, London: Simpkin, Marshall, Hamilton, Kent and Company. 1902. Cloth. (viii+292 pp.)

In this small volume Mr. Coxe has brought together in clear and concise form a mass of information on French legal and commercial matters which is of use and interest both to the layman and to the lawyer. The subjects are arranged alphabetically; most titles are disposed of briefly, but certain subjects, such as Bankruptcy, Bills of Exchange, Companies, Divorce, Marriage, Patents, Servants, and Wills, are treated at considerable length.

MANUAL OF FORENSIC QUOTATIONS. By *Leon Mead* and *F. Newell Gübert*. Introduction by *John W. Griggs*. New York: J. F. Taylor and Company, 1903. (xiv+207 pp.)

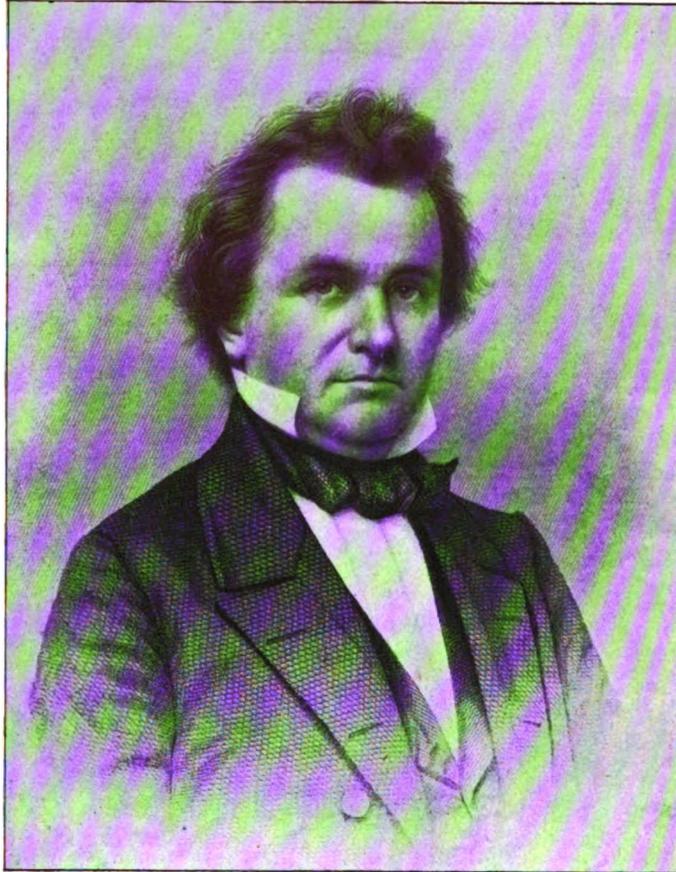
The extracts which make up this volume are gathered, in the most part, from addresses at the bar in well-known civil and criminal trials in England and in the United States. Nearly one hundred speakers are quoted—among them the great leaders of the bench and bar, and some of our greatest

statesmen. Not the least interesting parts of the book, however, are the extracts from arguments at the bar by counsel whose fame is local. Twenty-four full page portraits of famous advocates add to the interest of the volume.

THE AMERICAN STATE REPORTS. Vols. 90 and 91. Containing the cases of general interest and authority decided in the courts of last resort of the several States. Selected, reported and annotated by *A. C. Freeman*, San Francisco: Bancroft-Whitney Company. 1903. (1008, 1020 pp.)

The earliest volume—the ninetieth—contains cases selected from 131 and 132 Alabama, 115 Georgia, 197 Illinois, 106 Kentucky, 107 Louisiana, 96 Maine, 167 and 168 Missouri, 62 New Jersey Equity, 66 Ohio State, 202 Pennsylvania State, 63 South Carolina, 23 Utah, 26 Washington, 51 West Virginia, and 113 Wisconsin. The more important monographic notes are those on the following subjects: What Irregularities Will Avoid Elections, When an Official Bond becomes Binding on the Sureties and What Irregularities Fail to Relieve Them from Liability, Summary Proceedings to Impound and Sell Animals, Cold Storage, Part Owners of Vessels, Attacks by Creditors on Conveyances Made by Husbands to Wives, Unintentional Homicide in the Commission of an Unlawful Act, Injunction to Prevent Breach of Contract, and Security not to Commit a Misdemeanor.

Volume 91 includes cases decided from May, 1901, to June, 1902, to be found in 133 Alabama, 70 Arkansas, 28 Indiana Appeals, 115 Iowa, 64 Kansas, 180 Massachusetts, 86 Minnesota, 26 Montana, 67 New Jersey Law, 40 Oregon, 23 Rhode Island, 15 South Dakota, 108 Tennessee, 24 Utah, 27 Washington, and 114 Wisconsin. The more important notes deal with Admissibility of Evidence given on Former Trial in Civil Cases; Justification in Slander and Libel; Acts for which Sureties on Official Bonds are Liable; Right of Interpleader; Conflict of Laws as to Measure of Damages; and Cotenants in Mines.



L. A. Douglas

The Green Bag.

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STEPHEN A. DOUGLAS AS A LAWYER.

BY EUGENE L. DIDIER.

LIKE so many men who have won political distinction in this country, Stephen A. Douglas began life as a lawyer. His early entrance into politics, his sudden and brilliant rise to a commanding position, his crushing defeat when aspiring to the highest office in the government,—altogether form one of the most interesting and picturesque careers in the history of the United States; showing, at the same time, the splendid opportunity that this great republic offers to every citizen. His life shows, also, for how brief a span even the most conspicuous men engross the attention of the world. For nearly ten years, from 1852-61, the name of Stephen A. Douglas was on every tongue, his speeches in every newspaper, his political opinions accepted by millions of his fellow-citizens. He possessed a personal magnetism second only to that of Clay and Jackson; but unfortunately for his fame, he sought the great office of President of the United States at the time of the parting of the political ways—when sectionalism was the burning question of the hour, and the safety of the Union was at stake. On that vital issue, Stephen A. Douglas went down to a political death, for he led a party which was powerless to save a threatened Union.

Before giving himself up—mind and body, heart and soul—to politics, he had won distinction as a lawyer and judge. It is this interesting period of his life, although less striking and brilliant than his public career, that is the subject of this article.

Like many men who have reached eminence at the bar, Stephen A. Douglas was a son of New England. It cannot be said of him, as was said of Homer, that seven cities contended for the honor of giving him birth, but it is recorded that, when Douglas was at the height of his popularity, several houses in Brandon, Vt., contended for the honor of being the place where he was born. It is also recorded that he who was to be the subject of so much newspaper publicity, commenced to figure in the press when only two months old. At that age, he lost his father, who, while holding the child in his arms, fell back in his chair and died, and Stephen rolled into the fire, from which he was rescued by a neighbor, who opportunely entered. It is worthy of remark that Douglas, like Clay, Jackson, Benton and other distinguished men, who lost their fathers early in life, was indebted to his mother for the training which helped to make him what he was—proving the truth of Napoleon's saying, that the future good or bad conduct of a child depends on the mother. Douglas' mother was left poor by the death of her husband, and was dependent upon her brother for support. Stephen, having taught himself the Latin grammar, applied to his uncle for permission to enter college. This request was curtly refused, and the boy was bound to a cabinet-maker to learn that useful, but not very intellectual trade. Although this was a bitter disappointment to the aspiring youth, he worked faithfully at the business; love of

learning still possessed him, and he spent all his spare time in study. With youthful enthusiasm he deprived himself of rest, recreation, sleep and exercise that he might have more time for his books. His health broke down, and he was obliged to return to his uncle's house. The latter, touched by the boy's delicate condition, gave him permission to enter the Brandon Classical Academy. He soon distinguished himself as a bright scholar. His mother, having married a wealthy lawyer, who lived in the interior of New York, Stephen was placed at the academy of Canandaiga, in that State. There he spent three years, studying hard, and acquiring the readiness in debate and fluency in public speaking which afterward distinguished him in the larger field of public life. While still at the academy, he began the study of the law, and at the age of twenty started to seek his fortune in the then far West. After wandering through several cities and towns, he reached the little town of Winchester, Illinois, in November, 1833. All his worldly goods were carried in a bundle on his back, and, in his pocket, he had only thirty-seven cents. He knew no one in the place—he was tired—he was hungry—his heart was heavy; and then, for the first and last time in his life, his splendid courage failed him, and he "gave way to gloomy forebodings." In that hour of depression, of disappointment, discouragement and almost of despair, the unexpected happened. He was leaning against a post in the public square, thinking over his prospects, and no doubt wishing himself back in his mother's house, when his attention was attracted by a crowd that had gathered at the other end of the square. Advancing in that direction, he saw on a platform, a big, burly, red-faced auctioneer, who was vainly trying to conduct a sale without a clerk. As Douglas approached, the auctioneer beckoned to him and asked whether he could "figure." The young stranger answered in the affirmative, and was

then and there engaged at two dollars a day and board to act as clerk to the auctioneer. The sale lasted three days, and Douglas made a very favorable impression on the crowd by his wit, politeness, good humor and quickness in attending to his duties. When the day's work was done, and the citizens were assembled in the bar-room of the tavern, he entertained them with anecdotes, political and otherwise, of which General Jackson was the leading subject, for Douglas was a great admirer of the Hero of New Orleans.

So agreeable did he make himself to the leading men of the town that a district school of forty children was started, of which he was made teacher at three dollars a quarter for each pupil. Borrowing some old law books and the Statutes of Illinois, he resumed the study of the law. As a teacher, he satisfied his pupils and his patrons, but he was not satisfied to remain long a pedagogue, and after teaching three months, he applied for admission to the bar. In March, 1834, he was licensed to practise, and opened an office at Jacksonville, Illinois. In the minor cases in which he was at first employed he showed great skill in managing the knotty points of the law, as well as in the successive defence of the worst criminals. In such cases he quickly developed his great natural ingenuity, tact and cunning; and they afforded him opportunities to display his learning and research. He was well read in the State Statutes, and his extraordinary memory enabled him to discover immediately any technical error made by his opponent at the bar.

His remarkable success in defending criminals caused the ruling powers of the State to elevate him to the position of Prosecuting Attorney for the First District of Illinois, when he was only twenty-two years old, and before he had been at the bar two years. When he made his public acknowledgment for this honor, he delivered so eloquent a

speech that his hearers were carried off their feet; they took him off the platform, raised him on their shoulders, and bore him in triumph through the streets, while a crowd followed, shouting: "Three cheers for the Little Giant!" "Hurrah for Little Doug!" "You will be President yet!" Perhaps, he then heard for the first time the Presidential bee, whose buzzing never ceased until life-long ambition was crushed by his overwhelming defeat in November, 1860.

One of the judges of the Supreme Court of Illinois declared that Stephen A. Douglas should not have been placed in such a position, adding, "What business has such a stripling with such an office?" But, after Douglas had held the office a few months, the judge changed his opinion. It is said that, during the time he was prosecuting attorney, not a single indictment framed by him was ever quashed; and it should be remembered that his circuit comprised many counties in which there were criminal cases embracing crimes of every grade. His success as a prosecuting attorney was remarkable, and his department at the bar, as well as among the people of the counties to which his duties called him, greatly increased his growing popularity. In 1836, he was elected to the Legislature of Illinois, and was the youngest member of that body. He took a prominent part in the Internal Improvement system which was passed that session. After the adjournment of the Legislature, he resumed the practice of the law, and before he had been seven years at the bar he was recognized as one of the ablest lawyers in the State. He was retained in all the important cases, on one side or the other. One case in which he appeared had an important bearing upon the vote of Illinois, and therefore on his own political fortunes. By the Constitution of Illinois, which was adopted in 1810, every free male white inhabitant above the age of twenty-one years was entitled to vote at all elections. Under this

provision, all actual inhabitants of the State, whether naturalized or not, were permitted to vote. As most of the alien vote was Democratic, it became the policy of the Whigs to throw out this vote, and thus secure the State for their party. In the Congressional election in 1838, one unnaturalized inhabitant voted for Stephen A. Douglas. The judges of election had received the vote with a full knowledge that the voter had not been naturalized. The opposition, through one Horace H. Houghton, instituted a *qui tam* prosecution against Thomas Spraggins, one of the judges of election. The case was tried before Judge Stone of the Joe Davies circuit, who decided that the State had no authority to give the right of voting to an unnaturalized alien, and rendered judgment against the defendant. The practical effect of this decision was to cut one-half of the Democratic vote in the great northern district of the State. It would be fatal to the Democratic party if that decision was allowed to stand as law. Douglas saw the importance of this decision, and he had the case taken to the Supreme Court of Illinois for review, upon the point that the State, having already conferred the privilege of voting, had the power or authority to do so or not. It was the first case involving such a question ever tried in the United States. It was understood that a majority of the Supreme Court were opposed to Douglas' view of the question, but, notwithstanding that, he fearlessly took up the case. The question was long and elaborately argued in the winter of 1839-40. The case was held under advisement until the next term of the court. Meanwhile, the famous "Tippecanoe and Tyler, too," campaign of 1840 was at hand. The Democrats of Illinois were alarmed, as the alien vote, if thrown out, would give the State to the Whigs. Douglas learned that a majority of the judges of the Supreme Court had agreed to sustain the decision of the court below, and he knew that, if such a de-

cision should be rendered by the Supreme Court the Democracy of Illinois would be in a hopeless minority. He set to work with his usual sagacity to meet the emergency. Upon reading the record sent up by the lower court, he found that it was defective—that it contained errors, and that it lacked many things which had been carelessly omitted. When the Supreme Court met, and the judges had unrolled their opinions, preparatory to pronouncing judgment in the case of *Spraggins v. Houghton*, Douglas addressed the court, stating that the case was one of great importance, important to the persons immediately involved in it, but of still greater importance to thousands of other persons in the State, as it was a case involving the political status of a very large portion of the people of Illinois. It was, therefore, highly important that the decision should be final, whichever way it might be. He then went on to say that, upon a careful examination of the record in the case since it had been argued, he had discovered that it was fatally defective, so much so that no judgment could be rendered on it, and he was unwilling to accept a judgment in a matter of such grave importance to the public when that judgment, in consequence of defects in the record, would be of no force or effect; he, therefore, moved that the case be dismissed. The motion was resisted, and was set down for argument. It was subsequently argued, and without any decision on the motion the whole case was continued until the next winter term. In the meantime the Presidential election took place in November, and the Democratic party retained its ascendancy in Illinois. The legal principle, asserted by Mr. Douglas in this famous case, and then supposed to be unsound, is now the well-established doctrine of all parties in all the States.

During the session of the Illinois Legislature, in 1840-41, the judiciary of the State was reorganized; the existing circuit courts were abolished, and the judges of the Su-

preme Court increased to nine. Under this act, the Legislature, in joint convention, on the fifteenth of February, 1841, elected five additional judges, of whom Stephen A. Douglas was one. It was only seven years since he arrived in the State, a poor stranger, without friends or books—seven years since he was admitted to practise law by four of the judges who were to be his colleagues on the bench. In less than seven years, by his ability, energy, industry and attention to business, he had risen to a commanding position at the bar of Illinois, and this, too, before he had completed his twenty-eighth year. So rapid and brilliant a rise in the conservative profession of the law is scarcely paralleled in the legal annals of the United States.

His circuit was the Fifth District, a district made memorable and annoying on account of the Mormon settlements included in it. The records show that some of the most exciting scenes of his life were spent in adjudicating the troubles growing out of the tribulations of the people in connection with the Mormon leaders. Joe Smith and his deluded followers were accused of every crime committed in their neighborhood, from robbing a hen-roost to murder. If a Mormon prisoner escaped conviction, the Gentiles held the court responsible; if a Mormon was convicted, his brethren accused the court of oppression. One case will show how difficult it was to administer justice under the circumstances; and, also, that Judge Douglas possessed something of the bold, decided character of Andrew Jackson. Joe Smith was brought before him accused with some offence. A great crowd of people collected to see the notorious prisoner, and to rejoice at his conviction. They were anxious to get rid of Smith, hoping that, if he were out of the way, the Mormon settlements would be dispersed. As the trial progressed, it was whispered that the evidence was not sufficient to convict the prisoner, and some per-

sons in the crowd proposed that they should enter the court house, take him out, and hang him. A gallows was hastily erected in the court house yard, and a body of four hundred men entered to carry out their purpose. With loud cries, they broke into the room where Judge Douglas was holding court, and approached the place where the trembling prisoner was sitting. The judge directed the sheriff to clear the court room, as the proceedings were interrupted by the noise and confusion. In a weak voice the sheriff requested the "gentlemen" to retire; but they only laughed at him, and infuriated by the sight of the prisoner, several of the mob climbed over the bar, and rushed toward him. Douglas rose at once, and calling upon a gigantic Kentuckian, who was in court, said: "I appoint you sheriff of this court; select your deputies, and clear this court house. The law demands it, the country demands, and I, as presiding judge of this court, command you to do your duty as a citizen bound to preserve the peace and enforce the laws." The newly appointed sheriff ordered the crowd to disperse, the judge encouraging him all the time. The first, second and third who refused to leave the court fell beneath the arm of the powerful Kentuckian. He threw others out of the windows, and soon the mob, instead of refusing to go, were fighting to get out. In less than twenty minutes from the entrance of the mob, the court room was cleared. Thus, by the cool courage of Stephen A. Douglas, a murder was prevented, and the administration of the law was allowed to have its course. The most striking feature in the matter was the fact that the judge had no authority to appoint a sheriff, as the duly appointed sheriff of the county was present. He knew this, but he knew, also, that the emergency was great—that a moment's delay would have been fatal—and that the least sign of wavering would have cost the prisoner his life. It was a great occasion, and Douglas proved

himself equal to it, just as General Jackson had in proclaiming martial law in New Orleans.

The honor of a seat upon the Supreme Bench had not been sought by Mr. Douglas. His practice was large and increasing rapidly. He was already holding the office of Secretary of State of Illinois, the duties of which were light, and did not require him to give up his law business. As judge, his salary would be small in proportion to his work. He held court ten months out of the twelve, and it is said that his journeys from county to county were by no means pleasure trips. He decided many important cases, only one of which was reversed, and that involved merely a question of practice. This is a great, a remarkable, a splendid record for a judge, presiding over the chief court of the State before he was thirty years old.

Judge Douglas' labor in his judicial capacity had been so severe and exacting that, in the spring of 1843, his health was so impaired he thought of resigning the position, and passing the summer in what was then known as the Indian country—Kansas and Nebraska—with which his name and the wreck of his political fortunes were subsequently to be so closely associated. But instead of resting that summer, and retiring for a while from public life, he was called upon by his party to accept a Congressional nomination in a doubtful district. He was holding court at Knoxville, when a committee waited upon him and informed him of his nomination. He was told that his acceptance was necessary in order to carry the district. His friends advised him, as his election to Congress was doubtful, not to resign his judgeship until he knew whether he was elected. This he declined to do, and having accepted the nomination, he resigned his office as judge as soon as the term was closed.

Douglas' early success in politics was as marked and remarkable as his last years were disastrous and crushing; although in

the opinion of many persons, the very last weeks of his life were those most deserving of praise. His political opponent, James G. Blaine, bears splendid tribute to his patriotism. His last days were his best days. The hour of his death was the hour of his greatest fame. In his political career, he had experienced the extremes of popular odium and popular approval. His name had at different times been attended with as great obloquy as ever beset a public man. It was his good fortune to have changed all this before his death, and to have secured the approval of every lover of the Union. His career had been stormy, his partisanship aggressive, his course often violent, his political methods sometimes ruthless. His legal career was a series of brilliant successes which followed each other in rapid succession. His political career was a series of dramatic surprises. He was one of those unfortunate men, who, haunted by the ghost of the Presidency, trim their political sails to catch the wind of popular favor, and end by losing the great prize for which they have staked everything. His course in the Senate by dividing the Democratic party into Northern and Southern Democrats, assured the election of Lincoln in 1860. Fearing a political death if he went to the extreme point to which the South was rushing before 1860, he attempted to please the North and satisfy the South at the same time. He knew that his doom was sealed if Illinois failed to reëlect him to the Senate in 1858. Then followed that memorable contest for the Senate between Lincoln and Douglas, involving a debate on the political questions of the day, which became so interesting that it attracted the attention of the whole country. Never before nor since had great public questions been so thoroughly, so elaborately, so exhaustively argued on one side and the other. It resulted, as all the world knows, in the election of Douglas to the Senate—a victory in Illinois which

proved his destruction in the wider field of national politics. While Lincoln, defeated in Illinois, opened the way to an immortal career, Douglas, by trimming, lost the Presidency, which Lincoln, by frankness, won. The principles uttered by Douglas in that famous debate gave profound offence to the South, and made the election of the "Little Giant" to the Presidency in 1860 an impossibility.

Stephen A. Douglas died on the third of June, 1861, and the *New York Tribune* in a leading editorial, deplored his death as a national calamity. It pronounced him "the best off-hand, tit-for-tat debater in America, perhaps in the world." The editorial then proceeds to say that Douglas, in the political arena, although poor, undistinguished, unfriended, without family influence, imposing presence, or personal following, in a community where he was a stranger, filled, before he was thirty years old, the offices of State's Attorney, Assemblyman, Secretary of State, Register of the Land Office, Judge of the Supreme Court, Member of Congress, and finally, entered the United States Senate when he was just thirty-five years old.

When the news of his death was received in New York the expressions of sorrow were almost universal—flags were draped in mourning, and lowered at half-mast, public meetings were held, resolutions of regret adopted; and throughout the North similar demonstrations of regret took place in most of the larger cities.

It was the singular fortune of Stephen A. Douglas to be associated in two public measures with the two most famous men of their time—Henry Clay and Andrew Jackson. While serving his first term in the House of Representatives, he took a prominent part in advocating the bill for removing the fine which had been imposed upon General Jackson for declaring martial law in New Orleans in 1815. After the adjournment of Congress a great Jackson Convention was

held at Nashville, which Douglas attended as a member of the Illinois committee. With hundreds of other men, he was invited by Jackson to visit the Hermitage. When he was introduced to the old hero, the General grasped his hand, and asked whether he was the Mr. Douglas of Illinois who had delivered a speech at the last session on the subject of the fine imposed for declaring martial law at New Orleans. Douglas said he had delivered a speech in the House on that subject.

"Then stop," said the General; "sit down here beside me; I desire to return you my thanks for that speech."

And then the General kindly and cordially expressed his gratitude for the words so eloquently spoken in his behalf that Douglas was overcome with emotion, and unable to utter a word, grasped the venerable soldier's hand, and left the hall. Among General Jackson's papers, found after his death, was a printed copy of Douglas' speech, indorsed in the handwriting of the former: "This speech constitutes my defence; I lay it aside as an inheritance for my grandchildren."

When the famous Compromise measures of 1850, introduced by Henry Clay to pour oil on the stormy sea of sectional politics, were before the Senate, it was Stephen A. Douglas who joined the great Kentuckian in advocating them. The final bill, reported by Mr. Clay as from the Select Committee of the Senate, was in fact the California and

Territorial Bills drawn up by Mr. Douglas, united. The latter suggested that this should be done, and when Mr. Clay objected, saying it would be unfair for the Committee to claim the credit which belonged to another, Mr. Douglas asked by what right the peace and harmony of the country should be jeopardized in order that this or that man might receive the credit due for the origin of a bill. The noble heart of Henry Clay was moved by such unselfish generosity, and grasping Douglas by the hand, he cried: "You are the most generous man living! I will unite the bills, and report them; but justice shall nevertheless be done to you as the real author of the measure." Jefferson Davis said: "If any man has a right to be proud of the success of these measures it is the Senator from Illinois." Rufus Choate described "with what instantaneous and mighty charm they calmed the madness and anxiety of the hour."

It has been truly said that Stephen A. Douglas led a strenuous life—not a noble or beautiful life, but it possesses a certain fascination in its wonderful energy and the pathos of an overwhelming defeat, followed in a few months by his death in the full splendor of his intellect. Had he resisted the enchantment of the siren, politics, he might have lived a better, a happier, a longer life, in the enjoyment of professional success and domestic peace and tranquility.



THEM 'LEVEN STUBBORN MEN.

BY JOHN COLLINS.

I served upon a jury once,
When I had come to town;
You mind it now—when old Jake Howe
Sued Uncle Hiram Brown.

I set and heard just every word
That them two lawyers said,
And learned enough of law to stuff
Most any feller's head.

And soon as Hiram's lawyer seen
I understood the thing,
I tell you, he just treated me
Like I was born a king.

I s'pose you heard that afterward
They tried the case again
Because right square agin me there
Was 'leven stubborn men.

I could agree to Hiram's plea;
I seen his case was clear.
The lawyer tried on t'other side
To claim 'twas mighty queer.

The judge, too, got—it made me hot—
At times clean off his base,
And Hiram's lawyer told him so
Right out before his face.

I knowed that Howe begun the row—
That Hiram ought to win—
And swore that I'd take Hiram's side
And stay through thick and thin.

But what could one poor chap a-done
To find a verdict, when
He had to win the case agin
Them 'leven stubborn men?

THE HUMBERT TRIAL. A GLIMPSE OF A FRENCH CAUSE CÉLÈBRE.

By A. E. PILLSBURY.

IN the vacation rambles of an American lawyer, surveying the realms and noting the customs of European nations, few things are more interesting than personal observation of their judicial proceedings. A visit to the Court of Assises of Paris during the Humbert-Daurignac trial has left some impressions which, if they can be reflected in print, may not be unwelcome to members of the profession who look in vain for a mental picture of a foreign court of justice in the colorless formality of the Law Reports.

The central figure in this extraordinary case, which marked an epoch in the history of fraud, scandalized the French judiciary, threatened the government, and finally culminated in one of the most sensational trials of our time, was originally a peasant girl of Toulouse, by name Thérèse Daurignac, by vocation successively a laundress, saleswoman and milliner's apprentice. In or about 1877 she caused it to be given out that she had inherited from an American named Robert Henry Crawford a fortune of one hundred million francs. She came to Paris, married Frederic Humbert, an advocate with a taste for poetry and the arts, son of an ex-Minister of Justice, who was one of the most eminent lawyers in France, and embarked upon a meteoric career of luxury and display with money borrowed upon the faith of her alleged inheritance. She acquired an imposing mansion in the most fashionable quarter of Paris, furnished and adorned with the rarest works of art, a country-seat on the Seine, with such appurtenances as a steam yacht and a fleet of gondolas, various chateaux and estates in other rural parts, established in Paris a life insurance and annuity company, the *Rentes Viagères*, entertained lavishly, some of the most eminent men in

France sitting at her table, frequenting her box at the Opera, shooting over her preserves, and borrowing her money, and for about twenty years maintained a considerable influence in political and financial circles, and a foremost place among the brilliant leaders of smart Parisian society. All this she did upon no other capital than her own assurance, without a franc in the world that she could honestly call her own.

The tale by which this Circe lured the money-lenders to their destruction was, in substance, this: As she was about to enter upon her inherited wealth, two nephews of the deceased Crawford turned up, with another will of the same date as that under which she claimed, dividing the hundred millions between her and themselves. This led to controversy, but the Crawfords, representing that they cared nothing for the money and only desired to carry out their uncle's wish to unite the families of Crawford and Daurignac, proposed that one of them should marry Mme. Humbert's younger sister; and it was finally agreed that the whole fortune should be deposited with Mme. Humbert, to be invested in French *rentes*, from which she should take to her own use an income of one thousand francs per day, holding the capital and its further accumulations as the dowry of her sister upon the marriage. Accordingly, the safe, now celebrated, was installed in her house and filled with the securities in which the fortune was invested. When Mlle. Daurignac, the prospective *fiancée*, reached her majority, she declined the alternative of marrying either of the Crawfords. This led to further controversy, and finally to an agreement of compromise by which the bulk of the fortune became the property of Mme. Humbert.

Down to this point, the only substantial reality is the safe; which by itself obviously is not enough for the purposes of the scheme. But certain alleged violations of this supposititious agreement were made to furnish a basis for fictitious litigation between the Crawfords and Mme. Humbert, which, in various forms, has occupied the attention of the French tribunals, up to the supreme Court of Cassation, for a dozen years or more; involving complicated and voluminous proceedings, with several judgments in her favor, and appearing to establish the existence of the fortune, and her possession of and title to it. The records of the litigation and the judgments were real and genuine. The Crawfords were, of course, imaginary personages, represented when necessary by Mme. Humbert's husband and her brothers Emile and Romain Daurignac, her accomplices in the scheme and co-defendants in the trial. The judgments in her favor are thus easily accounted for.

By means of her story, corroborated by the safe and the official records of the litigation, Mme. Humbert borrowed from banks and money-lenders, from time to time, the capital upon which she exploited herself and her various enterprises, to the amount of between sixty and seventy millions of francs; of which something like seventeen millions was repaid, leaving an indebtedness of about fifty millions at the time of the catastrophe. The bubble was finally punctured by a judicial order, May 19, 1902, for examination of the contents of the safe; which, being opened by the authorities, was found to contain one English penny piece, and nothing more. The Humberts and Daurignacs fled to Madrid, where they were arrested in December, 1902, and brought to Paris for trial upon charges of forgery and swindling.

The wild absurdity of this performance would be wholly and irresistibly humorous, but for the shadow cast upon it by the ruin of the victims of the *Rentes Viagères* and

many of Mme. Humbert's creditors, and the darker and mysterious interest which it borrows from the murder of the banker Schottzman, a creditor to a large amount, in a railway train between Paris and Lille, the suicide of the banker Girard, another principal creditor, and the death by suicide or murder of Frederic Humbert's nephew and namesake. Apparently, however, no guilty connection of the Humbert-Daurignac group with these tragic events has ever been established.

It will be seen that Mme. Humbert's apparently complicated scheme, reduced to its elements, has the simplicity of genius. The central conception is the obtaining of credit by means of collusive litigation over an immense sum of money. This involves nothing but the personation, so far as necessary, of two or three non-existent characters. All the rest is comparatively simple detail. In fact, little or no actual personation of the mythical Crawfords appears to have become essential. The eminent advocates who at one time or another appeared on that side of the litigation received their instructions from a notary at Havre, supposed to be in direct communication with the Crawfords, and authorized to represent them, and the proceedings were so managed as not to call for their appearance in the flesh before any judicial tribunal. Whether this notary was a dupe or an accomplice does not yet appear to be determined. The scheme would have been possible in our own country, and probably in any other.

The fourteenth day of August, the sixth of the Humbert trial, was a genuine American dog-day in Paris. The Court of Assises sits in the *Palais de Justice* on the north bank of the Seine, in a handsome and spacious chamber, much longer than the average American court room, but lighted and ventilated only by a row of windows high above the floor on a single side. It was densely crowded in every part, a brilliant bouquet of feminine

colors appearing in the centre of the section assigned to the public, and the atmosphere was stifling.

The judges enter at the simple announcement of "the court," take their places and proceed at once to business, without formal proclamation or other ceremonial. At the adjournment the President announces the time of the next session, and the judges file out of the chamber in the order of their rank, the audience rising respectfully when they enter and retire. They sit upon a dais slightly raised above the floor, surrounding one end of the chamber, flanked on the right and on the same level by the Advocate-General and at his right by the jury, and on the left by the officers of the court and the prisoners, the latter surrounded by a cordon of police, in full uniform, including their head-coverings, according to the European custom. In the enclosure thus formed are the members of the bar, the counsel for the prisoners sitting directly in front of them, and in the rear of the bar the audience. On the dais behind the judges are a dozen or more seats for visitors of note, especially judges of other courts, most of whom were observed on the present occasion to wear the ribbon of some civic distinction. Lawyers on this side of the water may be interested to know that a couple of their brethren, decorated only with American citizenship, were deemed by the President of the tribunal qualified for admission to this select circle. To these visitors a home-like appearance was imparted to the scene by the easy manners of a swarm of newspaper reporters and sketch-artists, who strolled about the bar, in a recess of the proceedings, wearing their hats and chatting affably with the principal personages of the trial.

The Court of Assises of Paris is the highest tribunal for the trial of crimes, and is commonly constituted of three judges, selected in rotation from the seven civil chambers. M. Bonnet, who presided at the

Humbert trial, is a member of the Court of Appeal of Paris, and is understood to have been assigned to this duty for his exceptional ability, especially in the examination of witnesses. At the opening of the trial, as a precaution against miscarriage by illness or other disaster in view of its importance and probable length, the Advocate-General moved for an additional judge, and two extra jurors to sit with the panel of twelve, and this was ordered.

The judges and the Advocate-General are gowned in red, the bar in black, each with a facing of ermine. The horse-hair wig is not an instrumentality of French justice, but a square cap of black silk or velvet, which may be but is not usually worn in court, forms part of the official costume of the judges and advocates. With characteristic French adaptability in the matter of dress, they wear this livery with an easy grace which makes it seem becoming and an appropriate part of themselves; in marked and favorable contrast with the grotesque and monastic appearance presented by the tonsured English judges and barristers in wig and robes. The French judges and lawyers are a fine-looking body of men, usually bearded, well groomed, and appearing like cultivated men of the world. *Maitre Labori*, the most interesting figure among them, is of medium size, blonde, gold-spectacled, Vandyke bearded, quick and incisive in manner and speech. The jury appeared to be intelligent and substantial men, comparing favorably with the best of our own. Several were observed busily taking notes of the testimony. Hardly a personage actively concerned in the trial seemed to be beyond middle age.

In the French criminal procedure the accused and the witnesses are first examined by the *juge d'instruction*, whose *dossier*, or synopsis of the testimony, transmitted to the court, constitutes the brief, so to say, upon which the President of the Tribunal, as the presiding judge is called, conducts the trial.

The examination of the witnesses is chiefly by the President; the counsel, though having a much greater freedom of interruption and running comment than with us, playing comparatively a minor part until they come to address the jury. It is to the credit of the French that in swearing witnesses they have abandoned the repulsive practice of "kissing the book," which still prevails in England, and require only the uplifted hand.

Fortunately for the interest of the occasion, it happened that among the witnesses introduced at this time was Cattai, the money-lending creditor who had instigated the proceedings for the opening of the safe. This man was the *bête noir* of the Humberts, and his appearance instantly produced what the Parisian newspaper reporters call a *crise psychologique*. The delivery of his evidence was a running fire of question and answer, interruption, retort, comment and ejaculation, following one upon the other like the discharges from a Gatling gun. A few actual samples of the proceedings will convey a more vivid idea of their character than pages of description. For example:

M. CATTAI. She demanded two hundred thousand francs, and we paid her that sum.

MME. HUMBERT. It is false.

THE PRESIDENT. Don't interrupt him.

MME. HUMBERT. I will not sit quiet under such a falsehood.

CATTAI. The sum has been audited.

MRE. LABORI. Yes, but who has audited the auditor?

MME. HUMBERT. Cattai is a vampire. Remember, it was this man who got control of the Minister of Justice, by employing his services as private counsel.

THE PRESIDENT. Stop a moment. I allow you a large liberty, but your form of expression is objectionable.

MME. HUMBERT. I wish to speak a little of this man Cattai.

THE PRESIDENT. So you may, but speak of him in such terms as I can properly permit you to use.

MME. HUMBERT. Cattai knows that he has robbed us.

THE PRESIDENT. No, no, that is not the kind of expression I mean. Here is a witness called at your request. Discuss him as much as you like, but treat him with the respect due a witness.

FREDERIC HUMBERT (satirically). Oh, yes! With the profoundest respect and deference!

MRE. LABORI. Mr. President, I wish to propose a question, and I wish to put it in proper terms. Will you ask M. Cattai whether he did not send his books

to Egypt in 1901, in order to put them beyond reach of judicial examination?

M. CATTAI. What books?

MRE. LABORI. Your books of account.

THE PRESIDENT. Will you specify? I do not wish to put the question in those terms.

MRE. LABORI. Translate it as you like, Mr. President.

THE PRESIDENT. In the public interest it is preferable—

MRE. LABORI. How will you have it put?

THE PRESIDENT. There are some expressions which ought not to be used in court.

MRE. LABORI. If you mean inexact or incomplete expressions, you are right.

THE PRESIDENT. The meaning may be as forcible as you like, but the form should be moderate.

M. CLUNET (counsel for Emile Daurignac). Mr. President, will you allow me a word?

THE PRESIDENT. Yes, but not all of you at once.

And so forth. All this with a vehemence of gesticulation fully justifying the adage that a Frenchman cannot talk with his hands tied.

Again:

MRE. LABORI (to Cattai). I do not make assertions. I present the documents. What have you to say to them?

CATTAI. My books have been seized, examined, verified, turned and returned, and they found but 490,000 francs to the credit of Mme. Humbert.

MRE. LABORI. Then M. Roy has made a false statement?

THE PRESIDENT. Observe, it is not necessary to use that expression.

MRE. LABORI. But, Mr. President, it is necessary to select some expression.

THE ADVOCATE-GENERAL. M. Roy may very likely have been misled or deceived.

ROMAIN DAURIGNAC. There were four police commissaries with him.

MRE. LABORI. If everybody is deceived, we, too, may be, but that does not make the evidence any better.

FREDERIC HUMBERT (satirically). It is, of course, only the witnesses for the prosecution who are never mistaken!

Cattai wore the ribbon, and being asked for what reason he was decorated, replied that it was for services rendered the government in Egypt. This brought out from the accused and their counsel sundry satirical suggestions touching the character of the services in question, much to the entertainment of the crowd, in which the improvident who have sworn eternal hate against the whole money-lending tribe were evidently well represented. Indeed a strong hope of the defence was in the popular prejudice against

the usurers. It is to Mrs. Labori's credit that he did not press this appeal too far, and to the credit of the jury that they disregarded it.

The following will serve to show the freedom which prevails between the President of the tribunal and the prisoner at the bar. The prosecution was trying to show that the Daurignacs had personated the Crawfords:

THE WITNESS. Some people came to the house who were called "the diplomats," and one "His Highness."

THE PRESIDENT. Was this Emile Daurignac?

EMILE DAURIGNAC. I pray you, Mr. President, let the witness continue. This is a very serious matter. I am in danger of punishment. You seem to be amusing yourself, but I am not.

THE PRESIDENT. My question is precisely in your line.

DAURIGNAC. You appear to wish to cut off the witness. We maintain that the defence should have the largest possible latitude. Consider, we have waited eight months for this opportunity.

THE PRESIDENT. I submit that I am making it as large as possible, and as you deny personating Crawford, when I ask a witness whether you did so you have no occasion to complain. What more would you have?

At the end of a passage of fence between the President and Mme. Humbert, she neatly secures the last word, according to the custom of the sex. The President is admonishing her upon her behavior, which reproof she meets with spirited retort and remonstrance. Finally:

THE PRESIDENT. I do not exact personal respect for myself, but you must pay some respect to the court.

MME HUMBERT. (with sarcastic politeness). Thank you, Mr. President, for that distinction. It is well put.

The President received the fire of the prisoners and their counsel with perfect composure, betraying no irritation and no disposition to resent the freest exercise of their privilege consistent with a decent regard for order. Being quite able to take care of himself, he had no occasion to retreat behind the barrier of his official dignity. It was a fair field and no favor.

In this stage of the trial Mme. Humbert took a more active part than her counsel. She was plainly dressed in black, and appeared sallow and careworn; but in spite of this, and of her thin and pointed aquiline

nose and masculine chin, it is apparent that she may have been an attractive, or at least what is called a "stylish" woman. Probably she did not overstate her age in declaring it to be "about forty"; an admission which might not have been wholly satisfactory to a life insurance company, and which was received by the President with some ironical pleasantry, promptly retaliated upon him by the fair defendant. At the close of Cattau's evidence, she interjected into the proceedings a commentary upon it of exactly forty minutes; addressing the jury with perfect fluency and self-possession, considerable grace of gesture and manner, and apparently with some force and effect. The President made one or two ineffectual attempts to cut her off, but with this exception she was undisturbed, and judges and jury, as well as the bar and the audience, listened with the closest attention to all she had to say.

Mme. Humbert's long-deferred disclosure, the "awful secret" sprung upon the court and the public in a speech addressed by her to the jury at the very end of the trial—that the mysterious Crawford was actually the Regnier who acted as intermediary between Marshal Bazaine and Bismarck in the treasonable surrender of Metz in 1870, conveying the inference that the Crawford millions were the corrupt fruit of that transaction, from whence arose the necessity for secrecy and concealment—produced no public sensation, and seems to have affected the tribunal, if at all, only as the crowning proof of her genius for mendacity. There is some historical foundation for such a story, in Bazaine's trial and sentence to death for treason, and the condemnation "in contumacy," at the same time, of one Regnier, who had disappeared, for complicity in the affair. It was an ingenious invention, and it aimed high, but it came too late to be of service. The Parisian press and the prosecuting counsel paid tribute to the United States as a world-power by adopting our word "bluff" (pronounced *bloof*) to char-

acterize Mme. Humbert's inventions, and this American product is now duly incorporated into the French vernacular.

Whatever may be said of the appearance of indecorum which the French tribunals often present to a stranger, they perform their functions with more directness and dispatch, and less parade of archaic forms and ceremonies, than the courts of the English-speaking nations, and probably, in general, not less efficiently. The French do not seem to consider a court of justice holy ground, but a place of business. It may, perhaps, be open to doubt whether sanctimony actually contributes anything, by itself, to the efficiency of justice. In the Humbert trial there was no lack of proper dignity on the part of the tribunal, and beneath all the smoke and clamor there was plainly to be felt the steady undercurrent of a serious purpose.

Direct observation of French judicial proceedings is calculated to impress one that much of the criticism upon them is superficial and unwarranted. In general there is little ground for the impression that the rights of the accused in criminal prosecutions are disregarded. In many particulars the prisoner is allowed a latitude unknown to the English or American courts. The French tribunals have a way of threshing out things as they go along, which may strike a foreign lawyer as disorderly and confusing, but clearly does the accused no harm. They are not entirely alone in this. The writer once saw the Lord Chief Justice of England stop a trial, *in medias res*, to take the opinion of the jury upon a single question in the case. The jury, under his direction, put their heads together and returned a finding upon it, his Lordship taking snuff with much satisfaction in the interval, after which the trial proceeded with that question settled. If the defendant has no opportunity for hours, or perhaps for days, to contradict or explain a damaging statement by a government witness, the impression may become so fixed in the minds of

the jury as to be practically indelible. In France, the prisoner may contradict or explain upon the spot; so that the charge and the answer go to the jury together. The practice is not wholly objectionable. If it results, as sometimes it does, in interruption, altercation, and a sort of free fight, in which judges, counsel and parties are all trying to be heard at once, it must be remembered that much of this is due to the natural vivacity of the French temperament and manner; that Frenchmen are not always excited when they appear to be; and that the material question is not of the effect of such proceedings upon our minds, but upon theirs.

The French practice of interrogating the accused, if fairly conducted, has much to recommend it. Of all means of developing the truth of a criminal case it is the most effective. There is usually no reason why an innocent person should fear to account for himself or explain his conduct. Probably the privilege is sometimes abused. No rule of man's making is or can be executed with absolutely exact justice. Yet between this practice on one hand, and on the other our rule of immunity from disclosure, often administered with a superstitious deference which sacrifices the rights of the public to the protection of the accused, there is much reason to believe that the interests of justice lie with the former. The present, however, is not an opportune time to suggest any modification of such constitutional restraints as remain to us.

The speeches to the jury which concluded the Humbert trial, by M. Blondel, the Advocate-General, and Mre. Labori, who had the close, were of a high order; moderate in statement, forcible in reasoning, free from any straining after rhetorical effect, but marked by a dignity of tone and symmetry of style now rarely known to our courts. The accused were charged with three offences; forgery, availing of forgery, and swindling.

The first two are crimes, the third a misdemeanor. It was evident from the first that Mre. Labori, not expecting to secure an acquittal, was steering toward a conviction upon the minor charge alone. He handled the evidence with great skill, and, while strongly tempted to take advantage of the popular feeling by arousing the prejudice of the jury against the government, in view of its failure to put a speedier check upon the predatory career of the Humberts, he used this weapon sparingly. He was direct and bold, but not violent or vituperative. The result of the trial was unavoidable. The conduct of the defence will detract nothing from the enviable reputation of this brilliant and fearless advocate, distinguished at the French bar as the one man of eminence who faces

the mob or the government with equal courage.

At the close of the twelve days' trial, after deliberating four hours, the jury found the prisoners guilty upon all the charges. The verdict was clearly in accord with the evidence, the views of the judges, and intelligent public opinion. The penalty imposed, of five years' *réclusion* (solitary or separate confinement, but less severe than penal servitude) for the Humberts, and three and two years' imprisonment respectively for the Daurignacs, is remarkable for its moderation. If justice is only placated by this result, it was reached with commendable expedition, and without the appearance of any disposition to press the power of the government unduly in view of the aggravated character of the offence.

ELI BASSETT—JUDGE.

BY GEORGE O. BLUMF.

WE don't have much call for law up our way, because our neighbors in the town of Jasper, State of Maine, are law-abiding citizens. But once in a while some one has a little difference to settle and on such occasions Trial Justice Bassett puts aside his farming and assumes the robes of judge with great satisfaction to all concerned. No one has ever been known to dissent from his rulings, and his findings, for plaintiff or defendant whichever it may be, is the end of that particular case.

One day in August Joel Spear had a little trouble with Hank Ridley over a cow which Joel had bought from Hank with the understanding that the cow was new milch and all right in every respect. Constable Obed True served the writ, the return was made and the case duly entered in court. The court was

always held in the back of Orrin Chase's store down at the village, which was a large, roomy place accommodating about twenty people by crowding. Judge Bassett drove up to the Chase's the day set for the trial and hitched his gray mare. The Judge didn't live but about half a mile up the road, but he always hitched up and drove down at court time, as he wished to uphold the dignity of his office.

The Judge mounted to the bench and rapped for order, while Hen Bailey, who was clerk of the court, called the case of Spear *v.* Ridley. The day was hot and lowry, and the Judge was plainly uneasy about something. Just after Hen Bailey got through, Judge Bassett, looking out of the open window at the sky overhead, said: "Boys, looks ter me ez ef we wuz goin' ter hev a shower; wind's

in the south, an' I've a tarnal sight o' hay out; s'posin' we adjourn this here case tel termorrer mornin' 'bout this time?" Both sides were willing, and every one hurried out and home to get in their hay before the shower came.

Next morning all were on hand at the appointed time, and as it was a fine day, it bid fair to get a hearing on the case of Spear *v.* Ridley, which was called again by Hen Bailey. Lem Springer's boy, Burt, who was studying law over at the Academy, was counsel for Joel Spear, plaintiff, while Ben Newell handled Ridley's side.

Burt said: "This is a case, your honor, of breach of contract, wherein the plaintiff, Joel Spear, alleges gross misrepresentation on the part of the defendant, Hank Ridley, in regard to sale of a cow to said Joel Spear upon July twenty-third last."

The Judge, who had just finished cutting a chew of Battle-Axe tobacco, said: "All right, Burt. Call your witnesses."

Whereupon Len Merriman took the stand, and in response to Burt Springer's "Tell what you know about this case, Mr. Merriman," he said: "I wuz halvin' work with Joel et the time, and we wuz mowin' Joel's intervale. Jest ez I pulled up ter whet my scythe Hank Ridley druv down 'cross and sings out ter Joel, 'How'll yer trade them yearlin's o' yourn? I've got er spankin' new milch I got over Richmond way I'll let yer hev with ten ter boot. I'll warrant ye she's all sound and ye won't hev ter use no butter coloring neither.' 'Jump in,' says Hank, 'an' we'll drive over an' take a look at her.' So Joel druv over ter Hank's, an' thet's all I know 'bout et."

Thereupon Joel took the stand and said, in part: "I hain't no hand et squeelin' on a trade ef et's done fair." Hereupon Ben Newell objected, and Judge Bassett said: "Joel, you jest go on an' tell what happened arter you druv off with Hank and I'll handle ther fairness part on it. By ther way, Hank,

ain't this ther same cow you let Bill Potter hev for that set of traverse runners?" Hank said, "Yaas, I guess it be, Judge," whereupon the Judge chuckled and said, "I kinder calated it war the same cow."

Then Joel resumed his testimony, saying: "I druv over to Hank Ridley's, an' we went into the tie-up, an' there wuz ez likely a lookin' cow ez I ever see. Hank said she wuz a full blood Holstein, an' he wouldn't let her go only he needed a leetle money. He said, 'I'll tell yer what yer do, Joel; don't you take her now, but come over ternight, an' I'll show ye what a mess o' milk she gives.' So I druv over to Hank's thet night along 'bout milkin' time an' met Hank c.m.in' out o' the tie-up with a heapin' pail uv milk. He said, 'There ye be, Joel. I thought ye never wuz goin' ter come.'

"Now all you folks," said Joel, "knows I ain't milked a cow sense ther time we shingled the widder Malcolm's barn an' I fel off the scaffoldin'. Well, anyhow, I sez ter Hank, 'You write out a guarantee an' I'll give you thirty-five dollars in money an' one o' them black shoats you wuz lookin' at ther other day.' Hank didn't seem ter be in no desprit hurry, but finally he sez, 'Joel, you may hev her, an' I'll write yer a guarantee.' So he writ out the guarantee an' I druv him down ter my house an' paid him his money, and put one uv the black shoats out seprit, so that when he come arter it one o' the women folks ud know which one wuz his in case I warn't at home. Now, Jedge Bassett, 'bout thet guarantee," whereupon Burt Springer handed the Judge the paper on which the guarantee was written.

Ben Newell tried to have it thrown out because he said it was only a matter uv pe'teness on the part uv Hank Ridley in givin' it to Joel, ez Hank couldn't guarantee something that he hadn't raised. But Judge Bassett said: "Ben, this here guarantee wuz giv' ter Joel as ther best uv Hank's knowledge uv ther cow durin' ther time he hed hed it,

so I think we'll hev ter admit it." Hereupon the Judge read the guarantee aloud, which was, in substance:

"I, Hank Ridley, guarantee the black and white cow known as Spot ter be perfectly sound, an' thet no one needs ter put no butter colorin' in her cream, ez there's be no call fer it."

"There's ther pint right there, Jedge," says Joel; "the dern critter never give no milk thet yer could put butter colorin' in, because she wor ez farrer ez a burnt boot."

This ended Joel's testimony, and the other side being called and not having anything to offer, counsel's pleas were dispensed with, and Judge Bassett said: "Friends an' neighbors, we have jest heard how neighbor Joel Spears wuz tuk in by neighbor Hank Ridley on a cow trade. We hev afore us the question ez to whether Joel has a right ter damages agin Hank on 'count of said trade. In the fust place, how many of ye ever beat Hank on any kinder uv a trade and how many of ye air there but what knows that

Hank is a hoss jockey. Ef Joel hed a come ter me, I could a told him all 'bout thet cow; but Joel says ter himself thet a cow is wuth seventy-five dollars, ef she's wuth a cent, an' ef Joel hed been right, he'd a had it all over town how he beat Hank Ridley. Now we cum ter the pail uv milk and ther guarantee. Hank didn't tell Joel thet ther milk in the pail come from the full blood Holstein. He said, 'There ye be, Joel; I thought ye never wuz goin' ter come,' holdin' up the pail. Sides all this, the guarantee says no need uv butter colorin', ez there'll be no call for it. Course there warn't no call for it. I had this all figur'd out over a week ago, ez I tol' Lem Springer down to Potter's Mill; Joel hain't got no complaint. We hev no evidence in writin' thet Hank brought 'bout ther sale of the cow by a trick. There wor no force used. Joel hain't a drinkin' man, so he warn't imposed on; it wor jest 'fected by a leetle sharp-tradin', so it 'pears ter me ez ther pl't'f hez produced no evidence in s'port uv his claim; we'll dismiss the case."

WRONG WITHOUT REMEDY: A LEGAL SATIRE.

VI.

EXPENDITURES NECESSARY, BUT UNLAWFUL.

BY WALLACE McCAMANT.

ANDERSON up to this time had never attempted to prey on a railroad corporation. He knew the power possessed by railroad officials and the fight they were capable of putting up when once aroused. But Anderson was now in the possession of large available assets and was in receipt each month of a handsome income from his Oregon mine. He had no enterprise on hand for the time being and he determined to utilize his knowledge of corporation law for the purpose of transferring to his own ac-

count some of the surplus funds of a railway corporation. He had for several years been the owner of a few shares of stock in the St. Louis and Western Railway Company and he began with serving a notice on this company that he desired to examine their books. He received no reply to his notice and wrote again after a reasonable time on the same subject. This communication also remained unanswered and finally Anderson called at the offices of the company with his expert and demanded the right to ex-

amine the auditor's books. The right was denied and he immediately began a *mandamus* proceeding to enforce it. This proceeding was hotly contested on both sides. It found its way through the several courts, and finally at the end of two years a peremptory writ of *mandamus* was issued directing the officers of the company to permit the examination. Anderson accompanied the sheriff and saw that the writ was personally served on the secretary, the treasurer and the auditor.

Anderson and his expert settled themselves in the office of the latter official and from day to day spent their time in wading through the books of the company for the previous six years. They were treated cavalierly by the railway men; sarcastic remarks were made about them with intent that they might overhear; in countless ways they were impeded and embarrassed in their work of investigation. They paid as little attention as possible to these things and proceeded with their work with a patience and tenacity of purpose worthy of a better cause.

After several months' work Anderson was able to write the following letter to the treasurer:

George M. Knox,
Treasurer St. Louis and Western Railway
Company,
St. Louis, Mo.

Dear Sir:

On investigation of the books of the corporation I find a record of itemized expenditures by you as the treasurer of the corporation during the past two years which may be conveniently lumped together as follows:

Expense of securing additional necessary franchises for the use of streets in St. Louis.....	\$31,256
Contribution to campaign fund to reelect Governor Bean of Colorado	5,000

Amounts expended to beat Legislators Hatch, Jones, Maxwell and Atchison, all candidates for reelection and all hostile to corporate interests	9,830
Amounts expended to assist in reelecting Legislators Dixon, Hampton, Williams, Lefever, Bascom, Kirby and O'Farrell, all friends of the road	11,465
Amounts expended in protecting company's interests at last session of Missouri legislature	23,400
Amounts expended in protecting company's interests at last session of Kansas legislature	17,750
Amounts expended in protecting company's interests at last session of Colorado legislature	14,880

Total expenditure for purposes above noted in two years.....\$113,581

There are records of similar expenditures during the previous four years which aggregate \$206,413 additional.

None of these sums appear to have been paid for legitimate arguments made before the respective committees of the several State and municipal legislatures, for it appears elsewhere on the records that arguments were made in each case by retained counsel for the company before these several bodies and these counsel are paid by the year for their services. These payments were therefore made, as I contend, contrary to the policy of the law for an improper purpose.

I further dispute the right of the officers of the corporation to give away its money in campaign contributions as against the rights of dissenting stockholders. I therefore demand that these sums, aggregating \$319,994, be forthwith returned to the treasury together with interest thereon to date.

Very truly yours,
HAMILTON ANDERSON.

A similar letter was written to the auditor and by communications sent at the same time Anderson made demand on the board of directors that the corporation bring suits against the treasurer, auditor, executive committee, and all others implicated for the recovery of these sums of money.

A few days later Anderson received a call from one of the attorneys of the company, a man whom he knew very pleasantly at the club. He explained that Governor Bean and the legislators whom the company had helped had been instrumental in smothering and defeating legislation which might seriously have crippled the road. That the legislators whom the road had tried to beat were dangerous demagogues who had already made a great deal of trouble and expense for the company.

He detailed the records of these obnoxious legislators, explained the measures they had advocated and showed to Anderson's satisfaction that they were dangerous men who would confiscate corporate property if they had the power, and whose theory of politics was to win popularity by denouncing wealth as a crime and arraying the poor against the rich.

As to the franchises, he explained the necessity the company was under of securing them and that with things as they were in St. Louis municipal affairs at the time, the franchises could not have been secured without the expenditure of this money. He added that all large railway corporations were represented by lobbyists at sessions of the legislatures of the States wherein their properties lay and that without such representation, demagogues and grafters would legislate corporate interests out of business. He contended that the amounts so expended by the corporation were not excessive and in conclusion he reminded Anderson of the smallness of his holdings of stock and of the insignificant interest he had in the subject-matter of his complaint; he hinted

that Anderson laid himself open to the charge of being a blackmailer by persistence in his contention. In response to all of which Anderson courteously, but firmly, expressed his determination to bring his suit.

A conference was held between the treasurer, the auditor and the general attorney for the road. The general attorney advised the other officials that Anderson, having made demand on the board, had standing to litigate the matter of his complaint and that as to most of his contention he was likely to prevail. These expenditures, while probably necessary to the protection of the corporation's interests, were contrary to public policy and the litigation would probably result in a judgment against the treasurer, the auditor and possibly the executive board, in favor of the corporation for not less than two hundred thousand dollars.

This judgment, when rendered, would moreover be under the control of Anderson for many purposes and Anderson could issue execution upon it at any time.

"That would sweep away a large share of my fortune," said Mr. Knox, the treasurer.

The attorney added that the probing of the affair would be likely to send some one to the penitentiary.

"We must buy our peace at all hazards," said Mr. Knox.

A few days later Anderson sold his stock in the St. Louis and Western for thirty thousand dollars. He surrendered the manuscript containing the information he had secured from experting the books and signed an agreement whereby he contracted to pay fifty thousand dollars as liquidated damages if he should ever disclose his information as to the expenditures he complained of or should ever cause suit to be brought against the company for any cause. Mr. Knox was advised that this last agreement could not be enforced, but he took it, thinking its possession gave some assurance that Anderson would not further levy tribute on him.

THE GLOVE: ITS RELATION TO THE LAW, THE BENCH, AND THE BAR.

BY CHARLES J. ALDRICH.

AROUND the glove, which evidently originated in necessity and the common desire for comfort, have risen many quaint and curious customs. Most of these observances now exist as memories and records only. A few are left, however, which seem senile and antiquated in the presence of this youth-loving and over-common-sense age; yet it is pleasant to recall that our ceremonious grandfathers had many uses for the glove aside from the simple desire for comfort and appearance which almost alone appertains to the unromantic today.

The glove of ye olden time was much else than a cover for the hand. It was held to be an evidence of wealth, an insignia of rank, a mark of gentle breeding; and much skill and money were expended in attempting to make it reflect the wealth and station of the wearer. Indeed, families wore gloves as distinctive as their coat-of-arms. Some of them were bedecked with silver, gold and precious stones; more frequently, however, they were covered with significant and elaborate embroidery. An historian tells us that the vanity of the chivalrous Norman youths led them to wear gloves so long and ponderous, and so covered with ornamentation that, so far as their hands were concerned, they were held less while gloved. The saying to be "handled without gloves" could well have originated in that little Dukedom which overshadowed Europe and conquered empires, whose youths without gloves were brave, glorious and conquering.

Antiquarians have preserved to us some of these wonderfully embellished gloves. Indeed, it is said that the one glove-cuff remaining to us of the beautiful pair that the accomplished but unfortunate Mary of Scotland "broidered" with her own hands for the

ruffianly Darnley, is said to be one of the most artistic bits of needlework in existence.

It is natural that many of the romantic observances connected with the glove should not escape the limner's art. In nearly all large collections of paintings will be found some striking picture dealing with the custom of challenging by the glove. Some of these are bold in conception. I recall a very striking one in which a warlike knight is offering back on the point of his sword the glove which he has accepted as a gage of battle. His opponent is standing reluctantly and listening hesitatingly to the arguments of a priest, who, it is easy to understand, is urging him not to engage in the deadly combat so earnestly symbolized by the other.

A Pleudeman has given to art his conception of the defiant act of the unfortunate Prince Conradin of Hohenstaufen, who, throwing his glove among the crowd from the scaffold in the market of Naples, entreated some one to carry it as an investiture of his kingly titles to his relatives, who would avenge his death and by virtue of his glove regain the crown.

Indeed, from the time that Boaz took Ruth to wife and bought the lands of Elimelech, Chilion and Mahlon "of the hand of Naomi," giving as a pledge his glove, down to our own times, when the theatrical German Emperor commanded his brother Henry to lay his "mailed hand" upon the far East, we have this little article of wearing apparel mosaiced in history along with many wicked deeds and wise ones, with treacherous queens and crafty statesmen, austere churchmen and bewigged judges, kings both wise and foolish, fair women and heartless poisoners, swaggering sworders and great captains. This simple covering of the hand has

afforded the romancer a theme, and poets from Austin Dobson to David have sung of it as a gage and a guaranty. Surely art, history and song have woven the glove into the tapestried tales of the romantic past.

It is an interesting study to trace the evolution of an article of dress, such as a hat or a glove, from the uncouth covers which the elements forced primeval man to assume, up to the development of the king's crown and his jewelled gloves of investiture. The present article, however, contemplates no such ambitious project, nor even to enter upon the general discussion of the various observances connected with the glove, but rather a brief survey of some of the peculiar and often-

pledge of faith for the execution of an agreement. In fact the earliest authenticated history which we have of the glove is of its being given as a pledge of faith in the conveyance of a parcel of land to Boaz that was Elimelech's, the husband of Naomi.

"Then said Boaz, 'What day thou buyest the field of the hand of Naomi, thou must buy it also of Ruth the Moabitess, the wife of the dead, to raise up the name of the dead upon his inheritance.'

"And the kinsman said, 'I cannot redeem it for myself, lest I mar mine own inheritance: redeem thou my right to thyself; for I cannot redeem it.'

"Now this was the manner in former time



GLOVE OF MARY, QUEEN OF SCOTS.

times significant consuetudinary relations which it has sustained to law, litigation, judges and courts.

Early literature affords numerous examples of the custom of giving the glove as a pledge of faith, delivery and investiture.

It is natural, since the glove originated in the necessities of the North, that in the Oriental countries its use became a matter of symbol, luxury and ornament. Therefore it is not surprising that many of the peculiar usages observed in connection with the glove should originate among the people of the south.

The giving of a glove was commonly regarded by these ancient Orientals as a sacred

in Israel concerning redeeming and concerning changing, for to confirm all things; a man plucked off his shoe, and gave it to his neighbor; and this was testimony in Israel.

"Therefore the kinsman said unto Boaz, 'Buy it for thee.' So he drew off his shoe.

"And Boaz said unto the elders, and unto all the people, 'Ye are witnesses this day, that I have bought all that was Elimelech's, and all that was Chilion's and Mahlon's, of the hand of Naomi.'" (Ruth, chapter iv, 5-9.)

The word shoe as it appears in this passage should be translated as glove. The Hebrew word כַּעַל (*Nangal*) signifies to shut, to close or to enclose, and when followed by רַגַל (*Regal*) it must imply either a shoe or

sandal. When, however, the former stands alone, scholars have usually rendered it as glove. In fact, the Talmud Lexicon gives it as glove. Also the high authority of the Targum or Chaldaic version renders it as נרתקידמינא (*Nartek yad*), the case or covering of his right hand. Since it is quite certain, according to Casaubon, that the Chaldeans wore gloves, it can be confidently assumed that glove and not shoe is the correct rendition of the original Hebrew of the beautiful tale of Ruth and Boaz.

The same idiom occurs in the 108th Psalm: "Over Edom will I cast out my shoe; over Philista will I triumph." This is more correctly rendered by substituting glove, since the expression was one of defiance or threat. To show that this is not begging the question, it is well to recall that in all Oriental countries the shoe related to ceremonials of humility and sorrow. John the Baptist proclaimed himself as preceding one whose shoe latchet he was unworthy to unloose; the suppliant still enters the presence of the Eastern potentate barefooted; the pilgrims climbed the sacred mount with bared heads and naked feet; the Hebrew mourner of today sits on a bench or on the floor without his shoes; and the orthodox Jew stands on his bared feet when he prays in the Temple. From these circumstances we are compelled to conclude that the powerful and poetical David would not have sung his contempt and defiance to Edom, Philista and Moab in the accepted idiom of humility.

M. Joseph, a Hebrew of great literary talent, believed this to be the proper exposition, and Joel Levy, the celebrated German translator, renders the passage referred to by using *hand-schuh*, i. e., glove or shoe for the hand. Both ancient and modern Rabbins render the word from the original writings as *glove* and not *shoe*. Favyn, who is perhaps one of the best authorities in reference to the customs of the days of chivalry, also says that the ancient custom of throwing the

glove was derived from the Eastern people, who in all sales or delivery of land gave a glove by way of delivery and vesture.

The titles of possession of cities were commonly conveyed by the delivery of a glove. A recorded instance occurs in an old city charter dated 1088, but more specifically by the Register of Parliament of Paris in 1294, which informs us that "the Earl of Flanders by delivery of a glove into the King's hand (Philip the Fair) gave him possession of the good towns of Flanders, viz., Bruges, Ghent, etc., etc."

Indeed it is evident that possession by delivery of a glove was a formality observed in many parts of Christendom in the middle ages.

Favyn claims that blessing the glove at the coronation of the kings of France is a remnant of the Eastern practice of vesture by the glove.

Du Cange cites an instance given in a charter of the thirteenth century of reinvestiture or restitution, which was symbolized by the person depositing his glove upon the earth. In fact, the act of challenging by throwing down the glove and the taking of it up was the seal of the compact or contract to meet in combat at a certain time and specified place.

Early man was not a globe-trotter, and but little a merchant; his travels were usually limited, and his obligations few. Indeed, before the world became full of lawyers, scribes and bankers, he employed very simple means to keep record of his contracts, of his claims and obligations. Notches were cut in a stick, which was afterward split in half, each party retaining the one-half of the cleft notches, which were to be compared on the final day of reckoning. Such crude book-keeping once served the national exchequer of England. It was natural that the leading men of the times recognized the fact that a man's glove was easily identified; also a pair of good gloves were of no inconsiderable

value; besides there appears to be from the earliest times a trenchant idea as to the sacredness of the glove as a pledge of faith; hence, the giving of a glove as emblematic of an obligation followed. This pledge of the glove, the separation of a pair, each one useless without the other, and to be held apart until the day of reckoning and redemption, was an idea suggestive and full of romantic simplicity well calculated to appeal to the direct minds of primitive people.

A gift of land to the church was often accomplished by depositing the giver's glove upon the altar as a seal of the compact. The

In Holland a quaint custom has survived the deluge of matter-of-fact, and illustrates one of the oldest means of proxy known to the antiquarian. While lawyers and scribes have made, in unmistakable terms, written conveyances of deputed power of action in place of the simple sending of a glove as an evidence of *locum tenens*, yet when the Dutch Jan of today, who has gone to the Indies to make his fortune, becomes lonely and longs for one of the plump, blue-eyed, peach-cheeked damoselles of the dykes to share his heart and home, he writes to some friend describing his tastes, hopes and desires. The



GLOVE OF HENRY VI.

Earl of Shrewsbury, in vowing to build an abbey to St. Peter in 1083, placed his glove upon the altar as a pledge of faith.

The glove has borne a prominent part in the affairs of brides as well as bargains. The gift of gloves from a lover to his inamorata was considered a binding factor in the betrothal contract. "Seales to the truth of hearts," says the Coventry man in that rare pamphlet issued in 1618, in which the advantage of Country and Court were debated. It was held that the gift of "a payre of Gloves & a handkerchiffe are as good as the obligations."

friend forthwith proceeds on the French legal maxim, *cherchez la femme*. When he finds one both suitable and willing, he sends to the exile her photograph and description, the latter including both her weight and the size of her *dot*. If her pedigree and proportions are satisfactory, the return mail brings the power-of-attorney and a *left-hand glove* to the friend, who goes through the marriage ceremony by proxy and dispatches the blushing bride on the next packet to restore the left glove to its mate and receive the nuptial kiss.

Instances of holding land by the tenure of

a glove are fairly numerous. A remarkable instance is noted in the thirty-third year of the reign of Henry VIII., in which the site of the ancient Monastery of Workshop was given by the king to the Earl of Shrewsbury, to "be held *in capite* by the service of one-tenth of a knight's fee, and by the royal service of finding the king's right-handed glove at his coronation, and to support his right arm on that day, so long as he might hold the sceptre, paying moreover a yearly sum of £23 8s. 6d."

The Manor of Elston in Nottinghamshire was held by the annual payment of one pound of cummin seed, a steel needle and two pairs of gloves.

Since the earliest records of mankind and governments the glove has been an insignia of vested rights, and as such has borne a prominent and significant part in the ceremonies of coronations and installations in office.

In the year of 1002 the bishops of Paderborn and Moncerco were put in possession of their sees by receiving a glove.

The gloves which the archbishop presents to the king of France during his coronation and which have been blessed are emblematic of investiture of office, as well as a guaranty of secure possession of the kingdom. The following signal instance of the observance of this property of the glove is recorded: After the death of the bastard German usurper Mainfred, Charles of Anjou deprived the unfortunate German Prince Conradin of both crown and life. The following circumstances are said to have taken place: The last of the house of Hohenstaufen, while ascending the scaffold in the market place of Naples, lamented his hard fate, asserting the while his divine right to the crown. Then drawing off his glove, he threw it into the crowd and entreated some one to take it as a token of investiture to his relatives, who would avenge his death and recover his kingdom. A knight sufficiently bold and daring

took it to Peter, King of Aragon, who, by virtue of this investiture, took up arms against the usurper and through the claim transmitted by the glove was afterward crowned at Palmero.

The glove upon various occasions, at different ages, and in separate countries has been used and exhibited as an emblem of security to the person. It is to be related that the unfortunate Queen of Navarre was sent a pair of gloves to pledge her security when she went among her Catholic enemies. History recalls how that pledge of "irrefragable faith," as Sir Walter Scott puts it, was most infamously violated.

Until the first part of the eighteenth century, during the annual fair called the "Free Mart," a golden or gilt glove was hung out at the jail door in High street, at Portsmouth, England, as a pledge that all persons who attended the fair were secure from arrest for debt during the fair's continuance, which was usually about fourteen days. This peculiar immunity is said to be the reward for the service of a great crowd of petty criminals, debtors and montebanks, who, when summoned, went from the fair to the relief of a besieged Earl, near Portsmouth, and chased the enemy across the border.

The custom of hanging a large white glove upon the portals of the Guild Hall in Devonshire towns as an announcement of the king's grant to the people to hold a fair is still observed. This is a relic of an old custom sanctioned by law and was the legal mode of opening a Free-Mart or market. It was symbolic of the Royal consent to the privilege of assemblage of people for pleasure and exchange. The old law says "the king ought always to send his glove, in token of his consent and approval; without which, any law or regulations made for the Free-Mart, or market, are void."

Since the delivery of the glove was regarded as a necessary part of the ceremonial of investiture with office, it naturally fol-

lowed that in depriving a person of his office he should be divested of its insignia. It is stated that the Earl of Carlisle, in the reign of Edward II., being impeached for holding communication with the Scots, was condemned to die a traitor. Walsingham in relating the circumstances of the Earl's degradation, says "his spurs were cut off with a hatchet and his *gloves* and shoes were taken off." The spurs were removed in this rather rude form, since to take off a man's spurs was to humble one's self and to acknowledge him a superior or a guest,—a traitor

difficult to ascertain; it is quite possible, however, taking the most charitable view of the matter, that since gloves were considered very appropriate gifts and in early days often costly ones, it was thought, perhaps, that legal prohibition would relieve the judge of the embarrassment of the acceptance of a gift which might be construed or intended as a bribe. In fact so frequent was the giving of gloves indulged in that giving gift-gloves was the term applied to the common practice of presenting gloves in which money was enclosed as a bribe or token of thanks for any



GLOVE OF JAMES I.

was neither, therefore not even a menial would unlatch them.

So significant of authority and station was the glove that in early times, and indeed until quite late, all officers, civil as well as military, wore gloves.

Chambers states that in early days the Saxon judges were forbidden to wear gloves on the bench. This fact is to be noted in *Speculum Saxon* lib. iii. No reason is assigned for this prohibition. The interdiction doubtlessly referred to leather gloves, since a kind of white linen gloves in contradistinction to leather ones is also referred to, but without objection. The origin of this embargo is

attention or services rendered the giver. The prevalence of this custom appears to be a valid cause for the prohibition of judges wearing gloves on the bench. Perhaps the Portuguese proverb *Nao traz lavas* (he does not wear gloves), may have some bearing upon this question, since it is taken to be an expression of confidence in a person's integrity. The following historical incident further tends to show that glove giving and bribery were looked upon as two acts with but one intention:

When Prymme was searching the assets of Archbishop Laud, during the latter's incarceration in the Tower of London, the worthy

churchman urged his searcher to take a pair of gloves from a bundle which had been opened and carefully inspected. Prymme refused to take them until his Holiness had repeatedly assured him that he could take them without fear of bribery.

In connection with gift gloves and bribes a notable anecdote is related of the great and high-minded judge, Sir Thomas Moore. It appears that he had recently decided a case in Chancery in favor of a certain lady, who on the following New Year's Day presented his worship with a pair of gloves containing forty pounds in gold as a token of her gratitude. The virtuous judge returned the guineas with the following judicial and diplomatic acceptance of the gloves: "It would be against all good manners to forsake a lady's New Year's gift; but the lining you will be pleased to bestow elsewhere."

A singularly beautiful custom once prevailed in that of presenting the judge with a pair of gloves at a *maiden assize*. The custom in England is of high antiquity, and consisted of the sheriff presenting a pair of gloves to the judge who had presided over a session of the court which concluded without any one receiving the sentence of death. The clerk of assize and the judge's officers, on the same occasion, were presented with glove silver—money with which to buy gloves.

In Scotland a still more beautiful custom consisted of presenting the judge with a pair of white gloves on a maiden circuit: that is, when there was no case for trial. I have been unable to determine whether these customs have ever been followed in the United States or whether they still obtain in the old country. It is feared that the latter usage has disappeared, because of the increase of crimes by the legislative multiplication of offences. It is not learned if any antiquarian had found such a rare pair of gloves.

So many of these delightful customs are disappearing one after another until it is

reasonable to fear that the dignity of the court finally may be merged into the "gentleman in the shirt-waist," and that the bar will appear in their shirt sleeves and duck trousers or golfing breeks.

Among the instances of legal prohibition of the wearing of gloves, a unique and almost forgotten law is to be found in the old records of the city of Boston. It not only prohibits the wearing of gloves under certain circumstances, but also forbids the ancient custom of presenting funeral gloves. A reference to this law is found in the *Massachusetts Centinel* of April, 1788. The purpose of this peculiar legislation was to prevent excessive expenditure and the lavish display of mourning garb. It is the only instance of its kind that the writer has been able to find in the legal records of the United States.

An article which has borne such a significant part in the affairs of men and nations could hardly escape implication in many questionable affairs; indeed, the glove's relation to crime is historic.

Perhaps the first historical record regarding the glove's relation to criminology is that of the unfortunate Queen of Navarre, who was sent a pair of gloves as an embassy and guaranty that she could go among her enemies in perfect security. So great was her confidence in the pledge that she unhesitatingly went, and is said to have died from the effects of a pair of poisoned gloves which were presented to her. This infamous breach of faith was also the signal of the beginning of one of the greatest tragedies of fanaticism—St. Bartholomew's massacre.

The ancients who possessed little knowledge of pathology but greatly exaggerated ideas of the mysterious powers of the poisoner, have recorded numerous instances of death supposed to have been produced by the wearing of an article which had been impregnated with a deadly poison. The counsellors of Queen Elizabeth in a long recommendation to her Majesty, warned her

against accepting any presents from foreign countries or unknown people, unless these articles were carefully inspected and tested to ascertain whether or not they contained poison. Gloves were especially mentioned. This is not surprising when we consider the extravagant ideas then entertained as to the knowledge of the professional poisoner, and of Queen Elizabeth's fondness for fine gloves.

A curious instance is recorded in the Criminal Annals of England, where it is stated that two sisters, Margaret and Phillis Flower, were executed at Lincoln in 1618, for bewitching the youngest son of the Earl of Rutland. It is said that, "they did steal

to languish, and the witness is now permitted to take the oath while holding up a gloved hand. In England some one who desired to prevent further thickening of an already pachydermatous conscience appealed against this breaking of an ancient and respectful observance, but the judge, who decided the appeal, held that it was immaterial whether the hand was gloved or not, and that the oath was still binding and in full force, notwithstanding the fact that the hand was encased in leather. The good Lord only knows what encased the conscience. It is a question if there be not minds that would absolve themselves from perjury because they hold



GLOVE OF QUEEN ELIZABETH.

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and bury in the ground the glove of his lordship; and as his glove did rot and waste, so did the liver of the said Earl rot and waste." It is also said that Colonel Blood gave a pair of gloves as a manifestation of his friendliness to the wife of a Mr. Edwards, the keeper of the crown jewels in the Tower of London, and this friendship was a part of the plot by which this man of sanguinary name attempted to plunder England's strong box. Some few years ago it was asserted that an attempt upon the life of Madame Patti was made by presenting her with a pair of poisoned gloves.

In early days witnesses were required to remove their gloves while taking the oath, but this good old fashion has been allowed

up a gloved hand while taking the oath as they have when purposely kissing the thumb instead of the Bible.

While no authentic instance can be found wherein the glove was used to swear in court, yet it may not be amiss to recall the fact that many instances are recorded of the custom of swearing by the glove in conversation. It is very tritely alluded to by Shakespeare:

Falstaff: "Pistol, did you pick Master Slender's purse?"

Slender: "Ay, by *these gloves*, did he—by *these gloves*."

Pistol: "Word of denial—froth and scum—thou liest."

Slender: "By these gloves, 'twas he."—*Merry Wives of Winsor.*

Wager of battle or trial by combat is of the highest antiquity and survived up to a comparatively late period in the history of the two legal systems under which England was governed, yet we find few early references to the forms and ceremonies incident to the demanding of this form of trial.

The glove figured largely in the punctilious ceremonials of these primitive courts of force. It was not only the gage of battle, but was the sign and seal of a mutual agreement to meet in mortal combat at a certain specified time and place.

Sir Walter Scott, than whom no more painstaking and accurate antiquarian ever wrote, has beautifully described the ceremony of defiance in the case of a murderer who demanded trial by battle and under sanction of the church was allowed this right:

"High mass having been performed, followed by a solemn invocation to the Deity, that He would be pleased to protect the innocent and make known the guilty, the name of Bonthron sounded three times through the aisles of the church."

"The murderer's brain was so much disturbed, that it was not until he was asked for the last time if he would submit to the ordeal, that he answered, 'I will not; I offer the combat to any man who says I harmed that dead body.'

"And, according to the usual form, he threw his glove upon the floor of the church."—*Chronicle of the Canongate.*

Scott again used this custom in *Ivanhoe*, where he causes Rebecca to say, "I am a maiden unskilled to dispute for my religion; but I can die for it, if it be God's will. Let me pray your answer to my demand for a champion."

"Give me her glove," said Beaumanoir. "This is indeed," he continued, "a slight and frail gage for a purpose so deadly! Seest thou, Rebecca, as this slight glove of thine is

to one of our heavy steel gauntlets, so is thy cause to that of the Temple, for it is our order which thou hast defied."

This consuetude, according to Gerard de Nevers, also existed in Spain, and undoubtedly it extended throughout Christendom at that time.

The following curious record of defiance by the glove is related by Booth in his *Nature and Practice of Real Actions*: "In the writ of right for the manor of Copenhaw, in the county of Northumberland, battle was joined upon the meere right—and the champions appeared. And it was commanded by the court, that the champion of the tenant should put five pennies into his glove—in every finger-stall a penny—and deliver it into court; and so the demandant should do the same; and the judges received the gloves, &c.

"The champions being on their knees, the counsel for the parties were asked by the Lord Chief Justice why they should not allow the champions, and why they should not wage battle; who answered, they knew no cause, &c., &c."

As late as 1571, according to Spelman, a duel was appointed to be fought in Tothill Fields, which was to be a trial by combat respecting an estate in Kent. The parties appeared at the Court of the King's Bench and demanded "trial by battle." The court granted the plea under the ancient statute, whereupon the plaintiff threw down his glove and the defendant then took it up on the point of his sword and carried it off. The court fixed the time and place of the duel, but Queen Elizabeth interfered and it did not take place.

The last defiance by glove in which a case at law was to be decided by wager of battle is given in the records of the Court of the King's Bench in 1818.

"In the King's Bench, Michaelmas Term, in the 58th year of the reign of George III.—Ashford *versus* Thornton.

"Abraham Thornton was attached to answer William Ashford, who was the eldest brother and heir of Mary Ashford, deceased, of the death of the said Mary Ashford, *etc.*, *etc.*, of which said choking, suffocating and drowning, she, the said Mary Ashford, then and there instantly died, *etc.*, *etc.* And the said William Ashford, who was the eldest

granted by consent until Monday, November 16th."

"November 16th.—The appellee being brought into court, and the appellant being also in court, the count was again read over to him, and he was called upon to plead. He pleaded as follows: 'Not Guilty; and I am ready to defend the same by my body.' And



SHAKESPEARE'S GLOVES.

brother, and is heir of the said Mary Ashford, deceased, is ready to prove the said murder and felony against him, the said Abraham Thornton, according as the court shall direct, and hath found pledges to prosecute his appeal.

"Mr. Reader, who was with Messrs. Reynolds and Tindal, applied for time; the court

thereupon taking off his glove, he threw it upon the floor of the court, *etc.*, *etc.*"

The battle, however, did not take place, the authorities took immediate measures for the repeal of an almost forgotten law, terminating forever the trial by battle, a relic of the middle ages which had disgraced the English Statutes for more than eight centuries.

THE LAWYER-GENEALOGIST.

BY HARRY SHELMIRE HOPPER.

THE lawyer who delves into genealogical research frequently becomes possessed of curious facts and has many odd experiences. Of course, any person of ordinary intelligence can become a so-called genealogist, but the lawyer's familiarity with legal records and court files, together with the suggestiveness of his mind—the result of legal training as to the sources of evidence, give him a decided advantage over the layman. The law recognizes certain fixed rules as to evidence of pedigree, all of which enter more or less into the histories of families. Birth, marriage, descent and collateral relationship, constitute the principal lines of evidence.

Whenever a lawyer enters into an investigation of a genealogical subject, the layman suspects him of a hidden object or purpose, and he is credited with or accused of hunting up a "fortune" or an "estate" or "property," which is being enjoyed by unscrupulous usurpers or squatters, and which rightfully belongs to certain "heirs" who are kept out of it. Sometimes the estate is alleged to consist of property in a certain location belonging to undetermined heirs. Again, the heirs are said to be known, but they do not know where the property to which they lay claim is located. The writer has assured people—men and women—over and over again, that he was simply compiling a family record and had no idea of recovering or hunting any property or estate, but the assurance has fallen meaningless upon the ears of the listeners, and some of them will believe as long as life lasts that he is hunting a "fortune," of which part belongs to them.

The female portion of society seems to be born with a characteristic which develops early and lingers long, of not truthfully stating ages—that is, of themselves—but the

writer has found the most willing informants to be those of the sex who could tell the ages of all their relatives accurately. Old age is generally considered a crown and an honor, but a foot note was added to a copy of a page of family records, to the effect that the ladies preferred that their ages be not known. They were all nearly or over seventy years of age, but still were jealous of imparting that fact.

Superstition is sometimes unearthed in searching for evidence. Among a number of ancient documents relating to a family was a folded sheet of paper to which was attached the "caul" in which an ancestor had been born fully a century before. And this family was composed of religiously inclined people!

In one instance, search was being made concerning the parentage of a man who was deceased and a court record of a most peculiar nature was found. At the time of his death, he was the owner of considerable real estate and certain alleged brothers of the decedent claimed an interest in the property. In self-defence the widow was obliged to bring an equity proceeding to quiet the title and remove the cloud which appeared upon it. To do this, she was obliged to prove by witnesses that her deceased husband was an illegitimate child and that the alleged brothers were legitimate children of the same mother.

In the course of another investigation, the fact was developed that the only child of a certain couple was an adopted child: a foundling left upon their door-step in infancy. Being childless, they took in the waif and raised it as their own, and gave it their name and left it their property when they died.

Sudden disappearances are always subjects of daily news, and in searching out branches of families, instances are found in which an

individual goes to a certain town, or starts on a voyage or journey and is never afterward heard of.

A genealogist becomes popular with his kin, near and distant, notwithstanding the fact that some are suspicious of his motives. The lawyer-genealogist discovers that he has many, many "cousins"—which is the convenient term for kinsmen whose relationship is

too remote to be otherwise expressed in a single word. The alert practitioner is happy to have some of them become his clients, but he is also sometimes made unhappy thereby. The writer has rendered legal services to "cousins" and has afterward been met with the compensation of words: "We did not know we had to pay!"

WOMAN AND THE LAW IN BABYLONIA AND ASSYRIA.

By R. VASHON ROGERS.

GEOGRAPHICALLY, ethnologically and historically, the whole district between the two great rivers of Western Asia, the Tigris and the Euphrates, forms but one country. The ancients recognized this fact, and called it all Assyria, though Babylonia would have been a more accurate designation. Its primitive people who built its cities, originated its culture and invented the hieroglyphics out of which its cuneiform writing came, were of the Turanian family; the Highlanders were called Accadians; the Lowlanders were Sumerians, "the people of the two rivers." We are not bound to believe (as Berosius tells us) that kings reigned in this land 432,000 years before Noah's flood, but we do know that two thousand years before Christ, Sargon founded a library. Babylonia was the older State, but at last became a mere apanage of Assyria. In art, science and literature Assyria was the pupil and imitator of Babylonia.

In ancient Babylonia the parents had the power of selling their children before they came of age, and where the parents were dead the same power was possessed, at least in Assyria, by a brother over his sister. In Babylonia the sons of well-to-do parents were sent to school at an early age, and the

girls shared in the lessons given their brothers. Much time was spent in learning to read and write. It took years of patient labor to learn the cuneiform system of writing; a vast number of characters had to be remembered, conventional signs differing often very little from one another; the styles of writing varied greatly, and the pupil had to learn them all; and each character had more than one phonetic value. The language of the Sumerians, who had invented these symbols, had to be acquired to fully understand them. The children were well taught in the rudiments, judging from the few mistakes we find in spelling.

The writing material was clay, and the cuneiform (or wedge-shaped letters) were engraved upon soft bricks of this common stuff by a stylus; the bricks were afterward baked in a kiln to dry them. Ofttimes the writing is so minute that a magnifying glass is necessary to read it properly. Several tablets, or bricks, fastened together, formed a book, and of these books immense numbers have been found; in one place thirty-two thousand of them were discovered, arranged in the order in which they had been placed 2700 B. C. Letters yet remain written by a lady in Babylonia to one of the Pharaohs of

Egypt about 1500 B. C., and amid these same archives of Tell-el-Amarna are letters from women to women, and one dainty little tablet written by a princess to her royal father, all in the cuneiform characters; these after lying in wooden chests for more than thirty-three centuries have been deciphered and read once more. Many legal documents signed by women exist in the brick libraries of the Euphrates valley.

In Assyria education was more limited. In these countries, when the writing was intended to last, the old Chaldean cuneiform characters were used and clay tablets; when it was but of an ephemeral nature, the scribes often used prepared skins, or wooden tablets, or the papyrus leaves and the cursive characters derived from the Phoenician alphabet (at least in later times.) Books of baked earth were inconvenient to hold, heavy to handle, and the letters did not show up well against the yellow of the clay; but they lasted better than papyrus rolls, fire could not hurt them, water was slow to injure them, if broken they could still be re-united and deciphered, unless actually ground to powder. Thus have books, composed thousands of years before the Assyrian empire, survived the accidents of twenty conquests, the destroying fury of man and the assaults of time, and remain intact.

When legal contracts were drawn up each party employed a scribe, who, with the judge's scribe, all began to write at the same time, at the upper left-hand corner of the tablet; for three copies of every legal document were required, one for each party and one to be deposited with the royal notary, or registrar of deeds; originally two copies only of contracts had been used, one remaining with each party: but skilful though dishonest people even then existed. These Chaldeans had a good way of preventing fraudulent alterations—the tablet when signed and sealed they covered with a second layer of clay, upon which they traced an exact copy

of the original deed or contract; this latter was, of course, inaccessible to the forger, and if a dispute arose or an alteration was suspected in the visible text the outer tablet was broken open before witnesses and the original version appeared. When the scribes had finished their work, they compared the copies, the judge read it aloud, then the parties, the witnesses, the scribes and the judge all affixed their signatures or marks, the officials also placing their seals; finally the tablets were placed in an oven and baked.

These contracts were dated—sometimes in the year of the king, sometimes by reference to some event, as "the year in which Ash-numak was inundated, under King Kham-murabi," or "the year of the great wall of Kar-Sha-Mash," or "the year in which King Khammurabi, by order of Ann and Bel, destroyed the walls of Mairu and the walls of Malka."

Two different principles struggled for recognition in the Babylonian family, the patriarchal and the matriarchal. This may have been due to the duality of race, the older Sumerian, the younger Semitic; or perhaps to the circumstances under which the early Babylonian lived. Scholars say that at times it would seem as if we must pronounce the Babylonish family to have been patriarchal in its character; while at other times the wife and mother occupies an independent and even a commanding position. In the old Sumerian hymns the learned reader finds the phrase "female and male;" but in the Semitic translations we have "male and female," as in these twentieth century days. Wherever in the Semitic world Babylonian culture had not penetrated, the woman was subordinate to the man, his helpmate and not his equal. Istar, in Babylonia, was a goddess; independent; equal to the gods; when she got among the Semites in Southern Arabia, and Moab, she became a god.

In Babylonia the women claimed rights which placed them almost on a level with

the men. One of the early sovereigns was a queen, Ellat-Gula; and even in Assyria the bas-reliefs of Assur-bani-pal represent the queen as sitting and feasting with her husband. All Biblical readers know well the stories of the banquets of Vashti and Esther and King Ahasuerus; but of course these were of much later date. In the Tell-el-Amarna tablets one can read the polite greetings sent by Tushratta of Nutani, a king of Mesopotamia, from his wife to the widow of the Egyptian king, fourteen or fifteen hundred years before Christ.

Up to the last the Babylonian women could hold property in her own name, could enter into partnership in business with others, could buy and sell, lend and borrow, was the equal with man in regards to the possession and management of property; could appear either as a plaintiff or a defendant in a court of law; could bequeath and devise her property as she wished, and inherited equally with her brothers subject to her father's will. There still exists a document (written in the days of Abraham), recording the gift of a female slave by a husband to a wife, and this slave and her progeny the wife was to keep though she became a widow, or was divorced. A will still remains, made in the eleventh century B. C., while Nebokina-bla reigned, bequeathing property to a daughter and then to a sister; in a deed of the second year of Nabonidas (555 B. C.), a father transfers all his property to his daughter, reserving to himself only the use of it for the term of his natural life, and she agrees to supply him with all necessaries, food, drink, oil and clothing. A few years later, in the reign of Cyrus, a woman named Nubta, or the Bee (who evidently owned looms and traded in woven fabrics on her own account), hired out a slave for five years that he might be taught weaving, and (by another contract) she agreed to supply him with food and clothing while he was learning his trade. The record exists of an action

brought by the widow of Ben-Hadad-Nathan to recover her husband's property; the husband and wife had traded together, and a house had been bought with part of their money; a half-brother of the defunct husband claimed the house and everything; the case was tried in Babylon before five judges in the ninth year of Nabonidas, and the widow won. The following were the judges present at the delivery of the judgment: Nergal-banunu, Nebo-akhi-iddin, Nebo-sum-ukin, Bel-akhi-iddin and Nebo-balasu-igbi, and the clerks of the court were Nadin and Nebo-sum-iskum.

Other writings remain relating to borrowing money by a husband and his wife in partnership; to a woman selling a slave; to a woman suing in the court for the price of a slave. It must be confessed that clear evidence exists to show that ladies in those primitive days were quite capable of sharp practice in their commercial transactions—sometimes even trying to win their lawsuits to perjury. One woman, we know, was heavily fined by the judges for trying this short road to success.

These Babylonian laws prevailed also in Assyria, and contracts that have come down to the present time show that the Assyrian women enjoyed almost as many privileges as their sisters in Babylon. In fact, it seems that they could hold civic offices and even act as governors of a city in that country.

Indeed, wherever Babylonian laws and culture extended woman seemed to have been able to hold separate property. Canaan was long a Babylonish province, and Sarah—who was of Babylonish origin—owned a slave; and Caleb gave a well-watered field to his daughter Achsah. When the Jews were settled in Canaan, Babylonian customs and laws became effete among them.

In Babylonia slaves were deemed human beings; even female slaves were allowed to carry on business; we can read of one named Khunnatu who did so; after a time she de-

sired to set up some kind of a tavern or drinking shop; she rented a house, hired a large quantity of furniture, including three beds, ten chairs, three dishes and other kitchen utensils; borrowing 122 shekels of silver (upon which she agreed to pay interest) from her master, and spent it in buying fifty casks of beer and other things.

In the reign of Cyrus we hear that a lady mortgaged her field just outside the gate of Zamama at Babylon to a slave; still wanting money, she proposed that if the mortgagee would make her a present of ten shekels she would hand over to him her title deeds; this was done, and the slave took possession of the field.

The dowry which a woman generally brought with her on entering her husband's house made her independent, protected her from any tyranny on his part, and from any divorce on insufficient or unreasonable grounds. The dowry was her own absolutely, and she could will it as she liked, in case of a divorce she could take it back with her to her father's house or use it in setting up an establishment of her own. It was usually paid by the father of the bride, but if he were dead or if the mother was divorced and living on her own property, the mother took the father's place and provided the dowry for the daughter. If both parents were dead, it would seem as if the brothers had to furnish it. It was not always money; sometimes it was composed of slaves, furniture or cattle.

Naturally it was the bridegroom's duty and interest to see that the dowry was duly paid; if it was not handed over at the time of the nuptials he generally took security for its payment. The husband enjoyed the usufruct of it during the time of the union; often it was used to start the young couple in house-keeping and in business; perhaps more frequently the careful wife employed it in her own business affairs, especially if she had

other property. Should the father die before the actual marriage, his heirs had to pay what he had contracted to give. From a deed dated when Cambyses was king we find that sometimes payments were slow, in this case the dower was unpaid nine years after the marriage.

If the wife died childless, the dower returned to her family. If her husband died and she married again, of course she took her dowry with her, and if she had children by both her husbands, those of the first took two-thirds of it on her death, the children of the second getting only one-third, according to some authorities; according to others the children took equally. The dowry could not be alienated without the consent of the wife's parents, if they were alive; at least when Nergal-sharezer was king and Nergal-balidha and his wife Dhibta wished to sell a slave, part of the dowry, the lawyers considered the sale invalid without the consent of both Dhibta's father and mother.

The wife was also able to hold and dispose of whatever came to her by inheritance, or gift; the gains she made in business, the proceeds of the sales of her property, and the interest upon the capital she lent all belonged to herself, and herself alone.

No doubt the whole of the wife's privileges arose from the fact that the dower was given by the father to the bride, not by the husband, nor to him; she was not purchased by the husband or his friends, nor was he paid for taking her to his home. The husband received her and her estate with her; he received a benefit conferred, and so had to accept the conditions offered him, and could not make any. However, there are traces of an older order of things among the Semitic element of the population, and here the marriage portion was paid over by the husband.

Sometimes the mother had to provide the dowry for her daughter; when she did, her consent to the marriage had to be obtained.

In the eye of the law matrimony among the Babylonians was a legal contract, the forms of which had to be strictly observed. The ceremony itself was in part religious, in part civil; no marriage was legally valid without a written contract duly signed and attested. In later days more stress was laid on the legal and civil aspect of the ceremonial than on the religious; the reverse was the original view. A fragment of Sumerian manuscript thus describes the religious ceremony: Those who officiated first placed their hands and feet against the hands and feet of the bridegroom; then the bride laid neck and head alongside of his; (why these postures we know not). Then the man spoke and said: "Silver and gold shall fill thy lap; thou art my wife and I am thy husband. Like the fruit of an orchard will I give thee children." Next sandals were bound on the feet of the young people and a latchet was handed to them wherewith to untie the shoes; then the bride's father handed over a purse of gold and silver, symbolic of the dowry.

Here is an account of another wedding: The men being assembled in one room, the women in another, the groom's father arises and makes the offer of his son's hand, the bride's father accepts it, and informs the company the amount of dowry he will give; the bride then enters, attended by her friends and the women of both families. She is placed by the side of the groom; his father takes her hand and places it palm to palm on his son's hand and ties them together with a thread of wool (symbolic of the band that links husband to wife); then he invokes the double of Nebo and of Merodach and of the king, and prays them to grant long years of happiness to the young people. Next the assembled friends add their blessings, prayers and congratulations; after that come feasting, banqueting, amusements, until the shades of evening fall, when the bride is conducted to her husband's home amid the wailings of the women and the delighted gazings

of the crowd outside. Only a freeman could use the symbol of the thread or invoke the attendance of the gods.

In the time of Nebuchadnezzar the ceremony had dwindled down to a simple joining together of the bride and groom. The joining of hands, or the bridegroom's taking the bride by the hand, is one of the most important marriage ceremonies among all Indo-European peoples. The same custom occurs among some of the peoples of Malacca; among others the little finger of the right hand of the man is joined to the left hand of the woman.

When there was a religious ceremony the scribe who had to draw up the formal marriage contract attended it, saw that everything proceeded regularly, and when it was over began his clerical work. The terms of the contract were generally very simple and clear. For example: "Iddina has spoken to Soulai, saying give thy daughter Bilitsounon in marriage to my son Zamamanadin. Soulai has consented and has given his daughter Bilitsounon one maneh of silver and three servants—Latoubaronon, Illasillabitiniz and Taslimon—as well as a set of furniture and a field of eight canes, as a dowry from Bilitsounon to Zamamanadin. He has given to Zamamanadin a guarantee of the maneh of silver, which he will pay by-and-by, his servant Nanakishirat, who is worth two-thirds of a maneh, and he adds nothing for the security of the other third still due; when he pays the maneh of silver Nanakishirat will be restored to him." After the contract was written the witnesses placed their nail marks or seals on the tablets.

At one time it was customary to state in the marriage settlements that the bride was spotless; for instance, we read: "Ana-a-uzni is the daughter of Lalimat. Lalimat has given her a dowry and has offered her in marriage to Bel-sunnu, the son of Astisan. Ana-a-uzni is pure; no one has anything against her."

Occasionally the bride's grandparents wished to show their appreciation and approval of the marriage, and we then have supplementary contracts drawn up something like this: "The Lady Etilleton gives of her own free will to the lady Bilitsonnon, the daughter of Soulai, her eldest son, Banitloumou and Bazit, her two servants, two servants in addition to the three servants which Soulai, her father, has given her. If any one should make a claim to revoke this gift may Merodach and Zirpanitum decree his ruin; may Nebo, the scribe of Esaggil, cut short his future days."

Hammurabi, or Amraphel,—who lived more than four thousand years ago and whose laws, engraved about 2250 B. C. (some 700 years before Moses wrote) have recently been discovered and translated,—was very explicit in his legislation about women, of the 247 sections of his code that have come down to us, over sixty deal with the fair sex. He expressly declared that a wife taken without a formal contract of marriage should not be deemed the legal wife of the man so taking her. He provided for the protection of the fame, honor and bodies of married women by enacting that the utterer of baseless slanders should be branded on the forehead; a woman accused by her husband of adultery and put away, if there was no proof of her sin, might make oath of her innocence and return to her home; an adulteress (unless forgiven by her husband) was to be drowned; a man violating the maiden wife of another in her father's house was to be put to death, but she went free, if he was caught. If a husband was made a prisoner of war and went away leaving his wife provisions for her support, and she—preserving not the sanctity of her home—went away to another house, upon conviction she was to be drowned; if, however, the husband had left no provision for his spouse when he was carried off a prisoner, then, even though she

went elsewhere, she was adjudged guiltless; even if children were born to her in the house in which she had taken refuge and afterward her true husband returned, then she was to go back to his bed and board, but the children were to follow the father. If a man struck a free-born woman, who was pregnant, and thereby caused a miscarriage, the assailant, upon conviction, had to pay her ten shekels for damages; if the woman died from the blow then the *lex talionis* came into play and the assailant's daughter was put to death; if the stricken one was a freed-woman, and miscarriage ensued, the sum payable in damages was half the amount; if a servant, it was two shekels; in case of the death of a freed-woman, the assaulter was fined one-half a maneh; if a slave, the third of a maneh.

What the prohibited degrees were is uncertain. A man could marry his sister-in-law; a marriage with a niece is reported; in the reign of Cambyses a brother married a sister by the same father; this was a Persian custom. Among the Assyrians marriage with a half-sister on the father's side was allowable; this was also lawful among the Athenians, and Abraham, an ancient Babylonian, married his half-sister. In Central America, on the other hand, a man could marry his mother's daughter, but not his father's. (Gen. XX, 12; Westermarck, 295.) Hammurabi decreed that a man having carnal knowledge of his daughter should be driven from the town, and he was to be drowned if he committed adultery with his son's wife; if he acted improperly with a girl betrothed to his son, but whom the son declined to marry, he was to be fined and had to return her dowry, and the woman could marry the man of her choice. If a man had illicit intercourse with his mother, both he and she were to be burned up; if with his father's legal wife, after she had borne him children, he was to be driven from his father's house.

During the Assyrian and Babylonish exile the Hebrews, contrary to their own habits, conformed to the practice of attesting marriages by written instruments, if indeed we may judge from what Raguel did when he gave his very much-married daughter Sara in wedlock to her cousin Tobias; "he blessed them and called Edna his wife and took paper and did write an instrument of covenants and sealed it." This story gives a remarkable example of how eager young fellows were, even in those days, to become the sons-in-law of wealthy men, however uninviting the lady fair might be; *mariage de convenance* is not a modern European invention; the murderous demon lover could not drive away suitors from Sara's side. (Tobit, ch. 6, 7 and 8.)

If the wife brought no dowry with her, or even when she did, the husband was often required by the marriage contract to pay her a certain sum of money in case of a divorce. For instance, a marriage contract made in the thirteenth year of Nebuchadnezzar provides that if the husband married a second wife such act was to be equivalent to a divorce, and the husband was to pay over to the first wife her dowry and a maneh of silver (thirty dollars) as well.

According to an early Sumerian law, while the repudiation of the wife by the husband was punishable only by a small fine, for the repudiation of the husband by the wife—that is, by adultery—the penalty was death. This law was in force in the days of Abraham, and a document of that date lays it down that if the wife is unfaithful to her husband she may be drowned, while it was provided that the husband could rid himself of his spouse by simply paying a maneh of silver. One Nebo-akhi-iddin, who married a singing woman in the time of Nebuchadnezzar, stipulated in his marriage contract that if he should divorce her and marry another, he would pay her six manehs, but if she committed adultery she should be slain with an

iron sword. Where the wife came from a wealthy and respectable family it is not likely that the husband in those late days would have dared to enforce the old Draconic laws against her; she was then considered on an equality with her lord.

We do not know all the reasons that were sufficient to justify divorce. The language of the early laws seems to imply that originally it was quite enough to say, "Thou art not my wife," "Thou art not my husband," just as a Mahomedan may say to his wife, "Thou art divorced," and she must return to her parents; or the old Hebrew said, "Take thy dowry and go," or the ancient Roman, "*Tuas res tibi habeto.*" The pecuniary penalties following divorce doubtless kept the husband in check, except in special cases. Perhaps want of children may have been a sufficient reason for divorce; adultery was; and a second marriage in the lifetime of the first wife.

Barrenness was a ground of divorce, and if a husband put away his wife for that reason, he had to give her the marriage portion he had bestowed on her at the wedding and the dowry she brought him from her father's house; if there had been no wedding portion, he had to give her a maneh of silver. If she was found guilty of dissipating his substance and neglecting him, he was permitted easily to dispose of her by throwing her into the water. Extravagance on the wife's part entitled the husband to a divorce and he might send her away without any compensation; if he did not care about a divorce, but wished another wife, the extravagant one might be compelled to remain in the house of her wronged husband as a servant. Sickness of the wife was no ground of divorce; 'tis true, the husband might take another one, but he could not cast out the invalid—he had to keep her in his house and support and maintain her until death them did part. If, however, the sick one on the arrival of number two desired to leave the house, the husband

could be compelled to restore her her dowry and let her depart in peace.

If a wife quarrelled with her husband and produced proof to the court justifying her conduct, and she was found free from blame, she was permitted to return to her father's house and the husband had to give her compensation.

When a man deserted his wife and she went to another house, if he returned and wished to take her back to his bed and board, she was not bound to go to him.

A man in a certain case might take a concubine. If, however, his wife gave him a handmaiden and he had children by her, he was then barred from taking a side-wife (as a concubine was called). If having a childless wife, he took to himself a concubine and brought her to his home, she was not to stand on the same footing as the wife proper; should she attempt to place herself on an equality with the wife, her master was to sell her, if she had no children; if she had children, he could not sell her, but was to give her money and reckon her among his servants. Should a father not give the daughter of his concubine a dowry and otherwise provide for her marriage, on his death the girl's brother had to furnish these things in a style in keeping with the paternal fortune. If a man intended to cast away his concubine, who had borne him children, and his legal wife had also presented him with children, he had to let each wife have her own children and also a useful portion of field, garden and possessions, that she might raise her little ones. When the man died and the children had reached majority, each woman received an allotment equal to a son's share; and she might then marry the man of her choice.

Polygamy was rare in Babylonia, and the tendency of the law was to prohibit it altogether. Few of the multitudinous documents that have come down to us from the second Babylonian empire show that a man had two wives living at the same time.

Sometimes a man had a concubine as well as a wife, but she was usually a slave. In early days there is no doubt that rich Babylonians occasionally indulged in two wives. We read that in the age of Khammurabi a certain Arad-Samas first married Taram-Sagilla and then took to his bed and board as a second spouse her adopted sister Iltani; but the agreement provided that Iltani should be subject to the orders of her sister, should prepare her food for her, carry her chair for her when she went to the temple of Mero-dach to worship, and obey her in all things. In fact, the poor second wife was to be little better than a slave; neither wife brought any dowry to Arad-Samas—this doubtless was one reason why he acted thus.

In time, the marriage with a second woman acted as a divorce of the first. Thus the man became subject to the same rule as the woman; neither could indulge in two consorts at once.

Professor Rawlinson states that so far as we have any real evidence, the kings of Assyria were monogamists, but he thinks it probable that they had a certain number of concubines. In Media, on the other hand, polygamy was commonly practised among the more wealthy classes, and the Persian kings' (particularly in the later times) enjoyed, or at all events possessed, a considerable number of wives and concubines.

According to the laws of Hammurabi, a widow with ungrown children had to obtain the consent of the court ere she could marry again. If the court approved, it first ascertained the value of the estate left by her first husband, it then transferred that to the custody of the widow and the intended number two and they had to keep it in good order and use it for the support and maintenance of the children of the first marriage; any sale of it, made without the approval of the court, was void.

If a man gave his wife any property, and the gift was evidenced by a writing, on his

deathbed she could give it to any son she chose; unless other sons could substantiate some claim upon it for service. If a widow married a second time, her new husband's property was exempt from seizure for her debts; and her estate was not liable to his creditors. If the two jointly contracted a debt after their marriage, they were jointly liable therefor. If she had children by her second husband, they shared her dowry with the children of her first husband upon her death.

A widow to whom her husband had given no gifts received her dowry and in addition a share of his estate equal to the portions of all her children; she also was entitled to remain in his house; if she wished to leave, she could bestow upon her sons the gifts he had given her, retain her dowry and marry again.

Among the Babylonians there were public prostitutes, who were under the protection of the law and formed a class apart, and had nothing to do with the respectable women of the community. But the records that have come down to us do not bear out the story of wholesale public prostitution told by Herodotus; the Father of History must have been imposed upon. Even if he was right, this prostitution must have been a kind of religious worship, as it was in Cyprus, in Armenia, in India in the temples of Juggernaut.

Istar, the Sun-goddess, was served by women whose lives would not now be called respectable; they were never lawfully married; they, however, formed a corporation like the priests. Besides these women there were priestesses of Istar, who were forbidden to marry; they lived in the temples, could hold property of their own and carry on business with it, paying a portion of their profits into the treasury of the temple. Women of high birth aspired to these positions. The records show that one Amat-Samas entered into partnership with two men to trade with a maneh of silver, which

had been borrowed from the treasure-house of the god; the contract provided that in case of disagreement, the capital and the profits should be divided equally between the three partners. Hammurabi was particular about these priestesses; he enacted that if a virgin of the temple sold liquor or entered a bar for the purposes of a drink, she should be burnt up. One who uttered an unproved slander against such a virgin was to be marked upon the brow.

Women were the equals of men in matters of religion. There were priestesses as well as priests. The oracle of Istar at Arbela was presided over by inspired prophetesses; and of them even kings inquired the will of heaven. By the way, Istar could be pretty lively at times; in the celebrated library of Assurbanipal, at Nineveh, there were tablets containing an account of her descent into Hades to bring back to life her lately departed husband. We are told that when she reached the ramparts of Hell she knocked, and on the appearance of the doorkeeper she addressed that worthy in some such words as these: "Guardian of the waters of life, open thy doors; open thy doors, that I may enter. If you do not I will sound the knocker. I will break the lock. I will strike the threshold and break through the portals. I will raise the dead and devour the living." (Needless to say, the imperative lady got in.)

Hammurabi required every man and woman to do his or her duty. For instance, if any one left a child with a wet nurse and the child died in the nurse's charge and she then suckles to maturity another child without the knowledge of the father or mother of the first infant, that nurse should be arrested because she so nursed the other babe, and upon conviction of the offence, her breast was to be amputated.

P. S.—Should the learned readers of the foregoing find fault with the diversity of spelling, I would remind them of a passage in

Owen Wister's novel: " 'But I expect I've got my own notions about spelling,' said Scipio. 'I retain a few private ideas that way myself,' remarked the Virginian."

P. P. S.—For corroboration and further de-

tails see *Babylonia and Assyria*, by Sayce; *The Tell-el-Amarna Period*, by Neibuhr; *Life In Ancient Egypt and Assyria*, by G. Maspero; and the last American Edition of Hammurabi's Laws.

THE RIGHT OF PRIVACY.

BY W. ARCHIBALD McCLEAN.

EVERY tendency evolves its antithesis. An irritant creates the need of a counter-irritant. The swinging of the pendulum in any one direction develops the returning swing. Nations and men seem to be in an endless struggle to acquire balance and poise.

The present age, among other things, may be said to be marked with a characteristic of publicity. The press of the country typifies this spirit of publicity. It seems to have a public sanction as part of the freedom of the people. The white light of publicity is rightfully looked upon as a safeguard. It is a protest against star chamber methods. Yet this very condition holds within itself the germs of a right of privacy, the returning swing for balance.

This right of privacy has been slowly developing within the last decade. It is unmentioned in the legal tomes of other days. It is based upon no ancient or modern statute. It is a new right Baron Commonsense is demanding of King Publicity. This king will yield as did his prototypes of old. The decisions of courts of last resort defining this right as yet can be numbered on the fingers of one hand. This antithesis of publicity becomes a hope making for national and individual poise.

This right is in no sense one of property. The reproduction of a private manuscript, or painting, or the publication of private letters, or of oral lectures delivered by a teacher

to his class, or the revelations of the contents of a merchant's books by a clerk, or the publication of a catalogue of private etchings, have all been prohibited on the ground that the manuscript, paintings, letters, lectures, merchant's books and etchings are a species of property belonging to the particular individual, which law and courts will protect. The dream of an artist's brush is the property of its creator and if never donated to the public will be as sacredly defended as lands and other possessions.

The right of privacy is not, however, one of property. It is a personal right, pure and simple. It has been called the right to be let alone, to be secure from public molestation. It is a condition plainly labelled "hands off." It is something which is each individual's very own. As much of it may be given the public as one chooses. There is a division line in each one's life, over which the public may not step and demand as of right that which is on the other side. The law says there is such a thing as the privacy of one's life which legally belongs to the individual and which may not be invaded without the permission of its owner.

To understand what this right of privacy now is and what it may become in the future, the authorities defining it must be examined. While they are clear upon the fact that there is such a right, they are timid at points in defining its limitations. They confine themselves rather closely to the issue and do not

venture into *obiter dictum*. Yet these decisions unquestionably suggest the elaboration of a fuller bill of rights on the subject.

The publication of a photograph was forbidden in a contest where votes were to be cast to determine the most popular individual. The voting was unsolicited and the photograph proposed to be used was unauthorized. An individual may not be compelled to lend himself or his vanity toward such a public exhibition to learn to see himself as others see him. If the proposed spectacle should be shocking to one's sense of modesty and refinement, so that he is unwilling to be a party thereto, it is the duty of the public to let him alone. To molest him under such circumstances would be a violation of the right of privacy. It can be no abridgement of the freedom of speech to prohibit publicity when it invades the rights of another. If it is not restrained when a right is to be protected, it would mean to give countenance to lawlessness.

It can be said to be unequivocally established that a private individual has a right to be protected in the reproduction of his likeness in any form. This is a right of privacy. It does not, however, follow that every photograph is an invasion of this right.

Where the publication of a life of a noted inventor was contemplated, which was to contain his portrait, both unauthorized by him, the court declared the law to be that while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book or painting becomes, when not protected by copyright, public property by the act of publication.

There is a distinction, however, between a public and private character. A private individual should be protected against the publication of any portraiture of himself, but

where an individual becomes a public character, the case is different. A statesman, author, artist or inventor who asks for and desires public recognition, may be said to have surrendered this right to the public. When anyone obtains a picture or photograph of such a person and there is no breach of contract or violation of confidence in the method by which it was obtained he has the right to reproduce it, whether in newspaper, magazine or book. It would be extending this right of protection too far to say that the general public can be prohibited from knowing the personal appearance of great public characters. Such characters may be said of their own volition to have dedicated to the public, the right of any fair portraiture of themselves.

It has been declared that whatever right of privacy an individual has, dies with him or her. This was legally asserted where an association of women selected a woman who had been dead for fourteen years, as a typical philanthropist and proposed to have a statue of her executed by a competent professional sculptor. This was met by a protest on the part of a single living relative. Death deprives us all of rights in the legal sense of that term. When the woman died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived, was a right pertaining to the living only. It is the right of privacy of the living which can only be sought to be enforced. 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 to be recognized.

A woman may very well in her lifetime have been most strongly adverse to any public notice, even if it were of a most flattering nature, regarding her own works or position. She may have been of so modest and retiring a nature that any publicity during her life would have been to her most disagreeable

and obnoxious. All these feelings died with her. After her death the execution of an appropriate statue could not violate her right of privacy nor would that of any living relative.

These declared legal propositions are the premises upon which will be built the future dominion of the right of privacy. What this realm may be, and how the domain of publicity, though bounding it on all quarters, will be compelled to make room for it and keep on the outside of it and let it alone, may be presaged by an inferential consideration of the right as already construed.

If a private individual has a right to be protected in the reproduction of his likeness in any form, then all cameras must respect this right. Because a kodak will reproduce the image of what it is pointed at when the button is pressed, is no sufficient reason or excuse for pointing it at everything and everybody. The publicity of photography must be compelled to take notice of every condition the right of privacy labels "hands off." Everything and everybody of a public nature may be said to be legitimate game for the lens. Where, however, the subject is a private character, should it not be understood that the kodak is forbidden unless it is with permission given?

Should not the rule as to one's own likeness also apply to his possessions which are peculiarly private and personal? If a picture has been painted, or the model of invention perfected, or a rare object purchased, the reproduction of the likeness of which might be disagreeable and mean a loss to the owner, should not the reproduction by camera or in any other way, of the likeness of all such personal possessions be prohibited until the owner has seen fit to dedicate them to the public?

If there is a distinction between an individual of a private character and one of a public character, ought there not to be a distinction in the individual of public character

between such things making up his public and such his private personality. So much of his life as he has dedicated to the public belongs to the domain of publicity. Are there not, however, private chapters in every such life, which have never been dedicated to the public, which ought to belong to the individual of public character as a right of privacy? Because the public is entitled to his portrait and every incident in his public life, or as much of his private life as he has given to the public, is no reason why the public should have a picture of an embrace between husband and wife, given when they have shut the door upon the world, or of a tear-stained face at the bedside of a sick child. Surely a public character ought to have the right to go home from the show and be protected from all public molestation by portraiture as he rides hobby horse with his son, plays bear with his children on his knees or rolls over the floor with the baby.

It has been legally intimated that a parent has no right to prohibit the reproduction of the likeness of an infant daughter. The right of privacy belongs to the daughter and not to the parent, being a purely personal right. If this is good legal common sense, may it not be a question of how much of the life of a public character as surrounds his wife and children is the proper subject of publicity?

Though the wife and husband may be a partner in the public character of the other, may not each, however, be said to have a right of privacy of their own, as well as the children which should not be invaded? In other words, has the public the right to snap kodaks at the wife and children of a President the moment they appear on the street and reproduce these portraitures? Without permission, ought not the right of privacy protect them from public molestation in this form?

It would seem as though the right of privacy, so far as legally interpreted, has been confined to reproductions by photographer,

painter or sculptor. Is it to be limited to this or given a larger meaning? Will not a pen picture as vividly portray the subject and invade privacy? May not a pen portrait offend the feelings and distress the subject more acutely than any other reproduction of a likeness? If so, why should it not be restrained as a violation of the right of privacy?

Does not the license of yellow publicity suggest the absolute need of and establish the principle and righteousness of privacy? Does not the publication of purely personal individual matters without any public significance or excuse, shock the verities of existence? Or is it only a question of taste? Or does its existence question the right of publicity in the premises? Does not every such unpermitted breach contain in itself a protest that the individual ought to have been let alone? Is not the ought but an expression of the right to be let alone?

If an individual of a purely private character lives within the law, ought he not to be let alone in so much of his life as is his own private concern and which he has in no way dedicated to the public? Ought not the individual of a public character be let alone in so much of his private life as is no part of his public life? The position the individual occupies in the social and political world as a citizen and laborer, his birth, education, marriage and death, and many other facts of existence may be said to be incidents of a public character. But are there not many incidents in his life which are his own and which ought to be his own as a right of privacy, and as to which ought it not to be said to the press "hands off?"

In every true man's heart there is a respect for privacy, and nowhere in the world does this redound more to the honor of mankind than among the gentlemen composing the realm of the fourth estate. Private matters, secrets of souls, have come to them by confession and otherwise, all of which are respected unless permission is given to use.

Examples of heroic self-sacrifice to this trust of privacy are of frequent occurrence. This condition, by a logic of common sense, means that there is a right of privacy which is respected by the reputable press and ought to be legally recognized and enforced upon all others.

Nor ought this to be unconstitutional. The freedom of speech and of the press guaranteed by the Constitution, implies a right to freely utter and publish whatever the citizen may please and to be protected from any responsibility for so doing, except so far as such publication by reason of its blasphemy, obscenity or scandalous character may be a public offence, or by its falsehood and malice may injuriously affect the standing, reputation or pecuniary interests of the individual. Would it not be entirely right and just for the court of last resort to further say that this freedom is guaranteed, except so far as it invades and violates the right of privacy? Any freedom enjoyed at the expense of a right is not a liberty, but a license, and it ought to be strictly technical to so interpret the Constitution. Should there not be a right of privacy which the public press could not invade, and in which every private individual or every individual in his private character would be let alone?

Ought there not to be a right of privacy, a freedom from public molestation by unnecessary and avoidable noise? Much noise is thoughtlessness and waste and without excuse in a public made up of individuals possessed of most delicate nervous systems. Are there not odors, and smoke, which invade not only one's possessions, but also one's personality? Is not the thoughtless blowing of a whiff of tobacco smoke into the face of another, to the latter's nausea and distress, an invasion of a right of privacy? Noise, smoke and odor have been enjoined as nuisances. Is there not a higher right calling for their restraint? Are they not invasions of the right of privacy?

The right of privacy has so far, in every reported case, been protected by the equity remedy of injunction to restrain a violation thereof. Where, however, the right has been violated and there has been no opportunity to prevent it, there must be a remedy. Every wrong must be punished. An invasion of a right of privacy would necessarily be a wrong to be legally vindicated and measured in damages. In many cases, the injury might not be tangible, as being to the feelings of the one whose rights of privacy have been invaded. Hence, it is to be expected that the damages would be small. In fact, it is altogether probable that courts would restrict recovery to nominal damages unless special damage could be proven.

With relief by injunction, when the right of privacy is threatened, and nominal damages when it has been invaded, should not

this right of privacy become so established as to protect every private and personal relation of the individual? Would not such a condition be an education toward respect for each other and hence self-respect? Would it not be a wholesome curb to publicity? Would it not give a new meaning to our boasted liberties, by opening, enlarging and guarding a sphere where individuality might grow and mature, conscious of a right to be let alone? If individuality is entitled to privacy as a right, then it is a duty resting upon each one of us to see that it is given.

The recent Libel Act of Pennsylvania will not, however, help to define any such right of privacy. It is restrictive in its terms and as such only worthy of condemnation. It is no bill of right. New liberties or new expressions of same can only come from enlarging declarations of government.

A LEGAL STUDY OF SAINT AUGUSTINE. THE SAXON.

By JOSEPH M. SULLIVAN.

THE origin and historical development of the early English law is a subject well calculated to arrest and rivet the attention of the thoughtful student. In the early days of Christianity the learned fathers of the church exercised a vigilant watch over the legal affairs of mankind. Saint Augustine was selected by Pope Gregory the Great to convert the native Britons to the Christian religion, and this noble saint, with several other monks, arrived in the province of Kent in the year A. D. 597, and immediately commenced their noble work among a strange and hostile people. King Ethelbert was readily convinced by their logic, and he immediately embraced the Christian religion. The baptism and conversion of King Ethelbert by Saint Augustine had a wholesome effect upon the common people, and in con-

sequence thereof the Christian religion made rapid progress.

From the conversion of Ethelbert by Saint Augustine we can trace the first collection and preservation of Saxon laws into writing, and the origin of English jurisprudence. This collection of Ethelbert's laws occurred about the beginning of the seventh century, and was a collection of the most meagre scraps. After that time collections of laws continued to be made occasionally in Kent, and the various little kingdoms into which England was then divided; but none of them reached respectable dimensions until the time of Alfred the Great, toward the end of the ninth century.

Alfred's collection is the only one the English nation can show of any value. None of the originals of the early works relating to

law were written in the language of the English people; the originals in Saxon times were always in Latin, and those of Norman times in Latin or Norman-French. The copies of the Saxon Doms extant are transcripts from the translations in meagre use.

The originals of Acts of Parliament continued to be written in Norman French down to the beginning of the sixteenth century, and the records of legal proceedings down to the middle of the eighteenth century.

The government and laws of the natives were subjects of grave concern to Augustine, and to relieve his anxiety he submitted his case in nine questions to Pope Gregory, and Gregory answered them at length, setting forth Augustine's future conduct in Britain.

The third, fourth and fifth questions of St. Augustine, and the answers of Gregory, have a peculiar interest to students of legal history. I give them in detail here:

Augustine's third question: "I beseech you to inform me what punishment may be inflicted if any one shall take anything by stealth from the church?"

Gregory answers: "You may judge, my brother, by the person of the thief, in what manner he is to be corrected. For there are some, who having substance, commit theft, and there are others who transgress in this point through want. Wherefore it is requisite that some be punished in their purses, others with stripes; some with more severity, and some more mildly. And when the severity is more, it is to proceed from charity, not from passion; because this is done to him who is corrected, that he may not be delivered up to hell fire. For it behooves us to maintain discipline among the faithful, as good parents do with their carnal children, whom they punish with stripes for their faults, and yet design to make those their heirs whom they chastise; and they preserve what they possess for those whom they seem in anger to persecute. This charity is, therefore, to be kept in mind, and it dictates the measure of

the punishment so that the mind may do nothing beyond the rule of reason. You may add that they are to restore those things which they have stolen from the church."

Augustine's fourth question: "Whether two brothers may marry two sisters, which are of a family far removed from them?"

Gregory answers: "This may lawfully be done; for nothing is found in Holy Writ that seems to contradict it."

Augustine's fifth question: "To what degree may the faithful marry with their kindred? And whether it is lawful for men to marry their stepmothers and relatives?"

Gregory answers: "A certain worldly law in the Roman Commonwealth allows that the son and daughter of a brother and sister, or of two brothers, or two sisters, may be joined in matrimony; but we have found, by experience, that no offspring can come of such wedlock; and the Divine Law forbids a man 'to uncover the nakedness of his kindred.' Hence of necessity it must be the third or fourth generation of the faithful that can be lawfully joined in matrimony; for the second, which we have mentioned, must altogether abstain from one another. To marry with one's stepmother is a heinous crime, because it is expressly forbidden in the law. It is also prohibited to marry with a sister-in-law, because by the former union she is become the brother's flesh."

The third question and answer intelligently deal with the law of theft, and regulates a fine and corporal punishment for malefactors. It also counsels the restitution of stolen property, and lenient punishment for thefts committed under certain conditions.

The fourth answer establishes a marriage relation which is unchanged to this day.

The fifth answer clearly defines what marriages are and are not incestuous. This law has remained unchanged to this day in England, but in some American States it has been slightly modified.

From the doubts which arose in Augustine's mind, we can trace the source of many of our laws of domestic relations. These doubts were answered by Gregory according to the Roman law, and in this manner the Roman law became indelibly impressed upon

the jurisprudence of England. In later periods Norman feudalism began to exert its influence upon the jurisprudence of England, but the Roman influence had come to stay, and it made English legal procedure what it is today, the best in the civilized world.

SUCCESSFUL.

BY GEORGE BIRDSEYE.

A lawyer had a client
'Gainst a tailor to defend;
The suit that he'd made for him
Did not his appearance mend,
In fact it did not fit him,
So the claim he did refute;
'Twas the tailor was non-suited
And the lawyer got the suit.



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NOTES.

JUDGE—"I will give you just one hour to get out of town."

Tramp—"Well, if I'm brought back here for overspeeding me auto, don't blame me, jedge!"

It is illegal in Germany for physicians to dictate prescriptions to druggists through the telephone. Fatal misunderstandings are likely to result from the practice, therefore the interdictory law was enacted.

"ARE you acquainted with the defendant?"

"Very slightly, sah."

"You know him by sight?"

"Not exactly, sah."

"What do you mean by that?"

"I mean dat de night was so dark, sah, dat I couldn't distinguish de gemman's features on de only occasium when we encountered, sah."

"And when did you encounter?"

"At de door of de chicken coop, sah, jest as he wuz comin' out."

A WESTERN lawyer, who enjoys a nip or two with his friends and does not object to occasionally making a night of it, returned to his home early one morning not long ago to confront an enraged and indignant wife. For many hours she had turned remonstrance and abuse over and over in her mind

and was loaded when she turned loose on him. He stood it for nearly a half hour, attempting occasionally to interrupt with an explanation but with no avail, and finally shouted out so that he might drown her voice:

"The American Constitution—hic—insures to every citizen—hic—domestic tranquility. I wish—hic—to God it—hic—would deliver the goods!"

AN incident occurred the other day before Judge A. G. Andrews in the Augusta, Maine, Municipal Court, which illustrated how varied are the experiences of a Municipal Court judge.

A man had been arrested for drunkenness, and as he passed along with others of his kind the judge simply pronounced a fine of \$3. The man had no money, and with the consent of the city marshal he started out to find the amount. Three hours later the man was found by an officer. He had found the amount necessary to square himself with the court, but his appearance showed conclusively that it had not been used for that purpose. He was rounded up by the officer, and when the judge beheld him it required only a glance to decide the case.

"Thirty days," were the words that the judge pronounced. For a moment the man was a little dazed; then it was his turn:

"Judge," said he, "this ain't right. There's something in the Constitution about a man's not being put in jeopardy of life or limb twice for the same crime. I have already been fined for this crime. This is the same drunk I was up for this morning. I haven't got over it yet."

This latter statement was evident, and the court considered the point well taken.

WHEN Judge Otis P. Lord of Massachusetts was to hold his first term of court after a serious illness, a bright young Methodist minister was asked to open the court with prayer. He was told of the illness of Judge Lord and that this was his first term since his recovery. The minister took in the situation, and made a prayer, which was a good one. He did not particularize until he came to the judge, and then he bent himself to his task. His virtues, and great ability as a lawyer and as a judge, were all remembered and praised, thanks given for his restoration to health, and prayers offered for his long continuance in his useful life.

When the court adjourned at noon, Judge Lord turned to the sheriff and said: "Mr. Sheriff, what did you say was the name of the clergyman who opened the court this morning?"

"The Reverend Mr. X——," answered the sheriff.

"Well," said Judge Lord, "for a man who goes into particulars, that was the best prayer that I ever heard in a court room."

MAGISTRATE: "Have you ever been married?"

Prisoner: "No, your honor, but I've been blown up by dynamite."

AN Iowa justice recently decided a case involving the principle of *E Pluribus Unum* so the story goes. It was a small damage case in which the defendant sought to set up the claim of right for his actions. His counsel was the local school-teacher. The justice was the proverbial county justice. The school-teacher had written out his argument and incorporated into it a number of Latin phrases. One of his strongest points was that his client was standing upon the doctrine of *Vis Major*. The opposing lawyer saw that this was making a hit with the justice, so he began framing a reply.

When the school-teacher sat down the attorney for the plaintiff began: "If the court please, counsel for the defendant has overlooked one thing. The doctrine of *Vis Major* would apply to the case if it were still

in existence. But away back more than a hundred years ago our forefathers fought for the doctrine that all men are created equal, and that governments derive their just powers from the consent of the governed. And when these principles triumphed the doctrine of *Vis Major* became null and void and the doctrine of *E Pluribus Unum* superceded it. And that is the doctrine which governs this case, and is the direct opposite of the principles cited by my learned opponent." Then the attorney went on at great length to expound the theory of *E Pluribus Unum*, and the justice found for the plaintiff.

"THE evidence shows," said the magistrate, "that this woman threw a brick at the complainant, her husband."

"Not so fast," interrupted counsel for the defense. "The appearance of the man is evidence that the brick hit him, which proves that she must have thrown it at somebody else."

OF all the horse trades which figure so conspicuously in literature none has yet been uncovered to equal an exchange at Mt. Ayr, Iowa, recently, the validity of which lawyers were called upon to decide.

It all came about because Foster Defenbaugh wanted an animal which William Long owned. A purchase was suggested and Long demanded one hundred and twenty-five dollars for his animal. Defenbaugh thought the price a little too high, and no agreement could be reached till finally he offered to give the owner as many five dollar bills as would be required to girth the horse. Long sized up his animal and jumped at the opportunity. Defenbaugh paid him one dollar to bind the bargain, and then the bills were pinned about the beast. To the surprise of the owner it only took eleven. He refused to deliver the horse. The purchaser consulted a lawyer, who said the contract would be binding. But the two men met later and settled the matter out of court, it being presumed Defenbaugh increased the price, as he acknowledged he never knew before that a five-dollar bill was so large.

THE House of Commons, writes an esteemed English correspondent, has now under consideration a bill dealing with motor cars. It is proposed *inter alia* to regulate the speed, and puts upon the owner, as well as the driver, the responsibility of observing the regulations laid down by the act. Of course the House is dealing with the motor car as an entirely new conveyance. When one is dealing with new acts of Parliament in England the great question is first to know whether Statutes have not already been passed, dealing, possibly inadequately, with the evil the new act is aiming at. For instance, there still appears to remain on the Statute Book this curious act of 1514, which has, apparently, never been repealed. If it were put in force, I fear the description of the "new-fangled, dampnable & dewilish engine" would fit admirably some of the machines which break down outside one's house at the most inconvenient times conceivable.

Statute 6 H. VIII., c. 19 (1514).

Forasmuch as divers and sundry lewd, malicious and evil-disposed persons, being men of evil and perverse disposition, and seduced by the instigation of the devil, and not minding the hurt and undoing of the King's true and faithful subjects, of their malicious and wicked minds have lately invented a certain new-fangled, dampnable and dewilish engine and have by the space of seven years last past put the same in and upon divers parts of His Majesty's realm, and more especially upon the highways thereof, and do in great numbers some with masks and visors and otherwise disguised to the intent that they should not be known as well by night as by day use to drive the same on the said highways at great and outrageous speed and with a most abominable blowing of horns and other instruments of noise by color whereof the highways aforesaid have been greatly annoyed and marvelous distempered by excessive dust and by the corrupt and noisome airs engendered therein by occasion of the foul and filthy oils in the said engines contained to the great

annoyance and jeapourdous abiding of His Majesty's liege subjects and by reason of the horrid speed whereby the said engines be driven His Majesty's peaceable subjects be sore let and hindred in passing along the said highways on horse or on foot and may scantily even be thereon by reason of the lewd practices aforesaid and divers others inconveniences have ensued to the provocation and ensample of evil disposed persons in the like case offending to the great displeasure of the King's Majesty Our Sovereign Lord the King like a virtuous and most gracious Prince nothing earthly so highly weighing as the advancing of the common profit considering the daily great annoyances which have happened in his said realm by reason of the premises for remedy whereof hath enacted that all such persons having such dampnable engines and now being in the realm have monition to depart therefrom within sixteen days after proclamation of this statute among them shall have been made upon pain of imprisonment and forfeiture of their goods and chattels, and if they then so depart then they shall not forfeit their goods nor any part thereof saving always the said engines only, this present statute not withstanding.

MARRIAGEABLE young ladies in China usually wear their hair in a long single plait, in which is entwined a bright scarlet thread. The thread indicates that the maiden is awaiting a connubial partner.

It is a curious historical fact that the first reported decision of the Supreme Court of the Territory of Iowa, in July, 1839, was made upon the question of the rendition of an alleged fugitive slave, the court at that time consisting of Charles Mason, Chief Justice, and Joseph Williams and Thomas S. Wilson, Associate Justices. Ralph, the alleged fugitive slave, had been owned by one Montgomery of the State of Missouri. The latter consented that the slave might come into the Territory of Iowa, but after-

wards sought to assert his rights as owner and recover his "property." Montgomery secured Ralph's arrest by the sheriff of Dubuque county, and had started with him down the river in a steamboat. Mr. A. Butterworth obtained a writ of *habeas corpus*, upon which Ralph was brought before the District Court, whence, by consent of the parties, the case was at once taken to the Territorial Supreme Court. This case is given in full in a thin octave volume now very scarce, containing "Reports of the Decisions of the Supreme Court of Iowa from the Organization of the Territory in July, 1838, to December, 1839, inclusive, by Wm. J. A. Bradford, Reporter of the Supreme Court." It was also included in the later reports by Morris.

The colored man's defence was conducted by David Rorer, who afterwards won high distinction as a lawyer and author. It was written long ago that "Slaves cannot breathe in England," and it would seem that the atmosphere of early Iowa was equally unfriendly to that "peculiar institution," as it was called in those days. A few were held for a time—as the United States census of 1840 sets forth in Dubuque and Des Moines counties, but Iowa soil was never congenial to slavery and it soon disappeared.

THE sale of the Indiana and Illinois to the Illinois Central recalls an amusing story. When the Switz City division of the Illinois Central was built it was known as the Indiana and Illinois Southern. It was a narrow-gauge road; the roadbed was bad; the engines and cars were built on a miniature scale, and while there had been a schedule, had a train been on time the fact would have been regarded as a miracle. The road was known as the "Try-Weekly." About twenty years ago Josiah McConnell desired to go to Switz City from Sullivan, but missed the train by a minute or two. The clock at the station showed that the train had left Sullivan five minutes ahead of time, and McConnell sued the railroad company for \$5,000 damages. On a trial of the case, it

was proved beyond a doubt that the train McConnell missed should have gone the day before, and was really 23 hours and 55 minutes late.—*New York Commercial*.

IN England, from the earliest times, the facts in civil matters, as well as in criminal charges have been without intermission determined by juries. In Scotland also, down to the sixteenth century, the assizes dealt in a perfunctory way not only with crime, but with matters of civil right; but, upon the institution of the Court of Session in 1532, this branch of jury trial was entirely eliminated, and for nearly 300 years trial by jury was almost entirely confined to crime. In 1815 an attempt was made to reintroduce into Scotland jury trial in civil causes, but it has never been very successful, and the determination of the facts by evidence led before a single judge, or before a court of judges, is still permitted and preferred, in many cases where it is necessary to place these facts before a jury.—*The Law Times*.

THE Balkan crisis is likely to revive that almost insoluble problem of international morality, as to whether intervention in the internal affairs of one State by other States on humanitarian grounds for the prevention of cruelty and wrong can properly be undertaken. As international public law professes to deal solely with the relation of States to each other, and as such immoral acts of a particular State in its internal dealings with its own subjects as result in massacres, brutalities, and religious persecutions do not fall within the scope of such relations, many contend that the right of intervention cannot be legally invoked for their redress or repression. . . . Interventions for the purpose of putting an end to religious persecutions within civilized States are not generally sanctioned by publicists. They seem, however, to be regarded as legitimate when employed by Europe as a means of protecting Christians within the limits of the Orient, upon the general ground that the Eastern Question constitutes an exception—a case apart.—*The Law Times*.

IN *Blackwood's Magazine* "Sigma" gossips entertainingly about famous English judges, telling the following anecdotes, among others:—

Lord Bowen was probably the only judge who, on being summoned on an emergency to the dread ordeal of taking Admiralty cases, entered upon his doom with a pleasantry. After explaining to the counsel of that consummately technical tribunal the reason of his presiding over it on the occasion in question, and warning them of his inexperience in this particular branch of practice, he concluded his remarks with the following quotation from Tennyson's beautiful lyric, then recently published: "And may there be no moaning of the Bar When I put out to sea."

Although posing as one of those un terrestrial judges who have never heard of a music-hall, and are wholly unacquainted with slang, Lord Coleridge was not above enjoying an occasional touch of Billingsgate when applied to any individual whom he did not particularly affect. One of his learned brethren, with whom he was on intimate terms, was one day abusing a fellow Puisne, who happened to be especially repugnant to them both, in language the reverse of parliamentary. Coleridge listened to the approbrious appellations with bland satisfaction, and then unctuously observed, "I am not addicted to expressions of that kind myself, but would you mind saying it again?" As is well known, he signalized his tenure of the Lord Chief Justiceship by presenting the unprecedented spectacle of appearing as a defendant, in an action brought against him by his son-in-law, in the course of which he actually sat in the back benches of the court prompting his counsel.

Probably the greatest compliment paid to Lord Chief Justice Cockburn as an advocate was from Palmer, the Rugeley poisoner ("my sainted Bill," as his mother always termed him!), who, on being found guilty, handed down to his counsel a slip of paper bearing the following words: "It's the riding that's done

it," Cockburn having been the prosecuting counsel.

Lord Westbury had issued invitations for a "high Judicial" dinner party, the guests including Vice-Chancellor Wood, a saintly old gentleman who had recently produced a work on "The Continuity of Scripture," and the late Lord Penzance, alike in official and private life the embodiment of austere decorum. To the inexpressible indignation of these eminent worthies, both of whom were accompanied by their ladies, they found the end of the Chancellor's table, that should have been occupied by Lady Westbury, presided over, in her absence, by a foreign Countess, more conspicuous for her fascinations than her fair fame! As may be easily imagined, the drawing room part of the entertainment was not of long duration, and on reaching home the outraged author of "The Continuity of Scripture" immediately sat down and indited a complaint of four pages to Lord Palmerston, the peccant Chancellor's ministerial chief. Lord Palmerston's reply, which my informant had the privilege of seeing, was scarcely consolatory. It ran thus:

"My dear Wood,—I quite agree that the Chancellor's conduct is inexcusable; but I am sure you will admit that he treated me worse than any of you, for he made me take the lady down to dinner! Sincerely yours,
"Palmerston."

Mr. Justice Byles was trying a case at Winchester, in which some soldiers of the dépôt were indicted for a riotous affray with a gang of navvies employed in the neighborhood. One of these navvies had been under examination for a considerable time with very little practical result, and at last the judge interposing observed to the examining counsel that he appeared to be making very little way with the witness, who had better be allowed to give his evidence after his own fashion. "Come, my man," said the judge reassuringly, "we must get to the end of this. Suppose you tell the story in your own way." "Well, my lord," broke out the navvy, greatly relieved at being delivered from his tor-

mentor, "yer see, it as like this—we met the sodgers on the bridge, and one of 'em says to me 'Good mornin'.' 'Good mornin', yer——'"; but before the specimen of appalling vernacular that followed was well articulated, Mr. Justice Byles had fled precipitately from the Bench, with, no doubt, a mental resolution never again to invite a witness of the navigating order "to tell his story in his own way."

I remember hearing a leather-lunged gentleman bawling legal platitudes to old Vice-Chancellor Bacon, who, after sitting passive for some time in a state of ill-concealed irritability, gave utterance in quavering tones to the following pungent remonstrance: "I am, of course, aware, Mr. So-and-so, that it is my duty to hear you, but I venture to remind you that there is such a quality as mer-r-cy!"

One of the greatest Equity judges of the last half century was the late Sir George Jessel, the first, and, so far, the only Jew who has been raised to the English Bench. Jessel's appointment was received with a certain amount of misgiving, not on account of his attainments, which were unexceptionable, but by reason of an undesirable audacity which had occasionally marked his conduct of cases at the Bar. There is no doubt that at a pinch in order to score a point he was not above "improving" the actual text of the Report which he purported to be quoting, and I well remember this practice producing quite a dramatic little scene, when, having sprung upon a particularly painstaking opponent some case which apparently demolished the latter's argument, that learned gentleman with an almost apoplectic gasp requested that the volume might be passed to him. The result of his perusal was more satisfactory to himself than it was to Jessel, who, however, treated the matter as a mere "trifle," not worth fussing about, and calmly restarted his argument on a new tack! In this undesirable habit he resembled an eminent predecessor, who on investing some obsolete case on which he was relying with a complexion peculiarly favorable to his ar-

guments but quite new to the presiding judge, the latter quietly asked him to hand up his volume of Reports. After a moment's examination the judge handed the volume back with the scathing rebuke: "As I thought, Mr. —, my memory of thirty years is more accurate than your quotation."

A Chancery Court is not, as a rule, a very amusing resort, but Vice-Chancellor Malins was always able to command a fairly "good house," as he might generally be counted on to show a certain amount of sport under the stimulating attacks of Mr. Glasse and his Hibernian rival, Mr. Napier Higgins. Mr. Glasse, whose countenance recalled that of a vicious old pointer, when not engaged in bandying epithets with Mr. Higgins, applied himself only too successfully to developing the unhappy Vice-Chancellor's propensities for making himself ridiculous. Sir Richard, an amiable, loquacious old gentleman who had bored and buttonholed his parliamentary chiefs into giving him a judgeship, was certainly an easy prey for a bullying counsel. In external aspect dignified enough, he was afflicted with a habit of conversational irrelevancy which might have supplied a master-subject for the pen of Charles Dickens. While Higgins roared him down like a floundering bull, Glasse plied the even more discomfiting weapons of calculated contempt and impertinence.

The following is a sample of scenes which were then of almost daily occurrence in Sir Richard's court. "That reminds me," the judge would oracularly interpose, fixing his eyeglass and glancing round the court,— "That reminds me of a point I once raised in the House of Commons——"

"Really, my lord," Mr. Glasse would brusquely interrupt with a withering sneer, "we have not come here to listen to your Lordship's parliamentary experiences." Whereat with an uneasy flush the Vice-Chancellor would mutteringly resume attention. On one occasion I recollect Mr. Glasse so far forgetting himself as to exclaim audibly, in response to some sudden

discursion from the bench, "D—d old woman!" Every one, of course, tittered, and the Vice-Chancellor, for once nerving himself for reprisals, bent forward with a scarlet face and the interrogatory, "What was that you said, Mr. Glasse?" But his terrible antagonist was not to be confounded. Without a moment's hesitation he replied, airily flourishing his many-colored bandana, "My Lord, I will frankly acknowledge that my remark was not intended for your Lordship's ears;" an explanation which Malins thought it prudent humbly to accept.

At the time when Vice-Chancellor Bacon was one of his colleagues, Malins had before him some case in which one of the parties was of that order peculiarly obnoxious to the legal mind—namely, the "cranky" litigant. In delivering judgment the Vice-Chancellor felt himself constrained to take a view adverse to the claims set up by this individual, who determined to avenge himself for what he chose to consider a miscarriage of justice. Accordingly, one morning shortly after the judgment, he presented himself in court, and, taking hurried aim from amid the bystanders, hurled an over-preserved egg at the head of his oppressor. The Vice-Chancellor, by ducking adroitly, managed to avoid the missile, which malodorously discharged itself at a comparatively safe distance from its target. "I think," observed Sir Richard, almost grateful in spite of the *lèse majesté* for so apt an opportunity of qualifying as a judicial wag,— "I think that egg must have been intended for my brother Bacon!"

An amusing story is being told among lawyers (says *The Canadian Law Review*) of a Walloon peasant who had gone to law with a neighbor. In conversation with his lawyer he suggested sending the magistrate a couple of fine ducks. "Not for your life," said the adviser. "If you do you'll lose the case." The judgment was given in his favor, when he turned to his lawyer and said: "I sent the ducks." Astonishment on the lawyer's part turned to admiration when his client continued: "But I sent them in my neighbor's name!"

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

ELEMENTS OF THE LAW OF BAILMENTS AND CARRIERS. Including Pledge and Pawn and Innkeepers. By Philip T. Van Zile. Chicago: Callaghan and Company. 1902. (lvii+785 pp.)

The law of Bailments and Carriers is an interesting branch of the law, because while the underlying principles are old, the constant and rapid change in social, business and economic conditions makes necessary a frequent readjustment of these principles to new conditions. Because of this frequent readjustment or reapplication of general principles new text-books dealing with these subjects are welcome. Professor Van Zile brings to his task enthusiasm; more important still, he comes to it well equipped, since for the past dozen years he has lectured upon these subjects in the Detroit College of Law.

The author's general method of treatment is good. His statements of the common law, of the modern lines of decisions, American and English, and of the conflicting decisions on many questions, are well stated and sufficiently full. Leading cases are quoted freely, but not by way of padding. The frequent summaries of the law on various points are clear and concise; and—what is most pleasant to find—Professor Van Zile discusses many of the questions on which there is conflict of opinion, and is not afraid to state his own views. In a word, the volume before us is an excellent text-book on Bailments and Carriers.

THE LAW OF STREET SURFACE RAILROADS. By Andrew J. Nellis. Albany, N. Y.: Matthew Bender. 1902. (cii+682 pp.)

This volume is frankly an epitome, logically arranged, of judicial decisions relating to street railways, with no discussion of principles of law. Within such narrow limits

as indicated, the work is well done, producing what rightly may be called a "practical" law-book, one of considerable value to the active practitioner as a book for quick reference. The various chapters treat of the charter, the franchise, the rights in highways, regulation, operation and taxation.

Not the least interesting part of this volume is one sentence in the preface, which states that "the writer has the utmost confidence that the work will be found a useful one, because it contains no ideas of his own." Would that certain other compilers of law-books were as frank!

PROBATE REPORTS ANNOTATED. Containing recent cases of general value decided in the Courts of the various States on points of Probate Law, with Notes and References. By *George A. Clement*. Vol. VII. New York: Baker, Voorhis and Company. 1903. (xlviii+797 pp.)

The one hundred cases, or thereabouts, in this volume were—barring three earlier cases—decided in the various State courts between June, 1901, and June, 1902, and cover a wide range of probate matters. The more important Editorial Notes are those on Annuity or Income, Effect of Death on Executory Contracts for Sale of Real Estate, Equitable Conversion as affected by Failure of Purpose, Renunciation of Executors and Administrators, Duties and Powers of Ancillary Administrators, Contracts of Executors and Administrators, Moneys due from Mutual Assessment Insurance Associations as subject to Will, Power of Sale, Devise as affected by Secret Trust, Evidence of Testamentary Capacity as affected by Time, Rights of After-born Children under Wills,

Revocation of Will by Mutilation, Cancellation or Destruction, and When Will is Void for Uncertainty in Quantity or Amount.

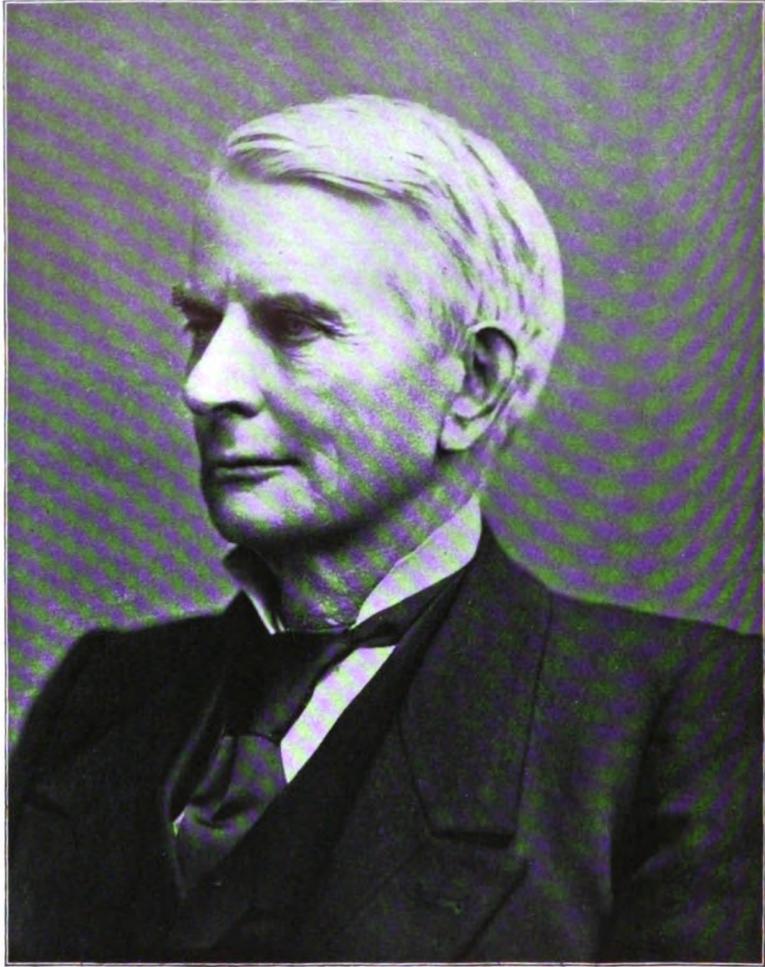
A MANUAL FOR NOTARIES PUBLIC, JUSTICES OF THE PEACE AND THEIR EMPLOYERS IN MASSACHUSETTS. By *James T. Keen*. Boston: Little, Brown and Company. 1903. Cloth. (xi+267 pp.)

This small volume, after a short historical account of the origin of the office of Notary Public and of Justice of the Peace, treats in a concise and satisfactory way of the method of appointment of notaries, of their powers apart from statute—the protest of commercial paper and the noting and extending of marine protests,—and of powers given by statute; the duties of justices are dealt with under the heads of depositions, calling of meetings, acknowledgment of deeds, issuing of warrants, oaths and affidavits and general powers and duties. Many forms are given in the text.

ANALYTICAL TABLES OF THE LAW OF EVIDENCE. For use with Stephen's Digest of the Law of Evidence. By *George M. Dallas* and *Henry Wolf Bicklé*. Philadelphia: T. & J. W. Johnson and Company. 1903. Cloth. (ix+89 pp.)

In forty-three tables, grouped under the three general heads of Relevancy, Proof, and Production and Effect of Evidence, a methodical outline of the Rules of Evidence is here given. This seems to be an effective way of putting before the student a difficult, but important subject; even the practitioner, unless he has mastered the Rules of Evidence through long and constant court work, will find these tables convenient for reference.





TIMOTHY O. HOWE.

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TIMOTHY OTIS HOWE.

By DUANE MOWRY.

A MAN who has "seen" more than a quarter of a century of continuous public service, and who has, during most of that service, been a conspicuous figure in his country's affairs,—who had been a United States Senator from his adopted State for a longer period than any of his contemporaries from that State; who had been on intimate personal and official relations with at least two Presidents of the United States, and who held the implicit confidence of one, who declined office, when to accept it involved the sacrifice of principles dear to his heart and vital, as he believed, to the best interests of his country, who discharged, in an acceptable manner, the duties of a judge of the highest court of the State, who declined the offer of an appointment to the office of Chief Justice of the Supreme Court of the United States for what appeared to him as cogent political reasons, although greatly desiring to accept the high and honorable position, who was an important member of an international monetary conference, and who died "in the harness," holding a cabinet position,—such a man, lawyer, jurist, statesman, diplomat, deserves more than a passing notice or a brief encomium. The career of such a man is, essentially, public property, and it is fitting that an examination of the qualities which have given this country such a notable character he made. Such a man was the late Timothy Otis Howe of Wisconsin.

The subject of this article was born in Liver-

more, Maine, February 24, 1816; he received an academic and professional education in his native State and was admitted to the bar there; he was a member of the Maine Legislature in 1845, in the latter part of which year he removed to Wisconsin; he was elected a judge of the Circuit Court in 1850, and by virtue thereof became a member of the Supreme Court of Wisconsin, and held the office until he resigned in 1855; he was elected a United States Senator from Wisconsin for three full terms, first taking his seat in 1861, and serving continuously for the following eighteen years; he was one of the commissioners from the United States to the International Monetary Conference, which met in Paris in April, 1881; he was named post-master-general by President Arthur in 1882; he died, while holding that office, at Kenosha, Wisconsin, March 25, 1883.

Judge Howe was yet a young man when he set foot on the soil of the recently erected Territory of Wisconsin in 1845. Indeed, he was scarcely forty-five years old when he took his seat in the National Legislature in 1861. The intervening period represented, largely, the time which he gave to the practice of his profession, including a five-year sitting on the bench. In a State which had been so recently admitted into the Union—Wisconsin became a State in 1848—its litigation must have been slight, and the cases tried of minor importance, both in the character of the legal questions, and in the amount of money involved; the jurispru-

dence of the State was, practically, in a wholly undeveloped condition. Scarcely a dozen reports had been issued as a result of the deliberations of the court of last resort when Mr. Howe became a Senator. It is not surprising, therefore, to learn that Judge Howe was not identified with much important litigation during the years preceding his occupancy of a seat in the Congress. Nevertheless, one of his associates of the local bar at Green Bay, which he always made his Wisconsin home, has said of him during this period: "He prepared his cases well, and was skilful in eliciting the facts of his case, and in extracting the truth from a reluctant or refractory witness; he was effective, and often impressive, in his speeches, both before the court and the jury. I realize how colorless and imperfect this statement must appear to be. The incommunicable impression of the man behind the lawyer, can alone render it characteristic."

The Supreme Court of Wisconsin was not separately organized until 1853. From the date of his election, therefore, as a judge of one of the Circuit Courts, from January, 1851, Judge Howe, by reason of such judicial relation, became an *ex-officio* justice of the Supreme Court of the State. He occupied a place on the bench until it became separately organized. Cases in which Judge Howe participated as one of the judges of this court are reported in 3 Pinney's Wisconsin Reports.

Judge Howe delivered the majority opinion of the Supreme Court in the case of the State *ex rel.* Resley *v.* Farwell, Governor, 3 Pinney's Wis., 393. It was an application for writs of peremptory *mandamus* against the Governor. The power vested in the Supreme Court by the Constitution, particularly, with reference to the right to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto* and *certiorari*, is there very fully considered. The question, whether the Governor, in his person, is exempt from judi-

cial control, and whether, and to what extent, his official action may be controlled or directed by judicial power, is discussed in the following cogent language:

"Upon the question, as to what causes, to which the Governor may be a party, the court may have jurisdiction of, I will say no more than to indicate the rule by which I conceive jurisdiction is to be determined in any given case, and it is this: If the law gives to an individual a right which is properly the subject of an action, and gives it absolutely, whether against him as Governor, or as an individual, jurisdiction then attaches in the judicial power to determine and enforce that right. But if the right is contingent, and is made to depend upon the discretion of the executive, in such a case, until that discretion be exercised, no right can vest; and if, in the exercise of that discretion, the Governor deny the right, then all claim of right is gone. His determination is final upon the question of right, as much as is that of a court of competent jurisdiction."

Judge Howe was one of the attorneys for the relator in the case of the Attorney-General *ex rel.* Bashford *v.* Barstow, reported in the 4 Wisconsin Reports, 567. This was an information in the nature of a *quo warranto*, filed originally in the Supreme Court by the Attorney-General. The relator claimed to have been elected Governor of Wisconsin. The respondent had received the certificate of election and had been inaugurated into the office. The purpose of the action was to oust the respondent and declare the relator elected to the office. The legal questions presented were new and interesting in the then new State of Wisconsin, and able counsel were employed on both sides. A very full report of Mr. Howe's brief appears in the report of the case. A few extracts are made from it:

"The real case which is presented to this court is, who is entitled to discharge the duties of Governor of this State? . . .

The arguments of the respondent's counsel seem to present an almost inextricable confusion of two very distinct things. They have blended the person occupying the office with the office itself. They seem to have labored under the idea that the moment a man gets possession of the office of Governor, he was somehow dissolved in the office—held in solution in it—until by the analysis of revolution, he shall be deposited with the mass of the people. By their argument, there is no process for removing an intruder into the office of Governor, except by revolution, by force and violence, or by voluntary abdication of the individual himself. . . . Revolutions have often been resorted to, for the purpose of overthrowing governments, but never to get possession of an office under a government. It may, indeed, be found necessary to employ force to put the relator in possession of his rights. If the intimations of the respondent's counsel are to be relied upon, force will be necessary. But if so, the question remains, shall constitutional force be employed, or shall the relator be turned over to revolutionary force? May he rely upon the force of the government to give him that place in the government to which he is confessedly entitled, or must he rebel against the government in order to expel a usurper from one of the offices under it? . . . The relator does not seek to subvert the government, but only demands a constitutional right under it. Revolution, therefore, clearly cannot be his appropriate remedy. Revolution, if successful, would be as fatal to the purpose of the relator as to that of the respondent. While it might drive the latter from the office, it would abrogate the office itself. Whatever position the relator might assume in the State after a successful revolution, he would hold by conquest and not by election."

In another part of this interesting brief, Judge Howe replied to the suggestion of

counsel for the respondent, who argued at great length upon the equality and independence of the three branches of government, using the following convincing language: "They have read from numerous political essayists in support of the position that the legislative, executive and judicial departments of the government are, or ought to be separate, independent, coördinate and co-equal. There are, indeed, strong reasons why these departments should be separate and independent; but in fact, no government ever existed in which they were wholly so. Writers mean only this—that in all governments these three powers exist. They are the sum of every government; inherent in every government. Whenever the autocrat of the Russias performs an official act, he exercises one of these three powers. It is essential in a republic that each of these powers should be deposited with a different tribunal or agency—when combined in a single individual, the rights of persons are exceedingly precarious. Then the only hope of the citizen is that the depository may be wise, virtuous and just. When distributed, there is a chance, that if the judiciary be corrupt, the executive power may be placed in upright hands—and *vice versa*—and that if both be corrupt, the immediate representatives of the people, in Legislature assembled, may hold both in check. The Sultan of Turkey may register what arbitrary edicts he pleases—may apply them to the rights of his subjects as he pleases, and execute them or not as he pleases, and the security of the multitude depends upon the integrity of the individual. But in Wisconsin, if her Legislature enact an oppressive law, the Governor may veto it. Or if he approve it, the courts may pronounce it unconstitutional. But if all combine to oppress the citizen, the citizens have only to combine to remove all. So that here the security of the individual depends upon the integrity of the multitude. Such are some of the advantages of having

these three great powers deposited with separate tribunals. But when legal writers speak of the coequality of these powers, they doubtless mean no more than that each is absolute in its sphere—that when the judicial power is appealed to, the whole judicial power of the State is put in motion, and so of either of the other powers—that each alike represents the sovereignty—that the judicial power declares, in the name and by the authority of the State, what the law is—that the Legislature in like manner declares what the law shall be, and the executive in like manner executes the law when it is declared. But to argue that these powers are equal to each other in any other sense would be as profitless as to argue that lightning is equal to an earthquake. There is no similitude between them. By reading promiscuously from various political essayists, counsel have confused themselves. They urge the importance of keeping the several departments of government separate and independent; and why? Because we are told they thus operate as checks upon each other. But how can two powers, entirely separate from and independent of each other, mutually check each other at all? In practice, it is easy to see they do so; but that results not from their mutual independence, but from a certain constitutional dependence of one upon the other.”

Judge Howe was a candidate for the United States Senate at the session of the State Legislature which convened in the early part of January, 1857. This body was strongly Republican, and it was believed that Mr. Howe would be its choice for the exalted position. But a condition precedent was required of the candidates, *viz.*, a declaration of their respective positions on the Fugitive Slave Act. Judge Howe had taken a radical stand against the prevailing sentiment in his party at that time, and refused to endorse the doctrine that a State might disregard an enactment of Congress and defy

Federal authority. Although the undoubted first choice of a plurality of the members of the Legislature, this open and frank avowal of his views upon a burning question of the hour, cost him a seat in the Senate of the United States, and landed Judge Doolittle, instead. But Judge Howe was soon to have his reward. A man who would not sacrifice his honest political faith, in the hope of receiving immediate recognition from his partisans, was soon to have ample political honors thrust upon him. In 1861 another United States Senator was to be elected. And the open and active opposition of the South to Federal authority and its practical application of State resistance to the general government, had worked a change in the sentiments of the Republican party in the North, so much so, at least, that in this year he was elected a Senator, and was twice re-elected, his re-election, in each instance, being without opposition in his party. Indeed, it may be said that during his entire service in the national legislature, he was always the idol of his party in his adopted State. The rectitude of his intentions were never brought in question.

Judge Howe became a member of the least numerous branch of the Congress at a critical period in our country's history. And he was also a member of the dominant party in that body. Naturally, therefore, he must have been in a position to exert considerable influence in the affairs of the nation during the war and reconstruction periods of our existence. He was a warm and close friend of Presidents Lincoln and Grant and had their confidence, completely. He was an open, but honest antagonist of President Johnson and his policy. He did not hesitate to criticise some of the views entertained by Charles Sumner. The reputation of the man was no protection against what his own judgment condemned. It was “a habit of his mind” to first determine what was for his country's best interest, and then fearlessly to

champion it. Yet he did not arrive at conclusions quickly, nor did he act doggedly or selfishly. His official life was characterized by principle. And his colleagues trusted him because of that fact.

Senator Howe took an active and prominent part in the reconstruction policy of the government. In the discussion of resolutions on the subject in the Senate, March 12, 1867, offered by Charles Sumner, Mr. Howe made some pertinent suggestions on the subject of education. They are particularly interesting reading, at this time, when a somewhat concerted attempt appears to be making to disfranchise the illiterate voters in the South. Mr. Howe, considering a resolution for the establishment of public schools in the South, said:

"Mr. President, think of it as you may, dream of it as much as you please, God's truth is, and it is man's truth, too, you cannot maintain republican principles and republican form of government over a people where education is not, and is not universal. For a time the attempt may succeed, but sooner or later it must fail. Your institutions are stronger or weaker just in proportion as education is more or less general among the people of the United States. In those portions of the country where education is most universal, there your institutions are the strongest and the most stable today, and have always been."

Mr. Howe took a prominent part in the impeachment trial of President Johnson. He submitted a carefully prepared opinion upon the questions involved. Some of these related to the historical phase of the question, others to the constitutional rights involved, and others, still, might be termed purely political in their nature. The argument is too long for reproduction. But we quote a single paragraph, which, within the range of the ground which it traverses, is particularly strong and happy:

"This power of removal is, then, not vested

in the President by anything said in the Constitution, nor by anything properly implied from what is said. It seems to me, on the contrary, it is positively denied by the manifest purpose of the Constitution. That manifest purpose is that the principal offices shall be held by those in whose appointment the Senate has concurred. The plain declaration is that 'He [the President] shall nominate, and by and with the advice and consent of the Senate *appoint* ambassadors,' etc. But this purpose may be wholly defeated, if the President have, by the Constitution, the unrestricted power of removal; for it is as plainly declared that 'the President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.' If, then, the President has also the power during the recess of the Senate to *make* vacancies, at his pleasure by removal, his choice is supreme and the Senate is voiceless. He is only to remove all officers in whose appointment the Senate has concurred immediately upon the adjournment of that body, and commission others in their places. They will hold until the end of the next session. Just before that event he must nominate again to the Senate the officers he removed, or some others whom the Senate will confirm, and when the Senate has confirmed them and adjourned the President may again remove them all and restore his favorites once more to hold, until the end of another session when the same ceremony must be repeated. A deed which should grant a house to A and his heirs and to their use forever, but should also declare that B and his heirs should forever occupy it free of rent, would probably be held void for repugnancy. I do not think the Constitution is a nullity; and so I cannot concede that the President has in it a power implied so clearly repugnant to a power plainly declared to be in the Senate."

Mr. Howe was a member of the Inter-

national Monetary Conference which met in Paris in April, 1881. The Conference was suggested by the governments of France and the United States. All of the principal governments of Europe were represented. The United States was represented by William M. Evarts, late Secretary of State; Allan G. Thurman, late a United States Senator; Timothy O. Howe, late a United States Senator, and Dana Horton, former delegate to the International Monetary Conference of 1878. Mr. Howe addressed the Conference upon the subject which had called the various governments to send representatives to it. Mr. Thurman, who was of an opposite political faith to that of Mr. Howe, did not hesitate to pronounce his speech *the* speech of the Conference. This is certainly high praise.

It is no wonder that when a public man can think so clearly and profoundly upon great public questions, supplementing that thought, as he did, with great moral courage and absolute honesty of purpose, that President Grant should offer him the appointment of the Chief Justiceship of the Supreme Court of the United States. The position was one greatly desired by Mr. Howe. But the acceptance of the place would make a vacancy in the Senate which would have been filled by the election of a man of the opposite political faith, that party being in the majority in the Legislature of his State at that time. And he believed, whether wisely or not, it is not for us to say, that the country's welfare demanded his presence in the Senate, or of another, of similar political antecedents. His refusal of the appointment for this reason, and for this reason only, caused General Grant to remark that he believed he was the only man he ever knew in public life whom he thought would have so sacrificed himself. Yet his action in this case corresponds with his earlier public career. He could not stultify himself, nor could he break faith with

those who had reposed confidence in him.

It is doubtless true that Mr. Howe was never preëminent in the profession of the law. His comparatively early and continuous public career made that practically impossible. And there are those who are uncharitable enough to say that he could have neither wanted or made himself fitted for the Supreme Court bench; that his early and later tastes were in keeping with a place in deliberative bodies, where he excelled. His own immediate relatives assure me that this is not the fact. One of them writes: "It was the only position he ever really wished for." And his early training, both before the bar and on the bench, as well as his long and varied experience in public life, well prepared him for the discharge of the important judicial office, if he had chosen to accept it.

It is not claimed for Judge Howe that he was particularly brilliant. But there were sterling qualities of head and heart which endeared him to men. As one has put it to the writer: "He was the soul of honor. He was, moreover, an exceedingly refined man, refined in manners, in thought, and in action. He had a marvellous fund of wit, clear, sharp and incisive. He was, essentially, a man of conviction. What he did, he did from principle, not from policy."

Timothy Otis Howe will be best remembered for his distinguished public services. These were given his country in no unstinted manner. He served her well. And the nation may well feel proud to have enlisted the wise counsels and active energies of such a man in its behalf. A noble profession, too, is to be congratulated to have had as one of its members an individual who has added something to the due administration of justice, and who was never known to cause that profession to be ashamed of him. As a lawyer, his abilities were eminently respectable; as a publicist, his services to his country were preëminent.

VERSES.

BY GEORGE BIRDSEYE.

HER WILL.

He is a fool who will oppose
 A woman's will, when he has wed one.
 Said Lawyer Brown: "I will oppose
 A woman's Will—when she's a dead one!"

ALTERNATES.

I bought a suit, then came the bill,—
 The sum I could not pay;
 So then there came a suit at law,—
 I did not win the day.
 Soon after came another bill
 My lawyer sent; I owe it still.

MINISTER AND LAWYER.

Much lighter task the Minister's
 Than is the Lawyer's, one infers;
 The simple fact is,
 As adage and experience teach,
 It is much easier to *preach*
 Than 'tis to *practise*.

IN MOURNING.

Old Codex died; so learned in legal lore
 No living lawyer knew so much before.
 In black the mourners to the funeral came
 To show respect to Codex' name and fame.
 His many legal friends contributed
 To place a monument above the dead:
 No marble shaft rears o'er his earthly bed,—
 They rightly placed a Black-stone there instead.



CRIMINALITY IN CHILDREN.

BY GINO CARLO SPERANZA.

PHILANTHROPIC effort seems to be concentrating its energies more and more towards helping or saving unfortunate children. This is both natural and justifiable not merely on sentimental grounds, but especially for practical reasons. The adult poor, the adult delinquent, the adult sick or cripple, is an object of just solicitude, care and study; we can help him a little, make him more comfortable and, in certain very special cases, give him a new start in life. But it is, in the majority of cases, an attempt to get good harvests out of barren soil. Indeed, there are sociologists who see in such work of rescue a positive harm to society, in that it goes counter to the law of natural selection. Others hold that it works for good in the effect upon those engaged in such labors rather than on those helped, developing and strengthening the life of the spirit. Howsoever this may be, it cannot be denied that the work which counts most, which has more positive and lasting results as well as the most deserving, is the work aimed at helping the child. He comes to the worker heavily handicapped through no fault of his, but his body and mind, in the great majority of cases, are still pliable and responsive to proper stimuli in him. Nature is still ready, with a little coaxing, to redeem the mistakes of parents who disobeyed, if not defied, her laws.

Of all the burdens with which these unfortunate children begin life, none seems to me heavier than that of criminal taint. I use that word in a loose sense, not merely as an inherited predisposition, but as embracing that environment of viciousness and squalor which foster crime or form the culture-bed of criminal propensities.

Let it be said at once that the child is

capable of committing as terrible crimes as the man; he can be as shrewd in planning them, and as ferocious in their execution; he can be prompted to their commission by the same impulses that prompt the act in the adult man. It is true the law creates the absolute presumption of incapacity to commit a crime until a certain age is reached, and a rebuttable presumption for crimes committed within the period of adolescence. Even if it did not, no modern jury would hang a boy of eight, as was done in the seventeenth century. This is partly due to the prevalent abhorrence to capital punishment which, in the case of a child, it would not tolerate. But the tenderness of the law towards children (and adults, too) as well as a sentimental regard of the public, cannot hide the fact that the child is, everything considered, as susceptible as the adult to that malice which, expressed in acts against others, becomes a public offense.

Careful study will show that the tenderness of the law in its provisions regarding special cases, and more especially the tenderness in its application in given cases, has its reason not so much in the unfitness of the punishment to the crime as in its unjust and unfair application to those who are not the real culprits. Thus the theft of bread is larceny, and larceny should be under the ban of the law; but the hungry man who steals a loaf would probably go free because the trial jurors would say: "It was not he who stole—but the Social Conditions that let him get hungry." And more clearly, if a child kills his playmate, the jury will almost instinctively attribute the child's malevolence to the indifference or viciousness of the parents.

Admitting the necessity for a greater leniency towards children in the application

of penal law, it may be asked whether too much adherence to this principle of mercy does not militate against the social defence against crime. If this leniency is justly applied to children who have erred, is it well to apply it in cases of a proven criminal act where the only extenuation is the youth of the offender? Is society best served by such mercy, however harsh a severe application of law in such cases may at first appear?

The prevailing sentiment is that youth is, in a measure, a partial defense, and indeed, it is often accepted as a total defense, to crime. This is based on the theory that youth is incapable of that depravity, viciousness and malice which are the essential element of a criminal act. Such theory strengthened by the popular fallacy regarding the comparative rarity of crime committed by children.

Upon this theory we have built a penal system as regards juvenile offenders, and have approved of a practice of mercy which, far from helping to decrease crime, have tendered to foster its development.

We have overlooked the fact that if the child is father to the man, as to virtue, he is father also as to evil. It is true that much is being done on behalf of unfortunate children, but it will be my endeavor to show that such work is not conducted along lines that will most effectually check crime and that, in fact, it does not reach the real delinquent.

We must first recognize the fact that offences by young persons are more serious and numerous than is generally believed. What is even more discouraging is the fact that juvenile delinquency is by no means decreasing, but rather shows a sensible increase. Let us examine a few figures. Omitting the large population of delinquent minors confined in reformatories and industrial schools, J. Holt Schooling found that in England and Wales 41 *per cent.* of all persons convicted of crime are under 21 years of age. Further, it is well established that

criminality is much more frequent in early than in adult life, the criminal propensity rising in effectiveness from early childhood to the ages between 16 and 20, when the maximum is reached. In commenting some years ago on certain criminal returns, Dr. Morrison said that the deplorable fact had been established of an enormous increase in crimes of all kinds committed by persons between 18 and 21 years of age. Of 456,939 persons convicted in Germany in one year, 44,312 were under 18 years of age. In Holland, offenders under 16 years of age have doubled in numbers in the last decennial; Russia likewise shows an increase in juvenile criminalism. In France, where the connection between youth and crime is being carefully studied, we are told that "the most daring, the most sanguinary and the most hardened criminals with whom French justice has had to deal of late years, have been, with few exceptions, mere youths." In 1896, France had 5,933 boys and girls in her reformatories; in the same year Italy had 6,315.

Coming to our country, we find that in 1890, there were 14,846 offenders in our juvenile reformatories alone, an increase of 29.46 *per cent.* in ten years. To these must be added juvenile offenders in State prisons as follows: 711 under 15 years of age, 8,984 between 15 and 19, and 19,705 between 20 and 24. Taking the statistics of New York State for 1898 (a good year showing a tendency to decrease in crime) we find that of 3,567 persons convicted in courts of record, 68 were under 15 years of age, and 697 were between 15 and 21. Of the 68 under 15 years of age, 2 were convicted of assault, 10 of attempted burglary, 14 of burglary and 35 of grand larceny. These were not petty offences such as are tried in the minor courts. Impressive as only such numbers are, it is not to be believed that all these offenders are actually criminals. But the law as at present administered, makes no fine and necessary distinctions; it clings to historic rather

than scientific bases, and gives a system of tests and checks which really neither test nor check. And in this the administration of the law is seconded by educational provisions which further tend to manufacture criminals. For if a more rational and reliable system were followed, many branded as criminals would be simply subjects for reformatory agencies entirely outside of penal law, while the truly criminal would be found to be a very small fraction to be separated and treated specially.

Our first mistake is to overlook and condone certain qualities or acts in our children. Lack of moral traits, instability, or backwardness, we attribute goodnatureedly to the result of being "spoiled" or mischievous or young. Nervous excitability is very marked in young children, with the result that they will most readily turn to what most excites their nerve centres. The child has such strong "sensitive and nutritive needs," as Dr. Moreau has pointed out, that he never thinks of resisting them. He is, even in normal conditions, often a glutton, and a petty thief; at times destructive, spiteful and cruel, preferring those games which give trouble or even pain, to others. And because in a criminal act like theft, the child can, in the nature of things, steal articles of small value—we condone the deed. That is a grave mistake; the child will steal fruit or carry off lead-pipe, not because it isn't of much value, but because he can't reach something better. Do you expect him to embezzle bank funds? If we notice such offenses at all, we say "Oh, boys must be boys," and smile.

But for the very reason that man in his infancy is under the force of animal life, for the reason that the moral sense is more pliable, our watch should be especially careful and intelligent.

If the child has certain tendencies which, if unchecked, will cramp its manhood, and develop the animal life in excess, it is obvious that a vicious environment will in

most, if not in all, cases make a bad man of him. The potential delinquent of 5 years of age will at 15, by an overt act, become an actual criminal. Dickens bewailed the fate of those babes who, nursed by drunken mothers, drink into their blood the vice which will eventually land them in jail.

Let us, however, leave aside hereditary influences, terrible as they are. We cannot help past mistakes. But the redemption of a child's surroundings is a living possibility. Those of us who stand aside do not know the terrible miseries of certain childhoods; we cannot imagine parents instilling in their children criminal and infamous ideals—the ideal of becoming great thieves or achieving criminal celebrity—children sent forth into the world with the idea that society is their enemy and it is heroic to fight it; daughters forced to prostitution by the precept and example of their mothers; teachers in criminal practice, "lawyers" learned in the loopholes of penal codes, for the under world has its system of education in crime as the upper world has its institutions for the higher life.

Such facts are not easily believed, because they go counter to the generally accepted and convenient belief in the dignity of the human soul and the force of parental affection; they escape detection by institutional searchers and the self-styled social observers, because immorality of this kind is a class by itself—in a way independent of outside help. certainly not seeking it; men and women who can be attracted neither by churches nor social settlements, distinct from the pauper class because representing in an animal way a stronger element, shrewder in its intelligence, quicker in its activities and decidedly anti-social, except in some cases towards the members of its own world. The common mistake is to attribute to the criminal the thoughts, reasonings and sentiments of the morally normal. Now, though in the criminal world many phenomena resemble those of normal life, wrong conclusions will be

reached by studying them as deviations from normal conditions instead of manifestations of degenerate life. Study of such nature has rightly been called "not criminal psychology but reprehensible automorphism."

Poverty alone would not explain criminality, especially in children, for criminality in the young is by no means confined to the poor. And again, children are not unhappy in poverty. But poverty becomes self-conscious and cognizant of its great limitations by knowledge of the extravagance of the rich. Such knowledge is acquired by the publicity given by so many to their wealth, and through the descriptions of the doings of the rich by a vulgar press.

Poverty is often only indirectly the cause of crime, in that it drives children to become tramps and vagabonds. The adventuresomeness and excitement of a vagabond life are more alluring than a wretched home existence. If they stay at home, they are either forced to excessive work (in itself a cause of juvenile crime) or else schooled at home in the view-points and ideals of the under world. The progeny of the criminal is often "born tired" which is not surprising. It loves idleness and hates work. The reasons given by 225 juvenile offenders for their idleness, as collected by one of the most promising of Continental students (L. Ferriani) are interesting. Forty-eight said: "We're good for nothing;" 25 explained that "Our father doesn't work;" 22, "Work is fatiguing;" 19, "Idleness is continued fun;" 14, "Begging is work;" 6, "Why work every day?" 10, "You make more by stealing;" 36, "We get along nicely by begging;" 8, "We haven't time;" 18, "Our employers discharged us—how then can we work?" 19, "My father says only fools work." Of 145 girls asked the same question, 7 answered: "We eat so little and why should we tire ourselves?" 6, "What's the use of working

when you're paid so little," and 4, "Why should we, when there are free meals?"

Again, too much reliance is placed on education; education is not that universal panacea that some people imagine. This is perhaps because most of what passes for education is merely instruction. Of the 11,293 young offenders sent to Elmira since its foundation, only 16.54 *per cent.* were illiterates, while 32.31 *per cent.* had a common school education, and 4.08 *per cent.* that of a high school or college. Of the same number, 79.89 *per cent.* had good mental capacity, and only 1.33 *per cent.* were mentally deficient.

On the other hand, 34.24 *per cent.* of them were absolutely unsusceptible to moral impressions, 43.57 *per cent.* were possibly somewhat susceptible, and only 18.46 *per cent.* were ordinarily so. Over three thousand of them (26.59 *per cent.*) showed absolutely no moral sense, such as filial affection or sense of shame, 46.36 *per cent.* showed a little, and 21.97 *per cent.* were ordinarily susceptible.

It would seem from these figures (and the observation of experts strengthens it) that education alone, especially in the guise of instruction and independent of ethical training, is not a very efficient check to criminal propensities. Such is the opinion of observers like Le Bon, Taine and Leixner, the last of whom goes so far as to hold that education has contributed to the growth of prostitution in Germany.

In answer to all this criticism, it will be said: "Are we not constantly legislating on behalf of children? Have we not established reformatories and industrial schools? Are we not contributing to the support of children-aid societies, social settlements and other child rescue work?" The answer is two-fold. There is too widespread a belief that the passage of a law will of itself work a reform. Tremendous efforts are put forth to secure its passage and then comes a general quieting down and self-congratulatory

inactivity. As it is, we have too many laws; an already overburdened penal code is supplemented by special penal acts—the State Charities Law—the Child Labor Law, *etc.* An intelligent and persistent application of a few provisions in the Penal Code of broad and general application, would yield better results than a plethora of dead or semi-dormant legislative specifics.

Secondly, philanthropic effort is exercised on a fundamentally wrong belief that bad children and criminal or degenerate children can be treated by practically the same methods and in the same institutions. In children, as in adults, we shut our eyes to the fact that there is a morbid element distinct and different from the merely irregular. To that morbid element we give the treatment that we give to the bad but redeemable element, thereby vitiating to a great extent the results among those who are subjects of reform.

It is well to insist on the force of good over evil, but this must not blind us to biologic and psychic facts. Even the criminal has rights, but the rights of the law-abiding must not be sacrificed to the criminal. It is well to be merciful to the wicked, but are we to be unjust to the good? It is time that something be done for the good children to save them from the bad. Crime is fearfully contagious—are we doing our best to prevent its spreading among the innocent? Children born of unspeakable orgies, children who, in tender years, look upon suicide as a "good way out," juvenile alcoholists, boys recidivists at ten, boys and girls past-masters in loathsome vices—what hope of reform is there for these? If you say there is hope, then you do not know them. If you say there is hope, it is because you confound them with those whom an unscientific and unfair legislation brands with the same name, because it judges from superficial similarities. You are punishing too many; your

wholesale measures only serve to keep alive that really criminal element which, though small, is a power for great harm. The social extinction of this small element is the only way to salvation. Social and governmental fostering of crime, as present methods might be called, must be put an end to.

We must recognize the criminal nature of certain children and apply against it severe social measures, severe not in a punitive sense but in a socially defensive sense. To let criminal acts go unpunished in children, is to make recidivists of them. To exonerate them from guilt and return them to their family, is a double social crime, for besides being an invitation to repeat an evil deed, a return to their family is a return to that environment which probably caused the act. Indeed, the one weak point in the system of probation and suspension of sentence, lies in the fact that the accused is generally left to go back to his old environment.

Legalized social and physical ostracism is our one great hope. It seems a very great hardship, especially for the young; but it is no greater hardship than the segregation of the insane and the contagiously sick.

The wages of sin is death even to the third and fourth generation. This is the universal law. If the criminal has so far escaped it, it is because society has protected him as far as it lay in its power, against it. And it has done so, mostly because penal law, with its historic basis and its lack of rational criteria, has judged legions of human errors as crimes. But when wiser laws will distinguish the really vicious from the occasional wicked or the mistaken, and bend its energies to reform the latter instead of punishing them, it will then be found that the really criminal, though beyond redemption, are numerically few. The duty of the social defense will then be very plain.

A PARADOX.

By L. G. SMITH.

VERILY this is a wonderful age, and in no way are its marvels of achievement more vividly illustrated than in the lessness of our inventions. We have wire-less telegraphy, the horse-less carriage, smoke-less powder, *etc.*, but in one thing the lessness of the ancient Romans distanced us, and that was in their fee-less lawyers.

A feeless lawyer, paradox of paradoxes; but such there were, and to be feed in those early days meant a forfeiture of four times the sum of the fee received.

It seems the ancient Romans held the position of advocate, or pleader, in especial esteem. Senators and consuls deemed it an honor to lend their voice to redress the wrongs of the people, but woe to that grasping wight who loaned his vocal powers for hire. Such a thing was not thought of in the days of simple living, but as luxury and corruption crept in, eloquence was at times for sale to the highest bidder. To put a stop to this, then called, disgraceful practice, the tribune Cincius procured the passage of a law, called from him *Lex Cincia*, whereby advocates were forbidden to take any money or presents from their clients.

On the discovery that one senator, Sullius, had accepted fifteen thousand dollars, or its Roman equivalent, for his services to an illustrious knight and had afterward betrayed his client, the Emperor Augustus caused a severe revival of the law, and added the fine

mentioned above of four times the amount of the fee.

The illustrious Thrasae taught that advocates should undertake only those cases of friends, or for people in dire distress, and then only such cases as might tend to set a good example, and purify morals. Later this same senator, Thrasae, was ordered to his death by Nero because he would not acknowledge the sweetness of the annual holiday which Nero desired the senate to decree to celebrate the graceful act of murdering his mother, which had been one of Nero's little pieces of by-play.

Atrocious as the Fiddling Emperor was and as audaciously as he suborned the senate to suit his own evil ends, yet even he, in his first speech to that august body, declared his intention of enforcing the ancient laws whereby advocates were forbidden to receive fees.

Later Emperor Alexander Severus gave stipends to advocates in the Roman provinces provided he was assured they pleaded without fees from their clients. Still later it was found that the restriction against fees was impracticable, but Constantine pronounced "those advocates who obliged their client to make over to them by deeds the best part of their property in land, cattle and slaves, or who prostituted their talents in this odious traffic, unworthy to be admitted into the company of honest men," and all such he promptly excluded from the bar.



A STORY OF A RURAL SHIRE.

BY HALE K. DARLING.

IN all New England there cannot be found a county seat that retains quite so much of the old-time flavor as does the shire of Orange County, Vermont. Since 1796, the town of Chelsea has been distinguished as the county seat; and although no railroad train has ever ventured nearer than thirty miles and the village is shut in by high hills, it seems likely to remain the seat of justice so long as the present county lines of Vermont are maintained. Ordinarily the most placid of rural communities, when Chelsea semi-annually entertains the Orange County Court, it attains to something of the swirl and excitement of a metropolis. While the court is in actual session, every day pursuits are at a standstill, and the village inhabitants, male and female, flock to the Court House, to augment the goodly delegations already in attendance from other towns in the county.

Some seventy years ago, this worthy town had a narrow escape from the disgrace of a public execution, and while the story is familiar in these parts it may be of interest to outsiders.

An aged fiend named Rebecca Peake, living in Randolph, was convicted of murder in the first degree, at the December term, 1835, of Orange County Court. We learn from the indictment that on August 12 of that year she commenced mixing white arsenic in a "certain hash," also in a "certain drink," to be eaten and drunk by one Ephraim Peake, and continued so to do for four days; and that in consequence of this course of domestic science, said Ephraim ate, drank, languished and died, the latter stage being reached August 20.

It is now currently believed that the victim was the husband of the respondent, but from certain parts of the correspondence

hereafter set forth it will be seen that this idea is wrong.

The then State's Attorney was William Hebard, afterward a judge of the Supreme Court, and it is among his papers that the earlier letters herein referred to have been found.

The then presiding judge of the County Court was the Hon. Jacob Collamer, who later became widely known as Postmaster-General and United States Senator. Nine days after Peake's death, Judge Collamer wrote the State's Attorney:

"In relation to the case of Mrs. Peake, I answer: You will summon the witnesses and have the case fully prepared for the next stated term of the County Court. It is not the practice to appoint a special session or to call in another judge until a bill has actually been found; but it is right that the attorney should keep the judge advised of the state of circumstances that there might arrangements be made that a judge should be in readiness if called on. As there is no press of business in your court, it is probable, if a bill were found, the trial could proceed the same term; but on that subject I have nothing at present to say, as I know not who will then be judges."

The respondent was duly indicted, and was tried from the twenty-third to the twenty-sixth days of December, 1835. The trial was presided over by the Hon. Charles K. Williams, Chief Judge of the Supreme Court, and with him sat Judge Collamer and the two assistant judges of the County Court. The respondent was defended by the Hon. William Upham of Montpelier, subsequently United States Senator and one of the most powerful advocates of his day.

As the court room was not large enough to hold all who desired to attend the trial,

the court was considerate enough to hold its sessions in the Congregational Church, a good-sized edifice, with a gallery on three sides. Boards were laid across the backs of the front pews to make a platform for the judges, jurors and attorneys, and the rest of the house was given over to the spectators. The respondent was found guilty of murder in the first degree, and was sentenced to be hung Friday, February 26, 1836, between 10 a. m. and 3 p. m.

think the Legislature would commute her punishment to imprisonment for a term of years or for life. Perhaps it is of no great consequence which. She is now far advanced in life, and in all human probability, if her punishment is commuted, in a few years she will go down to her grave. . . . If the Governor and council meet here, I intend, if I am able, to appear before them in behalf of the petitioner, and I hope you will also appear in support of the petition. I



COURT HOUSE.
THE TOWN OF CHELSEA, VERMONT.

The efforts of the respondent's counsel in her behalf did not end with the verdict. On Jan. 21, 1836, Mr. Upham wrote Mr. Hebard as follows:

"Will you let me know whether or not any petition has been got up to the Governor requesting him to call the council together for the purpose of granting to the wretch, Mrs. Peake, a reprieve until the next session of the Legislature. You have discharged your duty as counsel for the State, and I hope you will now interest yourself in behalf of the prisoner so far as to save her life. I

cannot endure the idea of a public execution. It is barbarous in the extreme. It is offensive in the sight of God. 'From heaven did the Lord behold the earth; to hear the groaning of the prisoner, to loosen those that are appointed to death.' I should consider a whole life well spent that resulted in rescuing one human being from the gallows. If the prisoner is guilty, let the walls of a prison secure her from any further communication with society. Give her time in the solitude of her cell to repent of her sins and prepare for the retributions of eternity. I

wish you would inquire of Mr. Peake whether he intends to pay my fees without complaining.

"Yours respectfully,
WM. UPHAM."

"P. S.—I hope Mr. Peake will sign the petition to the Governor. I would not wish him again to receive the prisoner to his bosom if he believes she attempted to poison him. For I believe with the poet that

'True reconciliation can never grow
Where wounds of deadly hate have pierced
so deep.'

"She is, after all, his wife, and the mother of his children, and for their sake he should try to save her from the scaffold. W. U."

Barring the "commerce clause" of this letter, it is indeed an eloquent appeal, and must have had the effect desired upon the State's Attorney; for on February 9, the Governor of Vermont wrote Mr. Hebard as follows:

"I have come to the conclusion, however painful to myself, that public justice does not require and would not warrant the convening of the council in relation to the case of Mrs. Peake. I think I can duly appreciate the motives which may have operated on the minds of the petitioners, but still I cannot believe that the provisions in the Constitution authorizing the convening of the council and empowering the executive to grant reprieves in certain cases should be exercised except in cases marked by some mitigating or palliating circumstances, and certainly none such have been presented or urged for consideration in the case of Mrs. Peake. This case, compared with the convictions for capital offences heretofore had in this State, stands perhaps without a parallel for moral guilt. As an additional reason if any such were necessary—the late hour at which the application was received and that it was at that time the opinion of some that unless a special messenger was employed there was

not sufficient time to give notice to all the members of the council to convene seasonably for the objects of the petition. Respectfully yours,
S. H. JENISON."

The Hon. Matthew Hale, late of Albany, N. Y. (a native of Chelsea), in a letter written to me in 1896, thus tells the rest of the story:

"Great preparations were made for the execution of this wretched woman. A gallows was prepared, which was to be erected on the South Common in front of the Court House, in sight of everybody who chose to be a spectator. The sheriff of the county, who seemed to be a man of a good many words, talked freely as to what he should do on the occasion. He was to ride round with a drawn sword, and if he saw more than two or three people engaged in conversation together, he would ride up and command them to disperse, and preparation was made for what was generally anticipated as a great day for Chelsea. Many of the people, however, did not feel that the occasion was to be a hilarious one. I remember that my next older brother, William, was very much disgusted and had arranged to go out of town, so as not to be present at the hanging. It turned out that the 26th day of February, 1836, was one of the worst days of the year. A terrific snowstorm had set in a day or two before, and the roads about the county were drifted so as to be almost impassible. Notwithstanding this, the little town was filled with eager spectators, or persons who desired to be spectators of the execution, but in spite of their great efforts they were disappointed. The old woman had in some way obtained poison in the jail and had poisoned herself the day before, so that the gallows they had prepared was never erected; and those who came to witness the putting to death of a feeble, wicked old woman were disappointed. Rage took possession of their souls. Good old Dr. Winslow, whom some people charged with connivance, by means of which the poison was obtained

and the gallows defrauded, was threatened with the vengeance of the disappointed crowd; but this ended in talk, and the community was not disgraced by any attempt at mob violence. Most of the people of the vil-

lage, I believe, were gratified that the contemplated barbarous exhibition did not take place. All these things made an impression upon my boyish mind, which will remain while I live."

THE TRIAL OF LOUIS GAUFFRIDIS.

By JOSEPH M. SULLIVAN.

IN the early days of the Christian church witchcraft was frequently confounded with heresy, but whether purposely or not, I am unable to say. Pope John XXII. was the first pope to formally condemn the crime of witchcraft, but the famous bill of Innocence VIII. was not proclaimed until the year 1484. This bill marked the most memorable epoch in the annals of witchcraft, and by its terms the prosecution of witchcraft was formally sanctioned, enforced, and developed by the highest authority in the church. The crime of witchcraft was then raging in Germany, and the proclamation of Innocence VIII. empowered the inquisitors to seek out and burn the malefactors "*prostrigiatius hæresi.*"

The case of Louis Gauffridis gives the reader an adequate idea of the methods resorted to in the early years of the seventeenth century to obtain convictions in witchcraft trials. Louis Gauffridis, who had debauched several young women, was formally accused of exercising witchcraft upon one Madeleine, a novice in the Convent of Aix. The facts of the cases are briefly as follows: Madeleine, one of the novices, soon after entering upon her novitiate, was seized with the ecstatic trances, which were speedily

communicated to her companions. These fits, in the judgment of the jurists, were nothing but the effect of witchcraft. Exorcists elicited from the girls that Louis Gauffridis, a powerful magician having authority over demons throughout Europe, had bewitched them. The questions and answers were taken down, by order of the judges, by reporters, who, while the jurists were exorcising, committed the results to writing, published afterwards by one of them, Michaelis, in 1613. Among the interesting facts acquired through these spirit media, the inquisitors learned that Antichrist was already come; that printing, and the inventor of it, were alike accused, and similar information. Madeleine, tortured and imprisoned in the most loathsome dungeon, was reduced to such a condition of extreme horror and dread, that from this time she was the mere instrument of her atrocious judges. Having been intimate with the wizard, she could inform them of the position of the "secret marks" on his person; these were ascertained in the usual way by pricking with needles. Gauffridis, by various tortures, was induced to make the required confession, and was burned alive at Aix, April 30, 1611.

WRONG WITHOUT REMEDY: A LEGAL SATIRE.

VII.

THE RAILWAY LEASE.

By WALLACE McCAMANT.

IN Western Pennsylvania there were two railway lines, which extended parallel with each other in the Alleghany Valley for one hundred and fifty miles. They were the Pittsburg and Northeastern and the Buffalo and Alleghany. They reached the same cities and competed for the same freight and passenger traffic. The officials of both roads felt the keenness of the competition and were persuaded that their profits would be larger if they were able to operate under one management. The Pittsburg Northeastern was the stronger of the two corporations, and its officials devoted themselves to the work of securing control of the rival line.

One day, while Hamilton Anderson was in Philadelphia, he noticed by the paper that a charter had been granted at Harrisburg to a corporation under the name of the Alleghany and Northern Railway Company. Among its corporate powers named in the charter was that of building, buying, leasing, acquiring, maintaining and operating a line of railway and telegraph between Pittsburg and other points named in the Alleghany Valley. The charter was issued on the application of a lawyer whom Anderson knew to be a warm personal friend of the general attorney of the Pittsburg Northeastern. Anderson had long known of the competition between these two roads running northeasterly out of Pittsburg and he suspected that the granting of this charter looked in the direction of a control of one of these roads by the other. He immediately wired his broker in New York to buy him a few shares of the stock of the Pittsburg Northeastern and a few additional shares of that of the Buffalo and Alleghany. He then went to Pittsburg to investigate. A

man of high financial standing and great wealth has ways of finding out things which are unavoidable to the average man. Anderson, at any rate, succeeded in fathoming the plan by which the Pittsburg Northwestern proposed to control the rival road.

The stock of the Alleghany and Northern Railway Company was held in trust for the Pittsburg Northeastern. The Alleghany and Northern Railway Company was to lease the Buffalo and Alleghany for a term of ninety-nine years at a rental sufficient to pay the interest on the bonds of the latter road and six *per cent.* in dividends on its stock. The Alleghany and Northern, being as yet a mere paper corporation, it had been found necessary for the Pittsburg Northeastern to guarantee the performance of its contract and the payment of the rentals called for by the lease. They had secured the consent of many of those who were interested in the Buffalo and Alleghany and were at work convincing the remaining stockholders that the lease was advantageous to them. They did not worry with small stockholders like Anderson, but when they had reached all the large interests represented in the Buffalo and Alleghany, they called their stockholders' meeting and voted authority to the directors to execute the lease. Anderson was present and voted, "No."

A few days later a suit in equity was started in the Alleghany Common Pleas and a preliminary injunction was issued restraining the Buffalo and Alleghany from executing the lease and the Pittsburg Northeastern from guaranteeing its performance by the lessee. Hamilton Anderson was plaintiff in the suit; he alleged that he was a stockholder

in both corporations. The defendant corporations promptly appeared and moved to quash the injunction. In due time the motion came on for hearing. The smallness of Anderson's stock-holding was emphasized by the defendant's attorney, and Anderson's motives in starting the suit were impugned. Counsel cited *Lauman v. Lebanon Valley Railroad Company*, 30 Pa. St. 42, wherein it was held that two railroad companies might consolidate lawfully, provided the dissenting minority stockholders were given fair value for their stock in cash. He produced a written offer signed by one of the officers of the Pittsburgh Northeastern to buy Anderson's stock in both companies at whatever the court might deem its value, and he also produced a bond in the sum of fifty thousand dollars, executed by a surety company of approved solvency, guaranteeing that the funds would be forthcoming on demand to effect this purchase.

Anderson's counsel in reply did not notice the aspersions on his client's character and motives further than to say that the question before the court was one of law. Anderson might be a good man or a bad man; the record did not disclose which; that was not the question. Anderson, whatever his character, had certain rights as a stockholder in these two corporations. The question was whether he was entitled to enjoin the execution of this lease and the guaranty of the lessee's agreement to pay rentals. He contended that as a stockholder in the Buffalo and Alleghany Anderson had standing to enjoin the lease and as a stockholder in the Pittsburgh Northeastern he had standing to enjoin the guaranty. He cited *Morawetz on Private Corporations*, Section 423, to the effect that the directors and even the majority of the stockholders have no right to give away the corporation's money. He contended that no corporation, except one formed for the express purpose of engaging in the guaranty business, had a right to guarantee the debt

of another corporation; at least it could only guarantee such debt for a legal and valuable consideration moving to the corporation giving the guaranty. In support of these contentions he cited *Davis v. Old Colony Railroad Company*, 131 Mass. 258; *Reese's Ultra Vires*, 136; *Cook on Corporations*, 775, and *Morawetz on Private Corporations*, 423.

What consideration moved to the Pittsburgh Northeastern to support its guaranty of the payment of these rentals by the Alleghany and Northern? There were but two answers which could be given to this question: Either there was no consideration; or the consideration was the destruction of competition, which he expected to be able to show, was an illegal consideration and the guaranty should therefore be enjoined.

This led him to discuss Anderson's standing as a stockholder of the Buffalo and Alleghany. He showed that as such stockholder Anderson had standing to enjoin an unlawful consolidation or a lease whereby unlawful consolidation was to be accomplished. On that point he cited *Taylor on Private Corporations*, 536; *Cook on Corporations*, 494; *Mowrey v. Indianapolis Company*, 4 Bissel 78, and *Mills v. Central Railroad*, 41 N. J. Eq. 1.

This brought him to the question of whether this consolidation was lawful. He easily showed that unless the deal were enjoined, the Pittsburgh Northeastern would control the road of its competitor, the Buffalo and Alleghany. The latter railroad company would cease to perform the public services which were the consideration for the grant of its franchises and would cease in fact to transact any business whatever. This, he showed, was contrary to public policy; a railroad company could not be permitted to abandon its public functions or to cease the operation of its road without express statutory authority for such purpose. On this point he cited *Thomas v. Railroad Company*, 101 U. S. 71; *Oregon Railway Company v.*

Oregonian Railway Company, 130 U. S. 1, and Central Transportation Company *v.* Pullman Company, 139 U. S. 24.

There was a further objection to this lease based on the fact that the road was leased to a corporation controlled by its competitor, contrary to section 4 of article 17 of the Pennsylvania Constitution, as follows:

"No railroad, canal, or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line."

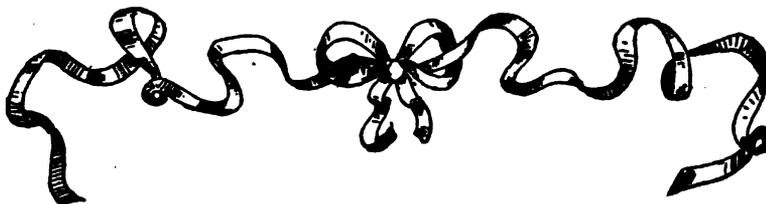
This section of the Constitution had been interpreted in the case of *Commonwealth v. Beech Creek Company*, 1 County Court Reports 223, where a consolidation essentially like that attempted in this case had been held unlawful. Anderson further showed by a newspaper clipping that this case had been affirmed by the Supreme Court, although the case had never been reported in the official reports.

He distinguished the case of *Lauman v. Lebanon Valley Railroad Company* relied on by the defendants on the ground that it had been decided in 1858, before the Constitutional provision cited above had been adopted and also on the ground that the roads consolidating at that time were not parallel and competing lines.

Anderson's stock, his counsel added, was not for sale. It was private property, and on familiar Constitutional principles it could not be condemned except for a public use. This principle he was able to establish beyond peradventure by late authorities notwithstanding some ill-considered words to the contrary found in *Lauman v. Lebanon Valley Railroad Company*.

The court took the matter under advisement, but intimated a strong impression that plaintiff's contention was sound in law.

Anderson was immediately waited on by counsel for the Pittsburg Northeastern and a confidential interview took place. Next day Anderson sold his stock in the two companies for seventy-five thousand dollars, dismissed his injunction suit and returned to St. Louis.



THE CIRCUIT RIDER.

REMINISCENCES OF JUDGE FRED J. RUSSELL OF MICHIGAN.

An Interview by Douglas Malloch.

THE first circuit rider with whom I had to deal was my father, who was Circuit Judge of the counties of Ionia and Montcalm, and opened the first court of record in Montcalm county. He proceeded from court to court upon foot. I remember that upon one occasion a delegation of distinguished attorneys stopped at my father's residence during the sitting of court. Just before their visit my father had purchased a barrel of whiskey, which had been placed in the cellar. As my father and his guests took their morning drink, I heard them discussing the value of whiskey and my father stated that this cost him eighteen cents a gallon. They agreed among themselves that it would be as unfortunate for a man to try to live without a barrel of whiskey in the cellar as to try to live without the use of a cow. It was a custom of the country then before each meal to take a drink of liquor, but my father never drank to excess.

When I began the practice of law, Western Michigan was an almost unbroken wilderness. There were no roads and the only means by which the different county seats could be reached was by travelling upon the beach of Lake Michigan. Flavius J. Littlejohn of Allegan, was judge of the Ninth Judicial Circuit, and perhaps had more circuit riding experiences than any man who has ever occupied the circuit bench in Michigan.

It was the custom of Judge Littlejohn in those days to visit the different counties on horseback. He was very proud of his equipment—a pair of saddlebags across his horse, like those of the old-time doctor. These were used to carry his clothing, books, etc. It was quite a common custom for the judge, and the attorneys who accompanied him

from court to court, to have an extra horse to carry what baggage was required on each trip. Provisions for at least one day were taken. Where the various rivers and creeks emptied into Lake Michigan, there was often great difficulty, and in many instances risk of life, in making the ford. Sometimes it was necessary to wait a day or two for an opportunity to cross because of the heavy seas on Lake Michigan.

Courts in those days were not able to transact their business as rapidly as at the present time, because of the fact that the attorneys had no opportunity to see their clients; the cases were not in readiness for hearing and they had to be largely prepared after the judge and his cohort of attorneys had arrived at the county seat. Usually their time was unlimited. One of the important qualifications of a circuit judge, or the old-time practitioner, was that he should be a good story teller; and nothing pleased one better than to entertain the natives night after night where court might be in session.

Sometimes the people of an entire county attended upon the trial of a law suit and at such times the question of providing provisions for the court and the attorneys was an important problem. Those were the days when wild pigeons were so plentiful in Michigan, and as a rule court and attorneys were provided with twenty-one meals of pigeon a week. On one occasion a party of judges and attorneys, going from one court to another, paused to enjoy a pigeon hunt. They climbed the sand hills on the bank of Lake Michigan and began killing pigeons with clubs as they flew from the tops of the hills. Judge Littlejohn told me afterward that they killed hundreds of them in this way.

On one trip of Judge Littlejohn, he and his brother attorneys arrived at Pentwater River but were unable to cross, owing to a severe wind storm which was in progress. They determined to go east into what is now the town of Elbridge, Oceana county, where an Indian payment was in progress. At that time it was customary for the Indians upon the reservation to congregate annually at some spot to receive the bounties that were paid to them by the general government. At these times there would be several thousand congregated for a week or more prior to the time of the actual payment. It was the custom as well for traders from Grand Rapids and other places to attend and not an uncommon thing for some of them to have liquor in bottles as one of the commodities for sale.

On this occasion it was suspected that an Indian had stolen a quart of whiskey and left the encampment. Complaint was made to John Bean, Jr., a justice of the peace, by one of these traders, asking for a warrant for this Indian. Justice Bean issued what was probably the shortest and most emphatic criminal warrant ever issued in Michigan. He took an envelope from his pocket and wrote across it with a pencil, "Bring the damned cuss back," signed it "John Bean, Jr., Justice of the Peace," and delivered it to the constable for execution.

At another time, while attempting to follow an Indian trail from Manistee to Newaygo, Judge Littlejohn and his party were delayed. It became dark before they reached their camping ground, and in consequence they lost their trail and for two days wandered in the woods.

Divorce cases have been common since my knowledge of the practice, but there are not many counties where justices of the peace have jurisdiction. In the early '60's in Oceana county we had a divorce case brought in justice court in the township of Claybanks. It was actually tried and a decree of divorce rendered on the ground of

cruelty. The justice not only granted the divorce, but at the same time banished the defendant from the county from that time forward. The decree was put into execution.

Judge John M. Rice at one time was prosecuting attorney of Oceana county and a warrant had been issued by Justice Tate of Elbridge, wherein Charles Wabasis was accused of crime. The Indian chose me to assist in the defense. The justice was one of those old-time technical magistrates who must have everything done according to common law. When it was time for the suit to proceed, Judge Rice instructed the justice to call the case. The justice adjusted his glasses, stood up, and throwing back his shoulders, said in a loud voice:

"The people of the State of Michigan are here by me in person."

Judge Rice said:

"That is not the way to call the case. Just say, 'The people of the State of Michigan!' and then stop."

The justice made another unsuccessful effort, by calling:

"The people of the State of Michigan, and then stop."

After three or four other unsuccessful attempts, he finally succeeded in calling the defendant and justice was properly meted out.

It not infrequently occurs in justice court, and especially was that true in the early days, that the justice sometimes seems unreasonably smart. There was a case of that kind at one time in my county. It was a question whether there was anything that this justice did not fully understand. He thought there was not, but I felt that there might be certain things concerning which he did not have full knowledge. I concluded to test his ability. I drew a bill of complaint, charging that a party in the township of Ferry was conniving and confederating with another party to commit adultery; and I asked for an injunction to issue from this justice court, under its great seal, to restrain the defendant in the premises. I presented the bill and obtained

the coveted writ, but it failed of the desired effect.

Soon after Manistee and Grand Traverse counties were severed from the old Ninth Michigan Circuit, Judge Ramsell was elected judge of the new circuit by the residents of Grand Traverse county. Complaint was made to Governor John J. Bagley that there was a large amount of pressing business that required immediate attention awaiting a session of court on Beaver Island. At that time the island was occupied by Strang and some of his Mormon followers, part of their colony extending into Charlevoix on the mainland, and several bands of fishermen, as well as woodsmen, who looked after the furnishing and loading of wood upon the occasional boats that came that way. The judge was requested by the governor to go to the island and hold a session of court and relieve the business that seemed to be so pressing. The judge responded to the governor that he did not feel like going to the island to hold court, for the reason that in his opinion there was no business requiring a term of court there, and also because there were no means of travel to the island unless he hired a boat in which to make the trip, and any boat that he felt safe for that purpose would charge \$100 to take the judge over and remain until he could transact the business of the term. He was receiving only \$1500 a year, and said he could ill afford such an outlay and therefore desired to be excused.

For a time this explanation seemed to allay the anxiety of the executive office. In the meantime the judge attended his other counties on horseback and visited a day or two at each, telling stories and renewing the acquaintance of his neighbors thirty or forty miles off the trail as he made his pilgrimage. One day the judge received a peremptory order from Governor Bagley to call a term of court on Beaver Island and go there and hold the term. The governor said that he had received repeated appeals for a term of court and that there was much urgent busi-

ness there that must not be delayed; and ordered him to attend to the matter at once.

The judge made the necessary arrangements, fixing a term of court on the island, and then looked about to find some scheme to relieve himself of the entire burden of paying \$100 to be taken over to the island and back. He went to Seth C. Moffit and other attorneys in the vicinity, and informed them of the great amount of business that was to be done at the court to be held on the island, and induced them to purchase tickets of him to go there to attend court. The attorneys were eager for business and when the judge's boat steamed out of Traverse Bay for Beaver Island it was freighted with about all the legal learning and ability in that part of the State.

When the boat arrived at the little bay at the island and came to anchor, for there were no docks, the shore was lined with those who had assembled with the view of attending a real, live court. The boats were lowered and the party went ashore, led by the judge. As they reached the bank, they were met by Patrick O'Flannigan, sheriff, and Mike O'Neil, county clerk. After the usual greetings, Patrick said:

"Judge, you have come to hold court?"

The judge answered:

"Yes. Where is the clerk's office, where court is to be held?"

"It is up to me place of business. Step right up there, Judge. I've attended to the liquors, and think everything is in readiness."

"What is there here for the court to do?"

"Your honor, I do not exactly know, but from what I hear there is a very large amount of business."

This was before the days when the clerk was required to prepare a calendar for the court. When the party arrived at the county clerk's office, they found a log building, twenty-five or thirty feet long and about sixteen feet in width. On the right as they entered were the bar and saloon fixtures; on the left

were the box stove and chairs to accommodate Mike's patrons. Near the back end, facing the front, was a desk made of kegs of beer, intended for the judge—with one keg of suitable size for the judge to sit on. This desk was touched up here and there with evergreen cedar twigs suitable for the gala occasion.

As the judge entered, Mike said:

"Your Honor, this is the county clerk's office and so is me place of business. If you will step back here, I will show you the judge's desk. You see I have everything ready. We do not feel like saving expense for we want everything nice and proper."

Judge Ramsell quickly determined that he could not hold court in such a place. The village school teacher was finally induced to dismiss school and there court was held.

At the appointed time the judge and his associates repaired to the little log school-house. Soon the seats, and the aisles as well, were filled to their utmost capacity. Court was duly opened for business. The attorneys were anxiously waiting for their prospective clients to step forward and make selection of the favored ones. The judge said:

"Mr. Clerk, what business is there to come before the court?"

"Your Honor, I do not know just what business there is, but I hear there is considerable."

After another pause, the judge asked:

"Is there any business to come before the court?"

After a considerable time, Mike Murphy solemnly arose from one of the seats in the body of the house, and politely putting his hat under his left arm, said:

"Mr. Judge, I want to know whether we cannot vote just as well by going before the county clerk, Mike O'Neil, and paying him seventy-five cents and declaring our intentions, as we can by coming before you and paying two dollars."

The judge replied:

"Yes, after declaring your intentions for the proper time, you have the same right to vote."

Mike Murphy said:

"Bedad, I thought so," and, putting on his hat, went out of doors followed by every other spectator except the judge's party.

This important business of the term being over, the court thereupon adjourned.

A BUNGLED AFFAIR.

BY H. GERALD CHAPIN.

THE great Condé, in the course of one of his periodical fits of rebellion against the Grand Monarque, had the misfortune to be placed under the leadership of a slow and altogether incompetent Spanish general of high degree. Once, when the word was given to advance, "Now," he said to the Duke of York, "you shall see how a battle ought not to be fought." Similarly, on the present occasion, we shall see how a murder ought not to be perpetrated.

There is no disposition to treat the Webster case at any very great length, for, from the standpoint of the connoisseur in crime, it was a distinct failure. To strike a man down in the heat of passion and then proceed to dissect his body and remove it piecemeal in the clumsy manner attempted by the slayer of Dr. Parkman, is certainly revolting to every true student in the art. A proper display of science might possibly have been manifested in eliminating all traces of the

crime, and had the homicide accomplished this feat in anything like a proper manner, we might be inclined to forgive his pristine clumsiness, setting it down to inexperience. But in a knowledge of the very rudiments of the chaste and elegant art of murder, nay, in very common sense, Professor Webster proved himself lamentably deficient. It is, of course, easy for the critic, seated in his library, at peace with the entire community, with a mind entirely free from any apprehension of a visit of the law's minions, to demonstrate how infinitely better he would have done had he been in the murderer's shoes. Just so can the military tactician, member of a board of strategy, conclusively establish an infinity of errors committed by the general in the field. It need scarcely be recalled to mind, however, that the murder is usually perpetrated and the battle fought under such stress of circumstances as take away a power of reflection and an ability to reason from all minds not of the very highest order.

Even this excuse cannot, however, be pleaded in extenuation, for, as we shall see, an ample space of time was afforded in which all traces of the crime could have been removed. The murderer was lost through sheer carelessness and clumsiness.

In the year 1849, John W. Webster held the position of professor of chemistry and mineralogy at Harvard College. He was a man of high attainments, author of a work on the particular subjects taught by him, and member of many scientific societies, both in this country and in Europe. He had always borne an excellent reputation. Of courteous and agreeable bearing, (though having as a child been somewhat indulged, he had in consequence become rather irritable in disposition), his popularity with his fellow townsmen and with the students was considerable.

Dr. George Parkman was an uncle of Francis Parkman, the historian. He had given the plot of ground upon which the Medical School of Harvard College was

erected, and in recognition of the gift, the professorship of anatomy and physiology received his name. He was exceedingly precise in manner, methodical to a degree, and while capable of great generosity, was just himself and demanded strict justice from others.

Some seven years previous, Webster, whose meager salary of \$1200 per year, plus a small sum, his share of the students' fees, scarcely sufficed to support his family of a wife and several daughters, had borrowed \$400 from Dr. Parkman, giving a fifteen months interest-bearing note secured by mortgage upon the former's household furniture and collection of minerals. In 1847, Dr. Parkman and several other friends made a further loan to him of \$1600, secured by similar collateral. Some months later, Webster being again in financial straits endeavored to obtain a further sum from Robert G. Shaw, a brother-in-law of Dr. Parkman, offering to sell him the mortgaged minerals. Mr. Shaw, ignorant of the lien covering the property offered him, agreed and paid Professor Webster \$1200, taking a bill of sale, leaving the minerals, however, in the latter's possession.

Shortly afterwards, Shaw casually mentioned the transaction to his brother-in-law, whereupon Dr. Parkman became fiercely indignant, and from that time on was the implacable enemy of Webster. On a number of occasions he called upon Professor Webster, demanding payment in a very violent manner, and when payment was refused, denounced him as a swindler and a rogue. On the last occasion, November 20th, a very angry interview ensued. We have now arrived at the time when the tragedy was to begin.

On Friday morning, three days later, between eight and nine o'clock, Professor Webster called at Dr. Parkman's house, and not finding him in, left word that he would be pleased to see his creditor in the lecture room of the Medical College at the close of

that day's lecture. Several persons between half-past one and two o'clock saw Dr. Parkman walking toward the Medical College. He was never seen alive after. As a matter of fact he did call upon Professor Webster and again demanded payment of the various outstanding claims. The latter endeavored to put him off with promises. Dr. Parkman refused to be pacified and growing more and more violent, finally ended by calling Professor Webster a swindler and a liar, saying that he had him appointed professor of chemistry and that he would now have him dismissed. Finally Webster, losing all control, seized the first thing within his reach, which happened to be a piece of grapevine about two feet long, purchased to show the effect of certain chemicals in staining wood, and dealt Dr. Parkman a terrific blow on the side of the head. The unfortunate creditor had paid for his persistency with his life.

The crime was clearly without premeditation, and yet circumstances had so favored the criminal that if he had but adopted reasonable precautions, detection would have been well nigh impossible. According to his own confession, Dr. Webster was horrified at the result of his sudden ebullition of temper and spent some time in an endeavor to resuscitate his victim. Finally, realizing the impossibility, he determined to conceal the body.

He hurriedly bolted the door, then stripping the deceased, he thrust the clothes into the laboratory furnace, where they were soon reduced to ashes. The watch he put into his pocket and threw it from the bridge on his return to Cambridge that evening. The body he placed in a sink which stood in his private room, and taking a sharp knife used for cutting corks, it was quickly dismembered. A stream of water kept running through the tank served to carry off the blood. The head and viscera were placed in the furnace and fuel heaped on. So great was his agitation of mind, that the murderer did not even

stop to examine to what degree they were consumed. The pelvis and a portion of the lower limbs were put in a so-called "well," a deep lead-lined tank, situated under the lid of the lecture-room table, and a stream of water turned on which was kept running all Friday night. The thorax was put in a similar well in Professor Webster's other laboratory on the floor below, and potash thrown in. The stick was burned. The two notes which had fallen on the floor he picked up, and cancelling them with a dash of the pen placed them in his pocket. Professor Webster succeeded in accomplishing much in the comparatively short time at his disposal for he was seen to leave the college about six o'clock.

That evening, after tea, and about eight o'clock, the murderer went out with his wife and daughter. Leaving the latter at a party, he and his wife went on to Professor Treadwell's house, where they passed the evening in conversation. On Saturday and Sunday, possessed by the morbid fascination which ever induces the slayer to return to the spot where his victim fell, Professor Webster called at the laboratory, but left the remains untouched. Uncertain as to his future course, with no definite plans formed, he was content to drift with the tide.

Now, as previously stated, Dr. Parkman was most methodical in his habits, and when he failed to return to dinner on Friday, his family felt greatly alarmed. It was not, however, until the following morning that definite steps were taken. The police were notified and advertisements inserted in the Saturday evening papers. Up to Friday of the following week, the search continued. The river was dragged and certain yards and out-buildings in the western part of the city, where Dr. Parkman was known to have owned considerable property, received careful examination.

On Sunday, Nov. 25, thinking to allay any suspicion that might arise, Professor Web-

ster called upon the Rev. Dr. Francis Parkman (brother of the murdered man) at about four o'clock in the afternoon, and stated that he had seen the notices in the papers and that he had himself had an interview with Dr. Parkman on Friday last in the lecture-room of the college, when he had paid the latter the \$483 then due, who thereupon promised to attend to discharging the chattel mortgage of record. Accidentally meeting Mr. Blake, a nephew of the deceased, and Littlefield, janitor of the Medical College, on the street, he repeated the same statement to each.

To still further divert suspicion, he also called upon the City Clerk of Cambridge and asked whether the mortgage had been cancelled.

On Monday, it was determined to make search through the Medical College. Having first thoroughly explored the other parts of the building, the party knocked at the door of Webster's laboratory and after some delay, were admitted. The examination was of an exceedingly cursory description and was utterly unproductive of results.

Left alone, when the officers had departed, Professor Webster took the pelvis and limbs from the upper well and threw them into a vault under a private privy.

At ten o'clock the next day, the party of officers again called for the purpose of making a thorough search. Professor Webster stated that while he was perfectly willing to assist in any way, he would have to ask them to be very careful not to disturb things, as he was to lecture at twelve. Finding nothing, the police withdrew.

In the afternoon, the murderer, having carefully secured the door, drew the thorax from the lower well, and packing it in tan, placed it in a tea chest which stood in the laboratory and heaped minerals on top up to the brim. He then returned home and passed the evening playing whist with his family.

On Wednesday, the 28th, Webster went early to the college. A hot fire was soon made in the laboratory furnace. Some of the limbs, what ones or how many, he was subsequently unable to recall, were consumed. This was the last he had to do with the remains. He left the college at noon, and returning to his house at Cambridge, dined there, passed the afternoon working in the garden, and in the evening went with his wife and daughters to a party in Boston.

Thursday was Thanksgiving day and he remained at home.

On the Tuesday previous, Prof. Webster had purchased a considerable quantity of fish hooks and twine, asking the clerk at the same time, to instruct him in the art of making a grapple, and on Friday morning about 10 o'clock he called at a tinman's store and left an order for a large tin box with strong handles and a cover that could be tightly soldered. Nothing better reveals the chaotic condition of the criminal's mind, than the statement, undoubtedly true, made in his subsequent confession, that he had no really definite purpose in doing this. The grapple he designed for possible use in drawing the remains up from the vault whenever he should determine to dispose of them, the box was procured to contain them, though he had for a considerable time intended to order both for the purpose of securing certain specimens of marine vegetation which he desired to add to his collection. He had not even concluded where to conceal the box in the event of its being used for the first mentioned purpose. What possible design he could have had in soldering it up before disposing of it, thus enabling the evidence of his crime to be much better preserved, is undiscoverable. It reveals the utter inability of the man to conceive of any rational plan. His purposeless actions resemble nothing so much as those of the simian perpetrators of the murders in the Rue Morgue.

Littlefield, the janitor of the college, had become somewhat suspicious, and on numerous occasions during the absence of Webster had examined the laboratories. About three o'clock on Friday, after borrowing a strong crowbar from a neighbor, he went into the cellar and began to break through the wall of the private vault. About this time, some police officers appeared and assisted him in his work. The wall was soon broken through and the party saw lying upon the ground, parts of a human body consisting of the hip bones, the right thigh (from hip to knee) and the left leg (knee to ankle), together with towels spotted with blood, marked with Webster's initials, and similar to those used in his laboratory.

The evidence was then deemed sufficient to warrant arrest, and three officers drove to the criminal's house in Cambridge and took him into custody. At first he seemed to take the matter very coolly, but finally became utterly prostrated, and after having been placed in a cell at the station, fell in what appeared to be a fit. As a matter of fact, on the day of the homicide he had prepared a strychnine pill which had been constantly with him ever since. Owing probably to the condition of his nervous system the action of the drug was defeated.

On this day, an unsigned letter was received by the city marshal which stated that "Dr. Parkman was took abroad the ship *Herculean*. One of the men give me his watch and I was aferd to keep it and throwed it in the water right side the road at the long bridge at Boston." This had evidently been written with some blunt instrument. (A pointed stick with a wad of cotton tied over the end which had been dipped in ink was found in the criminal's room at the college.) This and another anonymous communication, likewise received by the city marshal, were, so the experts testified, in the disguised handwriting of Prof. Webster.

That same night, a thorough investigation

was made of the laboratory and lecture rooms. In the furnace, fused indiscriminately with slag and cinders, there were found a great number of bones and some blocks of teeth with melted gold adhering to them. On Saturday, they discovered in a remote corner of the laboratory the tea chest with its contents. Placed in apposition the parts were found to resemble corresponding parts of Dr. Parkman, there being, of course, missing, the head, arms, hands, feet and right leg from knee to ankle. The remains indicated that the height of the person to whom they belonged was five feet ten and a half inches, the stature of Dr. Parkman.

In the autumn of 1846, Dr. Keep, a Boston dentist, had made artificial teeth for the deceased, taking a mold which was still in his possession. Among the bones found in the furnace, were fragments of the lower jaw and blocks of artificial teeth, which, when put together, fitted the mold. Now it was evident that the remains were not those of a subject for dissection, in that there had been no injection of preservative fluid. All cadavers were furthermore accounted for independent of this by Dr. Ainsworth, who kept accurate record of them. The fragments, so the experts reported, had evidently been separated by a person of some anatomical skill, though it was quite apparent that they had not been dissected for anatomical purposes.

A pair of trousers and slippers were also discovered which had on them small drops of blood, though whether of recent date or not it was impossible to state.

On Tuesday, March 19th, 1850, the criminal was brought to trial in the Supreme Court before Chief Justice Lemuel Shaw and three associate judges. The evidence offered by the defense was chiefly in the nature of testimonials to Prof. Webster's high character and standing. The defendant also produced six witnesses who swore that they had seen Dr. Parkman in various places in Boston after the interview at the college. The ex-

istence of the remains in the laboratory was left entirely unexplained. Webster claimed furthermore, that he had actually paid Dr. Parkman the full amount of the notes in cash and that the latter had himself cancelled the instruments in question. He was thereupon promptly confronted with his bank book which revealed at no time a sufficient amount on deposit.

After a trial ending Saturday, March 30th, the prisoner was found guilty, and on Monday, April 1st, was sentenced to be executed. It is an interesting fact to bear in mind that at that time the Massachusetts law did not permit a prisoner to testify, hence the lips of the criminal were sealed.

Application for pardon or commutation of sentence was shortly after made by many of Prof. Webster's friends, among them the Rev. Mr. Putnam, to whom the murderer had made a confession in which the entire circumstances surrounding the crime were set forth. The Committee on Pardons refused to interfere, and on August 30th, a little over nine months after the commission of the homicide, Webster was hung at Boston.

Now, as previously stated, we have given but a short review of a murder which at the time excited considerable comment. In criminal law the case is referred to chiefly for the reason that it excellently illustrates what is sufficient to constitute proof of the *corpus delicti*. A disciple of DeQuincey can, however, have but little appreciation for the bungling piece of work which was perpetrated by the pseudo scientific man. Here all the appliances were at hand for a successful homicide. Circumstances could scarcely have been more favorable if everything had been pre-arranged with the utmost forethought. Ample time was afforded, and it seems almost incredible that no real attempt was made to destroy the remains. The

nerves could have been severed and the flesh stripped from the bones with the exercise of but slight surgical skill. A hot furnace fire, particularly if aided by some substance like oyster shells, would have utterly destroyed the flesh, and the mineral portion having been withdrawn from the bones by the use of sulphuric acid, they would have been made so susceptible to the action of heat that but a pinch of dust would have remained. Even without the assistance of the laboratory furnace (though it would have taken a longer time and required a larger amount of material to accomplish it) the entire body might have been destroyed piecemeal by the use of muriatic, or better yet, sulphuric acid. These chemicals the murderer's position as professor of chemistry would have enabled him to secure without exciting comment. The lead-lined vault would have been an ideal receptacle in which this could have been accomplished.

The liquid matter which would soon have constituted all that remained of Dr. Parkman, could have been drawn off through the pipes, running water would have washed all clean and baffled at a lack of ability to prove the existence of a *corpus delicti*, justice would have been powerless. It seems strange that a man of Prof. Webster's attainments, who possessed the requisite amount of "nerve" to go about his calling in life without attracting attention, and who mingled unsuspected with his fellowmen, knowing as he did that the evidence of the crime might at any moment be laid bare, would yet perpetrate the most senseless errors. The letter to the police, for instance, is a piece of childishness, pure and simple.

The foregoing only goes to show that the commission of a successful murder requires the highest degree of intelligence, a degree so high that the percentage of men possessing it is but infinitesimal.

TAXATION IN THE PHILIPPINES.

By W. F. NORRIS.

LEGISLATION in the Philippines since the American occupation is necessarily experimental in its character. A judicious system of taxation is one of the most difficult requirements to meet in this country, as it is one of the most essential for the benefit of the community. Of all bad measures of an oppressive government the worst is a vicious system of taxation; as it works greater injury to the people than any other means of political injury. The most tyrannical act of the bloody-minded Alva, the scourge of the Netherlands during the rebellion against Spain, was the imposition of a tax so heavy that it not only took the substance of the people, but paralyzed their industrial energy, and defeated the purpose of its imposition by making its collection impossible for any length of time in the future. Alva was, perhaps, the most blood-thirsty tyrant of European history; he is said to have executed some eighteen thousand people during his comparatively brief rule over the Low Countries, but what more than all beside crushed their energies and wrought ruin to the people was the tax laid shortly before his infamous reign came to an end by his recall to Spain.

The present tax system, introduced by the Philippine Commission, is modeled largely on that of the several States of the Union, as to its collection and the penalties attached for non-payment; in some important features, however, it differs widely from the general system adopted in the United States.

The main source of revenue is derived from the tax on land, that is, for provincial and municipal purposes, the general sources of revenue being an *ad valorem* tax on lands, buildings and improvements; beside the land tax, revenue is derived from an impost on the privilege of establishing fisheries, fees for certificates of ownership of cattle and the trans-

fer of title of the same; rents and profits of municipal property; fees for tuition in municipal institutions of learning; licenses for various occupations and privileges, among which are included cock-pits, cock-fighting, keeping or training fighting cocks, and municipal fines. One of the most peculiar taxes is an imposition on carts for the purpose of road repairs, which tax is classified as follows: Three dollars upon each draft cart with tires less than two and a half inches wide; two dollars on carts, the wheels of which are rigid with the axle to which they are attached; five dollars on each cart having both such tires and axle. The tax is in Mexican currency, making it less than one-half the amounts specified in United States currency.

As before observed, the great source of revenue for provincial and municipal purposes is derived from the land tax. For purposes of taxation, the land of each municipality is valued by a body termed the Municipal Board of Assessors, consisting of the President and Treasurer of the Municipality and a special deputy appointed by the Provincial Treasurer. Each owner of real estate within the municipality is compelled by the law to prepare a statement of the land owned by him and its value, and to file such statement with the Secretary of the Municipal Board within two weeks of its organization. The Board of Assessors are not bound by the statements filed by real estate owners, and as a matter of fact take them simply as an indication of the value of the land, making their assessments largely according to the financial requirements of the municipality.

A list of the taxable real estate with the valuation and assessments is made by the Board. Notice that said list is prepared, and that on a certain day, at least ten days after the posting of such notices, complaints will

be heard by the Board from land owners feeling themselves aggrieved by the assessment, is posted in public places. The law also provides that appeal may be taken within ten days from the decision of the Municipal Board to the Board of Tax Appeals, consisting of the Provincial officials, Governor, Treasurer and Supervisor, who by the law are to decide the matter submitted within fifteen days after the time limited for filing appeals.

There is liable to arise serious misunderstanding in regard to the necessity of making complaint and taking their appeal within the time limited by the law by the dissatisfied taxpayer. The Oriental is characteristically slow, none more so than those of the Malay race, which *manana* tendency is not helped by their Spanish training. Ten days to them means twenty days, or a month, or two months. When, some days after the time limited by law, the aggrieved party appears to make his complaint of excessive taxation, and finds that he is precluded from any redress, he feels that gross injustice has been committed, as, in fact, in numerous instances is the truth. Much difficulty is experienced by the American officials on the Provincial Appeal Boards in avoiding doing great injustice owing to the ignorance of the complainants, their want of appreciation of the necessity of making their complaint within the time provided by law, and especially from the partial and prejudiced valuations of the real estate made by the native members of the Municipal Board of Assessors.

There is one species of official dishonesty the Filipino rarely rises superior to, that is, resisting the temptation to reward a friend and punish an enemy in making an official award or decision. In instances the lands of certain parties are valued at an exorbitant figure, in other cases they may be valued at a rate ridiculously below their actual value. In an instance recently before the Provincial Board of Appeals of this province, the owner

of certain land offered to make the government a deed of the land rather than pay the tax imposed, if she were assured that no further demand were made on her for the tax imposed on the real estate. In another case the land was valued for taxation at forty dollars a hectare (about two and one-half acres), the owner said he would sell the property for one dollar per hectare, and meant what he said, as on one of the officials asking him if he was in earnest he replied that he was, and would part with the land at any time for that price. The official went out and after viewing the tract, concluded that he did not want it at that price, the land being almost worthless. The party alluded to thought he might invest a hundred *pesos* in the land for the purpose of setting it out in cocoanuts, which grow well on sandy soil, but decided that the hundred hectares not to be worth a hundred *pesos* for a cocoonut plantation. In both the cases referred to the complainants were late in making their complaint, the ten days having expired; the Board of Appeals, however, anxious to avoid doing great injustice in the case, referred the matter to the Commission at Manila.

Under the law, the owner of land cannot relinquish it to the government and avoid further taxation, as the tax is collected first from the personalty of the land owner. The real estate being resorted to only where the owner is unknown or has no personal property available.

If the payment of the land tax be delayed three weeks after due, a penalty of fifteen *per cent.* is added, which sum with the principal amount due is satisfied, if not paid fifteen days after the expiration of the three weeks, by the seizure and sale, by the Provincial Treasurer, of sufficient personal property of the debtor, to pay the tax, costs and penalty, said sale being made after ten days' notice, the owner being allowed to redeem the property seized any time before sale by the payment of tax, penalty and costs. The tax and

penalty constitute a lien on the land bearing interest at six *per cent.* In case personal property of the owner cannot be found to satisfy the delinquent tax within twenty days, the land is sold after a prescribed publication by posting notices of the sale in public and conspicuous places and three weeks' publication in a newspaper of general circulation in the province wherein the land is situated. The owner is allowed a year from the day of sale to redeem his land by paying tax, penalty and costs, with interest at six *per cent.*, and the amount paid by the purchaser at the rate of fifteen *per cent.*

At the present price of lands, and in the depressed condition of the sugar market, it is not probable that such lands as may be sold for taxes will be redeemed by the owners or parties interested. The great staple of this province is sugar, as it is of the island; owing to the low rates for sugar in the Hong-kong market, the scarcity of cariboo, since the ravages made among the animals by the rinderpest, and other discouraging conditions, the sugar interest is in a depressed condition, the outlook for the planters being very discouraging.

In case the tax due, with costs, be not offered at the public sale, the land is forfeited to the Municipality, and if not redeemed one year from the date of forfeiture, the ownership becomes absolute in the Municipality, a deed being executed thereto by the Provincial Treasurer.

The law also provides that the delinquent land tax may be collected by action at law, in addition to all other remedies. The establishment of any system of civil government in this country must necessarily work inconvenience and occasional hardship among the people. Progress must be made through experience, and improvements introduced as their expediency is made apparent. This is especially true of any system of taxation based upon an American model. The government heretofore prevailing has been of a

military character, and political institutions, have been in keeping with the nature of the government. The Spanish mode of imposing and collecting taxes was radically different from the present system. It consisted largely of personal taxation, the cedular tax, for instance, being an apt illustration, which was a sort of poll tax, the cedular being a personal credential granted annually by the government to each individual showing his personality and right to carry on any occupation. The cedular was issued at a cost of three *pesos* a head, under the administration of General Otis. The cedular is still demanded, the price being one *peso*.

Experience under the new system would seem to show that a greater length of time should be allowed for taking an appeal to the Board of Assessors from the assessment on real estate, and more especially, also, in appealing from the decision of the Board of Assessors of the Municipality to the Provincial Board of Appeals. Many of the real estate owners in the island from which I write reside at a distance from the Municipality in which their land is situate, sometimes living in the neighboring island of Panay. In the Philippines the means of travel or communication are frequently very inadequate, the roads being poor and in the rainy season almost impassable in certain localities, and communication by means of water very uncertain, so that the period provided by law may be insufficient for the land owner to file his complaint before the Board within the time prescribed by law.

It may be found expedient after trial to repeal that provision of the law enforcing the collection of the land tax by the sale of the personal property of the delinquent, and satisfy the tax alone from the sale of the real estate. It is highly probable that future legislation will provide that the tax shall attach to the land independent of individual ownership.

The new system is, in its general features,

as judicious, perhaps, as could have been adopted for this country. The evils attending any system of taxation in conformity with the prevailing procedure in the United States are inherent in the people themselves, and are of such a character as to inevitably occasion a good deal of injustice and hardship. In fact the injustice that has prevailed in this country ever since its occupancy by Europeans cannot be eradicated in a day. The tax assessors are elected by the popular vote, as it prevails in the Philippines. Sometimes the Board consists of large land-owners, sometimes of non-land-owners, or those whose holdings are of small extent. In the former

case the lands of the municipality have been assessed at a ridiculously low figure. Where the assessors possess no lands the assessment has been exorbitant. In one instance the members of the Board assessed their own lands at ten dollars a hectare, and that of the members of the town council at the same rate, all other lands being assessed at sixty to eighty dollars a hectare. Any system in accord with that prevailing in any of the States would be a startling innovation to the Filipino. What could be done has been done to establish a system of taxation in conformity with the newly introduced civil government.

THE SINGHALESE POLICE.

BY ANDREW T. SIBBALD.

THE police of Ceylon incorporate men of very varied nationalities—British, Portuguese, Dutch, Singhalese, Tamils, and members of mixed races. The men are smart and soldierly, and may be described as civil police with a semi-military training. The uniform is suitable and becoming, consisting of a tunic and trousers of dark blue serge, with waist-belt and boots of deep brown leather and a scarlet forage cap, with a black top-knot. The men are regularly drilled with Snider rifles and with swords; but, except when on jail-guard, or when overlooking convicts or treasure, they only carry bâtons. Till within the last few years there were no harbor police, and the work which those men now do fell on the regular force. The development of Colombo Harbor has necessitated the appointment of a harbor inspector, with two whale-boats and about sixteen men specially told off for this work. The police are now scattered over the country in ninety-four different detachments; and, when we consider that there are, on an

average, only four of the regular police to each rural station, to look after about a hundred square miles of cultivated land, liable to crop thieving, and that they have to escort and guard prisoners, to keep order in one or two large villages and bazars, and by their presence to deter crop thieves, and purchasers of such stolen goods, to take care of sick wayfarers, and to serve the countless summonses and warrants that may be issued, it is evident that they cannot eat the bread of idleness. In the whole force there is not a single mounted constable. All the work is done on foot.

In each Province, however, the Government Agent has a body of untrained and unpaid village police which doubtless lightens the toil of the regular police. Some idea of the miscellaneous work which falls on the police department might be gathered from a single detail of its office work. About 70,000 documents are annually received and despatched from Kandy and Colombo, the two chief offices. At those two stations the

police barracks are a perfect triumph of ingenuity, so admirable is the result produced for the money expended, both in the construction of really handsome buildings and the laying out of the grounds with flowering trees and shrubs.

This is especially the case at Kew, a peninsula on the Colombo Lake. There, and at Benlota, the gorgeous display of glorious *superba* and other climbing plants impressed itself vividly on my memory. The same care is shown wherever a police station has been established on the island. As they are at elevations ranging up to 7000 feet, they are, in a measure, experimental gardens for new products.

It is greatly to be desired that these should be quickly multiplied; for many police stations are still without any government buildings, and consequently, ordinary dwelling houses are hired to be used as offices and gaols, while the constables have to find quarters for themselves, and are often widely scattered, and sometimes in very undesirable neighborhoods. The married men, who constitute more than two-thirds of the force, have to pay about one-eighth of their slender salary for the use of very wretched huts.

This is doubly hard, as not only are the necessities of life much dearer in Ceylon than on the mainland of India, but the rate of pay in all ranks is only from a quarter to half of that of the corresponding rank in the Indian police.

The Singhalese police reports present a dreadful record of callous bloodshed. The victim is often someone towards whom the murderer bears no ill-will—perhaps, even, it is his own near relation—and the sole cause of the crime is a desire to bring a false charge against an innocent person against whom the murderer has a spite! A friend is murdered in order that a foe may be blamed! Most of the murders, however, are the result of momentary passion—it is a word and a stab. Drink and gambling, the prolific par-

ents of Singhalese vice, multiply this class of crime.

No one can fail to be struck with the singularly small proportion of women among the prisoners of Ceylon.

About 95,000 to 110,000 persons are each year apprehended, or summoned before the courts, and never brought to trial, which shows either the cases are utterly frivolous, or that the complainants or the witnesses, or both, have been bought.

Even these figures, large as they are, give no idea of the extent to which the machinery of justice is misused by the people to oppress and harass each other, and actually to frustrate justice itself, unless we take into account the cloud of witnesses, who are also brought up by summonses and warrants and further, the multiplied postponements which characterize the courts. In addition, it must be borne in mind that minor cases are actually tried by the Gansabhawa, or Village Tribunals.

The results of this inordinate misuse of the courts are the impoverishment of the people both by a waste of time and by actual expenditure on worthless, self-styled lawyers, the fostering of their innate love of litigation, the encouraging of false witnesses and of perjury, the general demoralization which follows the prostitution of justice, and the obstruction of the thorough investigation and punishment of serious crime. Better that a man should, at his own proper peril, strike a blow with a stick, or even with a knife, than by preferring false and malicious charges he should make a court of justice an instrument for inflicting a cowardly blow.

Of course, when it is made impossible for a judge to know whom and what to believe, true evidence is constantly rejected, criminals escape, and innocent people suffer unmerited punishment, or at least retain a rankling sense of injustice which leads to retaliation, either in the form of false charges in court or in that of criminal violence. The

chances of conviction are so small that heinous offences are committed with little risk, for nothing is easier than to bribe all the witnesses, and probably the headman, whose duty it should be to prosecute. Sometimes even the plaintiff himself is bribed! As regards the headmen, it is only natural that they should be amenable to bribes, for, instead of receiving remuneration for helping in the detection of crime, and in the capture of criminals, they have often to incur serious expense out of their own slender means.

In one very common class of accusation, against which no man is safe, namely, that of grave immorality, the result turns on which man can bribe the largest number of false witnesses, and the innocent accused is very often obliged to purchase safety by paying his accusers to let the charges drop. If the besetting sin of the Singhalese is their inordinate love of litigation, this certainly is fostered by their very troublesome law of inheritance, which results in such minute subdivisions of property that the 199th share of a field, or the 50th of a small garden (containing, perhaps, a dozen palms, and a few plantains), becomes a fruitful source of legal contention, of quarrels, and of crime. Emerson Tenant mentions a case in which the claim was for the 2,520th share in the produce of ten cocoa palms! To illustrate this sort of litigation, the Rev. R. Spence Hardy quoted an intricate claim on disputed property, in which the case of the plaintiff was as follows: "By inheritance through my father I am entitled to 1-4th of 1-3rd of 1-8th. Through my mother, I am further entitled to 1-4th of 1-3rd of 1-8th. By purchase from one set of co-heirs, I am entitled to 1-96th; from another set, also 1-96th; and from a third, 1-96th more. Finally, from a fourth set of co-heirs I have purchased 1-144th of the whole." There is a nice question to solve ere a landowner can begin to till his field or reap its produce.

But, although difficult questions, such as this, must always have proved a fruitful source of contention, it is only in recent years that the gentlemen of the legal profession have become so numerous. Singhalese or Tamil, Portuguese or Dutch, Eurasian or European, all have equal chances in the race for distinction as barristers, or magistrates, or judges. The business of the courts is most unnecessarily delayed by the invariable employment of magistrates' interpreters. In India, where in every presidency there are so many different languages, each magistrate is bound to master any language, a knowledge of which is requisite for the conduct of his own court, interpreters being employed in the supreme courts only. In Ceylon, although there are only two native languages, and every new-comer has to pass examinations in them, every word spoken in court, every question and every answer, must be repeated through an interpreter.

Among the cases which call for considerable detective skill are those of forging banknotes and of altering coins. The forgeries are generally the joint work of professional engravers and surveyors; the false rupees, though manufactured by Singhalese goldsmiths, are occasionally proved to be the work of Buddhist priests, who, by casting images of Buddha have acquired the requisite skill. The Buddhist priests are said to be the chief money lenders and usurers; and it is whispered that they contribute rather a large proportion of the felons, although to avoid scandal, they are, as a rule, unrobed before trial. Some years ago, however, one was hanged in full canonicals just to show that British law is no respecter of persons.

To glance at the pleasanter aspects of police work in Ceylon, one of the most successful schemes has been the Servants' Registration Ordinance, by which every servant is bound to have a pocket register, in which his antecedents are recorded, as are also the beginning and the end of his services, and the

character he has acquired in each. The assistant superintendents of police are the registrars. The scheme has proved invaluable in the prevention of one of the commonest forms of burglary, made easy by the connivance of servants.

Alas! here, as elsewhere, familiarity with the white race does not always tend to raise it in the veneration of our brown brothers. The days have gone by in which we could leave the house-door unbarred during the night. Much of the old contentedness and of the old respect for the European has gone, and new wants and excitements—amongst them drinking and gambling—must be satisfied. In a country whose wealth lies so largely in its crops, there is, of course, a continual source of temptation to thieves, not only in the crops when growing, which is scarcely possible for planters to guard, but still more in the harvest when it is being transported from the store to the market.

Take, for instance, the transport of coffee to Colombo, from a plantation in Uva, a distance of perhaps two hundred miles, by road, river, or either lake or rail. Under the old system, each cartload, which was worth about 1000 rupees, was entrusted to the sole care of a carter, and each boatload, worth about 10,000 rupees, to that of a crew, of whom, in either case, the senders generally know absolutely nothing, and in whose honesty they have every cause to disbelieve. The consequence was that whole cartloads disappeared. In one case the police had the satisfaction of convicting a native agent who had appropriated 400 bushels of coffee valued at 4500 rupees. Less audacious thieves were content with freely helping themselves from the cof-

fee bags. The carts were lost sight of for weeks, and the coffee which traveled from Ratnapura to Colombo by river, canal, and lake was at the mercy of the boatmen, who halted for as many days as they saw fit, and called in the aid of their families to manipulate the treasure as they pleased. Thus, throughout its long journey the coffee was subject to pilfering at the hands of drivers, boatmen, and other depredators, who sometimes stole half the good beans, and either filled up the sacks with inferior ones or made up weight and bulk by swelling the remainder with water. The loads, of course, reached the London market deteriorated in color and value.

To counteract this mischief a simple and very effective system of cart registration was devised. Along road and river, at regular intervals, police stations were established from Ratnapura to Kalutara, whence the sea-coast railway conveys the freight to Colombo; and each loaded cart or boat is compelled to report itself at those stations. The exact date of arrival and departure of each cart is intimated day by day to the Chamber of Commerce at Colombo. The precious produce is under strict care throughout its journey, and theft becomes well nigh impossible.

The regulation of pilgrimages and the strict sanitation of pilgrims' camps is another of the schemes devised, and excellently enforced, to prevent suffering and mortality, and the too probable development of cholera in the island.

The system of police registration of all dogs is so rigidly enforced in the principal towns that Ceylon is comparatively exempt from hydrophobia.

SINGULAR PUNISHMENTS.

THE variability of human morality is curiously reflected in the penal laws of various ages and countries. In Holland, for instance, it was once a capital offence to kill a stork; and, in England, to cut down another man's cherry tree. Idleness was punishable in Athens, but commendable in Sparta; and in Mexico, while a slanderer was only deprived of his ears or his lips, a drunken man or woman was stoned to death. Plato and Aristotle commended infanticide as a valuable social custom, and Plutarch, Seneca, and other ancient moralists advocated suicide under certain given circumstances. Modern moralists condemn both practices without exception; and, according to English law, if two persons agree to commit suicide together, and only one of them succeeds, the survivor is liable to be tried and executed for murder. In England, before the Conquest, slaves suffered mutilation or death for very trifling offences; while the nobles could commit even murder and be quit of their offence for a fine to the Church and some paltry compensation to the family of the murdered man.

At the present day it is our boast that we have one law for rich and poor alike, and that we do not mutilate nor, except in cases of murder, do we kill our criminals. On the contrary, we provide them with excellent sanitary dwellings and sufficient food, and endeavor to teach them useful trades, or at any rate, give them plenty of laborious work. Whether such treatment tends to the prevention of future crime, however, or to foster in the criminal a love of useful and honest work, is a problem on which opinions widely differ. It is now beginning to be suspected that there is very little relation between the severity of punishment inflicted and the amount of crime committed in any country, but from the earliest times until quite recently there

appears to have been no doubt about the matter, and whenever a given punishment failed to repress a particular class of crime, the demand was always for more punishment.

Among the early Saxons and Danes almost every punishment could be commuted for a money payment; but those offenders who were poor were very barbarously treated. They were branded and deprived of hands, and feet, and tongue, their eyes were plucked out, nose, ears, and upper lips were cut off, scalps were torn away, and sometimes the whole body was flayed alive. In the early part of the tenth century, a female slave who had committed theft was burned alive, and a free woman was either thrown over a precipice, or drowned. A man slave was stoned to death by eighty other slaves, and when a female slave was burnt for stealing from any but her own lord, eighty other female slaves attended the execution, each bearing a log for the fire.

By Ethelbert's laws, not only did every man have his price, but every part of a man had its specified price. The wergild, or price of the corpse, of a ceorl was two hundred shillings; of a lesser thane, six hundred shillings; of a royal thane, twelve hundred shillings. It appears to have been a common practice for many in those days to settle their disputes by knocking one another's teeth out, and the law laid down a scale of compensation, according to which a front or canine tooth cost six shillings, while a molar might be knocked out for one shilling, until Alfred was considerate enough to raise the price to fifteen. If a man could be satisfied with breaking an opponent's ribs, he was only fined three shillings, but a broken thigh would cost him twelve; while, singularly enough, the loss of a beard was estimated at no less than twenty shillings. The last seems

a very heavy penalty, when it is remembered that a man might have knocked out his enemy's eye for a matter of a fifty-shilling fine.

William the Conqueror was averse to hanging, or otherwise killing criminals; but it could hardly have been on humanitarian grounds, for he enacted that "their eyes be plucked out, or their hands be chopped off, so that nothing may remain of the culprit, but a living trunk, as a memorial of his crime."

Under Henry the First, coiners of false money were punished by the loss of their right hands, and other mutilations of various kinds were in common use. In 1160 we hear of heretics who had refused to abjure their faith being handed over by the church to the civil authorities, to be branded with a hot iron on the forehead, have their clothes torn off from the waist upward, and be whipped through the public streets.

Boycotting was at that time a legal practice, whatever it may be now, for the said heretics were not only forbidden to enter the houses of orthodox believers, but even to purchase the necessaries of life.

The popular notion of the Crusaders, as an army of Bayards, *sans peur et sans reproche*," is hardly consistent with the code of criminal law which Richard *Cœur de Lion* enacted for the especial behoof of those he set out for Holy Palestine. If any one of them was convicted of theft, boiling pitch was to be poured over his head, then a pillow full of feathers shaken over him, and he was to be abandoned at the first port the vessel touched. Whoever killed another on board ship was to be tied to the corpse and cast into the sea; whoever killed another on shore was to be tied to the corpse and buried with it. A blow was to be punished by three duckings in the sea, and the use of a knife in a quarrel caused the aggressor to lose one of his hands.

While the Lion-hearted was thus dealing

with his warriors on the high seas, his brother John was behaving as unmercifully at home. The terrible ways in which he showed his displeasure may be instanced by the case of the Archdeacon of Norwich. For some slight offence he caused the poor churchman to be encased in a sheet of lead, which fitted round him like a cloak, and, after a lingering and painful death, became his coffin. In the reign of Edward the Third, a London tailor convicted of contempt of court was condemned to lose his right hand and be imprisoned in the Tower for life. The general severity of punishment, however, seems to have had no corresponding effect in suppressing crime. "When Henry the Third ascended the throne," says Mr. Pike, "a gibbet with a robber hanging in chains, a petty thief in the pillory, a scold on a cucking-stool, or a murderer being drawn on a hurdle to the gallows, were spectacles as familiar to the Londoner of that day as a messenger from the telegraph office is to us." Now and again one comes across the record of an arbitrary or obsolete punishment to which even the modern humanitarian may give a qualified approval. The fourteenth century custom of punishing a London baker who gave short weight is an instance in point. The delinquent had a loaf of his own bread hung around his neck, and was exposed, to be pelted by his defrauded customers, in the pillory. For a third offence his oven would be pulled down and he compelled to abjure his trade in the city forever. Similarly, in a story of retaliatory punishment told by Sir Walter Scott, the natural man will find a pleasant spice of poetical justice. A poor widow, who had received some injury from the head of her clan, determined to walk from Ross to Edinburgh to see the king—James the First—and obtain redress. The cruel chief, hearing of her intention, had her brought before him, and, making the brutal jest that she would need to be well shod for her journey, nailed her shoes to her

feet. Of course, the poor woman's journey was long delayed; but, eventually, she did go to Edinburgh, and, when James heard the story of her wrongs, he sent for the chieftain and his accomplices, caused iron soles to be nailed to their feet, exposed them for some time to public derision, and then decapitated them.

In 1530, an attempt to poison the Bishop of Rochester and his family, by a cook, named Rose, who had thrown some deleterious drug in their porridge, created quite a panic in the land. Poisoning had hitherto been a rare crime in England, and was looked upon as a peculiarly horrible Italian crime. A new statute was accordingly passed to meet the new terror, and the penalty for the offence was boiling to death, without benefit of clergy. Rose was boiled to death in Smithfield.

The story of the fires of Smithfield is too familiar to need more than a passing reference. Henry the Fourth appears to have been the first to burn heretics. In the reign of Edward the First, incendiaries suffered a kind of *lex talionis* in being burnt to death. Burning for witchcraft was legal until the passing of 9 Geo. II. c 5. Women could be burned alive for treason at the time Blackstone wrote his Commentaries, and the ancient law of the Druids, which made the murder of a husband a sort of petit treason, was still in force in 1784, when a woman, who had murdered her husband, was condemned "to be drawn on a hurdle to the place of execution, and burned with fire until she be dead." During the "spacious times of great Elizabeth," any poor wretch adjudged to be a vagabond, if above the age of fourteen years, was grievously whipped, and "burned through the gristle of the right ear with a hot iron of the compass of an inch." According to Holinshed's *Chronicle*, rogues were great annoyers to the commonwealth in the time of the virgin Queen; and although King Henry the Eighth "did hang

up three score and twelve thousand of them in his time, yet since his death the number of them greatly increased, notwithstanding that they are trussed up apace."

Harrison, in his *Description of England* (1577), relates how "such felons as stand mute and speak not at their arraignment, are pressed to death by heavy weights laid upon a board, that lieth over their breast, and a sharp stone under their backs."

And he forgets to mention that those two frightful engines of torture—the rack and the "Scavenger's daughter"—were occasionally put in use. The rack, as is well known, stretched its victim until his fingers might be torn from his hands, and his toes from his feet. The less familiar "Scavenger's daughter" was contrived with diabolical ingenuity, to act in the reverse way, compressing the wretched culprit so that his legs were forced into his thighs, these into his body, and his head into his shoulders, until his shape was almost that of a ball.

Harrison relates a strange manner of execution in use at Halifax, where offenders were beheaded on market days by an engine somewhat like the modern guillotine. The knife fell on the pulling of a rope; and, if the culprit was convicted of cattle stealing, "the self beast or other of the same kind shall have the end of the rope somewhere unto them, so that they, being driven, do draw out the pin, whereby the offender is executed."

For certain offences, the same authority relates that both men and women are dragged over the Thames between Lambeth and Westminster at the tail of a boat; and, "as I have heard reported," he says, "such as have walls and banks near unto the sea, and do suffer the same to decay—after convenient admonition—whereby the water entereth and drowneth up the country, are, by a certain ancient custom, apprehended, condemned, and staked in the breach, where they remain forever as a parcel of the founda-

tion of the new wall that is to be made upon them."

Another class of persons who are nowadays popular and prosperous would have come off badly in the days of good Queen Bess. Conjuring and the use of the divining rod were capital offences. The stocks, the cucking-stool, the brank, and the pillory, painful as they were in themselves, were all supplemented by the brutality of the populace. Cucking-stools were of two kinds: one consisted merely of a strong chair, into which the offender was securely fastened, and then exposed either at his or her own door, or in some public situation, such as the town gates, or market place, and the other consisted of a chair affixed to the end of a plank, and balanced on a beam, and was used for ducking scolding wives in the nearest pond or stream. According to Mr. William Andrew's monograph on the subject, the cucking-stool was rarely used in the eighteenth century.

From the same authority we learn that punishment by the brank, or scold's bridle, although frequently resorted to, was never sanctioned by law. This instrument was made in various forms, and consisted of an iron head-piece, fastened by a padlock, and attached to a chain, and was so contrived that an iron plate, in some instances garnished with sharp spikes, effectually silenced the tongue of the person upon whom it was placed, who was then led by an officer through the streets of the town. The brank

appears to have come into use about the beginning of the seventeenth century, and there is a specimen preserved at Congleton, England, which was tried on a woman for abusing the church wardens and constables of that place, as recently as 1824.

The pillory was constantly in use for various offences until 1837, in which year it was finally abolished.

Voluntary intention has been generally held to be a necessary attribute of criminal action; but the rule has not been universal. In Athens an involuntary murderer was banished until he gave satisfaction to the relatives of the deceased; and in China accidental arson is now punished by a certain number of bamboo strokes, and more or less prolonged punishment. In the Middle Ages even inanimate objects were frequently tried, convicted, and punished for certain offences.

In 1865, when the Protestant Church at Rochelle was condemned to be demolished, the bell thereof was publicly whipped for having assisted heretics with its tongue. After being whipped, it was catechised, compelled to recant, and then baptised and hung up in a Roman Catholic place of worship. Probably similar absurdities may have been perpetrated in England, for it must be remembered that only in Queen Victoria's reign was the law repealed which made a cart-wheel, a tree, or a beast, which had killed a man, forfeit to the State for the benefit of the poor.



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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.

NOTES.

A WESTERN lawyer had defended a prisoner charged with murder, with the result that the man was convicted and hanged. Shortly afterwards the same lawyer appeared before the judge with a fee bill for defending the man and attending to matters in probate closing up his estate. The bill was for a large sum, and the lawyer explained it in detail.

"Well, I'll approve it," announced the judge, "but it does seem to me as if you could have killed that man for less."

JUDGE GIVAN, formerly circuit judge in Missouri, relates this incident of a trial he had before a justice of the peace in his early practice.

After the evidence was in Mr. Givan told the court he wanted "to read the law" which governed the case and then proceeded to read from the statutes. After he was through, a young attorney for the defendant, named Williams, addressed the court as follows: "If your Honor please, what the gentleman has read from has no application whatever to this case; what he has read may do very well for a court of law, but it has no application to a court of justice. Why, your Honor, this court is, as its very name implies, a court of justice and not of law." With this he sat down. The argument was conclusive.

ONE of the twelve attorneys who argued the recent Tillman murder trial in South Carolina followed a lawyer of State-wide reputation as an orator, and the position was

a difficult one. The lawyer made this explanatory preface:

"I am reminded of a good Sunday School teacher I once heard with her class. She was a good woman and she had a crowd of little boys as her scholars, and one Sunday she brought some pictures to show them, and she showed them the picture of Christ; she showed them a picture of Mary, the Mother of Christ, and then she showed them a picture of the devil. This picture represented the devil having great, glaring eyes, fire coming out of his mouth, and great horns. The teacher said, 'Now, boys, how would you like a thing like that to get hold of you?' All of them looked scared, and one little fellow said, 'Well, I wouldn't like it.' Another little fellow, on the back seat, said, 'Miss Mary, I wouldn't like that big devil to get hold of me, but trot out one of your little devils, and I'll give him the mischief.' Gentlemen, I am in that fix."

THE pistol carrying habit was almost universal in the South before the war, but there was one judge, in West Tennessee, who was determined to break it up in his jurisdiction and therefore made a rule, which has become a precedent for all time and has the force of an enactment of the supreme law making power of the State. It is known as the "law of fifty and sixty," and was promulgated by Judge John Harrigan, who presided over the courts of Shelby County for a number of years.

He was determined to break up the pistol carrying habit. To do this he established the rule of fining every man, caught with a pistol on his person, fifty dollars and sending him to the county work house for sixty days. During his whole administration he never departed from this rule. No matter who the

man was, or what influence he might be able to bring to bear, he was compelled to undergo this sentence. He had to serve his sixty days at hard labor, too. Harrigan would not let him out and there was no power that could get him out. As a result of the enforcement of the judge's rule, pistol carrying showed a vast decrease in that section.

On one occasion a prominent young man was arrested for carrying a pistol. He was given "fifty and sixty." The Governor of the State, two United States Senators, Congressmen, and other influential men sought to have the sentence mitigated. But Harrigan was inflexible. "Breaking a rule destroys it," he said, and he stuck to it.

Sometime afterward a young man walked up to the judge in the office of a Memphis hotel. "Isn't this Judge Harrigan?" he said. "No, sir, I am John Harrigan," replied the judge. "But you are the criminal court judge of Shelby County, are you not?" "I am when on the bench," said the judge, "but here and elsewhere, outside the court room, I am John Harrigan." He had recognized the young man from the beginning. "By the way, Judge," continued the young man, "that 'fifty and sixty' rule of yours broke me of a very bad habit, that of carrying a pistol wherever I went." And the same thing might have been said of very many young men who had been broken of the same habit in the same way.

THE duties and cares of the gentleman who conducts the column for law querists in the lay journals must surely be very considerable. He is expected apparently to act as guide, philosopher and friend, as well as legal adviser, to his correspondents, and he is sometimes called upon to give advice as to other matters. The following reply, which appears in the law column of a Dublin weekly, shows the trust which at least one correspondent places in this method of gaining information. The first part of the query was evidently concerned with a breach of promise of marriage of a particularly tragic character. The paragraph runs: "A Kerry Lass.—Under the circumstances, as you did not

break off the engagement, and as he agreed to the postponement of the marriage, I think you could recover damages from him in case he does not carry out his promise. The affair, no doubt, is very sad, but you have yourself partly to blame by postponing the marriage. Why not write to him and say that you see no reason why the wedding should not come off now? The legal editor does not know a cure for warts on the hands." There is a trace of gruffness in the last sentence which is scarcely consistent with the dignity and calmness of the editorial position.—*The Law Times.*

WITH Warden Gilmour of Canada championing the paddle in State institutions, and Allan Pinkerton standing out for whippings in the larger cities, the advocate of corporal punishment have received moral support from an unexpected quarter. The Supreme Court of the Commonwealth of Iowa has just upheld what might be called the terminate sentence of the nursery. It has defended the right to spank.

The right to spank, the bench holds, is plural, parental, and alienable, and, it may be surmised, constitutional in its application. The case was one appealed from Judge Wade's court, the higher tribunal sustaining the right of a mother to chastise her own children and to delegate this right to another under certain circumstances. One E. J. Rowe, eight years old, was chastised by his aunt and sued for damages. The mother has the same rights and duties as the father under the Iowa law regarding children. "The mother," says the court, "is equally entitled to the 'care and custody' of the children. This must necessarily mean that she is equally entitled to control and discipline them. Being given this power it must follow that if the father may authorize another to punish his child the mother may do so."—*Charities.*

THE following curious advertisement which appeared in the *Morning Post* last week, has the probably unconscious merit of the use of the term "gentleman of the long robe"

in its original application to a member of the Bar with reference to the House of Commons: "Will any lady (spinster or widow preferred) assist a gentleman of the long robe in contesting a Parliamentary constituency in the coming 'big fight'? Reward to be arranged.—Address Advocate, &c." "Gentlemen of the long robe" was the method in former times of reference to members of the Bar, in debate in the House of Commons, having seats in that assembly, from the fact that it was not unusual for such gentlemen to hurry from the courts in Westminster Hall to the chamber of the House of Commons in Bar costume. The term "gentlemen of the long robe," as applied to barristers who are members of the House of Commons, is, though no longer heard in debate, retained in the phraseology of the forms and proceedings of the House. Thus in 1857 a Committee of Privileges was appointed to consider the oaths of members, consisting of twenty-five members nominated by the House of Commons and all "gentlemen of the long robe"—a term which, Sir Erskine May observes, is "understood to comprise all members of the House of Commons who at the time would be qualified to practise as counsel according to the rules and usages of the Profession, whether actually practising or not." (May's Parliamentary Practice, p. 101.)—*The Law Times*.

IN the current number of *The Journal of the Society of Comparative Legislation*, Professor F. W. Maitland writes concerning the recently discovered Laws of Hammurabi:

This may be "The Oldest Code of Laws in the World"; it is very far from being the most archaic. It may come to us from "the third millennium B. C.," but we find ourselves doubting whether our own English ancestors at the end of the first millennium A. D. were not in many important respects behind the subjects of Hammurabi and the worshippers of the Sun-God.

It is true that we see a great deal more than we like of that "crude retaliation" which our ancestors, most unfortunately for them, saw in the Bible. There is a great deal of

eye for eye and tooth for tooth. "If a man has made the tooth of a man that is his equal to fall out, one shall make his tooth fall out," so it is written. We do not remember to have seen this principle carried to the length that it goes in the second of the following sentences, in which the Sun-God deals with the builders, the jerry-builders, of Babylon:

§229. If a builder has built a house for a man and has not made strong his work, and the house he built has fallen, and he has caused the death of the owner of the house, that builder shall be put to death.

§230. If he has caused the son of the owner of the house to die, one shall put to death the son of that builder.

On the other hand, some concept corresponding roughly to the Roman *culpa* or our own "negligence" seems to play a decidedly larger part than is assigned to it in bodies of law which are much younger than Hammurabi's. For example, the borrower of an ox which dies a natural death goes quit. "If the ox has pushed a man, by pushing has made known his vice, and he has not blunted his horn, has not shut up his ox, and that ox has gored a man of gentle birth and caused him to die, he shall pay half a mina of silver. If a gentleman's servant, he shall pay one-third of a mina of silver." You must, as our phrase goes, prove the *scienter* against the owner of the ox; it is entitled to its first push. On the other hand, if a man has a wild bull in his charge, and it gores another man, "that case," we are told, "has no remedy." We very much wish for a little explanation at this point; our guess would be that the liability for the bull's act is absolute. A surgeon seems to be an insurer, and an insurer under a heavy penalty. If his operation upon an eye leads to the loss of an eye, you cut off his hands. But surgery is "extra-hazardous" work.

Formal exculpatory oaths are known. So is the water ordeal in the holy river. The holy river seems to express its indignation, not by rejecting the culprit, as did the water in our ordeal pits, but by overwhelming him. However, we see a few passages which seem to point to a rational estimate of contradic-

tory evidence given orally by witnesses, and if this can be surely found, then we may say that the Babylonians had made a great and very difficult step along the appointed pathway of jurisprudence. But what strikes us most is the free use of writing for legal purposes. We even are told of a case in which the effect of a father's gift to his daughter is made to turn on the use of a particular clause in a written "deed." Did it or did it not contain the clause "after her wherever is good to her to give"?—a clause apparently which bestows a "general power of appointment." There is some delicate work of this kind in the code, not very easy to understand, but still delicate.

ONE of the speakers at a recent meeting of the Law Society at Liverpool, in advocating the establishment in London of a general school of law with the fund of over £130,000 which, through recent Chancery decrees, has been placed at the disposal of the Attorney-General for the purpose of legal education, said:

It is not perhaps always remembered that those who advocate the foundation in London of a general school of law are not seeking to establish a new, but rather to restore an ancient institution. Yet it is an undoubted fact that London possessed a legal university at a very early period. Fortescue, who wrote in the time of Henry VI., treats of such a university. There were, it seems, at that time ten Inns of Chancery, designed to teach the elements of law, and four Inns of Court for the instruction of the more advanced students, and it would appear that not merely law, but also other studies, were pursued in this school, and so high was its reputation that it attracted many students not destined for either branch of the Legal Profession. Coke writing in the reign of Elizabeth, says that the eight Inns of Chancery, the four Inns of Court, and Serjeants'-inn "altogether do make the most famous universities for profession of law *only*, or of any one humane science, that is in the world, and advanceth itself above all others, *quantum*

inter tribuna cupressus. In which houses of Court and Chancery the readings, and other exercises of the lawes therein continually used, are most excellent and behooveful for attaining to the knowledge of those laws." The Inns of Chancery were attached to or associated with the Inns of Court, and were: Furnival's-inn and Thavies'-inn, attached to Lincoln's-inn; Clifford's-inn and Clement's-inn, attached to the Inner Temple; New-inn and Lyon's-inn attached to the Middle Temple; and Barnard's-inn and Staple's-inn, attached to Gray's-inn. It would be beyond the scope of this paper to discuss what was the precise course of study followed by the students, but it may be noticed that prominence was given to moots—a prominence worthy of the attention of the modern reformers of legal education. Generally, however, it may be stated on the authority of Coke that the legal education provided was most complete and admirable, and it is material to observe that it was given alike to both branches of the Profession, and that solicitors were anciently compelled to belong to one of the Inns of Court or of Chancery.

And the same speaker added: It is deplorable that, while in England there are many institutions (including the universities) where a respectable legal education can be obtained, there is no law school worthy to be compared with that which America can boast in Harvard, and I am told that there are instances of students destined for the English Bar having been sent to Harvard to study law. A more eloquent testimony to the need of a school of law in England can scarcely be imagined.

It would seem that the question of the legality of the use of the Irish language and of the effectiveness as a fulfilment of various provisions of the statute law—a question which has been looming on the horizon for a long time—is about to be tested and determined at last. In south county Dublin a man signed a claim under the Parliamentary Registration Acts in Irish, and the revising barrister disallowed the claim and refused to

state a case. It is said that a *mandamus* to compel him to state a case is about to be applied for.—*The Law Times*.

A CURSORY glance at the finger-tips would scarcely lead one to suppose that they could serve the purposes of identification. But they can, and do. The tip of the finger tells a very remarkable tale. Take a sheet of ordinary white paper, not too highly glazed, and spread over it a little printer's ink. On this lay the bulb of the finger lightly, and observe the pattern that is left. You have there an absolute impression taken direct from the body, which might be the means in certain circumstances of sending you to or saving you from the gallows. It might procure you a fortune, or prevent you from being robbed of one; it might secure your being identified as John Jones in a situation in which some malicious person was endeavoring to prove that you were William Smith.

For this impression from your finger is practically unique. The pattern may be what is called a "whorl," a "loop," an "arch," or something else. The all-important point is that it is absolutely your own, and can be claimed by nobody else; it has been estimated that the chance of two finger-prints being identical is rather less than one in sixty-four thousand millions. This pattern persists, moreover, throughout the period of human life—and after. Such as it is found on the finger-tip of a child, it is traceable on the finger of the same individual in extreme old age. Death itself does not efface it, except when decomposition has set in. It has been observed on the fingers of Egyptian mummies and on the paws of stuffed monkeys. With the exceptions perhaps of very deep scars and clearly-made tattoo marks, there are probably no bodily characteristics so persistent and so distinctive as these. I have spoken of the impression taken from a single finger of one hand; but take them from

the five fingers of one hand or the ten fingers of the two hands, and you are identified beyond the possibility of denial or disproof. Such is the tell-tale finger-print:

A few years ago a very curious criminal case was before the Bengal Courts. The manager of a tea garden in a little place on the Bhutan frontier was found dead in his bed, his throat cut and his safe rifled. Several persons were suspected—a coolie, the manager's cook, an ex-servant whom he had caused to be imprisoned for theft, and others; but the evidence given at a preliminary inquiry incriminated nobody. Among the papers discovered and examined in a dispatch-box of the manager was a calendar in book form, printed in the Bengali character. The calendar had a cover or wrapper of light blue paper, on which were observed two dirty-looking, faint, brownish smudges. Upon these a magnifying glass was brought to bear, and one of the smudges was deciphered as a half-impression of the fingers of somebody's right hand. The Central Office of the Bengal Police keeps in a classified register the finger-prints of all persons convicted of certain offences; and the impression recorded on the calendar happened to correspond precisely with the impression of the thumb of the right hand of one Kangali Charan, the manager's ex-servant. This man was arrested in a district some hundreds of miles away, and brought to Calcutta, where the impression of his right thumb was again taken. The chemical examiner to the Government meanwhile certified that the stain on the cover of the calendar was human blood, and Kangali Charan was committed for trial. In the end, he was convicted of having stolen the missing property of the deceased, the assessors holding that it would be improper to find him guilty of murder, as no one had witnessed the deed. On appeal, the conviction was upheld by the judges of the Supreme Court.—*The Law Times*

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

CANADIAN RAILWAY CASES: Containing a selection of cases affecting railways recently decided by the Judicial Committee of the Privy Council, the Supreme Court and the Exchequer Court of Canada, and the Courts of the Provinces of Canada, with notes and comments. By *Angus MacMurchy* and *Shirley Denison*. Volume I. Toronto: Canada Law Book Company. 1902. Half-sheep. (xxxii+587 pp.)

The editors of the present volume, which is planned to be the first of a series of volumes on Canadian Railway Law, have brought together about fifty of the more important recent Canadian cases—a few of them not reported—grouped under seventeen appropriate heads. The cases are reported in full, and a note is added to each of the groups of cases. The more important of the notes are those on Liability of Railway Companies for Fires, Liability as Carriers of Goods, and of Passengers, respectively, Covenants of Railway Companies, and Liability to Fence. Of the dozen other subjects with which the cases here collected deal may be mentioned Farm Crossings, Jurisdiction of the Railway Committee, Highway Crossings, Negligence and Contributory Negligence, Master and Servant, and Land taken for Railways. An Index-Digest of the cases here reported adds to the value of the volume.

COMMERCIAL LAW REPORTS. Annotated.

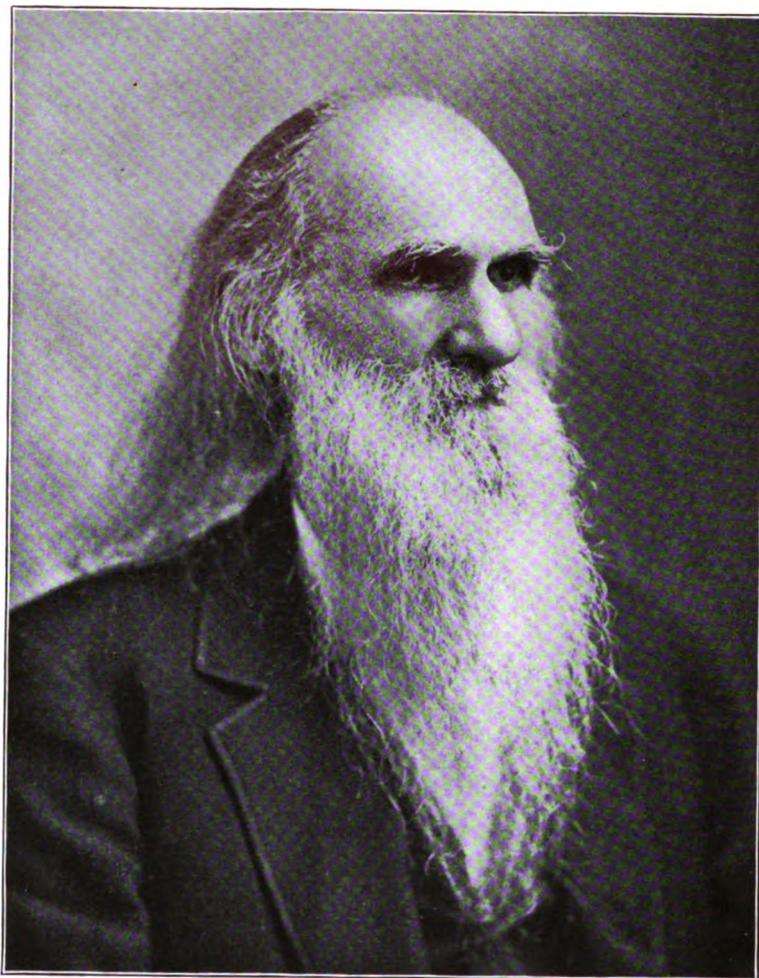
Being reports of important decisions relating to companies, banks and banking, insurance, insolvency, and similar subjects in the Federal and Provincial Courts. Volume I. Toronto: Canada Law Book Company. 1903. Half-sheep. (xx + 555 pp.)

There are here reprinted in full some fifty or sixty recent Canadian cases falling under the general head of commercial law. To many of the cases short editorial notes are added. The arrangement of the cases is chronological, without regard to the subject dealt with; a grouping of the cases according to subject would have made the volume more convenient for reference.

A REPORT of the dinner given December 9, 1902, by the bar of the Supreme Court of the United States to Mr. Justice John Marshall Harlan, in recognition of the completion of twenty-five years of distinguished service on the bench, has been issued in sumptuous form. The frontispiece is an excellent photogravure portrait of the Justice. The speeches here reported—which were excellent, as befitted the occasion,—were by the President, former Attorney-General Wayne MacVeagh (who presided), Justice Harlan, the Chief Justice, Justice Brewer, Senator Hoar, Sir Edward Blake, of the Canadian bar, Hon. Alexander Pope Humphrey, Assistant Attorney-General James M. Beck, and R. Ross Perry, Esq.

The committee in charge are to be congratulated not only on the success of the dinner, which was a truly notable occasion, but also on their excellent taste which has led to the production of a beautiful volume which will be a lasting memorial to the distinguished services of Justice Harlan.





L. E. BLECKLEY.

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LOGAN E. BLECKLEY,

Former Chief Justice of the Supreme Court of Georgia

By L. B. ELLIS.

IF a man conversant with the history both of jurisprudence and of statesmanship in the South should be asked suddenly to name the salient quality which has heretofore distinguished the masters of these two high crafts in the State of Georgia, for example, he would probably answer, unhesitatingly, eloquence. But give him time to reflect upon the eminent achievement, the public services and enduring worth of such men as Berrien, Stephens, Hill, the Cobbs, the Lumpkins and this gray-haired youngest brother of the group, Logan E. Bleckley, would he not rather change his answer to Wisdom? Nor would he mean wisdom in any restricted sense; rather that quality essential to greatness of life, wisdom, which can spring only from integrity of intellect and heart wedded to the widest, sanest knowledge.

Judge Bleckley has himself said, in one of those thoughtful essays deserving to live among the choice letters of today, that "to be wise, we must discern truth and love duty. To know is not enough; to feel is not enough; we must both know aright and feel aright, and from this right knowledge and right feeling, we must send forth a life stream of right conduct." Fairly has the life of the great jurist exemplified his own simple but majestic conception of wisdom.

The main facts in his career may be summed up briefly:

He was born on July 3, 1827; so, while his

intellectual powers are still undimmed and his physical vigor remarkable, he is already more than half a dozen years past the three-score-and-ten terminal. This enduring vigor of body and mind will doubtless be attributed by many to his being mountain-born. For a mountaineer of mountaineers is our great judge. Born on the hill-tops, as his sires before him, he has always found his dearest happiness there. His unflinching delight has been, whenever the holiday times came, the breathing-spaces in his busy career, to slip away from crowded thoroughfares and back to the mountain calms, the shades and streams and high, pure air that had made his boyhood's joy, and still stood for strength and peace in his life. His lonely little lodge on Screamer Mountain, an isolated peak of the Blue Ridge, has been, in his busiest years, a veritable paradise to him; while next has ranked in his affections the pleasant cottage in Clarksville, a hill-top village in North Georgia. In telling all this I have told, probably, the secret of Judge Bleckley's long-enduring vitalism both of physique and intellect.

It was early in the mountain boy's life that he chose law as his mistress; and in the first flush of youth he was admitted to the bar. But practice came slowly; for he had opened his office in a little country town in the section of North Georgia where he was born. The location was obscure, shut in by mountains, and wholly unfavorable to professional

success. Yet he had not at that time the money requisite for purchasing a library and removing to a more advantageous point. Consequently, the day was not long in arriving when the young barrister must find, temporarily, a more lucrative occupation.

A clerkship in a transportation office was opportunely offered to him, a position which he accepted and held for three years, only giving it up when Governor Towns appointed him one of the secretaries of the executive department. The latter place he filled but one year; for his first, most ardent love was wooing him back to her with a call which he could never disregard. Therefore, in 1852, being then twenty-five years of age, he opened a law office in Atlanta, where, from the first, his success was no matter of doubt.

In 1853, we find the mountain youth aspiring to a position of such importance that, in the early days of his candidacy, his aspirations were regarded by the State at large as audacious in the extreme. His own naive words relating to the matter, when he was recently asked by the Bar Association of Georgia to tell something of those early days, will give you the measure of the situation better than mine could do.

"The office to which I aspired," said he, "was that of Solicitor-General of the Coweta circuit, which, as then constituted, embraced eight counties, and included the city of Atlanta. The office was believed and reputed to be the best-paying office in the State, and so was an object of desire by nine other gentlemen as well as myself. Three of these were so badly beaten in the race that I have forgotten their names."

This election was by the Legislature on joint ballot of the two houses, and it suffices to say that, after several ballots, young Bleckley was chosen for the position, and that he served out his four years' term as Solicitor-General with such distinction that forever thereafter office and high dignity

have sought him. In 1864 he received the appointment of Reporter to the Supreme Court. This he accepted, but resigned three years later to resume his regular practice.

It was in July of 1875, when Mr. Bleckley was forty-eight years of age, that he became, by executive appointment, an Associate Justice of the Supreme Court of Georgia. This honorable seat was not only unsought by the busy and devoted lawyer, but, when first tendered, was declined. Later, however, it was accepted and filled for five difficult, over-worked years, after which he felt that he had won the privilege of resigning and giving himself to himself.

But Judge Bleckley's great wisdom, as well as his ability to serve, were too much needed in the constitution of the State's judiciary for him to be permitted long to walk his peaceful private ways. Earnestly and urgently he was summoned back to service in 1887, when rounding his sixtieth year. This time the Governor had appointed him Chief Justice of the Supreme Court.

The Supreme Bench of Georgia was at this time probably the most over-crowded court in the United States, the hardest worked and worst paid. The situation has been greatly amended since, by the addition of two new justices to the hard-driven three, and also by a better equating of toil and remuneration. But in the twelve years during which Judge Bleckley labored so faithfully upon this Bench, first as an Associate Justice, and later as Chief of the three, the work was such as would have worn to exhaustion the brain, body and nerve force of an ordinary man. Yet no ordinary man was this long-limbed, stout-sinewed, large-brained son of the mountains; therefore, he endured the strain heroically, until he was close upon his seventieth year, when he again resigned his seat, this time finally, as he had indeed earned the right to do. This ultimate resignation came in 1894, and closed a term of

public service remarkable in length and worth.

In the following year, 1895, Judge Bleckley retreated to his mountain home, and announced his permanent retirement from the profession; and this not for the purpose of spending his remaining days in slothful ease or vacuity, but in order to pursue uninterruptedly certain lines of study and intellectual occupation that had long attracted him. Again the words in which he himself has recited the aims and aspirations filling him when he retired from his life's chosen profession, will come in far more aptly than any of my own. Ingenuous as a boy he always is, in such confessions, more than half humorous, yet wholly sincere.

"My retirement to private life," he says, "was voluntary, and I supposed and intended it to be perpetual. Then the public duties of mere citizenship began seriously to engage my attention. The noble ambition to know how to vote took possession of me. I sincerely desired to qualify myself for the exercise of the elective franchise. The money question was then, as it still is, before the country, and I longed to understand it and see for myself how it ought to be decided. My ignorance of it was utter and profound. In the summer of 1895, laying aside all other business, I devoted myself to the study of this one subject. At first, the sole end I had in view was to qualify myself as a voter; but I soon found out, from an examination of the standard works and other writings, that nobody really understood the subject at bottom, and that I was hardly less ignorant concerning it than the rest of mankind. This fired me with zeal not only to master it, but to become its expounder to the world. Accordingly I began writing down in note-books brief notes of my reflections, meditations, and acquisitions touching value and its measurement, and touching money and divers related topics. This practice I have continued for five years, and am still engaged

in it. The note-books have multiplied to more than twenty, and their contents to more than two thousand pages, and I frankly say I have not yet qualified myself to vote intelligently on the money question, though I believe I am almost qualified!"

It should be added here that there was universal regret throughout Georgia, as well as other sections, when the destruction by fire of all these notes and manuscripts was announced through the public press little more than a year ago. This serious loss befell when the Judge's cottage at Clarksville was burned. It had been the hope of the thousands who not only admire but trust this man of wide study and thought, that from these voluminous notes would evolve, in the course of time, a well-digested, carefully moulded, condensed, but comprehensive work upon the momentous question of sound finance. Nor is this hope wholly lost; for the philosophical author, with a mere sigh or two over the ashes, set himself to the task of reproducing his notes and manuscripts, and the work is now moving on with good promise for future fulfillment.

Yet what need to dwell upon the unfinished work of this venerable man? Whether it shall be completed by his own hands, or left to others, is with Him who orders wisely. But here stands the eminent jurist's seventy-year record, fair, finished, full; and it is such as the most exacting among us might well be proud to leave behind.

To attempt, in a paper like this, to offer an adequate estimate of his achievements in judicature, or the value of his contributions to jurisprudence in the shape of notable decisions and weighty opinions from the Bench, would be utterly out of place, as well as supererogatory. The profession has already measured the worth of his work in that sphere, and has accorded to Judge Bleckley a place of distinction among the great living jurists.

Allusion has been made, on another page,

to his contributions to literature in the shape of finished essays, these being often fine and thoughtful dissertations, or again scintillant with humor, or replete with delicate sentiment. The Readers of THE GREEN BAG will recall with especial delight that "Letter to Posterity" in the issue of February, 1893.

But our paper would be indeed incomplete without reference to Judge Bleckley's poetry; for this many-gifted man is the author of some notable verse. Probably the most widely admired of his productions in verse is that fine poem of two stanzas which he read from the Bench, his last opinion during his first incumbency, and which will be found in 64 Georgia 452.

A unique proceeding, truly, as it is a unique poem. It was on the occasion of his resigning from the justiceship after five of the hardest-worked, most trying years a man could have, and is entitled "In the Matter of Rest." We reproduce it in full, as it deserves.

**"Rest for hand and brow and breast,
For fingers, heart and brain!
Rest and peace! A long release
From labor and from pain:
Pain of doubt, fatigue, despair,—
Pain of darkness everywhere,
And seeking light in vain.**

Peace and rest! Are they the best
For mortals here below?
Is soft repose from work and woes
A bliss for men to know?
Bliss of time is bliss of toil!
No bliss but this from sun and soil
Does God permit to grow."

A brother of the Bench, in a recent appreciation of Judge Bleckley, has most fittingly summed up the value of this poem: "The last stanza," he said, "should be burned into the heart of every young man. It is the essence of common sense, the conclusion of human experience, the final deduction of

philosophy, and the ultimate dogma of religion."

The poet's "Farewell to the Law" has also been widely quoted and admired. It was written and published on the occasion of his permanent retirement, in 1895, from the "fierce forensic war" in which he had been so long a central figure. The note of intense personal feeling in these verses gives them their strongest interest as well as value. You will dwell longest upon the lines:

"For more than one full decade, with pale,
unsandaled feet,
In pure and spotless ermine, I mused on
Georgia's seat,
And righteous judgment rendered between
the Tares and Wheat.

My grand majestic master, vice-regent here
of God,
I quit thy special service, but stay beneath
thy rod,
An old and humble servant, uncovered and
unshod."

It would indeed be a pleasure to give here a number of extracts from Judge Bleckley's miscellaneous verse, not only that in grave and lofty strain, but also from the many specimens in which is exhibited his marked propensity to combine humor and sentiment. But the lack of space forbids. In the latter class of his verse, we can only cite "Law Love," "Broadway," and "Cucumbers"; and in the former, "Faith," "Two Cities," and that unsurpassed sonnet upon Alexander Stephens, beginning:

"Of yeoman blood, but yet of noble birth."
and closing with the exalted tribute,
"His state and country were to him the same,
And both he served with love, and faith, and
fame."

One more quotation must be allowed, as it gives a true insight into the character, the happy trust and love and treasure of hopefulness that are the inheritance of this gentle-hearted agnostic:

“In the depths of the night
Cometh faith without light,
Cometh faith without sight,
And I trust the great Sovereign unknown.
No finite or definite throne,
But the infinite, nameless, unthinkable
One.

No definite hope may endure,
No favorite bliss be secure,
Not even existence be sure;
But the something that ought to befall
Will happen at last unto all.”

It is not our privilege to speak now of the personal character, the private walk and virtues, of this man of years and honors, to

extol, as the wish impels us, the simplicity and directness which constitute the majesty of his nature, the crystal-clear truth, unwithholding benevolence and sweetness, the devotion to family and friends, which have made his life a benison. Nor may we even dwell, as we would, upon his captivating combination, in thought and speech, of Celtic wit with Anglo-Saxon force and depth of sentiment. His biographers will tell, adequately, we trust, of all these qualities.

For him, the shadows are lengthening fast. But cheerful and undaunted he looks out upon them, finding still a daily happiness in his daily allotment. The respect and gratitude of the public he served, the admiration of the profession he ennobled by his brotherhood in it, the untarnished love and trust of all who were ever near to him,—all these followed him when he left active life, to return to his mountain calms; and they will follow him still when he passes to the great, golden calms of the Beyond.

A REASONABLE REMEDY.

BY GEORGE BIRDSEYE.

A marriage, as a matter of course,
Is necessary for divorce;
So we should legislate our laws
For a reduction of the cause,
And thus we'll have divorces few
When marriages are fewer, too.



THE JURY FETISH.

BY ENOCH JOHNSON.

ONCE there was a king—so runs the story—who had an inordinate passion for fine apparel. There were a number of weavers and tailors to his majesty whose ingenuity was constantly taxed in devising cloths and cuts to gratify this passion; and any person who had any new ideas to offer on the subject of kingly raiment was accorded a ready audience at court. One day there came to the palace a pair of precious rogues who had themselves announced to the king as weavers, who, if provided with the requisite gold and silver, could produce a cloth of marvelous richness, and fashion it into raiment for the king that would fairly dazzle the eye with its splendor. The king was delighted. The self-styled weavers were royally entertained. They were given apartments in the palace, and dined sumptuously every day. A loom was put up for them for the weaving of the cloth, and they were provided with the necessary melting pots and other implements required, and their large and repeated requisitions for gold and silver were promptly honored. In the course of a few days the king came to see how they were progressing with their work. He found them apparently busy at the loom. Shuttles were passing and repassing, the batten was rattling, the thread-beam moving regularly, but not a particle of cloth was to be seen upon the cloth-beam. The cunning knaves, prepared for this emergency, explained to the king that so fine and resplendent was the woven cloth that it could be seen only by an artistic and appreciative eye, adding, that he, of course, could see it; and then, tenderly passing their hands over the imaginary cloth, they called his attention to its rich texture and coloring. The king, doubting his own senses, and fearful of lying under the imputa-

tion of being blind to the highest beauty, pretended to see the cloth and to admire it greatly. He called in a number of his courtiers and explained the case to them. The king having taken snuff, the courtiers were in duty bound to sneeze, and they likewise pretended to be profoundly impressed with the richness and beauty of the cloth. And now, the knaves having set a time when the weaving would be completed and the clothing ready for the king to put on, the king issued a proclamation that on a certain day he would appear in public dressed in new and magnificent robes. On the day appointed the king repaired to the weavers' room, was divested of his outer clothing, and the knavish imposters went through the motions of putting the new raiment upon him, stopping every now and then to clasp their hands in silent wonder and admiration at the splendor of the garments. A procession was now formed, and at the head of this, under a gorgeous canopy supported by rich-attired bearers, the king marched from the palace down through the principal thoroughfare of his capital. It had been given out that the kingly robes were of such fineness and splendor that only those possessing keen eyes for beauty would be able to perceive them. The populace observing the king walking with stately and self-admiring pride, and his courtiers following in obsequious admiration, raised their voices in huzzas and loud acclaim as he passed by. But a little child held aloft in the arms of its mother that it might the better behold the spectacle, cried out as the king came by: "Oh, mamma! the king hasn't anything on!" The spell was broken. Derisive laughter was now heard on all sides. The king came to his senses, and hurried incontinently back to the palace in deep humiliation, to find, of course, that the rascally

weavers had made good their escape with their booty.

Haec fabula docet—well, it teaches several things. For our purpose let us draw the lesson, that we may be so blinded by our preconceptions of a thing, which have been formed and confirmed by authoritative opinion, that we cannot or will not see that thing in its true light; and only when we become as little children divested of such preconceptions and looking with the unobscured eye of sense—common sense—is the true character of the thing disclosed to us.

Trial by jury might almost be said to be indigenous to our law. Its origin, certainly, is obscure, and so closely has it ever been associated with the law in common, and even professional thought, that it has seemed to be of its substance rather than as it really is, merely an arm of its administration. It has been a favorite topic for eulogy with our lawyer orators, in and out of court. They have delighted to trace its history from the earliest recorded beginnings down through the centuries: how, in the Magna Charta Libertatum, this priceless privilege was wrested from King John by the barons, sword in hand, at Runnymede, confirmed by King Henry the Third, redeclared and reasserted in the Petition of Right under King Charles the First, and how it has ever stood the great bulwark of our liberties, guaranteeing the protection of life, liberty and property against the arbitrary interference and spoliation of tyrannical power. And so, by the fulsome panegyric of orators and writers this institution has become venerable, something sacred in our juridical polity, a legal Ark of the Covenant on which it were sacrilege to lay hands. Enshrined by tradition and cherished association, there has, thus, been an ascription to it of a sort of *a priori* excellence which has forestalled criticism, blinded us to its glaring defects and held in abeyance the question which such defects naturally suggest, whether this time-honored mode of trial has not served

its purpose, whether it is not unsuited to the present time and age, and should not be passing, as have gone before, trial by ordeal and by single combat or wager of battle.

Trial by jury, in early times, had its highest sanction as a political safeguard, rather than as a particularly just and expeditious method of determining personal or property rights; and the tenacity with which we have clung to this system of trial is doubtless due, in great measure, to the fact that it has been regarded as a repository of popular power to restrain the encroachments of tyrannical authority. And, indeed, a powerful weapon this was in the hands of the people in the days when autocratic and despotic kings held sway with little regard for the rights of their subjects, and whose minions sat in their courts to dispense a more than dubious justice. But an argument for jury trial, perfectly valid and convincing when based upon such conditions, avails nothing to-day. Our *nisi prius* judges are, generally, elective. They are from the people and stand close to them, and the citizen, jealous of the right of trial by his peers will be as like to find them on the bench as in the jury box. He will be less likely, too, to imperil his rights by submitting them to the determination of the court rather than to a jury, for while scandal is deplorably rife in connection with our juries, it rarely besmirches the judicial ermine. Indeed, the independence, the fearlessness, the probity and the fine sense of honor of our judges are at once the glory and the safeguard of our political system.

Laying aside extraneous considerations and viewing trial by jury simply as machinery for the administration of justice, does not this method fall so far short as to warrant lopping it off as a cumbersome and needless adjunct to our judicial procedure? One of the first essentials in the proper administration of justice, is, surely, that it should be speedy. But it moves at a veritable snail's pace in jury cases. Rarely do these

cases end with the initial submission of the issues to the jury. There are the aggravating disagreements and mistrials, with the consequent retrials, new trials granted by the court for improper instructions to the jury, for disqualification of jurors, for misconduct of or affecting the jury, for excessive or inadequate decisions touching these points? Is not all this the weight of evidence, *etc.* Do not our law shelves groan under the weight of the printed decisions touching these points? Is not all this exasperating and expensive to litigants and burdensome to taxpayers? Some lawyers who find a continuing profit in protracted litigation may look with complacency upon this tardiness in the final settlement of disputes, and in some cases, it is feared, even encourage it. But is not the prolonging of litigation like in kind, if not in degree, with the barratry which originally incites it? In China, it is said, physicians are paid so long as those who intrust their health to their keeping remain well. May the time soon come when the services of a lawyer who keeps his client out of litigation will be deemed quite as deserving of remuneration as those of the one who gets a client out successfully—never quite whole—after he is in it.

Business men, too, are becoming more and more restive under the burden of enforced attendance upon the court as jurymen. The lot of a jurymen is not, of course, as hard as it once was. He is no longer confined without meat, drink, fire or candle until the rendition of the verdict; but his position is sufficiently unenviable to make the average man of business prolific in excuses to avoid being placed in it. And, it is hard to see why in this busy, commercial age, when competition is so keen and time so precious, men should be forced to lay aside their own affairs to arbitrate the quarrels of their neighbors. Few men can, without warning, leave their business for days, sometimes weeks together, for jury duty, without

injury, often irreparable, to such business. Such sacrifices should not be called for except in public emergencies. Such an emergency may be conceded in the trial of one accused of a capital crime. So long as we have upon our statute books the barbarous paradox of a legal sanction for a breach of the sixth commandment, jury trial, in some form, will doubtless be necessary; not, however, because the rights of the accused would be any the less secure with the judge than with a jury, but because upon no one man should be placed the responsibility of holding the scales of justice where the balance is the awful one of life and death. But even here, as, perhaps, in the trial of other first-degree felonies, three judges might sit instead of one, with the requirement of unanimity for conviction. Any one charged with crime who would be loath to submit his case to such a tribunal, would, it is feared, be pretty much in the plight of the Irishman awaiting trial, who to the consolatory words of a sympathetic friend: "Cheer up, Pat, the judge will give you justice," responded dolefully: "Faith, an' I'm afraid he will."

But if a praiseworthy, though unwarranted, solicitude for the rights of persons accused of crime would stick at a denial of jury trial in criminal cases, a proposition for its abolishment in civil cases should not appear too startling for serious consideration. Why should not our judges decide the facts as well as the law in such cases? Will they be less painstaking and conscientious in their findings of fact than in their conclusions of law? And are they not better fitted by their training and experience to sift and marshal the ultimate facts in a complicated case than is the average jury, especially after whatever clear notions the jury may have as to such facts at the close of the testimony have become more or less confused by the counter harangues of opposing counsel? Indeed, judges are assuming more and more the obligations of final arbiters as to the facts,

in the frequent setting aside of verdicts and the granting of new trials. From this position, in effect that of a thirteenth jurymen with countervailing vote, it would not be a very abrupt, and certainly not an illogical step, to make the court the only jurymen.

With the court thus sitting as judge and jury, it is believed, also, that there would be a decreasing number of those meretricious claims which encumber the docket of our courts, and whose sponsors are ever encouraged by the hope that by some hocus-pocus they will succeed in getting their cases by the court to find favor with an indiscriminating jury.

Even now the foundations of this venerable institution would seem to be crumbling in the legislation which has been enacted in a few of the States, making less than a unanimous vote of a jury in civil cases sufficient

for a verdict, and in the constitutional authority given for such legislation, in others. Many lawyers, too, impressed by the inconveniences and delays attending jury trials, are making a practice of waiving the right to a jury, and trying their cases to the court by stipulation.

Times change and men and institutions change with them. This is a fast moving age, with a tendency to cast aside cumbrous and unnecessary weights that retard its progress. Conservative as is the law, it is not uninfluenced by the spirit of the age, and will ere long, it should seem, lift from its administration the incubus of a mode of trial which but for the traditional glamour that has been thrown about it would long since have been consigned to the limbo of forgotten and discredited procedure.

BRIEF NOTES ON THE NORTHERN SECURITIES CASE.

By FRANCIS R. JONES.

I.

1. The so-called Sherman anti-trust law is a purely penal statute. It prohibits the doing of certain things. It is like a liquor statute. Intent is not an ingredient. It is, therefore, to be construed strictly by all the tenets of statutory construction.

2. The prohibition against combinations in restraint of trade ought, therefore, to be construed in a strictly legal sense. Restraint of trade is an historical legal doctrine, which has prescribed limits. The combination of two competing persons, real or artificial, is not within those limits.

3. Even if the statute were not a penal one, it still ought to be construed most strictly, since it is in every way detrimental to trade and commerce. It harasses in a dia-

bolical way the irresistible evolution of modern commercial tendencies. As such it is in itself a restraint of trade.

4. If the statute is to be construed strictly, it is impossible logically to reach the conclusion of the Circuit Court without overruling the law in regard to the status of a corporation, which was settled by the brilliant opinion of Mr. Chief Justice Taney, in *Ohio and Mississippi Railroad Company v. Wheeler*, 1 Black 286. For a person, real or artificial, cannot conspire with itself.

II.

If, on the other hand, the Supreme Court of the United States should take the view that the statute is a salutary one, and as such ought to be given full scope, reasons of

policy may well dictate a broad interpretation.

In this case there can be no doubt that, if the court believes that the statute does and ought to prohibit the sort of thing accomplished in this instance, it can readily, upon accepted and settled principles, affirm the decision of the Circuit Court.

1. For there can be no doubt that transportation is a part of commerce, and as such that the practical amalgamation of two competing lines of railway may result in the hinderance of commerce. It is, therefore, in its broad sense a restraint of trade.— although not within the accepted legal doctrine. But it is perfectly possible and reasonable to say that the words were not used in their strict legal sense.

2. And if the statute is found to prohibit the accomplishment of this thing; it certainly gives power to a court to enforce the prohibition. It cannot be maintained that such a combination can be formed in a round-

about way in fraud of the statute. In its essence it is not, on a broad construction of the statute, a combination of a person, real or artificial, with itself,—which, of course, is an impossibility. There can be no doubt that the court, in order to avoid a fraud of the statute, can look at the whole transaction.

It is in this way alone, I conceive, that the opinion and judgment of the Circuit Court can be supported. And even then, the question must be handled with great care in order not to deal a tremendous blow to the science of the law.

In conclusion I would say that the statute seems to me to be most iniquitous and harmful, and needless to effect any salutary or beneficent purpose. And the legal principles involved are so axiomatic, on the one side and on the other, that it would be a work of supererogation to make an extended argument or cite authorities for or against the decision of the Circuit Court.

MR. GREGGOR FISHES IN CUBA.

BY LOUIS C. CORNISH.

"GREGGOR is still fishing, sir!" said the Corporal, in answer to the Colonel's inquiry. "He's been at it since six this morning." The Colonel passed along to his tent and there seated before his little writing table, his lighted pipe helping him in his cogitation, he tried to discern his duty.

In his brief military experience nothing had perplexed him more than this case of Greggors. The man had enlisted at the outbreak of the war. He had been alert to serve through the tedious weeks preceding the voyage to Cuba. No soldier in the company had been more faithful up to the beginning of the garrison duty two months before. Then there had come a change.

Greggor grew listless, and although he still performed his work satisfactorily, it was evident that he was no longer in the same good spirits. The apathy that had gradually been stealing over him gained control the previous week, when to the surprise of his company he was seen early one morning, fishing pole in hand, angling for imaginary fish in an imaginary stream that seemingly flowed before his tent.

To the jests that were flung at him from all sides Greggors made no reply. Indeed, he did not seem to hear them. Seated in front of his tent, humming to himself "Ye banks and braes o' Bonny Doon," he appeared heedless alike of the jeering crowd

who looked on him in amazement and of the camp duties which no sane soldier can forget.

The inevitable happened. He was promptly marched off to the guard tent for not answering the summons of the drum. But this change of locality made no difference to the babbling brook which had charmed him. Possessing himself of a piece of string and a pin, he soon was fishing again and again continuing the song, "How can ye bloom sae fresh and fair?"

Reprimanded, scoffed at, made to perform his duty under the vigilance of the guard, all of which he bore with a Scotch stoicism, when the chance offered he immediately returned to his fishing. Occasionally he would ask, "Do ye no smell the hills?"

A kindly wonder replaced the first jeering of the camp. All through the months of service Greggor had done a man's work. He was no shirk. And the laugh which first greets the disordered mind gave place to the sympathy which the sane always feel for the less sane. "They ought to send him home now, while there's a chance," the men had said. And the Colonel himself inclined to the same opinion. Yet to justify himself, he had ordered that Greggor should be left undisturbed for one day, to see if he would not tire of his endless fishing. Here was the result. From six o'clock that morning, without stopping for his food, the man had sat before his tent, humming that never-ending tune, and had fished and fished.

The Surgeon had reported on the case.

"There is nothing the matter with the man except homesickness," he had said, "but the chances are it will kill him inside of a week."

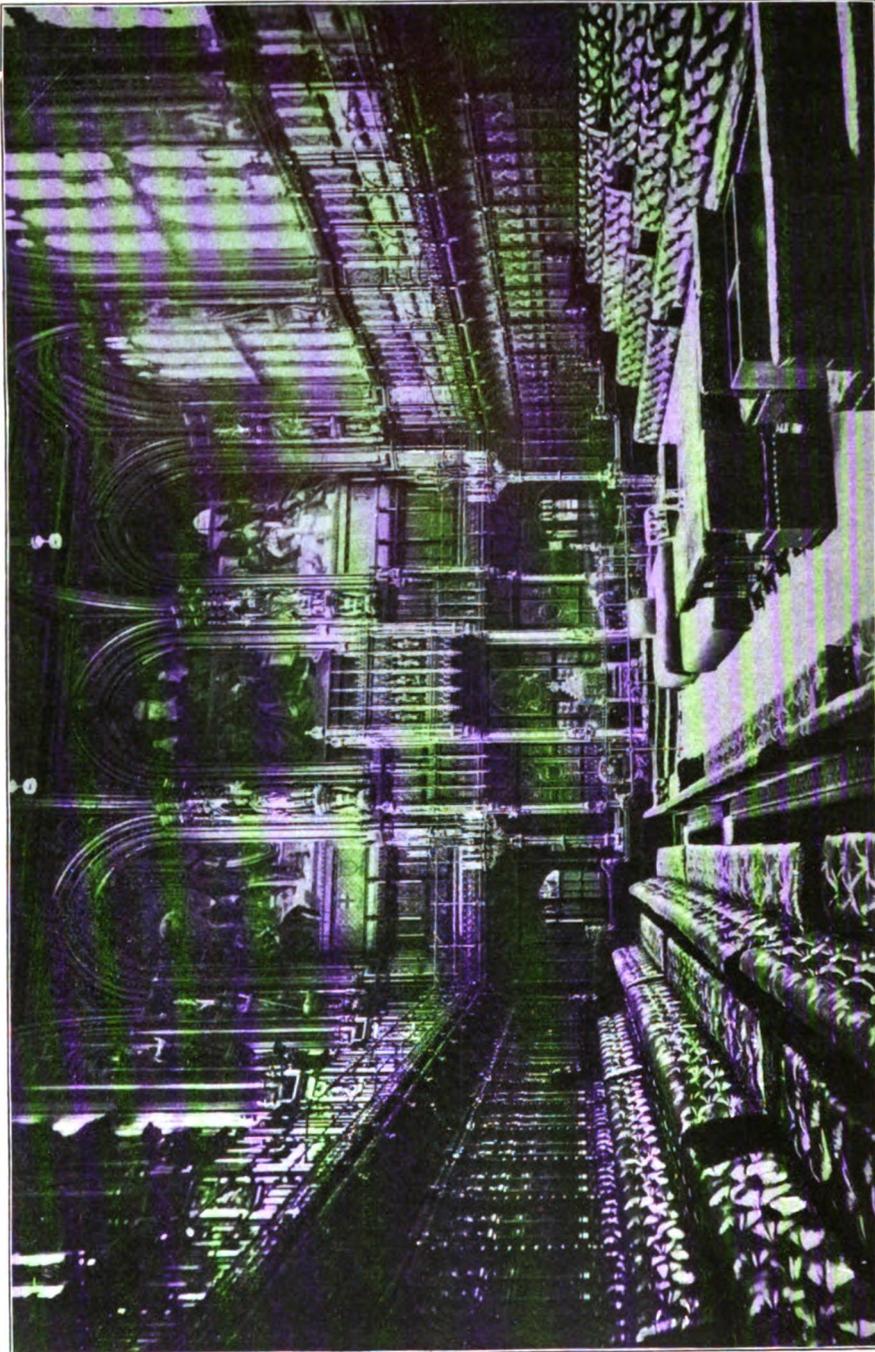
Nothing but homesickness! The Colonel as he sat in his tent and reviewed the case wondered if it were not enough. After the heat of the day the cool night air of Cuba suggested the lands far away to the north. Surely, when a man had served so sturdily, it was hard for him to die. The Colonel laid down his pipe, drew forth his writing materials, and recommended that on account of "acute nostalgia" Private Greggor be honorably dismissed from the service and be sent on the next transport to New York.

Through the few days that intervened before his discharge, Greggor continued to fish with unabated persistency. Called to his meals, he ate sparingly. Release from oversight, back he went again to his fishing, indifferent to all else about him. And when the hour for dismissal finally arrived he was allowed to carry his pole on board the transport, while two soldiers from his company saw to his effects.

Once safely on board the transport, however, the mists seemed to clear from his mind. The babble of imaginary brooks died away. And as the transport weighed anchor Greggor was seen to cast his fishing pole into the sea.

"I'm no gone daft at all," he called to the men in the small boat below him, as he peered over the side at them complaisantly. "Ye see I just caught what I was fishing for."





THE HOUSE OF LORDS.

THE BRITISH HOUSE OF LORDS IN ITS JUDICIAL CAPACITY.

BY LAWRENCE IRWELL.

AN appeal to the House of Lords is essentially and emphatically a last resort on the part of any litigant in Great Britain, and is also highly expensive. Moreover, it must be preceded by a long course of costly litigation in the lower courts, as well as by an absolutely unassessable amount of mental wear and tear. But an explanation of the course of procedure may not be without interest to those readers of *THE GREEN BAG* who know little of the procedure of the highest court in the United Kingdom.

The first thing that strikes both the appellant and the curious stranger about the House of Lords is its utter unlikeness to any court of justice with which he is familiar. The atmosphere is distinct and peculiar, and as different from an American court—or any other British court—as can well be imagined. The whole chamber seems bathed in an air of calm repose and cool deliberation. There is neither hurry nor excitement, and the usual crowd of interested spectators is absent.

If a litigant has lost his case in all the lower courts, and is still convinced or persuaded that the law is really on his side—and strict law is the nearest approach to absolute justice we can look for in human society—and decides to appeal to the House of Lords, he will find from the very outset that he is to have a wholly new experience. The familiar, if somewhat exasperating document headed with "Take Notice," which has appeared in all previous proceedings now disappears, and the appellant makes acquaintance with a document addressed "To the Right Honourable the House of Lords": the humble petition and appeal of John Blank, praying that the judgment in the case of *Blank v. Doe* may be reviewed

before His Majesty the King in his High Court of Parliament.

But even before this petition can be "lodged" (presented), the litigant must obtain two counsel (barristers) of repute to certify in formal terms to the Lords that they "humbly conceive this to be a proper case to be heard before your Lordships." This petition must be printed on parchment—a costly item in the luxury of appeal. When it is presented, security has to be given for due payment of the costs to be incurred—namely "a recognizance" to the amount of five hundred pounds and a bond for two hundred pounds.

Assuming that these preliminaries have been completed, then the case for each side forming the subject-matter of appeal has to be set forth for "My Lords." It must be clearly printed in large type on quarto-sized sheets, and bound in book-form. Forty copies must be lodged, and of these ten must be bound in purple cloth, with parchment slips inserted at each part of the case, thus dividing the book into sections—*viz.*: "Petition for Appeal"; "Appellant's Case"; "Appellant's Index"; "Respondent's Case"; "Respondent's Index."

No witnesses are called, of course, in an Appeal to the Lords, and consequently there is no cross-examination, and no sparring between counsel. The facts are supposed to have been already threshed out, and it remains but to deliver the final and irrevocable fiat of the highest court upon the law of the case.

The ultimate arbiters who constitute this Supreme Court of Appeal are, nominally, all the peers of the realm, that is, all the members of the House of Lords. Every peer, of whatever rank, is entitled to sit and hear



HOUSES OF PARLIAMENT.—THE CLOCK TOWER.

arguments in any case. But in actual practice the lay peers, as distinguished from the legal peers, do not attend, and they never attempt to exercise their constitutional right. The judges who constitute the House of Lords as a legal tribunal are the Lord Chancellor, the Lords of Appeal in Ordinary (life peers created for this special purpose), and any other members of the House of Lords who have held high judicial posts in the past, such as ex-Lord Chancellors and judges of the lower courts who have been raised to the peerage. Three legal peers are necessary to form a quorum, and this condition would be in no way changed if all the lay peers thought proper to attend at the hearing of judicial appeals. In practice, however, though not by statute, both the hearing and the decision are left entirely to the law lords.

During the hearing the Lord Chancellor in his robes comes down from the woolsack and takes a seat along with his legal colleagues on the bench nearest to the bar, on the other side of which is accommodation for about a dozen barristers. Before each of the Lords is placed a small movable table to hold his papers and books of reference. And then the business begins. But it is conducted in a very different manner from the proceedings of which the litigant has had unfortunate experience in the "courts below." In the House of Lords there are no flurried witnesses, no excited and anxious "parties," no amusing speeches. The facts are before the House in clear print and in compact and condensed form. The counsel for the appellant proceeds to argue against the judgment of the lower court in the light of the law as he views it—and sometimes he reviews facts, although he is not supposed to do so. He does not orate, and his argument takes somewhat the form of debate in a conversational tone. There is no haste, and as points are raised and cases are cited, the attendants are engaged in bringing books of

reference so that the Lords may verify quotations or refresh their memories. Now and then a peer puts a quiet question which either throws some new light on the subject or leads to further inquiry. Everything proceeds in a calm and dignified manner, and for an example of patient, dispassionate perseverance there is no court in the world that can excel the House of Lords sitting as a court of final appeal.

When the counsel for the appellant has stated his case, and the counsel for the respondent has, in the same conversational manner, replied; when the Lords have heard both sides of the disputed points in great detail, and have elicited all the information they require to form a judgment on the legal questions presented for their consideration, then the House adjourns, and the time comes for the suitor to exercise patience, for when a decision will be delivered, no man can say. The Lords require time for deliberation, and the law must not be jostled.

At last, however, the appellant hears from his solicitor (attorney) that his case is on the paper for the next day's business. The House meets at 10.30 A. M. The litigant goes to the palace of Westminster, as the Houses of Parliament are called, and finds himself in the lobby, with a small crowd of other anxious appellants and respondents, whose cases are also down on the paper for judgment. Here also are the gentlemen in wigs and gowns, who being professionally engaged may enter the sacred precincts by the big doors, while their brethren, equally learned in the law, but not at the moment professionally engaged, must wait their opportunity like ordinary civilians.

Assuming that the anxious litigant has obtained entry to hear what is officially designated "consideration" of his case, he will find the appearance of the Chamber somewhat different from what it was during his last visit. The Lord Chancellor is seated on the



HOUSES OF PARLIAMENT.—THE ROYAL GALLERY.

woolsack; and the other peers—four or five of them—are on the benches near the bar, two on each side of the “gangway,” and each with a little table in front of him. Perfect silence reigns; calm and deep peace pervade the atmosphere—whatever may be the turmoil in the litigants’ breasts.

After a time, the Lord Chancellor rises, and, with slow and deliberate pace, descends to the clerk’s table. He begins to read from

Some law lords are habitually minute in setting forth their reasons for arriving at conclusions, and in marshalling the arguments by which they fortify their reasons; but other law lords are as habitually terse and reticent, frequently concurring without giving either reasons or argument.

The following rule of the House is, however, as fixed and immutable as the laws of the Medes and Persians: each peer must



HOUSES OF PARLIAMENT FROM OLD PALACE YARD.

his manuscript as soon as he has reached the table: “My Lords, in the case of *Smith v. Jones*”—and so on to the deliverance of his own opinion on the disputed points. Then he returns to the woolsack, and a law lord rises and reads his opinion, perhaps at some length, but with great clearness and argumentative force. Then rise in succession the other law lords, each not delivering, but reading his opinion, some giving reasons at length, and others merely concurring in a few words with opinions already read.

read, not recite, his judgment from his own written or printed text, and he must read it standing, as if he were addressing the whole House, and not a long array of empty benches.

When all the law lords have finished reading their opinions, the appellant realizes, let us suppose, that they are unanimously in favor of the decision of the lower court—which means the dismissal of the appeal. This being so, the Lord Chancellor rises, but standing by the side of the woolsack, and

turning towards right and left, as if the silent benches were peopled by listening peers, thus pronounces, without pause or hesitation: "My Lords, the motion before your Lordships' House is that the appeal be dismissed. Contents? Non contents? The contents have it. The judgment of the House is that this appeal be dismissed, and that the appellant do pay to the respondent the costs of this appeal."

And all is over; nothing remains for the appellant but to pay, as ordered. This pro-

ceeding is final, and the unfortunate litigant has only the consolation of reflecting that the highest legal luminaries in the United Kingdom of Great Britain and Ireland have—in a most impartial manner, after considering the case in the light of strict law, and on principles of pure justice, decided that the lower court had arrived at a correct decision. To take a case to the House of Lords is a costly experience, but finality is seldom to be bought cheaply.

WRONG WITHOUT REMEDY: A LEGAL SATIRE.

VIII.

THE NOMINAL DIRECTOR'S MISFORTUNE.

BY WALLACE McCAMANT.

THE good times were over; a panic had swept through the country; banks had failed by the score, railroads were passing into the hands of receivers, the price of real estate had dropped until it had become unsaleable and the money market was tight. Hamilton Anderson was one of the few who could afford to be philosophical. He had his Oregon mine, on which development work had been freely done till now there was ore enough in sight to run the mill for twenty years. Its dividends brought in anywhere from fifty thousand to seventy-five thousand dollars a year, and gold was a commodity which found a ready market even in such times as these. Besides the mine, Anderson had other resources, cash and securities easily convertible into cash, amounting to at least two hundred and fifty thousand dollars. As he had turned to account the fever for consolidation which marked the good times, he was alive to the financial opportunities offered by the panic to a man of his resources.

On a visit to the mines he stopped in Portland and bethought him of his few shares of stock in the Banks-Elverson Company. He called at the company's place of business and asked for some information about the business. He learned that two years before, but after Anderson had become a stockholder, the house had purchased from David Allison for one hundred thousand dollars the property which it then occupied. He also learned that Allison had been a director in the Banks-Elverson Company at that time; Allison owned no stock in the company, except the one share necessary to qualify him to serve as a director, and he had accepted the position merely to fill out the board as a personal favor to his friend and neighbor, Mr. Banks.

Next day each member of the board of directors in the Banks-Elverson Company received a demand signed by Hamilton Anderson that the corporation rescind its attempted contract of purchase from Allison and bring suit against the latter to recover

the one hundred thousand dollars paid him. Banks immediately called on his attorney and laid the matter before him. Banks said that while the realty occupied by the corporation was now unsaleable, at the time they had bought from Allison it was well worth the purchase price paid. He was advised that under the law a contract between a director and the corporation was scrutinized with care and was set aside by the courts if in any manner unfair to the corporation; that some States upheld such a contract if it appeared to be perfectly fair, while other States held all sales made to a corporation by one of its directors as void *ab initio*. Oregon was one of these latter States. The Supreme Court of Oregon in the case of Stanley v. Luse, 36 Oregon 25, had squarely held that such a sale should be set aside as constructively fraudulent, even where the corporation paid only the fair value of the property sold. The manner in which Allison happened to be a director was pronounced wholly immaterial. Banks was further advised that in case the corporation did not rescind and sue Allison, that Anderson would have a standing in court to do so.

"If the hundred thousand dollars were recovered, to whom would it belong?" he asked.

"To the corporation," was the answer.

"We could distribute it in dividends, then, could we not? That would give Anderson a few hundred dollars and nearly all of the remainder to Mr. Elverson and myself. We could take Allison's note to ourselves for our dividends and make the matter one of bookkeeping except for the small sum paid Anderson. Isn't that the way out of this difficulty?"

"I see only one objection," said the attorney. "By section 3231 of our code the directors of a corporation are made personally liable for its debts if they distribute dividends to such an amount as to make the corpora-

tion insolvent, or even to diminish its capital stock. Is the financial condition of your company such that you can distribute one hundred thousand dollars in dividends without impairing your capital?"

"No," said Banks, "it is not. We owe a great deal and we cannot collect our accounts. Elverson and I cannot afford to make ourselves personally responsible for the corporate debts."

"Then see Allison, explain matters to him and let him protect himself."

Allison was astonished when he learned what Banks had to tell him. He consulted counsel and made up his mind that he was liable, if sued. The realty would be his again, but he well knew it could not now be sold for fifty thousand dollars. He could not raise one hundred thousand dollars, and all he had in the world was at stake. Moreover, he owed a good deal of money, and the mere bringing of the suit would impair his credit and seriously embarrass him. He saw in a minute that Anderson was a blackmailer and that it was necessary to buy him off.

Allison hunted up Anderson and made one proposition after another, all of which were rejected by Anderson. Allison had but little money, and his offers were not particularly alluring. Finally Allison bethought him that he had thirty-five hundred acres of timber land in Tillamook County, Oregon, valued at twenty-five thousand dollars. It was subject to a mortgage for five thousand dollars, and the interest and taxes were burdensome to carry. There was no railroad anywhere near the property, and inaccessible timber was hard to sell in the present condition of the money market. Allison offered Anderson this property subject to the mortgage, and Anderson accepted the offer, after sending out a timber cruiser and getting a favorable report on the land. The stockholders of the Banks-Elverson Company met and unanimously ratified the sale of the Portland

property by Allison to the corporation. Anderson paid off the mortgage on the timber land, and a few years later, when prosperity had returned and a railroad had been built into Tillamook County, he sold the property for fifty thousand dollars.

CONCLUSION.

Anderson shrewdly invested his available assets while prices were low and in scarcely an instance did his judgment prove at fault. On the return of prosperity he sold at one hundred dollars a share stocks which he had picked up for ten and twenty dollars. He now had money enough to supply all his wants and to give him the influence which money can buy.

In his singular career his iron nerve had never for an instant failed him and his knowledge of corporation law had never been at fault. He contributed liberally to the public and benevolent enterprises of the community and was regarded as a generous man. He spent his money freely at the clubs and entertained frequently and well; he was therefore regarded as a jolly good fellow. Without ever asking anything in return he contributed liberally each year to the campaign fund of his political party; he was, therefore, regarded as a party man from principle. His culture, leisure, money and ability enabled him to shine in society; he was regarded as the greatest matrimonial catch in St. Louis.

He was loyal to his friends and had helped many of them, financially and otherwise; his acquaintance was large, and he made it a point to remember faces and names. If he

had run for office now, he would have polled his full party vote and more.

He had neglected the admonitions of his conscience so often, that it no longer bothered him much. He had half persuaded himself that a large share of the wealth of the nation had been amassed by methods quite as reprehensible as his, and that methods sanctioned by success, approved by custom and not contravening the law of the land were not far out of the way.

And yet he knew full well that while he had grown in wealth, in power and in popularity, he had declined in manhood. The dishonest dollar in the pocket brought a lowering of ideals, a sacrifice of the clearness of moral vision. He no longer drew the clear distinction as of old between *meum* and *tuum*. As he looked back on the old days, when he had righteously battled for the purification of the bar, as he compared his old self with his present self, he sometimes asked, "Has it paid?"

He took up a course of historical reading; he read Motley's *Dutch Republic* and *United Netherlands* and was powerfully impressed with the heroism of the sturdy Dutchmen who won their land from the sea and preserved it from Spanish oppression in the most unequal struggle of the ages; as Hamilton Anderson turned the search-lights inward, he was conscious that his was no longer the fibre from which heroes were made, and there came to his mind the familiar couplet from Goldsmith:

"Ill fares the land, to hastening ills a prey,
When wealth accumulates and men decay."



REMINISCENCES OF A REPORTER OF DECISIONS.

BY GEORGE FOX TUCKER.

I.

WHILE the office of a Reporter of Decisions may not afford a great variety of incident, it is not without experiences, both pleasant and profitable, the purpose to portray which is offered as an excuse for these unpretentious reminiscences. It was in the last of June or early in July, 1892, that a court officer notified the writer that Chief Justice Field requested an interview at the Court house. I found that gentleman in the judges' lobby and was informed in an accent that betokened a kindly interest that he and his associates had concluded to ask me to accept the position so soon to be vacated. There is hardly a remembrance of association with the judges during eight and a half years of service that produces so pleasant a sensation as the memory of this evidence of their favor. Of course, it is well known that while the selection of a reporter belongs primarily to the Executive that privilege is graciously intrusted by him to the Court, so that the Governor's duty in the premises is largely a perfunctory one.

The first argument I listened to as a reporter was of the case of *Commonwealth v. Trefethen*, 157 Mass. 180, assigned at a special session of the court, in September, 1892. The Government was represented by Mr. Pillsbury, the Attorney-General, and the defence by Governor Long and Mr. William Schofield, recently raised to the Superior Bench. The Attorney-General presented his case with ability and Gov. Long spoke for the accused with force and with a profound sense of the responsibility. The decision of the Court held that "when evidence of declarations of a person are offered to show his state of mind or intention at the time the declarations were made, they may be so remote in point of time, or so altered

in import by subsequent change in the circumstances of the maker as to be wholly immaterial, and wisely to be rejected by the judge; but the discretion to be exercised by the judge or judges presiding at the trial, in the admission or rejection of this kind of evidence, is not an absolute one, and the exercise of it when the facts appear may be revised by this court." The facts were that a young woman, whom the defendant was charged with drowning, was found in the water a little over a fortnight after her disappearance and that the day before she was last seen she made the declaration that she was going to drown herself. As I remember, the duty of presenting the law on this point was largely assigned to Mr. Schofield. I now recall a young man of serious aspect and quiet deportment slowly, deliberately and forcibly offering argument after argument in favor of the admission of the dead woman's declaration, and producing, in the belief of the writer, a conviction in the minds of the judges that found expression in an opinion partly overruling a previous decision and concluding with the entry, "*Verdict against Trefethen set aside.*"

II.

Curious views prevail among laymen as to the duties of a Reporter of Decisions. Some are of the opinion that he is a kind of recorder, entering in a book the names of the cases and the decisions thereon and receiving therefor compensation to his advantage entirely disproportionate to his supposed labor. On more than one occasion a lawyer has presented me to his wife with the words, "Permit me, my dear, to introduce Mr. Tucker, the Reporter of Decisions of the Supreme Judicial Court." My experiences have never been disturbed by an exception. Every woman I can remember has regarded me with a pat-

ronizing air and has looked as if she wanted to say, "What! Reporter to the Court! Did it take you long to learn stenography, and do you not enjoy going round the State and listening to all the murder cases?"

The views of some members of the bar even are capable of considerable enlargement. I distinctly recall conversations with two attorneys during my time of service, each of whom observed that he thought my labors anything but onerous. The truth is that the position is not a sinecure; and the reporter naturally regrets that there is so much misinformation among members of the legal profession. A writer said over thirty years ago in the *English Law Review*, "The duties and labors of a law reporter are appreciated for the most part, even by those who reap the greatest advantage from his exertions, at a very low rate. Nobody within the legal profession doubts that he is a useful person; but that is the highest honor that is generally awarded to him; he is looked upon as a sort of mechanic, or perhaps that is even too high a title, for it is supposed to imply something like the possession of genius and science."

In modern times the term reporter has come to be misleading; and to this circumstance may be attributed some of the ignorance at least of those outside the profession. In this day there is little need of the reporter's personal attendance in court, as all the papers are printed and from them and the opinion of the judges the case is to be made up; but formerly it was required that the reporter have an acute ear and a ready pen, as it was his duty to preserve much of argument and observation. The late Judge Metcalf, commonly called a model reporter, gathered long ago, in 8 *American Jurist*, 260, statements of famous judges as to the value of certain reporting, a few of which may be quoted.

Blackstone's (William) Reports. "We must not always rely on the words of reports, though under great names; Mr. Justice Blackstone's reports are not very accurate."

Per Lord Mansfield, Doug. 93 (3d Ed.) note.

Gilbert's (Equity) Reports. "22d June, 1737, Easter Term 10 and 11, Geo. II., in the Com. Pleas. Mr. Serj. Wynne, in an argument this day in court, quoted, as an authority, a case in these Reports. The court exploded the book, and told the serjeant they hoped he would quote cases from some better authority." Clarke's *Bibliotheca Legum*.

The most caustic things were said about the Modern Reports.

Vol. 2d. "Mr. Carthew cited a case in 2 Mod. 97, to which Holt, Chief Justice, *in ira* said that no books ought to be cited but those which were licensed by the judges." 1 Ld. Raym. 537.

Vol. 4th. "See the inconveniences of these scrambling reports; they will make us appear to posterity like a parcel of blockheads." Per Powell, J., 2 Ld. Raym. 1072.

Vol. 8th. "A miserably bad book." 1 Bur. 386, in margin. "A book of no authority." Per counsel, 2 Bur. 1062. A case being cited from 8 Mod. 267, "the court treated that book with the contempt it deserves." 3 Bur. 1326, in margin. In 7 D. & E. 239, Lord Kenyon said nine cases out of ten in that book (8 Mod.) are totally mistaken.

Reference has been made to Metcalf as a model reporter. Such he was declared to be in my novitiate by one of the justices of the court, who urged me to study his style and method and profit by his example. A tribute to his ability and learning may be found in the 7 *Law Reporter*, 1, published in 1844.

Let us now approach the threshold of the august tribunal itself. This is not a misnomer; it is an august tribunal. Its origin may be found in the colonial period; its development has marked the great advance in commercial activity and relation, and its judgments have been and are respected and followed wherever the common law is practised and equity procedure is known. It is the observation of some that it no longer maintains its prestige in that its decisions fail to show

the originality of thought, the breadth of reasoning, the wealth of learning and the accuracy of treatment which characterized the opinions of the earlier judges.

It is true that many questions presented to it are of little value, and it is to be regretted that so many tort cases appear upon the pages of the reports. But the problems which involve corporate and commercial interests, the conveyance and transmission of property, in fine, all conflicts in which either principle or property is at stake, are solved both at law and in equity by opinions as luminous in statement and as just and logical in conclusion as any given in the history of the tribunal. This is not an assertion; it is a fact which is revealed by comparisons. Not many years ago an eminent member of the Supreme Court at Washington is reported to have said that the position of Chief Justice of the Supreme Court of Massachusetts is a higher and more honorable one than that of Associate Justice of the United States Supreme Court. And yet in less than a quarter of a century two eminent Chief Justices have accepted seats on the Bench at Washington.

It is certain that strangers have long regarded the appearance of the judges and the court as exceptionally interesting. The dignified deportment is worthy of imitation in other jurisdictions. Charles Dickens was favorably impressed by Massachusetts courts; he asserts in his *American Notes* that there is much to admire in the method of administration. "To an Englishman," he declares, "accustomed to the paraphernalia of Westminster Hall, an American Court of Law is as odd a sight as, I suppose, an English Court of Law would be to an American. Except in the Supreme Court at Washington (where the judges wear plain black robes), there is no such thing as a wig or gown connected with the administration of justice." But judges of our court have now adopted the gown and no one regrets the innovation.

And now before we consider brief and

argument let us dwell a moment upon the introduction of the court to the people and of the call to litigants to present their claims. At the beginning of the famous Borden trial in the Superior Court at New Bedford, in 1893, newspaper reporters from other States made light of the old-time ceremony with which the court was opened. Soon, however, they qualified their views, even to the extent of declaring that similar procedure might well be adopted by courts all over the country. In 1894 the Supreme Court fixed absolutely the forms to be used by the crier. By direction of the Chief Justice I printed them in 160 Mass. 601.

III.

The preceding observations naturally call for some explanation of the modern method of arguing a case and of its treatment and disposition by the Court. The rule as to the preparation of a brief is familiar to all, but there is no rule as to verbal presentation and persuasion. If I may be pardoned the presumption, I will classify the attorneys who appear before the full bench, as follows:

1.—The effusive man.

This individual does not often appear before the Bench, and, when he does, he talks and acts just as if he had come to have a good time. Doubtless he would like to bring his lunch with him and stay all day. His brief is padded, largely with irrelevant cases. He little dreams how the examination of these authorities is to try the patience of the judge who is to write the opinion. He is careless and slovenly in method, and, as likely as not, cites on his brief the 30th volume of Rhode Island Reports. He hardly touches a vital point, and has to be told when his time has expired. He volunteers the gratuitous observation that he was under the impression that he had only just begun. He gathers up his papers in the belief that he will win.

2.—The assertive man.

This advocate is imbued with the merit of

his case. He entertains contempt for his adversary and is confident of victory. He has little taste or tact. He is deliberately guilty of the dangerous and unjustifiable performance of "traveling out of the record." He has an irrepressible belief in himself. If a judge asks him a question he replies in language similar to that which I once actually heard from the lips of a young attorney: "I don't wonder this case troubles your honors; it troubles me." This is the man who boasts that he never took a senior but once, which deflection he occasionally alludes to in argument,—“And now, your honors, let me employ another illustration. Let me assume the case of a young attorney who employs senior counsel and the senior keeps all the fees.” This young barrister is satisfied with his own effort: the dissatisfaction will come when the court punctures his platitudes.

3.—The man who pities the judges.

This man is in middle life. When about thirty years of age he forsook his vocation—clerkship, trade or whatever it was—in which he was competent and at which he earned a living, to become a poor lawyer. The only person who is not aware of this last fact is himself. The judges are in his opinion so ignorant that he feels charged with the duty of offering enlightenment. Destitute of felicity of delivery or expression, he proceeds to read elementary law to his tired but patient hearers; and when, having begun a sentence, “This was a case,” the Chief Justice breaks in “Read only the parts which are pertinent,” he believes the interruptions inspired by jealousy of his attainments. He concludes his argument with no diminution of pity for the Court. And yet he is not a bad man. He practises his profession within his limitations and without violation of his initial oath. The only persons he has ever wronged are the judges before whom he appears.

4.—The learned and logical advocate.

This man is in every sense a lawyer. He marshals the facts carefully in his brief and

states the law so as to bring his facts clearly within it. He rarely refers to a book. He is a master of deduction. He never speaks over thirty minutes, even though the case involve interests of moment and magnitude. He employs a conversational tone; and, if the Court interrogates, he has a ready and pertinent answer. Of him it may be said that brevity is the handmaid of brains.

5.—The man who submits on brief.

This man has no great confidence in his powers of persuasion. He is a logician. He reasons that the judges must necessarily forget in consultation much of the arguments they have just heard, as they have to hear on the average four or five cases a day, and also that the judge who writes the opinion must largely take as his guide in any event the printed page. Hence this attorney submits a well-expressed and compact brief. He more often wins than loses. If the bull may be pardoned, the most eloquent of all disputants is the man who submits on brief.

When the Court is in session the Reporter sits with the Clerk. As has been observed, while the arguments are going on his duties are light. The lines of the Scotch punster in imitation of Hood are now hardly applicable:

“With fingers weary and worn,
With wig askew on his head,
A Reporter sat, at his lonely work,
Plying his cedar and lead—
Write! Write! Write!
In his desk by the side of the Court,
And thus he bemoaned the pitiful plight
Of him who is doomed to report.”

The Reporter keeps a docket, in which he enters the names of counsel and the disposition of the cases. It has long been the custom to give in the printed volumes only the last names of counsel in full; so when a woman first appeared before the Court I wrote her to the effect that her name would be published in full, so that it might appear

that she was a woman, and soon received the following sparkling epistle which is published by consent:

"I have your letter of the 14th and wish to thank you for the exception you are to make in the matter of printing my name as attorney for petitioner in — v. — in the Mass. Reports. I was not aware before that I am the only woman attorney who has presented a case to the Supreme Judicial Court; but since it is true that I am the first one who has dared approach 'the seats of the mighty,' I shall take pleasure in thinking that my name will so appear that all the world may know that a lawyer in petticoats did it."

The docket keeping is a simple affair and requires little time. The tedium is sometimes relieved by a gentle rapping indicating that the Chief Justice desires to communicate with the Reporter. He is handed a scrap of paper, upon which is written a request for information as to the name of some attorney who is making his first argument, or as to the condition and progress of matters in the Reporter's office. The same means is employed in reply and there is no interruption of the proceedings.

Of the mysteries of the consultation room the Reporter knows nothing. He is free to come and go as he pleases, with the single reservation that he is never to disturb the judges while they are consulting. Tradition declares that at the preliminary meeting the cases just argued are talked over and are then assigned by the Chief Justice to his associates and himself, respectively. Then, when the judges meet later, the opinions are passed around, and, in not a few cases, the opinion, which its author supposes will be adopted by his associates, is rejected by them and the case is then assigned to another judge. It is whispered that the first opinion is generally appended to the second as a dissent. It is probable that when a majority of the Court agree upon the original decision a dissenting opinion is rarely written, the views

of the minority being partially preserved by the statement, "A majority of the Court are of opinion."

When an opinion is sent to the Reporter, it is said to "come down"—a rather inappropriate phrase, now that the Reporter's chambers are one floor above those of the judges. An opinion is accompanied by a copy of all the printed papers and on the back of the report or bill of exceptions are frequently found pencil marks which show either doubt or concurrence of the respective judges. The report or bill of exceptions so marked the members of the bar are never permitted to see.

IV.

There are three kinds of cases to be made up. If all the facts are stated in the opinion, the Reporter's chief duty is to prefix the head-notes. If none of the facts are given in the opinion, he must state all that is material to make the opinion intelligible. If only a part of the facts are given, there is a difference of view as to the course to be followed, some maintaining that his part is simply to present the omitted facts and others that to afford symmetry and proportion he must also repeat the facts which the judge has stated.

The proof returns from the printer, with the corrections of an intelligent proof-reader. Then the Reporter and his assistant take turns reading, the Reporter adding to the changes already made. From the proof in this advanced form copies are made for the judges, to which the Reporter adds certain suggestions sometimes accepted, but more often, perhaps, rejected. While the Reporter is supposed to be independent, he solicits counsel and often adds or expunges as his superiors suggest. All these last corrections are transferred to the original proof, which goes back to the printer in a markedly different form from that in which it appeared. The Reporter is next presented with the second proof, which he reads slowly, word for word,

for the purpose of correcting any error which may have escaped his notice in examining the original proof. Finally the plates are cast and the pages appear in their last form. Even then keen scrutiny is required and errors are sometimes detected which necessitate changes in the plates. The labor is not all done; the index and the tables are yet to be prepared. Of course, it is understood that while the printed volumes become the law, the original opinions are all preserved.

As the opinions are sent in, visitors appear. The leading members of the bar rarely honor the office with their presence. Less eminent advocates are often in evidence. Not infrequently the question would be asked in my day, "Have any rescripts come down?" My answer generally was, "You mean opinions, not rescripts," the difference not being definitely fixed in the mind of the average lawyer. Sometimes the inquiry would be, "Has *that* opinion come down yet?" as if the case were the only one that needed attention. It was amusing to listen to an occasional character, who, rescript in hand, would rush into the office to see the opinion in the first case he had "taken up" for a dozen years, or perhaps, the first case he had ever "taken up" in his life. He would read the adverse judgment with a weary expression and lay it down with the gratuitous remark that he regretted that the Massachusetts Supreme Bench had so deteriorated.

During the eight years and a half of the writer's incumbency many important cases were decided. The judgment in *Hancock National Bank v. Ellis*, 164 Mass. 414, as to the liability of the stockholder of a corporation organized in another State and the subsequent confirmations and enlargements created a profound impression. "I don't know what to make of it," said a well-known lawyer. "I have always advised my clients just exactly opposite." In another case, *Andrews v. Andrews*, 176 Mass. 92, as to the validity of a divorce obtained in

another State, there was an equal interest. My assistant, who preceded me in the office by five years, was wont to say that during her entire employment these two cases attracted by all means the most attention and were called for the most frequently.

A very serviceable practice—with which the Reporter's office has some slight connection—is that of the Social Law Library in gathering together in ponderous books the original papers of all the cases. This began with the 97th volume and has been continued with a success that no one will question. Not only have the lawyers an accessible repository of forms and established methods of procedure, but the judges are supplied with an easy source of verification and a means of supplementing the deficiencies of the Reporter, as is evidenced occasionally by the statement, "An examination of the original papers reveals the fact, *etc.*"

Though much may be said as to the most advisable method of reporting, I shall say but little. Conscious of my own deficiencies and cherishing a grateful remembrance of the forbearance of the bar, I have only to say that it is often difficult to keep the happy mean between diffuseness and conciseness, nor is it always easy to crystallize the points adjudicated in brief and expressive head-notes. The writer has long been of opinion that the judges should state all the facts in the opinions and should write all the head-notes, thus reducing the duties of the Reporter to those of a clerical nature. But others think differently, for example, a writer in *27 American Law Reporter*, 86, who declares, "It may be gravely doubted whether the practice of requiring judges to make head-notes of their own opinions results in securing as good a syllabus as could be drawn by a competent Reporter. The head-notes of the decisions of some of the former judges of the Supreme Court of the United States who were in the habit of making their own head-notes were notoriously bad. They made an abstract of

all the reasoning, and the point decided was obscured and lost." In 5 *Southern Law Review*, 77, may be found a carefully prepared statement on the elements of successful reporting. The author offers fifteen suggestions, the eighth of which is as follows: "The head-notes should not be a mud-scow of recitals or a disembodied spirit, but should contain a clear, terse statement of the precise points decided, and should always be prepared by the judge who writes the opinion, because he knows better than any one else what was intended to be decided."

Of the judges a word or two more may be said in parting. Association with them, especially on the circuit, was a great treat. As there was little to distract and more or less opportunity for social amenities, they dwelt in their few leisure moments on reminiscences fruitful of anecdote and incident,

showed kindly interest in the current conditions of local bars and indulged in pleasantries that elicited the reward of a smile or a laugh. And yet one cannot but deplore the retention of a law which sends the justices of the Court on an annual mission only to deal as a rule with meagre dockets and to lose much valuable time. It is urged that the people desire and have a right to see their judges at least once a year. I do question the right; I do question the desire. The people take no interest in either judge or points of law, and at all law sessions the spectators' seats are empty or nearly so. This foolish and elsewhere generally obsolete system is not creditable to Massachusetts. One session for the whole State at Boston, each county to have the privilege of a special assignment, is all that is required.

HER INITIAL ATTEMPT.

BY EDGAR WHITE.

A GOOD-LOOKING young matron from the rural district was on the stand for the defendant in a criminal case. It was her first experience of the sort, but she got along smoothly during the direct examination. When the State's Attorney took her in hand, however, the trouble started instantly. The following is a transcription from the official record at this point:

Prosecuting Attorney: "Now, madam, I wish you would relate all that occurred the evening of this difficulty."

Witness: "Again? Why, I told it once."

Defendant's attorney: "Tell him again, Mrs. —."

P. A. (sarcastically): "Who's examining this witness, I'd like to know? If you ain't through—"

Witness: "When you're all talking at the

same time I don't see how you expect a body to think——"

P. A. (excitedly): "Wait a minute! Your thoughts are not evidence. We insist that the witness confine her testimony to facts."

By the Court: "Answer his question, madam."

Witness: "What was his question?"

By the Court: "Repeat the question."

P. A.: "I have forgotten what it was. Will the stenographer please read it?"

Stenographer: "Now, madam, I wish you would relate all that occurred the evening of this difficulty."

By the Court: "Now answer that."

Witness: "Why, certainly, I have no objections, but I supposed he heard me the first time. Well, to begin with, when Johnnie came home that night he put his horse in

the barn, and came up to the house and said——”

P. A.: “Hold on! Hold on! Was the defendant there?”

Witness (sweetly): “What’s the defendant?”

P. A.: “The man we’re trying here.”

Witness: “He was in jail, and as I was saying, Johnnie says, ‘Ma,’——”

P. A. (ferociously): “I object. She’s going to relate a conversation when the defendant was not present.”

Defendant’s Attorney: “She merely wants to state a fact.”

By the Court: “But she must not give a conversation during the defendant’s absence. Just tell what occurred, without repeating any conversation.”

Witness: “Well, Johnnie came home and put his horse in the barn——”

P. A.: “You said that before.”

D. A.: “I object to his interrupting the witness.”

By the Court: “Yes; he ought not to interrupt her. Go on, madam, from the time Johnnie got his horse in the barn.”

Witness: “Well, after Johnnie put his horse in the barn he came to the house and says, ‘Ma, I’m’——”

P. A.: “There it goes again, your Honor,

after she’s been expressly cautioned by the Court not to tell what Johnnie said.”

D. A.: “I object to his lecturing the witness. If he’d let her alone she’d tell the story all right. We’re offering this to show the time Johnnie got home, and his condition after witnessing the difficulty, as it may tend to corroborate his statement.”

By the Court: “That would be all right, but any conversation with her son there would be irrelevant. Leave out the talk and go on, madam.”

Witness: “No, I’m through. You people seem to know so much more about what I was going to tell than I do that I’m ashamed to tell you what little I know.”

At the noon recess the Court went to the witness and said: “Madam, would you mind telling me for my own interest, and not as a matter for the jury, what Johnnie said, because there are some curious features in this case I might better be able to deal with in the instructions if I knew more about it.”

“Why, no!” said the lady. “That’s what I was trying to tell. When he came back from the barn, he said: ‘Ma, I’m nearly starved to death.’ That’s all.”

His Honor thanked her and turned away to hide a smile.



THE ECCENTRICITIES OF TESTATORS.

A HUNDRED years ago, English lawyers, when dining together, used to drink to the health of "the schoolmaster," for schoolmasters at that period often made wills for their friends, and by their ignorance of legal technicalities gave the legal profession a considerable amount of remunerative business. At a later date, a regular toast was "to our best friend—the man who makes his own will." Prosaic as most last wills and testaments are—except to fortunate legatees—there are many amusing instances of eccentric bequests and curious disposals of property.

Some years since a Mr. Sanborn desired that in death, as in life, his body should proclaim the glory of the Republic. He left five thousand dollars to the late Professor Agassiz, in return for which the latter was, by a scientific process, set forth in the will, to tan his—the testator's—skin into leather, and from it have a drum made. Two of the most suitable bones of his body were to be made into drumsticks, and with these a Mr. Warren Simpson—to whom Mr. Sanborn left the bulk of his property—was "on every seventeenth of June to repair to the foot of Bunker Hill, and at sunrise beat on the drum," the parchment of which had been made out of the testator's skin, the stirring strains of "Yankee Doodle."

A somewhat similar request was made by a German gentleman in 1887. The difference, however, consists in the fact that no annual commemoration of the deceased was required. The testator died at Pittsburg, and by his will directed that his body should be cremated and the ashes forwarded to the German consul at New York, who was to give them to the captain of the steamship "Elbe." When in mid-Atlantic, the captain was required to persuade a passenger to ascend to the topmast, holding in one hand

the funeral urn, and to scatter the ashes to the four winds of heaven. The passenger was to be requested by the captain to dress himself in nautical costume before commencing his duties. These directions were faithfully carried out. The instructions for the funeral of an Englishman named John Underwood were decidedly curious. He willed that he was to be buried in a green coffin, with a copy of Horace under his feet, one of Milton under his head, a Greek testament in his right hand and a small volume of Horace in his left. Six friends, who were not to wear black clothes, were to follow him to the grave, and were there to sing a verse of the twentieth ode of the second book of Horace. After this they were to "take a cheerful glass and think no more of John Underwood."

Wills may occasionally be used as evidence of the mixed blessings of the matrimonial state. An English nobleman said in his will: "I give and bequeath to the worst of women, whom I unfortunately married, forty-five brass half-pence, which will buy her a pullet for supper." A physician, in Scotland, dying about a dozen years ago, left the whole of his estate to his two sisters; and then came the following extraordinary clause: "To my wife, as a recompense for deserting me and leaving me in peace, I expect my said sister Elizabeth to make a gift of ten shillings sterling, to buy a handkerchief to weep on after my decease." Another Scotchman bequeathed to his wife the sum of sixty thousand pounds "on condition that she undertakes to pass two hours a day at my graveside for the ten years following my decease, in company with her sister, whom I have reason to know she loathes worse than she does me." Another husband, an Englishman this time, stated that he would have left his widow ten thousand pounds if she had allowed him to read his evening paper in

peace, but as she always commenced playing and singing when he began to read, he left her only one thousand pounds. One other case of this kind is worthy of note. A husband left his wife twelve thousand pounds, to be increased to twenty-four thousand pounds provided she wore a widow's cap after his death. She accepted the larger amount, wore the cap for six months, and then ceased to wear it. A lawsuit followed; but the court held that the testator should have inserted the word "always," and gave judgment for the widow, who, the following day, re-entered the state of matrimony. Thus the husband's plan for preventing his widow marrying a second time failed.

The malevolence of some men is manifested in their death as well as during their lifetime. It is difficult to imagine anything much more cruel than a father who left his daughter thirty thousand pounds upon the following conditions: "Should my daughter marry and be afflicted with children, the trustees are to pay out of the said legacy two thousand pounds on the birth of the first child to the — hospital; four thousand on the birth of the second; six thousand on the birth of the third; and an additional two thousand pounds on the birth of each subsequent child, till the thirty thousand pounds is exhausted. Should any portion of the sum be left at the end of twenty years, the balance is to be paid to her to use as she thinks fit."

The following account is taken from a newspaper, and the writer is unable to vouch for its accuracy:

A certain Henry Budd died in 1862, leaving considerable property. It was to be divided equally among his sons, and held by them as long as they wore no mustaches. Should one of them cease to shave his upper lip, his share would be forfeited. This condition is simplicity itself compared with that laid down by an inhabitant of the English town of Derby. He left all his possessions to his oldest son, with the proviso that he

must never use tobacco in any form. If he broke the regulation, the property was to be divided between his six brothers and sisters.

A few years ago a Russian gentleman living at Odessa left four million roubles (one rouble is worth about seventy cents) to his four nieces, but they were to receive the money only after having worked for a year as washerwomen, housemaids or farm servants. The conditions were carried out, and while occupying these positions they are said to have received many offers of marriage.

Kindness to animals seems to be quite common among testators, and hundreds of people have left considerable sums for the comfort of their pets. A spinster who died in London (England), whose name was Charlotte Rosa Raine, bequeathed her "dear old white puss *Titius* and puss's tabby *Rolla*, tabby *Jemiffee* and black and white *Ursula* to Anne Elizabeth Matthews," directing her executors to pay her twelve pounds a year for the maintenance of each cat, so long as it should live. Her long-haired white cat *Louise*, and her black and white cat *Doctor Clausman* she gave to her housemaid, Elizabeth Willoughby, and her black ebony and white *Oscar* to Lavinia Beck, and her executors were directed to pay these persons twelve pounds *per annum* for the maintenance of each cat. The remainder of her cats—how many Miss Raine had is not recorded—she left to the aforesaid Anne Elizabeth Matthews, "to whom one hundred and fifty pounds *per annum* shall be paid for their maintenance as long as any do live, but such annuity does not apply to kittens born of them." Another eccentric old lady left a few small sums to her relatives, but five hundred pounds a year to be held in trust for her parrot, with five hundred pounds for a new cage for the bird. Yet another lady left a hundred pounds a year for the maintenance of her parrot, which was to be produced twice a year "to prove that the person tending it had not wrung its neck."

As far as I have been able to ascertain such eccentricities as I have described are much more common in England than in this country. Of other countries, I am unable to speak, but there are more wealthy people in Great Britain than in continental Europe, and eccentric bequests are usually confined to rich persons.

An English maiden lady, who was far from insane, left seventy pounds a year for the maintenance of three goldfish, which were to be identified in the following manner: "One is bigger than the other two, and these latter are to be easily recognized, as one is fat and the other lean. If the fish, on quarter-day, are found to be of this description, the money is to be paid; if not, it is to be expended on flowers, which are to be placed on the graves of the goldfish after death."

In 1892, a French lady left ten thousand francs to her cat. On its death the money was to be spent upon elementary schools of the kindergarten order. The death of the cat in 1897—this animal, like all pensioners, lived long—caused the money to revert to the district governing body for educational purposes.

To dispose of one's property in poetry is certainly unusual, if not incongruous. Nevertheless, quite a number of rhymed wills are in existence. An English lawyer (solicitor), who made his own will, wrote: "As to all my worldly goods, now or to be in store, I give them to my beloved wife, and hers forevermore. I give all freely, I no limit fix; this is my will, and she is executrix."

An old bachelor, on dying, left the whole of his estate to three ladies to whom he had proposed, and all of whom had refused him. The reason of this bequest was that by their refusal, "to them I owe all my earthly happiness."

One of the most curious wills of which the writer has heard was that of Mr. Lalesky, a Polish land-owner, who died in 1889, leaving property valued at one hundred thousand

roubles. His will was enclosed in an envelope bearing the following words: "To be opened after my death." Inside this was another envelope, upon which was written, "To be opened six weeks after my death." When this time had elapsed, the second envelope was opened and a third uncovered. Upon it the following words were found: "To be opened one year after my death." At the end of the year a fourth envelope was discovered, to be opened two years after the testator's death; and so the play proceeded until 1894, when the will was both uncovered and discovered. It was quite as remarkable in its provisions as in the process of hiding its contents for a number of years. The testator bequeathed half his property to such of his heirs as had the largest number of children; the rest of his estate was to be turned into cash, deposited in a bank, and a hundred years after his death was to be divided, with the accumulated interest, among the testator's descendants, so that, by 1989, at five *per cent.* compound interest, the fifty thousand roubles will have swelled into six million roubles; but the probability is that the descendants will be so numerous that each will receive only a small sum.

That many attempts should be made to "break" wills is not surprising, although the claimant who brings the action must know that litigation is costly, and that, even if he should be successful, the value of the estate will be diminished. It is surprising, however, that any person of average intelligence should make a will without legal assistance. A case is on record in which a gentleman bequeathed \$2,500 "to that amiable young lady, Miss Blank, who smiles so sweetly on the street when we meet." In the Blank family there were six sisters, each of whom naturally supposed that she must be the "amiable young lady" referred to. The difficulty never reached the courts, and it must be assumed that the sisters arrived at some arrangement satisfactory to all of them.

There is nobody more capable of giving his friends a genuine surprise than the eccentric testator. A Frenchman, Paul Scarron, who bequeathed to his wife permission to marry again, to the Academy power to alter the French language, and to Pierre Corneille five hundred pounds weight of patience, was probably the most extraordinary of such will makers; but the race is a hardy one, and never becomes extinct. It is not confined to any particular country, age, or condition of life, and in the Old World there appear to be as many curious and unreasonable wills made as ever before. Let us hope that the people who inhabit the North American continent are better balanced mentally than their nothing could be much more extraordinary in its way than the following clause in the will of a Frenchman who died in 1895: "I request that my body be delivered to the Paris Gas Company for the purpose of being placed in a retort. I always used my mental power for the enlightenment of the public, and I desire that my body be used to enlighten the people after my death."

Another Frenchman, who was an enthusiastic card player, left to certain of his card-playing friends a legacy of considerable size on condition that, after placing a deck of cards inside his coffin with his body, they should carry him to the grave and should stop on the way to drink a glass of wine at a small saloon, where he had passed "so many agreeable evenings at piquet."

Still more unusual, if not altogether unique, was the whim of a rich old bachelor, who, having endured much from "attempts made by my family to put me under the yoke of matrimony," conceived and nursed such an antipathy to the fair sex as to impose upon his executors the duty of carrying out what is probably the most ungallant provision ever contained in a will. The words are as follows: "I beg that my executors will see that I am buried where there is no woman interred, either to the right or to the

left of me. Should this not be practicable in the ordinary course of things, I direct that they purchase three graves and bury me in the middle one of the three, leaving the two others unoccupied."

A German gentleman, who was a member of a New York fishing club, in his will requested his fellow-fishermen, after cremating his body, to throw his ashes into the sea on the shoals of New York Bay, where he had often fished. The will was carried out to the letter. Although it cannot be asserted that the ashes attracted the fish, the fishermen related that when they again threw out their lines where they had sprinkled the remains of their deceased friend, they made an exceptionally large catch.

Some very rich men during their lives seem to enjoy the luxury of preparing at great expense the mausoleums they wish to occupy after death. M. Lalanne, a wealthy Parisian, went to the other extreme. He had a horror of anything like ostentatious funerals, and after bequeathing over a million francs to the various public institutions of his native city, he directed that his body be buried as cheaply as possible—in fact, like that of a pauper. A shabby one-horse vehicle conveyed his body to the *fosse commune* (the Potter's Field), and the total cost of the funeral was only six francs, that being the charge for the cheapest kind of funeral under the French system, in which the undertaker's business is a government monopoly.

Quite a number of men, both Americans and Englishmen, who have spent a great part of their lives in hunting have wished to be buried in their hunting dress, and this desire has been shared by at least one woman. An eccentric Welsh lady, who lived at a small place called Llanrug, was buried there in 1895 in accordance with the provisions of her will, which was in keeping with the local estimate of her character. She wished to be buried in her fox-hunting clothes. The rest of her clothes and her carriages were to be

burned on the day of her funeral, and all her horses—six in number, varying in value from £60 to £90 each—were to be shot on the day following the funeral. The remainder of her real and personal property to the value of £90,000 was left to her “dear husband,”—a former laborer on her estate, with whom some years previously she had, on her own suggestion, contracted a marriage—provided that he strictly and literally carried out all the orders expressed in her will.

A horror of being buried alive so haunted Mr. R. of Chicago that on his death he left minute instructions in his will to make such a fate quite impossible in his case. His body was not to be fastened up in his coffin till thirty days after his funeral, and the vault in which the body was placed was to be kept lighted and its doors left unlocked. Provision was also made for the employment of two men—trusted employés of the deceased—who were to guard the entrance, one by day and the other by night.

Tantalizing conditions tacked on to legacies appear to have a special charm for some testators. An individual of this sort invited four hundred intimate friends to his funeral at eight o'clock on a winter's morning. They were not previously informed, however, that every lady who attended was to have a certain sum of money, and every gentleman a smaller sum, and consequently only twenty-nine attended. (This case occurred in England, and the figures are omitted from the writer's notes. He believes them to have been three hundred and fifty pounds for each lady and two hundred for each man.)

The county of Yorkshire in England is noted for its tall men, and a resident of that county left his entire estate to those of his descendants who were not less than six feet four inches in height.

A Vienna banker made a bequest to his nephew with the stipulation that “he shall never, on any occasion, read a newspaper, his favorite occupation.”

Peter Campbell, of Glasgow, Scotland, left a large sum of money to his son Roger on condition of his abstaining from tobacco. Dr. F. W. Cumming, on the other hand, left six hundred pounds to the Royal Infirmary, Edinburgh, to provide poor patients, male and female, with snuff and tobacco, giving the following reason for his unusual bequest: “I know how to feel for the suffering of those who, in addition to the irksomeness of pain and the tedium of confinement, have to endure the privation of what long habit has rendered in a great degree a necessity of life.”

There is probably no phase of humor—good or ill—and no sentiment, grateful or spiteful, which has not been illustrated in testamentary documents. William Dunlop left a legacy to a minister named Chevassie, “as a small token of my gratitude for the service he has done the family in taking a sister no man of taste would have,” and to another sister he left an estate because she married a minister “whom she henpecks.”

William Darley left a shilling to his wife for “picking my pocket of sixty guineas.”

Money is so generally welcome that it is hardly conceivable that a legacy in cash would ever be refused. Occasionally, however, as a result of the absurdity or harshness of the conditions attached to legacies, substantial bequests of this kind have been declined. An Englishman refused a legacy of two hundred pounds because it was stipulated that before receiving it he must walk down the most important street of a fashionable summer resort (Brighton) “dressed in female attire.”

A maiden lady over fifty years of age, with a strong aversion to all theatrical amusements, was scandalized by being put down for a legacy in the will of a facetious friend, who attached the condition that within six months of the testator's death the legatee must obtain an engagement at a theatre and must perform there for one whole week.

A wife who domineers over her husband

sometimes discovers that she has made a serious mistake. Four years ago the London (England) newspapers reported that a publican (saloonkeeper) took a curious revenge on a nagging wife, whose sharp tongue had given him many bad days while he lived. On his will being read, she learned that in order to receive any property she must walk barefooted to the market place each time the anniversary of his death came around. Holding a candle in her hand, she was there to read a paper confessing her unseemly behavior to her husband while he lived, and stating that had her tongue been shorter her husband's days would probably have been longer. By refusing to comply with these terms she had to be satisfied with twenty pounds a year "to keep her off the parish."

The restrictions imposed upon widows and other legatees with regard to matrimony are often arbitrary, and sometimes suggest cruelty. A husband who died in 1896 left his widow an annual income of about five thousand dollars, which was to be reduced to four thousand in the event of the lady marrying a second time. Another reduction of a thousand dollars was to be made on the birth of the first child of the second marriage, and every additional child was to involve the further loss of five hundred dollars *per annum*.

An eccentric Frenchman left his estate to his six nephews and six nieces on the condition that "every one of my nephews marries a woman named Antonie and that every one of my nieces marries a man named Anton." They were further required to give the Christian name Antonie or Anton to every first-born child according to the sex. The marriage of each nephew was to be celebrated on one of the St. Anthony's Days, either January 17th, May 10th, or June 13th, and if, in any instance, this last provision was not complied with before July, 1896, one-half of the legacy was in that case to be forfeited.

It seems undesirable to refer to recent will contests in this country. In many instances the facts are quite well known to the profession. The cases already cited are most of them notorious, and such as are not are taken from foreign records, chiefly British. They exemplify extreme eccentricity of a very varied character. But between this characteristic and insanity there is, of course, a wide dividing line, and the display of eccentricity by a testator is no proof whatever that he was mentally unbalanced when he made his will.

History shows that neither lawyers nor laymen can be trusted to make their own wills. Sir Joseph Jekyll, who died in 1738, without children, bequeathed £20,000 after his wife's death to the commissioners of the national debt to be applied as a sinking fund. A portion of this fund was resorted to by the testator's residuary legatees by an act of Parliament passed in 1747. At this period the British national debt was about eight hundred million pounds, and Lord Mansfield is said to have remarked that Sir Joseph "might as well have attempted to stop the middle arch of Blackfriars' Bridge with his full-bottomed wig." The will was set aside on account of the mental condition of the maker at the time when it was made.

Lord Mansfield made his own will, and although it was declared valid, it was far from being in regular form.

Lord St. Leonards was one of the most distinguished judges the English bench has known. He made his own will, and it was a source of long and costly litigation. But it cannot be said that the testator was the sole cause of this, for the document, which had been signed some years before his death, had mysteriously disappeared when it was wanted for probate. The resulting lawsuit established the "admissibility of secondary evidence of the contents of a will in the absence of a presumption that the testator had destroyed it *animo revocandi*."

THE TESTIMONY OF THE ROCKS.

BY HENRY BURNS GEER.

IT was an injunction case, and the injunction was sought by the widow Jenkins,—the keeper of a summer boarding-house out on the bluff overlooking the Cumberland River,—to restrain Thomas Partee, a street contractor and quarryman, from carrying on operations in his stone quarry at an unseasonable, as well as an unreasonably early hour of a morning.

One day, a small army of negro quarrymen, blasters and stone breakers, armed with drills, sledges, picks, dynamite and fuses, came trooping out and pitched camp at the rear of the widow's select boarding-house. They were late in arriving the first morning, and the pandemonium they raised was barely tolerable that day. But imagine, if you can, the consternation and the indignation of Mrs. Jenkins and her summer boarders the next morning—the early morning—when at the unseemly hour of half-past four o'clock, the intolerable racket was renewed!

Miss Pattie, the nineteen-year-old daughter of the landlady, swept into the dining-room that morning with fire in the liquid depths of her beautiful dark eyes—real southern eyes! She went straight to the young man with the light moustache, who was honored with a seat at her mother's right hand. He glanced at her with a look that revealed the old, old story,—but she heeded it not.

"Frank Ransom!" she exclaimed, "if you do not do something to get those horrid noises stopped, I'll—I'll never speak to you again!"

"Why, Miss Pattie," he replied in mild surprise, "I shall certainly aid your mother in taking any legal steps necessary to suppress the nuisance."

Now it so happened that Mr. Ransom was an expert in phonographs, and other instruments that record sound, and had a knowl-

edge of the art of storing sounds that stood him well,—as the sequel will show.

Mr. Ransom, who valued most highly the good opinion and the sweet smiles of Miss Pattie Jenkins, lost no time, after a consultation with the mother, in hiring himself to a lawyer, and in having drawn up a bill for injunction to restrain the operator of the stone quarry from working at such an unheard-of hour for business operations as half-past four in the morning, or for two hours thereafter.

The case was duly brought to court, and the oral evidence given; and the judge early gave unmistakable indications of a disposition to minimize the disturbance and the nuisance created by Thomas Partee, street contractor, at his stone quarry on the bluff.

Then it was that Frank Ransom proved himself an individual of original thought and a resourceful mind. Through his attorney he had placed, as an exhibit in evidence, one of his latest and best phonographs; and when that previously posted individual exclaimed dramatically:

"Shall the widows and orphans of this beautiful city of ours have their sweet slumbers rudely broken by such harrowing, distracting sounds, as are now literally reproduced in evidence before this honorable court? Such sounds, at such an hour, in a Christian land, are not to be en——"

—he did not finish the sentence; for Ransom had quietly fitted the trumpet, or resonator to his phonograph, and set in motion the records of the stone quarry,—the sounds of the sledges, the picks, the drills, the shouts of the bosses to the men,—and one terrific blast that had been fired while he sat at close range one morning early, with the blank records of his instrument exposed and set to properly record the sounds of the quarry.

The judge was startled, as the testimony of the very rocks themselves rang through the court-room. The witnesses and the usual hangers-on were surprised and amused.

"Hear! hear! ye men of peace, who love the quietude of your own homes," shouted the attorney for the plaintiff; "hear the sounds of their midnight revelry, your honor; the protest of nature herself, when her slumber of the ages is disturbed! Shall we sub-

ject this fair lady—her beautiful daughter, and their friends, to this reign of pandemonium in the early hour of dawn, when slumber is the sweetest,—when dreams are the fairest and most real?"

The judge thought not. The testimony of the rocks was convincing. A temporary injunction was granted, which was later made permanent.

GREAT CRIMINAL JUDGES.

IN an interesting article in the *Pall Mall Gazette*, E. B. Bowen-Rowlands relates the following anecdotes, among others:

Lord Chief Justice Coleridge had a curious habit on the bench of leaning back in his chair and closing his eyes, and this oftentimes led the unwary to conclude that he was asleep.

I remember on one occasion, the trial of a prisoner for setting fire to a dwelling house. Counsel for the defence was much upset through his ignorance of the chief's habit. Throughout the day, he had been trying to get before the jury the fact that a man other than the prisoner had openly threatened to burn down the particular house. Each attempt was frustrated, but when the argument for the defence was begun, Lord Coleridge went off into his usual doze and counsel saw his opportunity. "Gentlemen of the jury," said he, "let me come to another and more serious point; we have heard from the witness that a certain Bill Smith had, prior to the fire, been dismissed by the prosecutor from his service. Now gentlemen, I can tell you something"—"but not about Mr. William Smith, I'm afraid," came from the bench in gentle tones, which conveyed no sense of irritation or annoyance.

I remember a most curious case being tried at the assizes before Sir James Fitzjames Stephen many years ago. A young girl was charged with administering poison with intent to murder, and the facts pointed to a scale of almost unparalleled crimes. Her master was a veterinary surgeon, who kept many of his drugs, including poison, in an unlocked cupboard in the dining room. This was well known to the members of the household, and perhaps to practically remonstrate with him for his carelessness, and no motive of any sort was suggested by the prosecution,—the girl poured enough aromatic vinegar into his soup to kill a township. He drank, but was overdosed and escaped death. The girl then mixed strychnine with the children's food and brought the household to death's door with other poisonous drugs; but incredibly, almost the whole family recovered, and the girl was placed on her trial.

The defence had only the alleged carelessness of the veterinary surgeon to work upon, since the case was too clear to admit of doubt. But the prisoner was acquitted, the astounding result which was brought about in this wise. The prosecutor came late to the court and kept the judge waiting. The result was that the much-poisoned man was deprived of

his expenses and had a long lecture to boot. The intelligent jurors who had followed the proceedings with the delight that every Celt takes in a wrangle, assumed that the judge was taking him to task for negligence in not locking up the drugs, and the case was over. And amid the plaudits of the crowd, this blood-thirsty young woman stepped from the dock and for that day only became a heroine of a degree to which only a lucky acquittal on a terrible charge can exalt anyone; so ended that strange case.

The Central Criminal Court has a high-sounding name, but it has no greater powers than the ordinary court of assize. However, it exercises jurisdiction over a very large area, and has to sit once a month to dispose of its business and thus it has come to be regarded as the chief criminal court of the country.

Fifty or sixty years ago, the system described below in the words of the late Serjeant Ballantine was in vogue.

The sittings of the court commenced at nine in the morning and lasted until nine at night. There were relays of judges. Two luxurious dinners were provided, one at three o'clock and the other at five. The Ordinary of Newgate dined at both. The scenes in the evening may be imagined, the actors in them having generally dined at the first dinner. An illustration is given by Serjeant Robinson in his "Reminiscences" of one of these scenes.

Serjeant Arabin, a former commissioner of the Old Bailey, after dining very freely, came into court in a somewhat flushed condition, and proceeded to examine a witness on the charge of stealing a handkerchief.

At that time, if there were no counsel, the judge examined the witnesses from the depositions.

In this case, unhappily for the judge, who was always rather blind and deaf, he took up a set of depositions which referred to the

stealing of a watch, and the following scene occurred:

Judge—Well, witness, your name is John Tomkins?

Witness—My Lord, my name is Job Taylor.

Judge—Ah, I see, you've been a sailor, and you live in the New Cut.

Witness—No, my Lord, I live at Wapping.

Judge—Never mind your being out shopping. Had you your watch in your pocket on the 10th of November?

Witness—I never had but one watch, and that has been in pawn for the last six weeks.

Judge—Who asked you how long you had the watch? Why can't you say yes or no? Well, did you see the prisoner?

Witness—Well, of course I did (this very loudly).

Judge—That's right, my man, speak up and answer shortly. Did the prisoner take your watch?

Witness—I don't know what you are driving at; how could he get it without the ticket, and that I had left with the missus.

The judge then threw out the depositions and asked the barrister to see if he could do anything with the witness. Now, Ryland, the barrister in question, had been dining at the three o'clock dinner also, and he had drunk not wisely, but too well, so when he had risen, he merely stared at the witness, and then turning to the bench observed: "My Lord, it's my profound belief that the man is drunk."

"That," said the judge, "is precisely the idea that has been in my mind for the last ten minutes. It is disgraceful that witnesses should go into a sacred court of justice like this in a state of intoxication."

Such were the scenes enacted at a time when the severest penalties followed conviction for the most trumpery offences.

CURIOUS LAWS OF FINES AND COMPENSATION FOR CRIMES

BY JOSEPH M. SULLIVAN.

THE system of fines or compensation for crimes is of very ancient origin. Fines were in common use in Hebrew jurisprudence as we can readily observe from a perusal of Holy Writ, and penalties were imposed for crimes in Ireland for ages before the Christian era.

A study of the ancient laws of computation for crimes is extremely interesting. "King Edmund, in order to check private feuds and combats which disgraced his reign, established various compensations for loss of life, making no discrimination between manslaughter and murder. A king's life was computed to be worth about £1,300, or about six thousand dollars. The value of a prince was about half this sum. A bishop or an alderman was worth about half as much as a prince. A sheriff was valued at about eight hundred dollars; a common clergyman at four hundred dollars. A common husband or tiller of the soil was worth about fifty dollars. The life of an archbishop was more valuable than that of a king. A king was worth about 112 common men, and this system of fines gave to the rich an unlimited right to kill and murder.

"A scale of prices for wounds and injuries was formerly in operation. Thus we find in the early Saxon annals that a wound an inch in length under the hair, was settled by the payment of one shilling; a wound of a like size in the face, two shillings; the loss of an ear was rated as equivalent to thirty shillings. These estimates applied to all classes. The code of Ethelbert provided that any man who committed adultery with another man's wife should be compelled to buy him a new one.

"Another curious feature of these laws

was the estimate placed on witnesses. A person whose life was valued at one hundred and twenty shillings counterbalanced six common men, being reckoned at twenty shillings each; and his oath was equivalent to all the six."

These laws are said to be descended from the ancient Germans, among whom we find that if a man was called a *pare*, or wrongfully reproached with having lost his shield in battle, he was allowed to exact a heavy fine from his libeller. These fines and equivalents were called a *fredum*. Montesquieu says: By the law of the Frisons, half a sol was granted as the compensation for a man who had been beaten with a stick. By the Salic law, an *ingénu* who gave three blows of a stick, paid a fine of as many sols; and if the blood were drawn, he was punished as though the injury had been inflicted with an iron weapon, and had to pay fifteen sols. The law of the Lombards established various compensations for one, two, three or four blows, and ordered that if a man, accompanied by his followers, were to assault another who was not upon his guard to bring shame and ridicule upon him, he should pay half of the compensation which he would have been obliged to give in the event of his having killed him.

The study of the above quaint and curious laws offers a fertile field of research to the legal antiquary. Today, on the threshold of the twentieth century these laws are regarded only as curious relics of the drear and musty past, but to the industrious student they lay bare the origin of our Anglo-Saxon jurisprudence, and present to his inquisitive mind the peculiar ingredients and historical origin of early English criminal procedure.

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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.

BEGINNING with the January number THE GREEN BAG will offer to its readers several new features. The light literature of the law, which has been the special field of the magazine in the past, will not be neglected; but in addition to the lighter articles there will be presented articles of a serious character, dealing with problems of jurisprudence, with the higher topics of the law, and with technical legal questions of interest. Attention will also be given to current cases, in a department which will bring together the most important cases in Federal and State courts during the previous month. A valuable part of the Editorial Department will be a monthly summary of notable articles in American and foreign law magazines; and it is hoped that judges, law professors and practising lawyers, who may have no time to write exhaustive legal articles, will avail themselves of our columns for the discussion, in brief letters, of interesting points which occur from time to time in their professional work.

NOTES.

THE story is told of a convict who had a rat for a pet in his cell. A visitor in the prison saw the convict playing with the rat and remarked:

"Ah, you have a rat, I see."

"Yes," replied the convict; "I feeds him every day. I think more of this rat than of any other living creature."

"That proves," said the visitor, sentimen-

tally, "that there's some good impulse if you can only find it. How came you to take such a fancy to the rat?"

"Coz he bit the warden," replied the convict, cheerfully.

THE well-known legal expression, "no more chance than a cat without claws would have in hell," was originated in Illinois. The author was Emory Storrs. Mr. Storrs was addressing the jury in a celebrated case. Opposing counsel had said in closing his address: "My learned friend who will follow me will undertake to make you believe that my client has no chance in this case. I warn you against his sophistry."

Storrs arose and made one of the shortest speeches ever made to a jury. He said:

"May it please the Court, and you, gentlemen of the jury, the plaintiff in this case has no more chance than a cat without claws would have in hell."

And then he sat down. The jury returned in less than ten minutes. The judge, who was a good deal of a wit and consequently liked a joke, asked, when the jury came in: "Gentlemen, have you agreed upon a verdict?"

The foreman replied, "We have, your Honor."

"Has the plaintiff any chance?" asked the Court.

In a moment the court room was in a roar and the bailiff was splitting the desk with his gavel. The judge, however, made no correction in his inquiry, and the clerk's entry in this case stands today as he wrote it:

"The jury finds in this case that the plaintiff had no more chance than a cat without claws would have in hell."

No practising lawyer was ever more popular in the courts than an obscure Irish solicitor named Barney Regan. No matter how dull the case, Barney could find out its humorous side and brighten up the court by the laughter he was sure to provoke. Barney practised chiefly in the county court, a court which has jurisdiction over small debts under twenty pounds. On one occasion, a witness, stepping into the box, said, "Yer Honer, if ye plaze, sorr, oi'm not ready to stharter yet." "Why not?" asked the judge. "Oi'm waiting fur Barney Regan, sorr." The judge was angry and felt the dignity of the court was insulted. "How dare you, sir," he exclaimed, "speak of an officer of this court in such a rude manner? It is Mr. Regan I would have you understand." Just then Barney entered the court, and commenced opening his case while removing his overcoat. "You'll excuse my client's familiarity, your Honor," he said. "Famous men in all ages have been familiarly spoken of. There were Shakespeare, Milton, Macaulay, Tom Moore, Nelson, and—Barney Regan!"

"A man may be as crazy as a March hare on some subjects and as wise as a statesman ought to be on others," said Judge Edward Higbee of Lancaster, Missouri, recently. "And all the while he may be enjoying excellent physical health," the judge went on. "Looks unreasonable, eh? I am not speaking from my reading, but from personal observation. Not so many years back—I think it was in 1886—Elder Andrew Hicks, a well-known Baptist exhorter of my county, was haled before the probate court on his wife's application to show cause why a guardian should not be appointed to manage his business affairs. Brother Hicks was sixty-five and had accumulated considerable property. It was charged that the light of his intellect had failed, and that his vast estate stood an excellent chance of going to the dogs unless something was done.

"The clear-cut issue of capacity was presented to the jury. As counsel for Brother Hicks I interrogated the applicant's wit-

nesses, and while all averred their honest belief that he was hopelessly insane on religion, they admitted he was superb on a business transaction, and most of them were candid enough to cite instances where the thrifty old preacher had beat them in trades. Several who were acknowledged business failures glibly testified the defendant wasn't mentally able to manage the large property he had created.

"Brother Hicks went on the stand in his own behalf, and made a capital witness. His memory was unusually good and his answers were prompt and intelligent.

"Then Attorney Payton took hold of him for cross-examination. He held on to the old man for two hours, and nearly every question brought an answer that strengthened Brother Hicks' case. He told of the first dollar he made, how he invested it, how his fortune grew, and his method of business, which was strikingly sound. He gave from memory a list of his notes and the interest due and credits entered on them. I was somewhat astonished at the elaborate detail my client was able to go into. Payton finally hung his head and looked at the floor.

"Is there anything else you want to know, Mr. Payton?" Brother Hicks asked, sweetly.

"The question seemed to arouse the lawyer. He looked the old Baptist exhorter square in the eye, and shaking his finger menacingly at him, thundered:

"Elder Hicks, answer me now on your solemn oath, are you not John the Baptist, sir?"

"Then there was a change in the witness. He threw his arms high above his head, and his eyes blazed with maniacal fire. In a voice many times louder than the question had been put he exclaimed:

"Before God, gentlemen, I was on the Isle of Patmos!"

"His frame shook as if swayed by some terrible emotion; his hands clasped convulsively; then he shrank back in his chair and was very quiet. He died in an insane asylum."

JUDGE MARCUS KAVANAUGH of Chicago and Judge Wm. H. McHenry of Des Moines are great personal friends and of the same nationality. The two judges frequently visit together. On the occasion of their last visit the pair became interested in genealogy and decided to hunt up their ancestors and trace their pedigree back as far as possible. Accordingly both began studying Irish history and reading genealogical works.

A few days later the two judges met again to compare notes. Neither looked very cheerful, but both had reports to make.

Judge McHenry was the first to speak:

"Well, Mark," he said, "I've looked up my ancestors. I found four generations of them back in the Irish war and out of the four three had been hanged at the yard-arm for treason."

Even this remark did not bring the smiles to Judge Kavanaugh's face. He waited a minute and then replied:

"Well, Bill, I looked up my ancestors, too; but I'm d—d if I'm going to tell you what I found."

And there the matter dropped forever.

IN *The Law Times* Tighe Hopkins tells the amazing story of "Botany Bay in the Thirties—A Felons' Paradise"; and from these articles the following extracts are taken:

The free settlers were out-numbered by the felons, and it was this circumstance chiefly which gave a character unique, bizarre, and terrible to New South Wales. The felony constituted a vast and most diversified order in the State. The various classes comprising it had many names. Thus there were "convicts," "ticket-of-leave men," and "emancipists," and the "emancipists" were subdivided into "conditionally pardoned-convicts," "fully pardoned convicts," and "expiries," or transported felons whose sentences had expired. To these may be added the "runaway convicts," and the "bushrangers. There is no class known to civilized England, from the peasantry up to the dealers and shopkeepers, from the dealers to the merchants, from the merchants to the liberal professions, and from them to the landed gentry,

and the people of leisure, which was not represented more or less faithfully amongst the felony of New South Wales.

Bucolic felony toiled in the fields, on the roads, and at a variety of humble occupations; felony a little 'cuter than this got itself a snug rum-shop; adventurous felony escaped and turned bushranger, "stuck up" the mail coach on the highway, and robbed banks, ware-houses, and private residences in full daylight; educated felony, found a score of openings in the thriving capital; and the beauty and fashion of felony displayed its jewels in the theatre and at the ball, drove its four-in-hand to the races at Parramatta, and its barouche amongst the gay equipages that crowded the "drive" to Bellevue Point, on the South Head-road.

Arrived in port, lists of the convicts were made out and applications for their assignment were put in by those of the settlers who were entitled to convict servants. The inequality of the punishment becomes manifest at this point. The laborers and plain mechanics, who had nothing to recommend them but their capacity of hard work (with, perhaps, almost unbroken records of good character), were pretty certain to serve out the whole of their sentences.

It was the "gentlemen legs" who found out the soft places in the colony, and the paths that led to fortune; accomplished clerks, of pretty appearance and sweet address, who had robbed confiding employers at home; nimble swindlers who had preyed upon the public for years, and elegant villains of all sorts and conditions. There was an elysium called Wellington Valley where many of these gentlemen were received on their arrival in the colony, and very few of them languished long in durance. Easy berths were found for them in the Government offices, or a bribe or a plausible tale might produce an immediate ticket-of-leave or conditional pardon. The cleverest among them seldom underwent any real punishment.

A young Irishman of good family, Luke Dillon by name, was transported for life from Dublin. He had drugged and brutally ill-

treated a young lady to whom he was engaged to be married. She died, and Dillon was sentenced to be hanged. Through the influence of his friends the sentence was commuted to transportation for life, and the gay young devil was shipped to Botany Bay. He had money in his pocket, and for several weeks he was allowed to walk about Sydney at his own discretion. Then he was sent to the luxurious Wellington Valley, and here in a short time he received a conditional pardon, which made a convict in almost every respect a free man. Returning to Sydney, he became one of the best known men about town, and the companion of gentlemen holding high rank in the colony.

Even more typical than Dillon's was the case of the ticket-of-leave man, James Watt. Watt was originally a clerk in the office of a Writer to the Signet in Scotland. Charged with some grave delinquencies, he fled to England, and was proclaimed an outlaw by the law of Scotland. In London, however, he obtained a situation in a commercial house in Fore street, where he remained until the discovery of a fresh series of frauds, put him to his heels again. He was taken at last, and sentenced to fourteen years' transportation. But the Botany Bay of fifty years ago was a veritable Tom Tiddler's ground for rogues of this quirk, and Watt made splendid weather of it there. At this date there was no necessity to employ either convicts or emancipated felons in the public offices, but the Government of the day stuck to that infatuated policy, and Watt, the thief and forger, instead of being sent to the road-gang and lodged in gaol, was at once engaged as a civil servant. After a length of time he was assigned to the proprietors of a leading Sydney journal. An emancipated convict edited this organ of colonial opinion, which, as may be imagined, had nothing unkind to say about the ladies and gentlemen languishing in the silken bonds of antipodean captivity. Soon, however, the irresistible Watt got the upper hand, and "Mr. Editor Watt," to the scandal of the decent settlers, became a person to be reckoned with in the colony. The whole of the free community

was thrown into a ferment. Watt defied it, and lived in open violation of the law. Efforts were made to bring him to justice again; one authority after another was appealed to, but the very chiefs of police were afraid of him. Placed on his trial at length, the magistrates assembled on the Bench threw up the case in disgust after a seven days' hearing, satisfied there was no convicting a felon who was proved in court to have had the secret countenance of a principal legal officer of the Crown, and even of the governor himself. Watt at this time boasted that he ruled the colony, and it is certain that he assisted in procuring the removal from the commission of the peace of thirty-three of the independent territorial magistrates who had been so presumptuous as to suggest that New South Wales was becoming convict-ridden.

Strangers visiting Sydney at this period learned with astonishment that the handsome carriages which rolled through the main streets were the property of "emancipants," or of convicts who had been assigned to their wives; that the rakish-looking gentleman with the diamond rings driving that smart cob was Mr. W. Sykes, of whom an Old Bailey judge had said five years previously that "hanging was too good for him"; that the handsome, keen-faced man riding his well-shaped hackney was an ex-attorney's clerk of Bedford-row, who had been in some little trouble about a forged will, but was now one of the most prosperous solicitors in Sydney; that the brilliant madam in the curricule was the once-notorious Mrs. Mary Flanders, whom the golden youth of London remembered to their cost; and so on.

The depravity of morals was all but universal. A negro had come to the colony as some gentleman's servant. He had been his master's faithful and trusted retainer for years, but in Sydney he robbed him. He stood his trial at the quarter sessions, and was asked by the judge if he could produce a witness as to his character. The blackie shook his head mournfully. "No, Massa! Poor Jaccho hab no character now! When Jaccho came a Sydney, Jaccho berry good

man. But Jaccho dam rogue now! All dam rogue in Sydney. *Bimeby, Massa Judge be dam rogue too!*"

The female convicts were for the most part quite as egregiously mismanaged as the males. From the hour of their embarkation in England they were under a merely nominal restraint. The herd of women conveyed on the transport—ranging from poor little servant-maids, vagrants, cutpurses, and common trulls, up to the Aspasias who had queened it in West-end supper-rooms, and who stepped on board in their furs—had full liberty of intercourse during the eight months' voyage. No prison matrons were over them, no warders of their own sex; they were disciplined solely by the ship's surgeon. The surgeon appointed whom he pleased as nurses to the sick, and, if he were gallantly inclined, he might admit to the indulgences of the hospital, for the whole of the voyage, all the prettiest and most interesting of his passengers. It was no part of Aspasia's penance to shiver on deck in a prison calico. Room was found in the hold for her trunks, which were usually stuffed with apparel in the best fashion; and she spent the last week of the trip to Port Jackson in selecting the most becoming wear for her *début*. The town turned out to witness the arrival of the "ladies' boat," and the ladies received offers of marriage, and other proposals, on their way from the transport to the Factory.

The Factory was an agreeable retreat at Parramatta for the frail recluses of Botany Bay. Three classes of women were admitted there: (1) Those who had not been assigned as servants on their arrival in the colony; (2) those whose masters had returned them upon the hands of the Government; and (3) those who, having completed their sentences, were awaiting there some fresh development of fortune. At the period under discussion, the Factory was administered by a Mrs. Gordon, whose "two dashing daughters" were said to be "not the most perfect examples of virtue to the numerous females under her charge."

The position of a plain settler, who, wanting a nurse maid or a cook, received un-awares into his household an erstwhile cele-

brated ornament of the Vauxhall Gardens, was in no way enviable. The story is still extant of an unsophisticated colonial farmer who hired in the capacity of housekeeper a dulcinea of this quality. She drove up to the station with a cartload of luggage, "perfumed with botanical creams," and declined to be interviewed by her master until she had put on silk stockings.

But the shrewdest of the female convicts preferred the Factory to service of any kind among the settlers; for "Mrs. Gordon's lambs," as they were called, were fairly well cared for, they were never put to work, and they had the chances of fortune. The Factory seems to have been at once a rather luxurious asylum, a show place, and a matrimonial agency. It may have been other things besides. It was certainly not in all respects the most reputable institution in the colony. Children born within the walls were baptised in the name of the governor of the day! Mrs. Gordon, one may conjecture, retired on a fortune.

Almost the whole legal system of the colony was wretchedly inefficient, and hopelessly immoral. The smartest persons connected with it were convicts and ex-convicts. Among the law officers of the Crown sent out from England there was hardly one competent man. An Attorney-General under Darling's administration was scarcely ever sober, and left his business to be done by his convict clerk, who was always open to a bribe when drawing an indictment. Criminals with long purses, whom Mr. Attorney-General B—— was called upon to prosecute, had rarely anything to fear. When legal abuses were at their height in the colony, the whole squad of barristers and attorneys acted both as solicitors and as counsel, and the most frivolous actions were got up "in the interests of business." Imported legal rogues abounded, and, as these were usually assigned to second-rate lawyers in the colony, the general standard of morality in the Profession may be readily imagined. What was euphemiously known as the "emancipist connection" was a highly profitable one to the

baser sort of lawyers, whose convict clerks, learned in every trick and quibble of the code, enjoyed nothing so much as bringing off the skin of his teeth a client of their own kidney. They had access to the gaols, where they worked up cases on principles of their own; they played the mischief with witnesses, never scrupling to put a dangerous one out of the way; they swore hard, and would slip out of court while a trial was in progress, to buy, for a pint of rum, witnesses to character who had never set eyes on the prisoner till they beheld him in the dock.

A finished specimen of the convict clerk was one Williams, who had been an attorney in Liverpool. While in practice there, he did a desperate piece of forgery by which the inheritance of a considerable property was altered. So gross was the case that Williams was sentenced to transportation for life. His troubles were at an end, however, when he descended in Botany Bay, for he was assigned forthwith to a young solicitor named Allen. Allen had been starving for want of a practice, but from the day that Williams entered his office business began to pour in upon him. Williams conducted it all behind the curtain, and was soon taken into partnership by his grateful master. His wife joined him, and, while his crime and conviction in England were still fresh in the public mind, he was driving a very neat turn-out in Sidney. That other adept, James Watt, was his bosom friend; and it was Williams who prepared the case for the defence when the able editor was put upon his trial.

"A sink of corruption and iniquity," "detestable profligacy and disgusting filth," are among the expressions used by the chronicler already referred to in his description of "the whole system of the law courts, and the actual state of the Legal Profession in New South Wales."

The jury-box and its occupants, on the occasion of almost any trial of importance, were a sight grotesque enough to provoke the humor of a Swift. Trial by jury was introduced experimentally, with the objects of "elevating the tone of public feeling, and of holding out to the convicts an inducement to

reform." These objects the Government set about realizing in the topsy-turvy fashion which, upon paper, seems an anticipation of the Gilbertian form of comic opera. The "tone of public feeling" was to be "elevated" by the admission of felon jurors to the panel, and the old "leg" in trouble was to be "induced to reform" by being privately assured by counsel of the stamp of Williams that the "right sort of men" would be put into the box. The "right sort of men" were the brotherhood of the felony, and of such was the jury of New South Wales. Ex-murderers, burglars, swindlers, forgers, grown into Carlyle's respectability of gighood and the possession of property, took their places in the box, to hold out, in the teeth of evidence, for the acquittal of an old friend, or for the conviction of a prisoner whose innocence was so plain that, as gaol-birds, they could not but regard him with contempt. There was no persuading them to convict the guilty, or to acquit the innocent.

A convict, well known in the colony, was charged with the murder of his wife. The prosecution produced a case without a flaw, and the judge gave the jury to understand that they could not decently acquit the prisoner. But there were four "legs" in the box, who told the foreman "they'd be d—d if they hanged" the wife-killer. One of them pulled off his boots in the jurors'-room, and swore he would eat shoe-leather till the rest of the jury were of his mind. He added, by way of encouraging them, that he had "eaten leather for a fortnight in the bush." Verdict: Not guilty.

On the same day an emancipated felon was arraigned before the Supreme Court. He challenged one juror only in the box. Asked to explain his objection, he said he "didn't know exactly—the gentleman was quite unknown to him—he didn't like his appearance." This was the only juror in the box who had not done time.

Convicted cattle-stealers were considered capital jurors for cattle-stealing cases. A famous cattle-lifter was summoned on the jury in a case of this kind. He was out on bail on a charge of horse-stealing, but that

did not prevent his admission to the panel. The case for the prosecution was in the hands of the Attorney-General, who, after a glance at the jury-box, declined to proceed with it. "He would not," he said, "in the absence of almost all the special jurors, go on with the case of cattle-stealing. The names that had been called were almost all publicans, emancipated convicts; and, in the absence of the merchants, he would not risk the administration of justice in the hands of the publicans."

On another occasion, a summoning officer returned two of the summonses for the jury with characteristic indorsements. One of the expected jurors had been transported for life to a penal settlement in the colony; the other had been "hanged for murder two years ago."

But now, for an instant, the other side of the picture. The felon's Paradise was also, at this very early stage of its existence, a highly civilized, a wealthy, an immensely productive, and a rapidly advancing colony. The parent country, having discovered its resources, its capacities, and its possibilities, had condescended to bestow upon it some measure of encouragement. Botany Bay was emerging from the character of a semi-savage penal settlement, and was assuming the character of a commercial and agricultural community.

The free settlers had proved themselves an energetic and an enterprising race, but they could not unaided have brought the colony forward at this pace in the astonishingly short time of five-and-twenty years. It is perhaps not extravagant to say that the felony furnished the greater portion of the brains and genius of the nascent colony.

AN ignorant foreigner was arrested in San Francisco the other day, and when taken to the city prison his condition was so uncleanly that he was told by the corporal to strip and take a bath. "Vat, go in de water?" he asked. "Yes, take a bath; you need it. How long is it since you had a bath?" With his hands aligned upward, he answered: "I never vas arrested before."

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

LITTLETON'S TENURES. In English. Edited by Eugene Wambaugh. Washington, D. C.: John Byrne and Company. 1903. Sheep, \$3.00; cloth, \$2.50. (lxxxvi+341 pp.)

Messrs. John Byrne and Company conceived a few years ago the happy idea of publishing, in a new and revised form, a "Legal Classic Series," to consist of the following four time-honored masterpieces: Glanville, Britton, Littleton's *Tenures*, and *The Mirrour of Justices*. Of these treatises, all but the last of the series have been published, and the present edition of Littleton's *Tenures*, issued from the press during the past summer, is the third.

The translations of the text have been carefully chosen, and a biographical and scholarly introduction puts the student, in a large measure, in a position to understand, and, therefore, to enjoy the text placed before the public. The present notice does not pass in review Glanville and Britton previously published and already noticed in these columns; but confines itself to the edition of Littleton's *Tenures*, admirably and lovingly prepared by Mr. Eugene Wambaugh, professor in the Harvard Law School.

"The book is of uncertain date," says the learned editor, "but probably was written toward the close of Littleton's life. It professes to have been written in order to aid Littleton's son Richard in his study of law. . . . The book was printed . . . in 1481 or 1482, being one of the earliest books printed in London and the earliest treatise on English law printed anywhere." Now, if this little treatise were really worthless, the fact that it is the first English law book to appear in print, would make it a choice morsel to the collector. It is, however, intrinsically valuable, and to the law-

yer it means the very source and spring of our printed law. Holding it within his hands he feels in a hitherto unsuspected way how singularly modest and unpretentious was the system of law, which, from being the common law of England, has become the common law of empires beyond the seas.

But rare as this little treatise is from a collector's point of view, it is a rarer and more truly a treasure to the lawyer. Once the "introduction to legal education from a hundred years before the publication of Coke's Institutes until fifty years after the publication of Blackstone's Commentaries," (with which treatise on Tenures the lawyer should be familiar at his peril) the little book has put off its earthly garments, as it were, and has become an historical document. As Mr. Wambaugh aptly says: "Nor has Littleton's reputation lessened with the lapse of time. It is true, that his famous book is no longer used as a daily key to existing law; but its diminishing utility in practice has been more than balanced by its increasing value as a picture of the past. . . . Here the historian gets a picture of the law at the interesting moment when from the middle ages were springing the beginnings of modern life, and reads one of the chief intellectual products in England of the fifteenth century, and, if he is wise, discovers that this little book—at first glance strangely out of place in the Wars of the Roses—was a natural and necessary product of an age when, despite private and public warfare, or, more accurately, on account of it, the English people saw in law the only protection from oppression and anarchy." (lxiv—lxvi.)

The first requisite in an editor is, it would seem, that he has genuine sympathy with his text; for editorial work is dry and repels many a well-disposed soul. This somewhat equivocal attitude often lends spice to the notes of the commentator; but inevitably operates to the detriment of the text, which silently but sensibly suffers in the process. In the next place, it would appear that the editor should possess, in addition to a sympathy for and appreciation of the text, a large and abundant understanding of the author's pur-

pose and work to the end that the annotation may bring out the meaning of the text, rather than blunt, confuse or sink it under a mass of superimposed learning. Mr. Puff's advice to the confidant in *The Critic*—to keep her "madness in the background"—applies in no uncertain way to an editor.

And in the next, but in no means the last place, the editor should look upon the text as something sacred. A manifest misprint may well be corrected, an interpolation may well be inserted if indispensable, but the original text of the author should remain, as far as possible, untouched. In this way the work is a new edition, not a new book. Of course, every emendation, or interpolation should be noted, so that the reader may not confuse author and editor. So-called liberties with the text can find no justification either in law, morals, or good conscience.

Mr. Wambaugh possesses these requisites in overflowing measure, and the text of Littleton appears, as it should appear, with no unnoted change; illustrated by a large and varied learning, and introduced by a biographical and critical essay, which outlines the life of the man Littleton, his relation to the times in which he lived, and the circumstances which led him to the composition of the little masterpiece on Tenures.

It is often as perilous to study a man apart from his environment and the circumstances of his times, as to take the weed from the sea, to borrow an illustration from Emerson's exquisite verse. Littleton, so surveyed, is nothing but a lawyer, with little or no claim to human sympathy. Mr. Wambaugh has viewed his author as a product of the middle-age England; has given him a local habitation—indeed, he personally visited Littleton's birthplace, Frankley, and other places connected with his fame, and has brought him at various points of his career before the reader as a not unknown or obscure figure of his time. Thus he makes him a contemporary, if not an intimate of Warwick (p. xxv.), and, in stating that he was recorder of Coventry, connects him with his famous successor and commentator Coke (p. lxi, note 2). Indeed, in another

passage the editor shows us Littleton standing face to face with royalty itself. "In 1450, Coventry was visited by Henry the Sixth. The ceremonies are carefully described in a minute that may have been composed by Littleton himself. The account of the King's receiving at the old Priory the Mayor and the other representatives of Coventry contains this passage as to the spokesman: 'Thomas Lytelton then recordur, seyde unto the Kyng suche wordes as was to his thynkyng most plesaunt; oure soveren lorde seyeng agayne the wordes: 'Sir, I thank you of youre goode rule and demene, and in spesiall four youre goode rule the last yere past, for the best ruled pepull thenne within my reame; and also I thank you for the p'sent that ye nowe gave to us.' The which p'sent was a tonne of wyne and xx'tie grete fat oxen" (xxvii).

In 1466, Littleton was appointed judge of the Common Pleas and once again the learned editor projects his author into the clear light of history. "In 1475, he received a mark of the royal favor by being brought in to add distinction to a brilliant ceremony, which then was picturesque and which now seems both picturesque and pathetic. Nicolas, the historian of the Order of the Bath, after describing certain early admissions to that order, says: 'The next creation was in 1475, when the Prince of Wales and Duke of York, the two sons of King Edward the Fourth, received the honours of chivalry, on which occasion . . . many other of the young nobility, together with the Chief Justice of the King's Bench, and the learned Judge Littleton, were made Knights of the Bath.' The historian goes on to describe the details of the instituting of a Knight of the Bath; but the modern reader does not need those details, gorgeous though they be, to fix his mind upon the pageant of that particular day; for when the venerable Littleton was made a Knight of the Bath the two princes who were similarly honored were children who now are among the most conspicuous figures in history: one of them was then five years old, and the other was three; and eight years

later the two were smothered in the Tower" (xliv—xlv). Six years later (August 23, 1841) the learned judge died and was buried in Worcester Cathedral. The interesting will is set forth at length (xlvii—lvii).

In this way Littleton is made a thing of flesh and blood; is made to appear in this world as one of us, clothed with a personal and historical interest, for whose personality we of the twentieth century may well have a genuine respect and human interest.

So much for Littleton the man. In the next place, Mr. Wambaugh shows us the course of study pursued by the lawyer of those days (xxi.—xxii.), and Littleton's progress in his profession as barrister and serjeant (xxix.—xxxviii.), under sheriff of Worcestershire and recorder of Coventry (xxv.—xxix.) and Judge of the Court of Common Pleas (xxxviii. *et seq.*).

It is perhaps in the treatment of this subject that Mr. Wambaugh's rich learning and painstaking investigation well-nigh overwhelm the reader. The Year Books are opened and made to testify to Littleton's practice, both before and after his elevation to the degree of serjeant, and the effect of his promotion is considered upon his practice (xxix.—xxxi.).

Nor is the investigation stopped here. The editor examines the cases in the Reports during Littleton's fifteen years' service in the Common Pleas and the statement is hazarded that "the Year Books present a considerable number of cases that can be read with interest even now" (xli.—xliv.). As Mr. Wambaugh enumerates the cases and gives exact references to them the reader is in a position to appreciate the labor of love everywhere evident in the edition.

Littleton—the man, the lawyer and the judge—is thus carefully placed before us, but lest the picture might fail as a portrait, Mr. Wambaugh tells us that there used to be three portraits and critically examines their origin and history (lvii.—lix.), and makes Coke vouch for "the well-known engraving which first appeared in 1629," as a "true portraiture."

The section on Bibliography (lxvii.—lxxxiv.) is a work of years. In speaking of it the editor says: "The following list attempts to catalogue all the printed editions of the Tenures. In such an undertaking it is inevitable that there shall be omissions and errors. To reduce the defects to a minimum, in 1902 the editor visited many libraries that might be expected to contain copies of Littleton. The copies thus found are attributed to the proper libraries by abbreviations in parentheses. The editor has also inserted—though without the parentheses indicating personal examination—other editions whose existence is vouched for by good authority. In making the list, editions heretofore uncatalogued were found; but it was also discovered that some editions heretofore supposed to exist were merely imaginary, cataloguers having made clerical errors in copying dates, or having said that an edition in Law French was in English or *vice versa*, or having confused Littleton's Tenures with the Old Tenures. The editor has good reason to suspect that he has not discovered all the editions; and, conversely, it is not improbable that some of the editions herein catalogued separately are from the same type, with mere alterations in the date of the title-page or of the colophon, and that consequently future investigators will make a few omissions in the list here given.

"Each edition is catalogued in an abbreviated way. First is given the date, when indicated by the title-page or by the colophon. Next is given—except as to Coke upon Littleton and the editions containing a translation into modern French—the name of the publisher, when known; and it is to be understood that the place of publication was London, unless otherwise indicated. Next is given, within parentheses, an indication of the libraries in which the editor has seen copies. When the editor has seen no copy the authority for inserting the edition is cited."

The various editions are grouped under the following headings: In Law French only (lxix.—lxxvii.); in Law French and modern French (lxxvii.—lxxviii.); in English only (lxxviii.—lxxxix.); in both Law French and English (lxxxix.—lxxxii.); Coke upon Littleton (lxxxii.—lxxxiv.).

The editor informs us that the last edition previous to his appeared fifty years ago. It is, perhaps, not too much to say, as a last word, that Mr. Wambaugh's edition may well be the final edition of the treatise. Littleton waited more than four centuries for the present editor, and it is not unlikely that an equal period will elapse before the little masterpiece appears in a garb to challenge comparison with Mr. Wambaugh's labors.

The book is at once an honor to American scholarship, and a model of painstaking, accurate and intelligent research. With that delicate, nor to say exquisite, sense of the fitness of things everywhere evident in the editor's text, the edition is graciously dedicated to "The Inner Temple, the learned society wherein Littleton for more than four hundred years has been regarded with peculiar veneration."

A TREATISE ON THE LAW OF JUDGMENTS.
By *H. C. Black*. Second edition. St. Paul:
West Publishing Co. 1902. Two volumes.
(ccii+1592 pp.)

Here is a book that contains an unusual amount of interesting law. Besides the more commonplace topics necessarily expected under the head of Judgments, there is here a presentation of somewhat collateral topics with which many lawyers are comparatively unacquainted and for which they frequently would not know where to go; for example, the theoretically and practically important question whether a judgment is a contract, what proceedings are *in rem* and what is the effect of such proceedings, foreign judgments and judgments of other States.

